WEATHERTIGHT HOMES TRIBUNAL

CLAIM NO: TRI-2009-101-000014

BETWEEN	**JOHN & KATHLEEN FINLAY** Claimant
AND	**GEORGE BAKER** First Respondent (Removed)
AND	**STUART SIZEMORE** Second Respondent (Removed)
AND	**LAJAK HOLDINGS LIMITED** Third Respondent
AND	**BRIAN LAMB** Fourth Respondent

PROCEDURAL ORDER NO. 4
Dated 3 September 2009

Contents

Conference

1. I convened a conference on this claim on 31 August 2009.

   Those present were:

- Roger Pitchforth, Tribunal Member,
- Paul Bleyenga, Case Manager,
- Kathleen Finlay (claimant),
- Shima Grice (representing the claimants and the third respondent),
- Grant Brittain (representing the first respondent)
- Stuart Sizemore (second respondent)
- Blair Kiddle (representing the fourth respondent who is subject to an application for removal)
- Michael Cavanaugh (representing the Tauranga City Council who is subject to an application for joinder)
- Ross Harris (representing Stephen Donaldson who is subject to an application for joinder)

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

Removal of parties

Stuart Graham Sizemore

3. The grounds for removal have been set out in previous POs.

4. There was no further opposition to Mr Sizemore's removal and he is removed accordingly.

George Baker

5. George Baker has applied to be removed from these proceedings. The application raises issues relating to the duty of care owed by a labour only carpenter to his employing builder and the subsequent owners of the dwelling

who are the shareholders and directors of the building company that employed the carpenter. One of the directors was also the builder who managed the project. The allegations are of negligence rather than breach of contract.

6. 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.

7. 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.

Objections to hearing

8. The hearing of the application is opposed by the claimant and the third respondent on the grounds that the *Cousins'* test is not met and there are facts requiring the dispute to be heard at the hearing.

9. The *Cousins* test[1] as set out by Adjudicator Ruthe is:-

> **Evidential Foundation**
>
> 16. In *Dennerly* (supra) Justice Harrison stated: "*a party for joinder would have to lay an evidential foundation"* [31].
>
> 17. Earlier at [27] His Honour said there had to be an arguable factual foundation to justify joinder. Equally for a party seeking removal that party has to produce sufficiently compelling evidence to establish a claim against it and is unlikely to succeed.

[1] *Cousins v Plaster Systems* etc, TRI-2008-0000107: P O 3 23 January 2009

18. 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.

19. 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 reach 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;

21. 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 took into account a potential of attribution of less than 50% liability for remediation. 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.”*

10. As Adjudicator Ruthe says, these are not the only tests. There must be a claim which is capable of being adjudicated.

11. The claimant says that the novelty of the argument in support implies that the matter is more appropriate for determination rather than as a simple removal application.

12. It is the practice of the Tribunal to regard all matters as being part of the case and, if the issue is suitably discrete and properly argued, may well be dealt with in a preliminary way. This may lead to a speedier and more cost-effective procedure thereby giving effect to s 3 of the Act.

13. Accordingly I decline the invitation to leave this matter until the case is heard and will deal with the application on its merits.

Factual background

14. The undisputed facts are that 197A and 197 B Marine Parade, Mount Maunganui, are a cross-lease development.

15. The history of ownership on the Certificate of title, CT 890/155 South Auckland registry, shows that the claimants purchased the property in 1991. The title was transferred to Mrs Finlay in 1994 and thence to Lajak Holdings Limited on 18 April 1997.

16. Lajak Holdings Limited (Lajak) is a duly incorporated company. The claimants own the shares and are the directors. The Hagans had some involvement with the administration.

17. Mr Finlay was a builder, as was Lajak.

18. Between March and May 1998 Mr Finlay caused plans and specifications to be prepared. They were addressed to 'Lajak Holdings and Mr & Mrs SH Hagan'. A contract was consequently signed between '*John Finlay Lajak Holdings'* and the Hagans between 22 May 1998 and 24 June 1998. The vendor in the contract should have been Lajak.

19. It appears that Mr Finlay regarded himself and Lajak as one entity. He signed the sale as if they were one entity. The application for building consent applied for on 2 June 1998 shows Mr Finlay as owner, contact person and builder. The consent was issued to Mr Finlay in those capacities.

20. It appears that the claimant carried out some negotiations as one builder appears to have priced the job on the basis that he would get a management fee. This proposition was rejected.

21. On 24 July 1998 Lajak wrote to the applicant:-

> Dear Ken
>
> We have for acknowledgement your submitted price for labour only contract for units one and two to be built at 197 Marine Parade Mount Maunganui.
>
> As advised recently we confirm acceptance of your prices.
>
> Unit one $33,875.00 plus GST
>
> Unit two $30,375.00 plus GST
>
> Together with the items and conditions as set out in your letter of the 18th April 1998.

22. Mr Baker issued his first invoice to Mr Finlay. Subsequent invoices were to Lajak.

23. Despite confusion on Mr Finlay's part when dealing with trades it appears that this was a development by Lajak. Mr Finlay, as an employee of Lajak, was actively involved in the project. He did not confine himself to acting as a director.

24. In his role as employee Mr Finlay contracted with Mr Baker to provide carpenters' labour only, arranged and programmed other sub-trades, made decisions about changing materials specified, attended site meetings, altered the design of the parapet wall and behaved as if he were the builder. Mrs Finaly administered the accounts of the development and prepared hand-written statements from Lajak to Hagan.

25. The first part of the project was sufficiently completed for the transfer of that half of the property. 197A was then sold to its current occupiers, the Hagans on 11 December 1998.

26. A weathertight claim by the Hagans against Lajak was settled on 25 February 2008.

27. Mr Baker appears to have ceased work on 197B some time in 1999.

28. There is little information about the interactions between Lajak and the claimants. On 21 August 2002 Lajak sold 197B to Mr & Mrs Finlay for $820,000.00. The property may have been worth more at that stage as an offer of $1,100,000 was declined.

Contracts

29. The contracts related to this application are the contracts between Mr Baker and Lajak and Lajak and the claimants.

30. Breach of the contract between Mr Baker and Lajak is not alleged.

31. The claimants allege negligence based on the duty of care they say is owed subsequent purchasers

Duty of care

32. It is fundamental for any allegation of negligence to be based on a duty of care[2].

33. In many situations the duty of care has been established in prior cases. There is not usually a duty of care for economic loss resulting from poorly built buildings.

34. In relation to domestic buildings *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (C: [1996] 1 NZLR 513 (PC) rescued the doctrine in *Anns* for New Zealand purposes and allowed a houseowner to claim for negligence resulting in economic loss in cases involving dwellinghouses.

35. In the present case, the situation is as set out in Todd relying on Rolls Royce:-

> Finally, the cases about defective buildings illustrate the difficulty facing the courts in setting a standard of quality in tort action for negligence that can operate independently of the contractual specifications pursuant to which the work was done. The standard of care expected of the builder of a dwellinghouse is to take reasonable care to build a reasonably sound structure, using good materials and workmanlike practices. Yet the terms of the contract pursuant to which the work was done, to which a subsequent owner is not a party, may lay down a different standard, or may purport to limit or exclude any duty. The problem of disconformity between the obligation in contract and that in tort was a significant reason why the House of Lords decided to reject the tort duty altogether. The courts in New Zealand and Australia have been prepared to uphold a duty with an objectively determined standard in the case of houses, but they have also recognised in the case of commercial construction contracts involving detailed contractual matrices the disconformity problem is likely to be acute.

> So in cases of this kind they have held that there can be no duty in tort operating independently of any contractual obligation assumed by the builder or engineer.[3]

36. There is no duty of care at common law in the situation that arises in the present case unless it can be drawn into the law relating to domestic houses.

37. In relation to domestic dwellings the question is whether, or the extent to which, a party to the building process, in the absence of any contract, may be liable to the owner in respect of putting right any defect. The claim is not for damage done to the property but rather is for the owner's disappointed expectation as to the true value of the property. The loss is the loss suffered by acquiring a defective property.[4] It is an economic loss.

38. In cases where there is doubt as to whether there is a duty of care the courts look first to the foreseeability of the injury to their 'neighbour' and secondly the broader implications for the community in recognising or denying a duty.[5]

39. In *Bowen v Paramount Builders*[6] it was confirmed that there is a duty of care owed to subsequent purchasers of residential property. Richmond P at 406 held that contractors are subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work. The duty does not extend to one who purchases the building with actual knowledge of the defect or who should have known of the defect. The opportunity for intermediate examination can negate proximity, so that a duty is not owed, (p 412).

40. Mr Finlay in his capacity as the employee of Lajak who was managing the project had control of the building. Mr Baker, as a labour only carpenter, clearly owed him no duty of care. Any liability would have been in contract with Lajak.

41. Mr Baker could have owed the subsequent purchasers of the property from Lajak a duty of care. However, the subsequent purchaser was, *inter alia*, Mr Finlay, the same person who was conducting the construction project and who had control

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[2] *Grant v Australian Knitting Mills Ltd*, [1936] AC 85, 103 (PC) per Lord Wright.
[3] Todd p 152.
[4] See Todd pp 266-267.
[5] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 and Todd (Ed) *The Law of Torts In New Zealand*, Thomson Reuters, Wellington, 2009. (Todd) p142.

over its management. Mr Finlay was in a unique position to inspect all aspects of the work. He has the necessary proximity to bring him within the situation discussed at p 412 line 20. If Mr Baker were negligent, Mr Finlay should have noticed and had the matter corrected.

42. There is a close association between the claimant and Lajak. In these proceedings, for instance, they are represented by the same counsel. In order for someone to be a subsequent purchaser to whom a duty is owed, there needs to be a break in the chain of ownership thereby indicating a clear distinction between a previous owner and a current owner of the same dwelling. However the distinction between the Finlays' ownership of the property as the current owner, and Lajak's previous ownership is blurred to the extent that it is difficult to identify the claimants as subsequent owners of the subject dwelling requiring a subsequent duty of care.

43. I am further assisted in this view by the vulnerability factor in *Hamlin*. And the comments of the Court of Appeal *in Queenstown Lakes District Council v Charterhill Trustees Limited*, [2009] NZCA 374 at par 39. Mr Finlay is possibly the least vulnerable person in relation to this building having personally supervised all aspects of its construction and then purchased it from his company. He is not an innocent purchaser. He had every opportunity to conduct an intermediate examination.

44. Much of the damage seems attributable to Lajak, for instance, the departure from the plans, the substitution of proprietary systems and materials for the cladding and waterproof membranes and the management of the building project.

45. I do not find that there is a duty of care or a potential liability in negligence in relation to the activities of Mr Baker. For the reasons set out above I conclude that it is fair and appropriate in all the circumstances for Mr Baker to be removed as a party.

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[6] [1997] 1 NZLR 394 (CA)

Brian Lamb

46. This application was deferred until the next meeting as it is dependent on the removal application from Mr Baker.

Joinder
Stephen Victor Donaldson

47. The first respondent, George Baker, applied to join Stephen Victor Donaldson. The application was previously deferred pending further information.
48. Affidavit evidence has been produced to show that Mr Donaldson was not involved in this building in a way that would make him liable to the owner.
49. The application was declined without opposition.

Tauranga City Council

50. This application was deferred pending the decision on the application of Mr Baker for removal.

Timetabling

The date of hearing for the remaining applications for joinder or removal shall be 21 September 2009 at 10.15 a.m. (phone conference).

DATED the 4th day of September 2009.

Roger Pitchforth
Tribunal Member