

CLAIM NO: TRI-2007-101-000022

UNDER the Weathertight Homes Resolution
Services Act 2006

IN THE MATTER of an adjudication

**BETWEEN JOHN ANDREW HAMILTON
and JADE HAMILTON**

Claimants

**AND O'DONNELL BRICK AND
TILE LIMITED**

First Respondent

**AND CHRISTCHURCH CITY
COUNCIL**

Second Respondent

ORDER OF THE TRIBUNAL
Dated 16 August 2007

Background

1. John and Jade Hamilton have filed an application with the Weathertight Homes Tribunal for adjudication of their claim in relation to the leaky home.
2. In 2006 Mr Hamilton lodged an application with the Disputes Tribunal in Christchurch against the first respondent, O'Donnell Brick and Tile Limited. The main issues for the Disputes Tribunal was whether the first respondent failed to use reasonable skill and care in the installation of the roof and whether the roof was not of acceptable quality. By order dated 14 September 2006 the Disputes Tribunal ordered the first respondent to pay Mr Hamilton, the claimant, \$1,200. Mr Hamilton subsequently applied for a rehearing in the Disputes Tribunal which was dismissed.
3. Mr and Mrs Hamilton have now lodged a claim with the Weathertight Homes Tribunal. The matter was set down for a preliminary conference on 9th August 2007. In the direction setting down the preliminary conference the parties were advised that one of the items on the agenda would be whether Mr and Mrs Hamilton have jurisdiction to bring this claim in the Weathertight Homes Tribunal given the fact that Mr Hamilton has already brought an action against O'Donnell Brick and Tile Limited in the Disputes Tribunal.

Applications by first and second respondents

4. The first respondent, O'Donnell Brick and Tile Limited, and the second respondent, the Christchurch City Council, have both filed applications seeking to have the claim struck out on the grounds that the Tribunal does not have the jurisdiction to hear the. In support of their application they allege the Tribunal claims have exactly the same subject matter as Mr Hamilton's prior claim in the Disputes Tribunal. Therefore the claimants are estopped from re-litigating these issues before the Weathertight Homes Tribunal.

Submissions by claimant

5. Mr Hamilton acknowledges that the claim heard by the Disputes Tribunal is substantially the same as the claim filed with the Weathertight Homes Tribunal. He however believes the Disputes Tribunal decision was wrong and the process unfair. In addition he noted that the Christchurch City Council was not a party to the claim in the Disputes Tribunal and that he had not brought his original claim on the basis of breaches of the New Zealand Building Code. He also stated that, on the grounds of fairness, he should be entitled to a hearing by the Weathertight Homes Tribunal because the Disputes Tribunal did not consider all the evidence. In particular it did not have the benefit of the assessor's report and had refused to grant an adjournment of the rehearing application to enable time for the assessor's report to be completed and presented. He also advised that there were additional facts he was unable to present and that there had been further disintegration to the roof since the time of the Disputes Tribunal hearing.

Decision

6. It is well established in New Zealand law that parties cannot re-litigate questions that have already been judicially determined. Authority for this can be found in the Court of Appeal decision of *Shiels v Blakeley* [1986] 2 NZLR 262 (at 266) where the Court stated:

"Where a final decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits."

7. The reasons for the existence of this rule is due to the following:
 - Public policy - it is in the interest of the public and the state that there should be an end to litigation; and

- It would create hardship on the individual if proceedings can be filed against them twice on the same matter.

8. In order to be successful in a claim of res judicata or estoppel the following elements must be established:

- The decision relied on must be a judicial decision
- The decision must be made by a court or tribunal of competent jurisdiction
- The decision must be final
- The decision must determine the same question as that in the litigation in which estoppel is raised or the decision involves the same questions; and
- The parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which estoppel is raised.

9. I accept that the decision of the Disputes Tribunal was a final judicial decision and that the Disputes Tribunal is a court or tribunal of competent jurisdiction. In addition I accept that both the legal issues and the subject matter of the claim in the Disputes Tribunal is the same as the claim in the Weathertight Homes Tribunal.

10. Mr Hamilton submitted that his claim around breaches of the New Zealand Building Act and the Code were not the subject matter of the Disputes Tribunal claim. However in paragraph three of the Disputes Tribunal decision the referee states:

“I have considered the applicants comments about non-compliance with the Building Act and building standards.”

11. I however accept that the second respondent was not a party to the Disputes Tribunal claim. Section 17(1)(a) of the Law Reform Act 1936 provides that judgement recovered against any tortfeasor is not a bar to an action against

any other person who would, if sued, be liable as a tortfeasor in respect of the same damage. However subsection (b) provides that the sums recoverable under judgments given in different actions against different tort feasons cannot exceed the amount of damages awarded in the judgments given.

12. Accordingly the claimants cannot obtain any judgment against the second respondent that is greater than the judgment they have already obtained against the first respondent in the Disputes Tribunal. In addition I understand that the first respondent has either paid or tendered payment for the full amount ordered by the Disputes Tribunal. This effectively precludes the claimant now pursuing the second respondent for the same amount.
13. I accept Mr Hamilton is not happy with the Disputes Tribunal decision and believes it is both unfair and incorrect. What in effect he is asking the Weathertight Homes Tribunal to do is to either be an appellant body to the decision of the Disputes Tribunal or re-decide that decision. I do not believe the Tribunal has jurisdiction to do either of these things for the reasons outlined above.

Conclusion

14. The claim filed by Mr and Mrs Hamilton is dismissed as the Disputes Tribunal has already pronounced a final decision in relation to the subject matter of the litigation.

DATED the 16th day of August 2007.

P A McConnell
Chair