IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2023-100-006

BETWEEN	**AINSLIE MICHELLE BAKER and GARETH CHARLES BAKER**
	Claimants
AND	**AUCKLAND COUNCIL**
	First Respondent
AND	**DETECT A LEAK LIMITED**
	Second Respondent
AND	**ISLAND STYLE LIMITED**
	Third Respondent

PROCEDURAL ORDER 4
(Removal Applications by Second and Third Respondents)
Dated 22 March 2024

Introduction

[1] The second and third respondents were both joined to this claim on the application of the first respondent in Procedural Order 2.

[2] In summary:

(a) The second respondent was joined on the basis of a tenable claim that it provided a pre-purchase inspection report that failed to identify certain defects recorded by the assessor;

(b) The third respondent was joined on the basis of a tenable claim that it carried out within time remedial works that were completed negligently.

[3] Both the second and third respondents now seek to be removed from the claim on grounds that traverse factual matters that are in dispute.

Removal applications

[4] Section 112(1) of the Weathertight Homes Resolution Services Act 2006 (the WHRS Act) provides that the Tribunal may order that a person be removed from adjudication proceedings if it considers it "fair and appropriate in all the circumstances to do so".

[5] The Tribunal's jurisdiction to remove a party from proceedings is akin, but not completely analogous to, the jurisdiction of the High Court to strike out proceedings on the ground that it discloses no reasonably arguable cause of action or defence. The jurisdiction is wider than that of the High Court and it can be fair and appropriate "to strike out a party in circumstances other than where no reasonable cause of action is disclosed".[1]

[6] The learned Judge in *Vero Insurance*[2] adopted the comments of Katz J in *Saffioti v Jim Stephenson Architect Ltd*[3] urging caution in removing a party:

> [44] Nevertheless, it is my view that the cases where it will be "fair and appropriate" for the Tribunal to remove a party from a proceeding in circumstances where the relevant causes of action would not be struck

[1] *Vero Insurance New Zealand Ltd v Weathertight Homes Tribunal* [2014] NZHC 342 at [19]
[2] *Vero Insurance* at [21]
[3] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519

> out on traditional strike out grounds will be relatively rare. Section 112 should not be seen as providing carte blanche to strike out parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak. Often in litigation claims which appear weak at an early stage may gain momentum at trial, whereas other claims which appeared strong at the outset are later revealed to be fatally flawed.
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> [45] It is necessary to be cautious when approaching applications under s 112 in order to prevent injustice to claimants who may in fact have a good claim once all the evidence is before the Tribunal, including thorough cross-examination in appropriate cases. Too broad an approach to the jurisdiction under s 112 would involve a risk of injustice to claimants. It is important that claims which may ultimately prove to be meritorious not be prematurely struck out at an interlocutory stage.

[7] Andrews J in *Vero Insurance* added that, while recognising the need to prevent injustice to claimants, it was also necessary to consider the interests of those against whom claims are made.[4]

[8] The Tribunal is not restricted to considering the pleadings only and may assess evidence in determining whether to remove a party.[5] Ellis J has observed that if the Tribunal is to hear and determine claims in an "expeditious and cost-effective way, [it] must be able to perform an active gate-keeping role in terms of both the joinder and removal of parties".[6] This can include the early receipt and assessment of evidence.

[9] In circumstances where the evidence is contentious or challenged, or a party's veracity is in issue, the Tribunal is wary of attempting to resolve such matters in the context of a removal application. Genuinely and reasonably disputed factual issues which could impact on the success of the claim are generally not suitable for summary determination.[7]

[10] The onus is on the party seeking to be removed to show that removal is fair and appropriate. The interlocutory removal procedure will seldom be successful when there are disputed facts that require determination at a substantive hearing.

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[4] *Vero Insurance* at [22]
[5] *Saffioti* at [38], [43]; *Vero Insurance* at [20]
[6] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70]
[7] *Saffioti* at [53]

The defects

[11] The assessor's report of September 2021 found that water had penetrated the home because of some aspect of its design, construction, or alteration, or from materials used in its original construction. The assessor found that the penetration of moisture had caused damage.

[12] The assessor identified the following weathertightness defects in the home:

(a) Defect A - Inadequate waterproofing membrane to the main concrete roof and the 1st floor deck;

(b) Defect B - Inadequately weatherproofed joinery perimeters;

(c) Defect C - Inadequately terminated upper edge of the tanking membrane;

(d) Defect D - Inadequate installation of chimney capping; and

(e) Defect E - Cracking to the external cementitious wall render.

[13] All of those defects were found to be causing either current damage or future likely damage. The same description of the defects is used in this Procedural Order.

Second respondent's application for removal

[14] The second respondent provided a pre-purchase inspection report. It has filed detailed submissions in support of its application for removal. Those submissions are thorough and deal with, from the second respondent's viewpoint, all of the allegations levelled against it.

[15] The second respondent's report contained various contractual exclusions.

[16] The scope of the report is set out in the heading "Scope" contained in the report itself. That description notes that the inspection type is as requested by the client. The front page of the report records the inspection type as:

"Pre-Purchase Infrared Moisture Inspection"

[17] The report does set out its findings of moisture detection work taken in the interior of the property.

[18] However, the report then goes onto inspect and report on exterior features, notably including roof, cladding, joinery.

[19] It follows from this that there is an issue about the *scope* of the report and to what degree the scope of the report or its findings was *limited* in any way.

[20] The second respondent appears from the report to have inspected in detail the roof areas and, if the report was intended to be limited in some way, it is not apparent or set out where or what those limitations are.

[21] There do not appear to be any limitations in the narrative part of the report as to the extent of the inspection and whether the party seeking the report could rely on that report as a full inspection and report on the roof, and other areas.

[22] The report does contain a number of items that are said to be excluded from its ambit.

[23] Those exclusions are set out in the beginning section of the report containing terms. The condition of roofing systems are not excluded items.

[24] In any event, the second respondent commented on the roofs. To the extent that I need to decide that point, there is a tenable claim that the second respondent assumed responsibility for the correctness of its reporting on the roofs.

[25] The second respondent makes the following key points in its removal application:

(a) The report was limited in scope and various exclusions applied;

(b) For defect A – inadequate waterproofing membranes to the main roof, turret and first floor deck – the second respondent says the defect was not visible when the report was completed, instead the defect arises from a lack of maintenance and the fibreglass reinforcing mesh was not poorly embedded in the membrane;

(c) For defect C - inadequately terminated upper edge of the tanking membrane – the second respondent says that the upper edge of the tanking membrane was not visible at inspection and any failure of the sealant and the adhesion at the top of the membrane occurred later;

(d) For defect D – inadequate installation of chimney capping – the second respondent says that the fall of the chimney capping was beyond the scope of the report and in any event the chimney capping flashing was removed and refitted after the report was completed.

[26] The Council's position on the second respondent's application is that the claim against the second respondent is in tort and that contractual exclusions will not necessarily apply to effect a complete exclusion of liability in tort. Such exclusions may inform the scope of the tortious duties of care. But, they do not necessarily exclude them completely.

[27] Ultimately, that issue will be one that requires consideration at a full hearing.

[28] In regard to the specific defects alleged against the second respondent, the Council asserts that there are disputed issues of fact that require determination at a hearing.

[29] For instance, on defect A it says that the visibility of the defect at the date of inspection requires evidence. It says that lack of maintenance will require evidence. It says that the issue of whether the fibreglass reinforcing mesh was poorly embedded in the membrane or not is a disputed question of fact. The Tribunal agrees.

[30] On defect C, the Council says that the upper edge of the tanking membrane was visible in areas other than just the area that had been excavated (which was the southern elevation). It says that ground settlement is not identifiable from the photographic evidence available. It says that there are multiple disputed questions of fact that will require determination. The Tribunal agrees.

[31] On defect D, the Council says that the second respondent in fact did take photographs of the chimney and, whilst commenting on the falls in other areas, did

not comment on the fall in the chimney. Again, this is a disputed issue of fact requiring determination.

[32] To summarise the Council's position, it is that the existence of a duty of care owed is well established and that there are disputed issues of fact that require determination.

[33] Whilst the second respondent has made detailed and cogent submissions rejecting the Council's claims of negligence and may well prevail at a hearing, the approach the Tribunal takes is that it is not appropriate to determine material disputed facts until they have been tested at a hearing.

[34] Hence, applications based on material disputed facts are unlikely to be successful. This application is unsuccessful.

[35] Accordingly, the second respondent's application for removal is declined.

Third respondent's application for removal

[36] The third respondent seeks removal from the claim on the grounds that:

(a) Any claim in relation to the installation of the tanking membrane is time-barred; and

(b) It did not carry out any remedial work on the roof membrane (the area where defect A is located).

[37] The third respondent notes that the work done to install the tanking membrane was carried out more than 10 years before the claimants applied for an assessor's report. It says that any claim arising from that work is time-barred under the Building Act 2004, section 393.

[38] In response to that submission, the Council submits that it is advancing a contribution claim under section 17(1)(c) of the Law Reform Act 1936 and so the Building Act 2004 longstop does not apply to such a claim.

[39] The Council was the applicant for joinder. Although it makes the point that it makes the claims seeking contribution against both the second and third

respondents as joint tortfeasors, the Weathertight Homes Resolution Services Act 2006 (the Act) does not differentiate between “defendants” and “third parties”.

[40] Rather, once joined each responding party is a respondent, irrespective of whether that party was joined on the application of the claimants, a respondent(s) or the Tribunal itself. Section 90 of the Act requires the Tribunal to apportion liability between the respondent parties. It is not required to make “third party” type liability rulings.

[41] The position regarding the longstop and contribution claims is currently before the Supreme Court. The Court of Appeal dealt with the issue in *Beca Carter Hollings and Ferner Limited v Wellington City Council*[8], finding that a contribution claim is not caught by the Building Act longstop provisions. The Supreme Court has yet to deliver its judgment on that issue. It is of significance to this case.

[42] However, due to my findings regarding the “in time” work, I do not need to determine the issue of the longstop and its applicability in this case.

[43] Turning to the “in time” work, that is, broadly, the remedial work undertaken by the third respondent in 2016. There is some uncertainty around exactly what work was done and what work was discussed and/or requested by the claimants.

[44] The evidence of the work carried out by Island Style is inferred from the exchange of correspondence contained in document BV11. That supports an argument by Council that repair work in that defective area was carried out by Island Style, but there is little evidence of what work was actually undertaken or the extent of it.

[45] However, there is tenable evidence before the Tribunal that Island Style likely did carry out work to this area and that the area where that work was done appeared to continue to have water ingress.

[46] As with the second respondent’s application, again counsel is seeking to have determined a factual dispute that will require consideration at a hearing.

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[8] [2022] NZCA 624 at [147]

[47] On that point, the debate is over:

(a) Whether the area that the third respondent did acknowledge it worked on continued to leak or whether its remedial work in that area was successful; and

(b) Whether, as submitted by Council, there was a wider obligation to ensure that the work required to recoat the membrane roof was carried out.

[48] What the evidence suggests is that the third respondent did provide an estimate in March 2016[9] to carry out:

(a) Remedial works to external vertical walls above kitchen area. Prepare, supply and install waterproofing membranes to vertical walls @ 3.5m^2; and

(b) Prepare and re coat flat roof membrane to specification.

[49] The third respondent has provided evidence that it carried out work to "supply and install Equus [*word unclear*] waterproofing membrane to plaster walls above roof"[10]. The area was 3.5m^2, which is suggestive of that work being the first of the two pieces of work in the earlier estimate.

[50] Whether or not that work was in the location of the later failure or if it resolved the water entry issue in that area is unclear. There is an exchange of email set out in document BV12 which records the claimants' comment that there was "a leak coming in above that parapet in the kitchen dripping water onto the floor".

[51] The third respondent's reply to the Council's opposition addresses various legal and factual matters, but does not specifically respond to the allegation that the leak referred to above was not related to the work the third respondent accepts that it did do.

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[9] Document IS-BV-07
[10] Document IS-BV-02

[52] The third respondent's estimate refers to "vertical walls above kitchen area". The email that is contained in document BV12 refers to "leak coming in above that parapet in the kitchen dripping onto the floor".

[53] There is a suggestion, sufficient to raise a tenable claim, that the limited work the third respondent carried out was unsuccessful. I do not express any view on the adequacy of that work, but do not need to at this juncture.

[54] I take the view that it is sufficient to know that the third respondent carried out work in that area in response to a request to address water ingress and that the area continued to experience water ingress following that work.

[55] As to whether the third respondent owed some wider, somewhat amorphous, duty to warn, that claim is weaker, but not one that I am able to dismiss summarily.

[56] The email that is in document BV12 is suggestive of a request for advice from the third respondent in its capacity as a waterproofing specialist. Again, the ambit of any such duty and whether it was discharged, is something that will need to be tested at a hearing. I would need to hear the evidence of what exactly was sought and discussed and what exactly the third respondent agreed to do.

[57] The Tribunal is unable to determine, with the degree of certainty required at this interlocutory stage, that there is no tenable claim that the work undertaken by the third respondent was not responsible for or contributing to the defects later complained of by the claimants.

[58] It follows, therefore, that the third respondent's application for removal is declined.

Outcome

[59] The second and third respondents' applications for removal are declined.

[60] The case manager is to schedule a telephone case management conference.

[61] That telephone case management conference will:

(a) Schedule the filing of responses to the claims;

(b) Consider resolution pathways, including mediation, settlement conference or formal Adjudication hearing.

DATED this 22nd day of March 2024

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P R Cogswell
Tribunal Chair
Weathertight Homes Tribunal