

**WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2009-101-000026**

**BETWEEN** **LLOYD & JOANNE DIXON**  
Claimant

**AND** **PETER THOMAS DIXON AND**  
**DARRYL THOMAS DIXON AS**  
**TRUSTEES OF THE PETER**  
**DIXON FAMILY TRUST**  
First Respondent

**AND** **KEY HOMES TAURANGA**  
**LIMITED**  
Second Respondent

**AND** **NEIL PAGE**  
Third Respondent

**AND** **MICHAEL COOK (REMOVED)**  
Fourth Respondent

**AND** **WILLIAM NICHOLSON**  
Fifth Respondent

**AND** **JOHN TURNER**  
Sixth Respondent

**AND** **MALCOLM HUNT**  
Seventh Respondent

**AND** **RYAN GROUP LIMITED**  
Eighth Respondent

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**PROCEDURAL ORDER NO. 2**

**Dated 04 August 2009**

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## **Conference**

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

Those present were:

- Roger Pitchforth, Tribunal Member,
  - Moana Mihaka, Case Manager,
  - Oliver Moorcroft (for the claimants),
  - Rebekah Webby (for the first respondent),
  - Ross Harris (for the second, third and fourth respondents),
  - Danny Jacobsen (assisting Ross Harris)
  - Max Goode (for Harvey Roofing),
  - Chris Frame (for Western Bay of Plenty District Council),
  - Pat Stuart (for Wayne and Raewyn Wellington),
  - Garth (for Kim Veltman),
  - No appearance of the fifth, sixth and seventh respondents.
2. A schedule showing the names and addresses of the parties and their counsel or representatives is attached.
3. Counsel are reminded that parties should attend preliminary conferences even though counsel have been instructed<sup>1</sup>.

## **Removal of parties**

4. 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.

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<sup>1</sup> Chair's Directions 3.3

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.

5. 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.

### ***Peter Dixon Family Trust***

6. The first respondent the trustees of the Peter Dixon Family Trust (the trust) are Peter Thomas Dixon and Darryl Thomas Dixon. They request that the records be altered accordingly.
7. The trust sought removal but accepted that it is not appropriate to remove a cause of action only in a process designed to ascertain the parties. The application was abandoned.

### ***Michael Cook***

8. Michael Cook applied for removal on the grounds that the allegations made against him are incorrect. Mr Cook says that he has been and still is a commission salesperson for Key Homes Tauranga Limited (Key Homes). He is not and never has been the project manager, constructor, foreman or otherwise involved in the construction of the houses.
9. Mr Cook's name appears on some documents as he was involved in obtaining consent for Key Homes as part of the sales process.
10. He is still employed by Key Homes, one of the parties to the claim.
11. The claimant opposed the removal of Mr Cook on the grounds that an historical search shows that he was a registered proprietor of the property, a matter not

disclosed by Mr Cook in his affidavit. It was alleged that he has had more involvement in the property than he discloses.

12. It was explained that Mr Cook was a temporary trustee of the trust for a matter of weeks following a family dispute among the then trustees. There was no evidence that Mr Cook took any steps as a trustee that would affect this matter.
13. Mr Page, the third respondent, provided confirmation of Mr Cook's position.
14. The claim against Mr Cook is unlikely to be successful and he is hereby removed.

### **Joinder**

15. Section 111 of the Weathertight Homes Resolution Services Act 2006 (The Act) provides that the tribunal may order that a person be joined as a respondent to the adjudication if it considers that:
  - a). The person ought to be bound by, or have the benefit of, an order of the Tribunal; or
  - b). The persons interests are affected by the adjudication; or
  - c). For any other reason it is desirable that the person be joined as a Respondent
16. In order to meet these criteria, tenable evidence of the proposed party's breach of duty and a causative link to the remedial work is generally required. In other words an arguable fact or foundation is required for a party to be joined.

### ***Bay Building Certifiers Limited***

17. Key Homes, the second respondent, filed an application for joinder of Bay Building Certifiers Limited
18. This company has been struck off so this application was abandoned.

### ***AHI Roofing Ltd***

19. Key Homes, the second respondent, filed an application for joinder of AHI Roofing Limited (AHI) which trades as Harvey's Roofing. The application is supported by the claimant and the first respondent.
20. The grounds for seeking the joinder are that AHI constructed the roof of the dwelling and the assessor has identified flashing issues identified with the roof installation that has caused leaking in the property.
21. AHI opposes the application on the basis that it does not reach the criteria set by the Chair of the Tribunal, namely, that the applicant must provide reasonable evidence of the new party's breach of duty to the claimant and a causative link to the remedial work required to be done.
22. AHI refer to Part 15 of the assessor's report and the repairs section, 15.6.2 and say the repairs are to modify design faults which should not be attributed to any installation by Harvey Roofing. There are no moisture readings showing water ingress through any of the flashings. Information indicates ingress of water via the cladding and window flashings and the unflashed parapet. Therefore, AHI say that there was no defect in the workmanship of Harvey Roofing.
23. The assessor has recommended, in relation to the roof, that the roofline be extended to form eaves and barge end overhangs to provide eaves protection and to accommodate a new cladding system a 20 mm minimum drained cavity with building wrap and insulation quilt to framing voids. This remediation work is not evidence of poor roofing workmanship but other failures, such as design, and is not proof of a cause of leaking.
24. I am satisfied that there is insufficient evidence to show that the roofer AHI Roofing Limited or its subsidiaries or agent have any responsibility for the leaks.
25. AHI Roofing Limited is not therefore joined.

**Kim Veltman**

26. Key Homes, the second respondent, filed an application for joinder of Kim Veltman. The application is supported by the second respondent.
27. The grounds for seeking the joinder are that Mr Veltman prepared plans and was paid for them by Mr Dixon. The plans, together with the site plan and the specifications were sufficient to obtain a building consent, so Mr Veltman should be liable if the plans were adequate.
28. This is not a valid ground if the building could be constructed to be weathertight by skilled trades people
29. The assessor's report shows that there were design issues. The assessor's report in section 7.11 says:-

The dwelling design today is not considered high risk, but there are risk features found on this building envelope. This does not necessarily mean the building will leak. This will obviously depend on how well the building has been constructed and the extent of departure from good trade practice, manufacturer's requirements, Acceptable Solutions and NZ standards.
30. In August 1999 Mr Veltman prepared some plans for Fyfe Homes Townhouses to be built in Auckland.
31. Mr Peter Dixon expressed an interest in the design of the Fyfe Homes and the plans were then provided to Mr Dixon, perhaps for a fee. Mr Dixon did not disclose to Mr Veltman that the plans were to form part of another project.
32. The plans contained a notice:-

The information on these drawings remains the property of KIM VLETMAN ARCHITECTURAL CONSULTANTS and cannot be reproduced without written permission.
33. No permission was sought to use the plans and Mr Veltman knew nothing about the use of the plans until the current dispute arose.
34. Pages 11 – 15 of Mr Veltman's plans were combined with other information in order to obtain a building consent. Mr Veltman did not prepare the site plan, specifications, working drawings or any other documentation for the council. He

did not arrange engineering services. The house as constructed varied from the plans used.

35. Although Mr Veltman's plans were part of the application for consent, they were not in the possession of the builder for this purpose and there was no contract in which Mr Veltman agreed to provide such services.
36. The only claim that could be made is in relation to negligence. Mr Veltman owed no duty of care to any of the parties in relation to the preparation of plans for Fyfe Homes. He does not acquire a duty of care if the plans are used in breach of the terms on which they were given to Mr Dixon. He does not acquire a duty of care if they are used in breach of copyright.
37. I accept that argument. The application is declined.

#### ***Western Bay of Plenty District Council***

38. Key Homes, the second respondent elected not to pursue this application.

#### ***Wayne Patrick Wellington and Raewyn Ann Wellington***

39. Key Homes, the second respondent, filed an application for joinder of Wayne Patrick Wellington and Raewyn Ann Wellington.
40. The application to join Mrs Wellington was abandoned.
41. The grounds for the application was that Mr Wellington was a director of Bay Certifiers Limited and in that capacity he owed a duty of care in the inspection of the dwelling to ensure that it complied with the terms of the Building Act. Failure to do so contributed to weathertight issues in the dwelling.
42. In support Mr Jacobsen said that the key point was the Building Act scheme and the use of corporate certifiers. He explained how the BIA checked the qualifications and experience of those involved before accepting that they were expert enough to be directors and responsible for a certifying company. The certifying body was statutorily liable and the question then was the role of Mr Wellington. As a managing director of the company he was responsible for the supply of the service. He was responsible for the way in which the employees

went about the supply of the service. He had to ensure that there was an adequate standard and quality to the service.

43. There were three persons in the company authorised to issue a Code Compliance Certificate, Mr Wellington was one of them. It was an act requiring care and skill, Mr Wellington could not say that signing the form did not involve any care and skill as it was just an administrative action.
44. In response Mr Wellington says that following *Hamlin's* case the only duty of care that could be owed is to the homeowner. Bay Building Certifiers therefore owed a duty of care to the owner and subsequent owners. They did not owe a duty of care to Key Homes nor were they expected to be a clerk of works telling Key Homes where their work was not up to standard or supervising the construction.
45. Nevertheless, Key Homes still say that Mr Wellington is personally liable.
46. There is no evidence that Mr Wellington undertook any inspection or took part in any way in the supervision of the construction of the house. On the basis of *Trevor Ivory* Mr Wellington has not been shown to have personally assumed responsibility for any part of the project apart from signing the form.
47. In relation to the form, Mr Wellington did not assess the plans, accompany the inspectors or supervise the inspections. It is argued that none of his actions were causative of Key Homes' loss; see *Body Corporate 183523 v Tony Tay & Associates Limited & Ors* CIV 2004-404-4824, Priestly J., Par 150.
48. Mr Wellington says that the company owed no duty of care to Key Homes, Mr Wellington as director owed no duty of care and there was, in any case, no negligence.

### ***Discussion***

49. The Building Act 1991, as Mr Jacobsen said, set up a regime of private certifiers.
50. A building certifier was defined in s 2 as:-

**Building certifier** means a person approved as a building certifier by the Authority under Part [7](#) of this Act:

51. The role of certifiers was set out in s 56.

**56 Issue of building certificates**

- (1) A building certificate issued by a building certifier under this section shall—
  - (a) Be in writing; and
  - (b) Identify the specific item or items that are the subject of the certificate, being items not excluded by any limitation on the building certifier's approval; and
  - (c) Identify the specific provisions of the building code with respect to which those items are certified, being specific provisions in respect of which the building certifier is approved; and
  - (d) Be signed by the building certifier; and
  - (e) Be accompanied by any relevant project information memorandum.
- (2) A building certifier may issue a building certificate, in the prescribed form, pursuant to this section if the building certifier is satisfied on reasonable grounds that—
  - (a) The proposed building work would comply with applicable provisions of the building code if the construction or alteration is properly completed in accordance with the plans and specifications; or
  - (b) The building work complied with the applicable provisions of the building code on the date of certification.
- (3) A building certifier may issue a code compliance certificate, in the prescribed form, pursuant to section 43 of this Act if the building certifier is satisfied on reasonable grounds that the building work complied with the provisions of the building code on the date of certification.
- [(3A) Subject to subsections (2) and (3) of this section, a building certifier may, at the building certifier's discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.]
- (4) Where a building certifier considers on reasonable grounds that particular building work does not comply with particular items of the building code, that certifier shall forthwith notify the territorial authority that a notice to rectify should be issued in respect of that building work.
- (5) A building certifier shall not issue a building certificate or a code compliance certificate unless a scheme of insurance approved by the Authority applies in respect of any insurable civil liability of the building certifier that might arise out of the issuing of the certification.

- (6) No building certifier shall issue a building certificate or a code compliance certificate in respect of a building in which the building certifier has a professional or financial interest.
- (7) A person shall be regarded as having a professional or financial interest in a building if that person—
  - (a) Is or has been responsible for the design or construction of any part of the building in any capacity; or
  - (b) Is a partner of, or is in the employment of, a person who has a professional or financial interest in the building; or
  - (c) Is, or any nominee of that person's is, a member, officer, or employee of a company or other body which has a professional or financial interest in the building:

Provided that this paragraph shall not apply to officers or employees of any Government department or Crown agency, territorial authority, or other body that acts pursuant to law for public purposes and not for its own profit.

- (8) For the purposes of this section—
  - (a) A person shall be regarded as having a professional or financial interest in the work even if having that interest only as a trustee for the benefit of some other person:
  - (b) In the case of married people not living apart, the interest of one spouse shall, if known to the other, be deemed to be also an interest of the other.
- (9) For the purposes of this section—
  - (a) Involvement with the building as an approved certifier; and
  - (b) Entitlement to any fee paid for acting as a building certifier—
 shall not be regarded as constituting a professional or financial interest.

52. In relation to civil actions against certifiers it provided:-

**90 Civil proceedings against building certifiers**

Civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier's statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort and not in contract.

53. The regime included protection for those using the services in the form of an insurance requirement. The local authority had power to appoint a building

certifier under s 52 if the applicants met certain criteria including under s 52(6) (c):-

(c) That a scheme of insurance approved by the Authority will apply in respect of any insurable civil liability of the applicant that might arise out of the issuing by the applicant of a code compliance certificate under section 43 of this Act or a building certificate under section 56 of this Act.

54. The only legal entity which could issue the Code Compliance Certificate was the certifier, Bay Buildings Certifiers Limited. They cannot be joined as they are in liquidation. There is no information about their insurers. Mr Wellington could not issue the Certificate as he was not a certifier.

55. The scheme of the Act was to make building certifiers authorised by the Building Industry Authority liable in tort for any negligent issuing of a building certificate or Code Compliance Certificate. The silence in the Act relating to employees or officers of building certifiers is based on the intention for legal liability to rest with the building certifiers who were required to hold adequate insurance.

56. As adjudicator Ruthe said in *Hamilton v Smith*, TRI 2009-101-000005, P O 2 1 April 2009:-

7. The overall scheme of the Act makes it clear a building certifier owed a duty of care and only a building certifier could be liable in tort for any negligent issuing of the Code Compliance Certificate. The absence of an equivalent to S 89 of the Act (that indemnifies territorial authority employees) does not imply an inspector employed by a certifier is exposed tortious liability. Rather the legislature considered it had created an impregnable shield protecting such employees by limiting the right to sue only a building certifier who had a mandatory obligation to have appropriate insurance cover.

57. I am not satisfied from the information provided that it is desirable for Wayne Patrick Wellington to be joined as a further respondent in these proceedings. The application is declined.

***Ryan Group Limited***

58. Key Homes, the second respondent, filed an application for joinder of Ryan's Widows and Doors. The application is supported by the claimant and the other respondents. Subsequent information filed shows the name of the company to be Ryan Group Limited.
59. The grounds for seeking the joinder are that Ryan Group Limited supplied and installed the joinery which the assessor's report shows are the cause of leaks.
60. I am satisfied from the information provided it is desirable for Ryan Group Limited to be joined as a further respondent in these proceedings.

### **Consequences of joinder**

61. An amended schedule showing the names and addresses of the parties and their counsel or representatives is attached.
62. Each newly joined party is to be served with this procedural order together with other relevant documents including the WHRS Assessor's report forthwith.
63. The newly joined party is required to produce or make available for inspection all relevant documents relating to this claim that may be in their possession or that they have access to. This can be arranged direct with the other parties or through the Case Manager and is to be carried out by the date set out in the timetable below.
64. The newly joined party is to attend the future conferences and attend the mediation and hearings scheduled.
65. If any party has a claim against a newly joined party they should file that claim with the case manager forthwith.

### **Documents**

66. The parties are to provide to the case manager forthwith:
  - (a) **All relevant non-privileged documents** that they have in their possession or control that relate to the design, development and construction, inspection or sale and purchase in relation to the property in dispute. The documents include (but are not limited to) plans and specifications, contracts, correspondence, site meeting

minutes, diary notes, invoices and receipts and photographs of the construction work inspection reports and other communications between them or between any of the above parties and any other person, company or entity involved in the design development and construction. Documents should also include details of repairs and maintenance. Documents relating to unsuccessful sales, valuations obtained during occupation, all reports received concerning matters relating to the discovery and extent of the leaks.

- (b) **A summary sheet** noting all key documents that the party may wish to rely upon in relation to these proceedings
- (c) **Written confirmation** that they hold no other relevant documents

67. The case manager will circulate copies of all documents to the parties.

### **Timetabling**

68. Mediation will take place as agreed on 26 August 2009.

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

70. 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).

71. 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.

72. 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.

73. 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 11 November 2009.
74. 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 2 November 2009 at 3.30 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.
75. A **site inspection** by the Tribunal will take place at 9:30 a.m. on the first date of hearing.

#### **Nature of Proceedings**

76. At the hearing the adjudicator will question the parties and allow other parties to ask supplementary questions.<sup>2</sup>

**DATED** the 4th day of August 2009.

**Roger Pitchforth**

Tribunal Member

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<sup>2</sup> s 73