# SUMMARY

**Case:** Carey & Anor v Still & Ors – Procedural Order No. 2
**File No:** TRI 2009-101-000022/ DBH 05711
**Court:** WHT
**Adjudicator:** R Pitchforth
**Date of Decision:** 3 August 2009

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**Background**
This Procedural Order deals with removal applications filed by:

- the second respondent Mrs Susan Still
- the third respondent Tauranga City Council (Council)
- the fourth respondent CGAF Ltd t/a Bay Inspections
- the fifth respondent The Building Advisory Bureau NZ Ltd (BAB)
- the sixth respondent Mr Kenrick Buckley
- the eighth respondent Mr John Stewart
- the ninth respondent Success Realty Limited t/a Bayleys Tauranga (SRL)

**Applications for Removal**
*Mrs Susan Still – Second Respondent*
Mrs Still sought removal on the grounds that:

- She was never on the title of the property
- Was not involved in the construction
- Was not married to the first respondent and had no financial interest in the property
- Did not sign and was not involved in the inspection or sale of the property
- Was never guaranteed nor implied or gave any assurance as to the dwelling's soundness or otherwise

The claimants, BAB and Mr Buckley opposed Mrs Still's removal on the grounds that:

- There was tenable evidence that Mrs Still owed a non-delegable duty of care to the claimants as co-developer
- The building consent application and letters from the building inspectors were addressed to both Mr and Mrs Still
- The plans were prepared for both Mr and Mrs Still
- Mrs Still was a vendor to the claimants and as such gave various warranties in the agreement for sale and purchase
- The grounds for Mrs Still's removal were either not acceptable or irrelevant

The Council and SRL agreed to these grounds of opposition.

The Tribunal held that the evidence did not establish the claims against Mrs Still were so untenable in fact and law as to be incapable of success. It also appeared that there may be genuinely disputed issues of fact and therefore it would not be fair and appropriate to order the removal at this stage in the proceedings.

*Tauranga City Council – Third Respondent*

The Council sought removal on the grounds that the Code Compliance Certificate was issued by it in accordance with the requirements of s50 of the Building Act 1991 following a report from a private building certifier, Bay Inspections. The Council stated that Bay Building Inspections and CGAF were to undertake all inspections under the Building Act 1991 and that the Council relied on certificates, documents and the statement of compliance supplied to it by CGAF.

The claimants opposed the Council's removal application on the grounds that the facts related to the Building Act 2004, which came into force before the Code Compliance Certificate was issued. The claimants therefore argued that the Code Compliance Certificate fell under s214 of the Building Act 2004, which provides that the Council is liable for the acts and omissions of CGAF in conducting the final inspection and issuing the Code Compliance Certificate.

CGAF also opposed the Council's removal application on the grounds that:

- The facts of the present claim differs from cases relied on by the Council
- That CGAF is only a building inspector and was not a building certifier
- CGAF was instructed by the Council to conduct inspections on its behalf under the 2004 Act
- The Council initiated the inspection and therefore the Council had an obligation to specify the ambit and extent of the final inspection – ie the Council had a statutory power to order invasive testing

The Tribunal held that the evidence did not establish that the claims against the Council were so untenable in fact and law as to be incapable of success. In addition it would appear there may be genuinely disputed issues of fact. Therefore it would not be fair and appropriate to order the removal at this stage in the proceedings.

*CGAF Limited – Fourth Respondent*

CGAF sought to be removed from these proceedings on the grounds that:

- The claimants wrongly identified it as the inspector of the property as it only undertook inspections on 8 March 2007 while earlier inspections were carried out by Bay Building Certifiers Limited
- CGAF is a building inspection company and was wrongly identified as a building certifier
- The Council instructed CGAF to carry out an inspection and so any duty of care would be owed by the Council
- They did not owe a duty of care to the claimants, and if they did, they were not negligent for they exercised reasonable care

The claimants submitted that CGAF breached its duty of care by undertaking the final inspection and negligently indicating to the Council that the Code Compliance Certificate should be issued. The claimants also asked for apportionment to be between the Council and CGAF.

The Council submitted that they have an indemnity from CGAF that they would invoke if they were found liable and therefore CGAF should therefore remain a party. For that reason, the Tribunal held that the evidence did not establish the claims against CGAF were so untenable in fact and law as to be incapable of success. Therefore it was not fair and appropriate to remove CGAF at this stage

*The Building Advisory Bureau NZ Ltd (BAB) and Mr Kenrick Buckley – Fifth and Sixth Respondents*

BAB and Mr Buckley sought removal on the grounds that:

- There is no causal link between their work and the leaks
- There is a disclaimer in the report for limited inspection with no invasive testing
- There is no causal link between the report and the loss claimed
- The claimants sought a report based only on condition and soundness and did not agree to invasive testing
- They drew the claimants' attention to weathertightness issues and put the claimants on notice concerning a lack of a Code Compliance Certificate but the claimants ignored the report or failed to rely on it so the claimants cannot have suffered a loss
- The claimants failed to show that they are owed a duty of care by them

The claimants opposed the application stating that the disclaimer is void by operation of the Consumer Guarantees Act 2003 whereby sections 28 and 29 require services to be rendered with reasonable care and skill and be reasonably fit for purpose. Moreover, under section 43 the parties cannot contract out of those provisions. The claimants also relied on negligent misstatement in relation to the report prepared.

The Tribunal found that there was no plausible allegation of misstatement on behalf of the company. The company made the report and the claimants proceeded with the purchase on the basis of or in spite of the statements made. As a result BAB did not owe a duty of care to the claimants and so cannot be held negligent. BAB was thereby removed from these proceedings.

Mr Buckley was alleged to have provided further confirmation that the property was safe to purchase. However Mr Buckley was firstly asked in his capacity as the person employed by the company to make the report, and secondly his response cannot be separated from the report, as it was not alleged that he contradicted what he said in the report. As a result, the Tribunal held that Mr Buckley has the benefit of the same disclaimer. The Tribunal stated that if it is wrong and the claimants were misled in terms of the Fair Trading Act 1986, then the remedy under s43 is at most a refund of the inspection fee. The Tribunal therefore held that the damages, being the value of the contracts, were insufficient to retain Mr Buckley as part of this claim. He was thereby removed as party to this claim.

*Mr Stewart – Eighth Respondent*
Mr Stewart applied for removal on the grounds that he was a labourer/plasterer and worked under Mr Still to meet his requirements.

The claimants argued that Mr Stewart did not provide evidence that he was not the subcontractor and was therefore liable to subsequent owners for the negligent work he performed as instructed by another person.

The Tribunal does not usually retain unskilled labourers on low hourly rates as parties. However the Tribunal found that the evidence did not establish the claims against Mr Stewart were so untenable in fact and law as to be incapable of success. In addition it appeared that there may be genuinely disputed issues of fact and therefore it would not be fair and appropriate to remove Mr Stewart at this stage of the proceedings

*Success Realty Limited (SRL) – Ninth Respondent*
SRL sought removal on the grounds that:
- It did not represent that the building was weathertight;
- They arranged meetings between the claimants and the vendor to discuss the Building Act
- They recommended that an independent report be obtained

- Neither applicant nor its agents were responsible for the lack of weathertightness in the building

The claimants stated that:

- SRL is liable in tort and for breaches of the Fair Trading Act 1986 relating to deceptive and misleading conduct
- SRL was negligent for the agent recommending BAB and Mr Buckley, which they did to their detriment
- They were always intending to get their own report on the building so they did not rely on the unseen building reports referred to by the agent
- The sale was conditional upon remedying matters raised in the inspection report including the Code Compliance Certificate that was subsequently issued

The Tribunal found that:

- There was no contract between the claimants and SRL
- There was no evidence of any negligence by SRL other than the allegations against BAB and Mr Buckley
- There was no evidence that the agent believed anything other than that BAB and Mr Buckley were careful and competent suppliers of building reports
- There was nothing to show that the agent breached the Fair Trading Act nor that she breached a duty of care or was negligent towards the claimants

The Tribunal accordingly concluded that SRL was not negligent. SRL was thereby removed from the claim.

**Result**

Based on the findings made by the Tribunal, the following respondents were removed from the proceedings:

- Fifth respondent The Building Advisory Bureau NZ Ltd
- Sixth respondent Kenrick Buckley
- Ninth respondent Success Realty Limited trading as Bayleys Tauranga