WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI-2009-101-000022

BETWEEN **Regan & Jodi Carey as Trustees of the Carey Clan Trust**
Claimant

AND **Rex Still**
First Respondent

AND **Susan Still**
Second Respondent

AND **Tauranga City Council**
Third Respondent

AND **CGAF Ltd t/a Bay Inspections**
Fourth Respondent

AND **The Building Advisory Bureau NZ Ltd (BAB) (REMOVED)**
Fifth Respondent

AND **Kenrick Buckley (REMOVED)**
Sixth Respondent

AND **Western Coatings Ltd**
Seventh Respondent

AND **John Stewart**
Eighth Respondent

AND **Success Realty Limited t/a Bayleys Tauranga (REMOVED)**
Ninth Respondent

PROCEDURAL ORDER NO. 2

Dated 03 August 2009

Contents

Conference

1. I convened a conference on this claim on 27 July 2009.

   Those present were:

   - Roger Pitchforth, Tribunal Member,
   - Sharnel Kapua, Case Manager,
   - Regan Carey, Jodi Carey & Richard Kettelwell (for the claimants),
   - Rex Still (for the first, second, seventh and eighth respondents),
   - Michael Cavanaugh (for the third respondent),
   - Wayne Wellington (for the fourth respondent),
   - Kenrick Buckley & Matthew Ward-Johnson (for the fifth and sixth respondents),
   - John Hamilton (for the ninth respondent).

2. A schedule showing the names and addresses of the parties and their counsel or representatives is attached.

Removal of parties

3. Section 112 of the Act provides that the tribunal may order that a party be struck out of adjudication proceedings if it is fair and appropriate in all the circumstances. It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is untenable in fact and law. An adjudicator should not attempt to resolve genuinely disputed issues of fact unless he or she has all the necessary material before him or her. Even then the jurisdiction to strike out should be exercised judiciously and sparingly because evidence is often disputed and requires testing and determination at hearing.

4. Where, however, a party is opposing an application for removal on the basis of disputed facts they must produce or point to some cogent evidence in support of their opposition. It is insufficient to say that there are disputed facts without providing some detail of what they are. In addition it is insufficient to say there

could be disputed facts or to require the Tribunal to go on a fishing expedition to see if some conflicting evidence may arise in the course of adjudication.

Susan Still

5. Susan Still, the second respondent, 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,
    - she did not sign and was not involved in the inspection or sale of the property,
    - she never guaranteed nor implied or gave any assurance as to the dwelling's soundness or otherwise.

6. The claimants oppose the application on the grounds that there is tenable evidence that Susan Still owed a non delegable duty of care to the claimants as co-developer. The application for building consent and letters from the building inspectors are addressed, *inter alia*, to Susan Still. Susan Still was a vendor to the claimants and as such gave various warranties in the agreement for sale and purchase. The third respondent, the Council and the ninth respondent, Success Realty, agreed.

7. The fifth and sixth respondents oppose the application on the grounds that: -

    - there is a tenable claim against Mrs Still in that she was one of the developers and previous owners,
    - as a co-developer she owed a non delegable duty of care to subsequent owners including the claimants,
    - the grounds on which the application is made are either not acceptable or irrelevant,
    - the application for Building Consent / PIM are in both names and they were both the subject of relevant correspondence, and

- the plans were prepared for both the first and second respondents.

8. The claimants and the fifth and sixth respondents all say there is no evidence in support of the application.

9. The evidence currently before me does not establish the claims against the second respondent, Susan Still, are 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.

Tauranga City Council

10. The Tauranga City Council seek removal from these proceedings on the grounds that the Code Compliance Certificate was issued by it in accordance with the requirements of s 50 of the Building Act 1991 and it followed a report from a private building certifier, Bay Inspections. The Council referred to *Huang & Anor v North Shore City Council* (unreported, High Court, Auckland, CIV 2005-404-02991, 12 December 2005, Venning J). They also referred to various decisions by the tribunal.

11. The Council set out a timetable of inspections. The dates relevant to this application are those surrounding the issuing of a Code Compliance Certificate. On 2 March 2007 the claimant's then solicitor, Evan Turbott Law Office, wrote to the Council: -

> Further to our discussion today, we understand the above property was caught in the Building Act transition period and also that a final building inspection was not carried out at the time of completion.
>
> Please find enclosed copies of the letters from Bay Building Certifiers Ltd in respect of inspections carried out on the property in 2004.
>
> We have contacted CGAF Limited who will fax you their assessment of the property and list of inspections to 1999 when the dwelling was completed.
>
> The absence of a code compliance certificate on this property has become a concern to prospective purchasers (and their insurers).

> Based on the information supplied would you please advise if the Council is in a position to issue a code compliance certificate for the property. If you require any further information please do not hesitate to contact us.

12. CGAF produced a job sheet which showed that they inspected the building on 8 March 2007 and on 13 March 2007 and provided the Council with a statement of compliance for the property. A code Compliance Certificate was issued the same day.

13. The claimant opposes the application on the grounds that the facts, unlike those in the cases cited by the Council, relate to the Building Act 2004 which came into force on 31 March 2005, before the Code Compliance Certificate was issued. They say the Code Compliance Certificate falls under the provisions of s 214 of the Building Act 2004. That section says: -

> **214 How liability apportioned if territorial authority makes arrangements relating to functions of building consent authority**
>
> If a territorial authority makes an arrangement under section 213(1) for another building consent authority to perform all or any of the territorial authority's functions on its behalf,—
>
> (a) the territorial authority is liable for the acts and omissions of the other building consent authority when the other building consent authority is acting in that capacity; but
>
> (b) the territorial authority and building consent authority may apportion the liability—
>
> (i) as between themselves; and
>
> (ii) as they see fit.

14. Under that section the Council is liable for the acts and omissions of CGAF in conducting the final inspection and issuing the Code Compliance Certificate.

15. The fourth respondent, CGAF Limited trading as Bay Inspections (CGAF) also opposes the application on the grounds that the factual situation differs from that in the cases relied on by the Council.

16. CGAF refer to the Turbott letter and say they were not privy to that letter at the time but did supply the Council with a job report that was not '*an assessment of the property*'.

17. When the Council in support of its application says that CGAF

> appears to have inspected the property on 8 marches 2007, as noted in the job sheet…. The note for this inspection includes the statement that:
>
> *I can see no reason why this house cannot be signed off.*

18. CGAF says that the Council have omitted to refer to the specific instructions to the note to that job report which says, in part,

> Rob Wickman has instructed Bay ins to do a final insp paying particular attention to cladding and report to him.

19. These instructions were given to CGAF on 2 March 2007. This shows, CGAF say, that the inspection of the property was initiated by Council, not CGAF.

20. CGAF say that the inspection was a visual inspection (not invasive) as was the invariable practice for final inspections.

21. CGAF drew attention to the time period between the issuing of the building consent in June 1999 and the request by the Council for a final inspection in March 2007. They said that in making the request the Council had an obligation to specify the ambit and extent of the final inspection. They were clearly on notice as they asked that particular attention be paid to the cladding. The Council had the statutory power to order invasive testing.

22. CGAF say that the Council could have instructed them to carry out invasive tests or, if the owners had refused, referred the matter to the Department of Building and Housing for a determination. However, the Council issued no instructions.

23. The Council say that Bay Building Inspections and CGAF were to undertake all inspections under the Building Act 1991. CGAF deny this saying that their instructions came from the Council on whose behalf they conducted inspections under the 2004 Act.

24. CGAF deny the Council's allegation that it reviewed the inspections undertaken by Bay Building Certifiers and provided a statement of compliance to the Council. They say they simply provided a job report for Council to review prior to the Council instructing CGAF to undertake the final inspection.

25. CGAF take issue with the Council's allegation that their only involvement was to issue the Code Compliance Certificate. CGAF say that the only entity that had the statutory authority to issue a certificate was the Council. It was its responsibility to review the files and issue instructions to CGAF. The Council did review the files and Mr Wickman issued instructions.

26. The Council say they relied on certificates, documents and the statement of compliance supplied to it by CGAF. CGAF say all they delivered was a copy of the job report of inspections carried out by CGAF and the statement of compliance.

27. CGAF denies that it is or has been a building certifier; it is only a building inspector.

28. CGAF also seek to distinguish *Huang* (Supra) on the grounds that CGAF is an inspector, not a certifier. The other cases referred to are therefore not relevant. CGAF says that in light of the situation there is a tenable case against the Council and accordingly it should not be removed.

29. The evidence currently before me does not establish the claims against the third respondent, Tauranga City Council, are 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

30. CGAF Limited trading as Bay Inspections seeks to be removed from these proceedings.

31. The grounds of the application are that the claimant wrongly identifies CGAF as the inspector of the property. CGAF say it only provided the inspection on 8 March 2007. Earlier inspections were carried out by Bay Building Certifiers Limited as shown in the Council's documents.

32. CGAF says it has been wrongly identified as a building certifier when it is a building inspection company. In that role, and at its request, CGAF supplied the Council with a copy of a job report relating to earlier inspections.

33. Tauranga City Council as the building certifier instructed CGAF, as the inspector, to carry out an inspection as outlined above which it did.

34. The visual inspection found the cladding to be well aligned and in good condition as was the paint. There was no visual evidence at the time of the final inspection that the cladding did not meet the requirements of the New Zealand Building Code. The inspection did not reveal any evidence that could entitle the Council to take action, such as requiring an assessment or issuing a notice to fix. Any problems were latent.

35. CGAF say the situation has to be looked at in the context of prepurchase reports for modest cost. In this situation that they did not owe a duty of care to the claimants and if they did, they exercised reasonable care. Any duty of care would be owed to the Council. They deny that they were negligent. There is no causal link with the loss.

36. CGAF refer to *Body Corporate 188529 v North Shore City Council*, High Court, Auckland, CIV 2006-404-3535 (Sunset Terraces) where it was said that the Council had an obligation to establish its own inspection regime. In Sunset Terraces case the Council was the certifier with the obligation to set out the parameters of the inspection regime. This is the same as the present situation. CGAF did not have an obligation to set out the inspection regime. In this case the inspection was carried out as instructed.

37. The claimants submit that CGAF breached its duty of care in undertaking the final inspection and negligently indicating to the Council that the code compliance certificate should be issued. They refer to Mr Wickman's instructions (supra) as evidence that the Council was concerned about the cladding. The claimants also ask for apportionment under that section is between the Council and CGAF.

38. The claimants say that notwithstanding the instruction to look at the cladding the inspectors did not notice that the house leaked severely, that there were bubbles indicating leaks, and that the agreement for sale and purchase was dependent on the obtaining of a Code Compliance Certificate, so that it should have been known that the Certificate would have been relied on. The claimants

will need to show a duty of care, negligence and a loss arising from it to be successful.

39. The claimants submitted that although the percentage of responsibility for the loss would be low, even at 8% the liability would bed about $100,000.00.

40. The Council say that they have an indemnity from CGAF which they would invoke if they were to be liable. CGAF should therefore remain a party. For this reason the evidence currently before me does not establish the claims against the fourth respondent, CGAF Limited trading as Bay Inspections, are so untenable in fact and law as to be incapable of success. Therefore it would not be fair and appropriate to order the removal at this stage in the proceedings.

The Building Advisory Bureau NX Limited (BAB) and Kenrick Buckley

41. The Building Advisory Bureau NX Limited (BAB) and Kenrick Buckley seek removal on a number of grounds. Many of them are based on the criteria set out in *Cousins v Plaster Systems* TRI 2008-101-107. They also say there is no causal link between their work and the leaks, there is a disclaimer in the report, which was only for limited inspection with no invasive testing, and there is no causal link between the report and the loss claimed.

42. An indication of the limited inspection sought is in the Agreement for Sale and Purchase where it was said that: -

> This agreement is conditional upon the purchasers being satisfied with a building inspection report (as to condition and soundness) to be carried out at the purchaser's own cost…

43. The disclaimer in the report is quite extensive. It explains the extent of the report and that its aims are to discover all defects of importance which could reasonably be discovered. It includes: -

> The results are a guide only and do not guarantee the timber directly below the area tested is necessarily damp, decayed or otherwise. Further investigation is recommended where readings above 20% moisture content are found.

44. The applicants say that they did not fail to identify deficiencies and specifically identified issues of concern with respect to weathertightness in terms of roof

cladding, silicone based sealants on the roof, water continuously flowing from a hot water overflow pipe penetrating the roof cladding, lack of maintenance to the roof/parapet walls, exterior monolithic cladding, blistering/bubbling to paint membrane on external walls indicating small amounts of moisture penetrating the membrane and tiled showers.

45. The applicants charged $556.88 for the service.

46. The applicants point to evidence that the claimants ignored the report or failed to rely on it so they cannot have suffered a loss.

47. The claimants say that the disclaimer is void by operation of the Consumer Guarantees Act 2003 and that ss 28 and 29 require services to be rendered with reasonable care and skill and be reasonably fit for purpose. The parties cannot contract out under s 43.

48. The claimants also say that the disclaimer refers only to the report and not verbal assurances. Verbal assurances were given to Regan Carey by Mr Buckley at his place of work on or about 26 February 2007.

49. The applicants say the claimants sought a report based on condition and soundness only. They did not agree to contract for invasive testing. The applicants drew the claimants' attention to weathertightness issues and put the claimants on notice concerning a lack of Code Compliance Certificate. The report reached the same conclusions as that given by Building Surveying Services Limited.

50. The Applicants say that as the claim is in negligence the claimants must show that they are owed a duty of care and that the applicants' acts caused them loss. So far the claimants have not been able to show this.

51. The applicants also say that any loss that could be attributable to them is negligible. Following the principles in *Cousins* they should be removed. In *Cousins v Plaster Systems Ltd & Ors* TRI 2008-101-000107 on 23 January 2009 Adjudicator Ruthe provided the appropriate test. He said: -

Evidential Foundation

13. In *Dennerly* (supra) Justice Harrison stated "*a party for joinder would have to lay an evidential foundation"* [31].

14. Earlier at [27] His Honour said there had to be an arguable factual foundation to justify joinder. Equally where a party is seeking removal that party has to produce sufficiently compelling evidence to establish the claim against it is unlikely to succeed.

15. In this claim as in claims before the Tribunal the Tribunal has the advantage of the factual matrix set out in an experts report and usually well delineated by the assessor. In the words of s 31 of the Act, the assessor has ''knowledge, skills and experience" and his/her report provides sufficient expert factual information to have enabled the Chief Executive, pursuant to S48 of the Act, to make his/her evaluation concerning eligibility criteria.

16. The Tribunal needs to weigh up a range of factors including, but not necessarily limited to:

(a) likelihood of success against the party seeking removal;

(b) the nature and quality of the evidence as to the liability for the leaks in the building, i.e. the "tenability" test;

(c) the relative significance of the allegations of breach of duty in the context of the overall claim;

(d) the possible amount of any award against the party applying for removal;

(e) the proportionality of that liability with the costs likely to be incurred;

(f) likelihood of delay (see *Kells* [48]);

(g) undue complexity caused by a proliferation of parties.

17. On the point of proportionality in *Dennerly* (supra), where the High Court declined to overturn the adjudicator's decision not to join the architect, the Court indicated a potential of attribution of fault of less than 50% liability for remediation could properly be taken into account. Justice Harrison stated:

> *"[28] A proposition that one or more of the other parties involved in the project **may** have owed and breached duties ..was insufficient to justify joinder. Council was bound to point the adjudicator to tenable evidence both of breach by the architects and of a causative link to the estimated costs of remedial work. A cursory evaluation of the assessor's report indicates that less than 50% of the remedial expense might possibly be attributable to architectural negligence."* (Emphasis added).

52. Mr Buckley provided affidavit evidence in support.

53. The claimants rely on negligent misstatement. The basic rule is set out in *Hedley Byrne v Heller* [1964] AC 465, 483 and 534. A false statement made by A to B upon which B relies to his or her detriment has long been held actionable at the suite of B in circumstances where A knew the statement was false or reckless as to its truth or falsity; *Pasley v Freeman* (1879) 3 TR 51; 100 ER 450. In *Hedley Byrne* the action failed because the defendants had disclaimed responsibility for the views put forward.

54. In this case there is no plausible allegation of misstatement on behalf of the company. The company made the report and the claimant proceeded with the purchase on the basis of or in spite of the statements made.

55. Mr Carey found nothing alarming in the report or the conversation. Moisture levels were acceptable and materials and construction were common practice. He thought that a prudent and reasonable purchaser would have relied on the report and that there was no issue of weathertightness as at the date of inspection.

56. In Hedley Byrne the respondents expressly disclaimed responsibility on their part and were found not liable. The plaintiff could not accept the reply and reject the stipulation. In the current situation the claimants are in the same position.

57. The company can owe no duty of care and therefore cannot be negligent. It is removed.

58. There is a denied allegation that Mr Buckley provided further confirmation that the property was safe to purchase. He was asked that in his capacity as the person employed by the company to make the report. His response cannot be separated from the report; it is not alleged that he contradicted what he had said in the report. It is said that he was asked if there was any reason why the Carey's should not purchase the house. Although not stated, it is implicit that Mr Carey thought that the answer was no.

59. Mr Buckley was working in his capacity as an employee of the company. His activities were in relation to the report. There was no indication that he assumed any other role. He has the benefit of the same disclaimer.

60. If I am wrong in this matter and the claimant was misled in terms of the Fair Trading Act 1986, then the remedy under s 43 is a refund of payment which is, in the circumstances, a trivial amount and grounds for removal following *Cousins*.

61. The claimant refers to the Consumer Guarantees Act 1993. The sections referred to together with the remedy section are: -

> **28 Guarantee as to reasonable care and skill**
> Subject to section 41 of this Act, where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill.
>
> **29 Guarantee as to fitness for particular purpose**
> Subject to section 41 of this Act, where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be—
> (a) Reasonably fit for any particular purpose; and
> (b) Of such a nature and quality that it can reasonably be expected to achieve any particular result,—
> that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that—

(c) The consumer does not rely on the supplier's skill or judgment; or

(d) It is unreasonable for the consumer to rely on the supplier's skill or judgment.

Compare: Trade Practices Act 1974, s 74(2) (Australia)

32 Options of consumers where services do not comply with guarantees

Where a service supplied to a consumer fails to comply with a guarantee set out in any of sections 28 to 30 of this Act, the consumer may,—

(a) Where the failure can be remedied,—

(i) Require the supplier to remedy it within a reasonable time:

(ii) Where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time,—

(A) Have the failure remedied elsewhere and recover from the supplier all reasonable costs incurred in having the failure remedied; or

(B) Subject to section 35 of this Act, cancel the contract for the supply of the service in accordance with section 37 of this Act:

(b) Where the failure cannot be remedied or is of a substantial character within the meaning of section 36 of this Act,—

(i) subject to section 35, if there is a contract between the supplier and the consumer for the supply of the service, cancel that contract in accordance with section 37; or.

(ii) Obtain from the supplier damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the consumer for the service:

(c) In addition to the remedies set out in paragraphs (a) and (b) of this section, obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the product of the service) which was reasonably foreseeable as liable to result from the failure.

62. The claimant does not allege any physical damage to the property by Mr Buckley, nor that he caused any leaks. He only alleges financial loss. It appears that at most he could be liable to refund the inspection fee.

63. The damages available again are the value of the contracts and are insufficient to retain the applicants as part of this claim. Mr Buckley is therefore removed.

John Stewart

64. John Stewart applied for removal on the grounds that he was a labourer/plasterer and worked under Rex Still to meet his requirements. Mr Still confirmed this situation.

65. The claimants say that Mr Stewart has not provided evidence that he was not the subcontractor. He is therefore liable to subsequent owners of the negligent work he performed at the instruction of another person.

66. It is for the claimants making the allegation to prove that Mr Stewart was the sub-contractor.

67. The Tribunal does not usually retain unskilled labourers on low hourly rates as parties to claims but the evidence currently before me does not establish the claims against the eighth respondent, John Stewart, are 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.

68. The claimants are to provide a brief of evidence showing that Mr Stewart was an independent contractor by 14 August 2009 if Mr Stewart is to remain a party.

Success Realty Limited

69. Success Realty Limited (Success) has sought removal on the grounds that: -

- it did not represent that the building was weathertight,
- they arranged meetings between the claimant and the vendor to discuss the building,
- they recommended that an independent report be obtained and
- neither applicant nor its agents were responsible for the lack of weathertightness in the building.

70. Success said that their policy is that: -

- no agent makes representations regarding weathertightness,
- they have no professional skills or ability to judge weathertightness,
- they did not represent that they had,

- they recommended that the claimants obtain a building report, which they did,
- they recommended that a Code Compliance Certificate be obtained, which it was,
- they arranged a number of meetings between the claimants and the vendor during which the claimants discussed the construction of the home. (The claimants have produced some notes which were the result of such discussions.),
- they are not in any way responsible for any physical defects in the property, and
- any claim is disproportionate following *Cousins*.

71. The claimants say that the applicant is liable in tort and for breaches of the provisions in the Fair Trading Act 1986 relating to deceptive and misleading conduct.

72. The claimants say they were not interested in monolithically clad homes but Jan Hodges of Success assured the claimants that this house was different because it was Fosrock and the vendor was the builder. Subsequent conversations were about the weathertightness of this type of building and Ms Hodges assurances. She allegedly advised that the house had passed two previous building inspections and the vendor's father held a senior position with the Master Builders Association. (This last remark is irrelevant and merely 'puff' on behalf of the agent.) The claimants 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.

73. The sale was conditional upon remedying matters raised in the inspection report. This included the issuing of a code compliance certificate which was subsequently issued.

74. They allege negligence by the agent in recommending the fifth and sixth respondents. They say they relied on those recommendations to their detriment.

75. There was no contract between the claimant and Success. There is no evidence of any negligence other than the allegations against the fifth and sixth

respondent. There is no evidence that Ms Hodges believed anything other than the fifth and sixth respondents were careful and competent suppliers of building reports.

76. The claimants rely on the Fair Trading Act for remedies. That Act provides: -

> **43 Other orders**
>
> (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—
>
> (a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or
>
> (b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or
>
> (c) Inducing by threats, promises, or otherwise the contravention of such a provision; or
>
> (d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or
>
> (e) Conspiring with any other person in the contravention of such a provision—
>
> the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.
>
> (2) For the purposes of subsection (1) of this section, the Court may make the following orders—
>
> (a) An order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct referred to in subsection (1) of this section or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date, before the date on which the order is made, as is specified in the order:
>
> (b) An order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date, before the date on which the order is made, as is so specified:
>
> (c) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to refund money or return property to the person who suffered the loss or damage:
>
> d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:

(e) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section at that person's own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage:

(f) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section at that person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

(3) In the exercise of its jurisdiction under this section a District Court shall not— [sets limitations]

(4) Subject to subsection (4A) of this section, in the exercise of its jurisdiction under this section a Disputes Tribunal shall not— [sets limitations]

(5) An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

(6) An order made under subsection (2)(a) or (b) of this section shall not prevent proceedings being instituted or commenced under this Part of this Act.

(7) Nothing in this section limits or affects the Illegal Contracts Act 1970.

(8) For the purposes of subsection (1) of this section, a reference to **Court** includes a reference to a District Court and a Disputes Tribunal.

(9) Nothing in this section affects section 317 of the Injury Prevention, Rehabilatation, and Compensation Act 2001.

77. There is nothing to show that Ms Hodges breached the Fair trading Act nor that she breached a duty of care or was negligent towards the claimant. Accordingly Success is similarly not negligent.

78. Mr Still suggested that there was a breach of contract between him and the agent, but did not elaborate. It was not suggested that this breach of contract contributed towards the leaks in the home.

79. Success is removed from the claim.

Timetabling

80. Mediation will take place by agreement on 7 September 2009.

81. The assessor is to attend the mediation if required by the parties.

82. Parties should note that s89 provides that the claim must be determined within 35 days after the claim has been referred back after mediation. Accordingly the timetable set out below will be followed unless all parties agree to a variation or the party making an application can show that the tribunal has power to grant the application without affecting the determination process. The dates are to be regarded as deadlines set pursuant to s 73(1)(e).

83. If the mediation does not result in full settlement the case manager will contact the parties to confirm the dates for the following procedural steps.

84. Parties are referred to the guidelines for hearing preparation and hearings available from the case manager or the Tribunal website. Parties should note that all documents referred to should be attached to statements or filed in an indexed folder. Parties must either serve all other parties with hard copies of documents or provide the case manager with sufficient sets of documents to circulate. Documents previously used in procedural hearings should be provided if they are to be relied upon.

85. All witness statements and evidence upon which the claimant seeks to rely is to be filed with the Tribunal by 11 September 2009.

86. All respondents are to file their witness statements and other evidence that they will seek to rely upon at the Tribunal hearing by 18 September 2009.

87. All replies to the witness statements and other evidence to be presented are to be filed by 25 September 2009.

88. A **hearing** will take place approximately 20 working days of the matter being referred back to the Tribunal. It is agreed that the hearing will start on 30 September 2009.

89. There will be a teleconference of all parties/counsel to finalise arrangements for the hearing including which witnesses are required to attend and when on 21 September 2009 at 2.15 p.m. By that time all parties are to have advised the Case Manager in writing of the names of the witnesses they wish to appear at the hearing to be questioned.

90. A **site inspection** by the Tribunal will take place at 9:30 a.m. on the first date of hearing.

Nature of Proceedings

91. At the hearing the adjudicator will question the parties and allow other parties to ask supplementary questions.[1]

DATED the 3rd day of August 2009.

Roger Pitchforth
Tribunal Member

[1] s 73