WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI-2008-101-000045

BETWEEN	**ALISON MARGARET HEARN, MURRAY DEANS AND HARTHAM TRUSTEES LIMITED AS TRUSTEES OF THE A HEARN FAMILY TRUST** Claimant
AND	**PARKLANE INVESTMENTS LIMITED (NOW BOULCOTT INVESTMENTS GROUP LIMITED)** First Respondent
AND	**EMPA GROUP CONSULTANTS LIMITED** Second Respondent
AND	**WELLINGTON CITY COUNCIL** Third Respondent
AND	**RAJU MORAR, NEESHA MORAR AND ISHWERAL MORAR AS TRUSTEES OF THE I & R MORAR FAMILY TRUST** Fourth Respondents
AND	**MARK ANDREW DEBNEY** Fifth Respondent
AND	**TONG LIU & WEN TENG (REMOVED)** Sixth Respondent
AND	**BARRY MILLAGE** Seventh Respondent
AND	**BARRY MILLAGE ARCHITECTS LIMITED** Eighth Respondent
AND	**WADESTOWN DEVELOPMENTS LIMITED** Ninth Respondent
AND	**HAYIM NACHUM** Tenth Respondent

FINAL DETERMINATION
ADJUDICATOR: R PITCHFORTH

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Interim Determination

[1] On 30 April 2009 I decided that the Wellington City Council, Mark Andrew Debney and Wadestown Developments Limited were jointly and severally liable to the claimants for the sum of $449,807.00.

[2] Those parties were invited to provide particulars of their claim against the tenth respondent, Mr Hayim Nachum, for a contribution.

[3] In his response, Mr Nachum denied the allegations made against him.

Mr Nachum's Position

[4] Mr McIntyre wrote to the Tribunal saying that the interim determination and Procedural Order No 8 are irretrievably tainted by illegality. He has also indicated that he intends to apply to the High Court for judicial review of Procedural Order No 7.

[5] The grounds for these submissions were that the decision of the Tribunal to join Mr Nachum contravened s 111(2) of the Weathertight Homes Resolution Services Act 2006 (the Act), the decision deprived Mr Nachum of his statutory

right under s 66 of the Act, and that it is not lawful to deal with matters in more than one adjudication decision.

[6] These matters were considered in Procedural Order No 10. The relevant paragraphs, 13 – 30, stated:-

> 13 The grounds for the application are that the joinder was made in contravention of s 111(2) of the Weathertight Homes Resolution Services Act 2006, that Mr Nachum has been deprived of his rights to reply pursuant to s 66 of the Act, and that to proceed with the claim against Mr Nachum would now be unlawful.
>
> ***Contravention of s 111(2)***
>
> 14 On behalf of Mr Nachum, Mr McIntyre states that Mr Nachum was not served with the application for joinder.
>
> 15 There are two ways in which a party may be joined under the Act. Firstly, under s 62 a claimant may initiate adjudication by applying to the Tribunal in writing to have the claim adjudicated and serving a copy of that application upon every other party to the adjudication - see s 62(4) in regards to the documents to be served. (Note: in practice, a case manager of the Tribunal will serve such documents if an adequate address for service is supplied). In this case the claimants did not apply to join Mr Nachum.
>
> 16 The other process is found under s 111 whereby subsection (3) states that if the Tribunal makes an order for joinder, that order is to be served on the newly joined party.
>
> 17 In the present case an order was made under s 111(2) and was served by the applicant party, namely the Wellington City Council. Proof of service was by way of sworn testimony of the process server.
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> 18 At the hearing nine submissions were made concerning Mr Nachum's involvement by Mr Anderson who then stated that he was making the submissions as counsel for the first respondent and accordingly Mr Nachum was not bound by anything he might say. It is unlikely that Mr Nachum, the director of the first respondent, was unaware of the application or the submissions of Mr Anderson regarding Mr Nachum's involvement, even though such submissions were not made on his behalf.
>
> 19 However, whatever the status of those submissions, there is no requirement for the Tribunal to require service of an application to join a party before making an order for joinder.

Rights under s 66

20 Mr McIntyre says that s 66(1) requires that a newly joined respondent is to be allowed at least 25 working days to file a written response to the adjudication claim. The written response was filed on 5 February 2009. In light of the progress of this claim, the Tribunal accepts this response as being within time for the purposes of the Act.

21 I find that Mr Nachum has not been deprived of this right and has indeed exercised it and therefore it is not a ground for removal.

Unlawful to proceed

22 The third submission is that it would be unlawful to allow the claim against Mr Nachum to proceed.

23 The basis for this submission is that it would be contrary to s 72(2) for the matter to be heard.

24 Section 72 of the Act provides:-

> **72 Matter tribunal may determine in adjudicating claim**
>
> (1) In relation to any claim in respect of which an application has been made to the tribunal to have it adjudicated, the tribunal can determine–
>
> i. any liability to the claimant of any of the parties; and
> ii. any remedies in relation to any liability determined.
>
> (2) In relation to any liability determined, the tribunal can also determine –
>
> (a) any liability of any respondent to any other respondent; and
> (b) remedies in relation to any liability determined.
>
> ***Compare: 2002 No 47 s29***

25 Mr McIntyre submits that the section is clearly written so that all matters to be dealt with under s 72 are to be adjudicated upon in one adjudication hearing, and not in separate adjudication hearings, which is now contemplated.

26 With respect, there is nothing in the section which restricts the Tribunal dealing with matters at only one hearing. The section allows the Tribunal to allocate liability between parties. It makes no mention of a restriction on the process by which the decision is made.

27 The second submission under this heading is that the Tribunal has already made some findings in its determination as to Mr Nachum's actions in relation to the fifth respondent, Mr Debney and the ninth respondent, Wadestown Developments Limited (Wadestown).

28 I accept that the findings made in my determination dated 30 April 2009, were necessary. However such findings were only in relation to the liability of Mr Debney and Wadestown, and not Mr Nachum.

29 As provided in the penultimate paragraph of the decision, the claim against Mr Nachum has yet to be heard. Mr Nachum is therefore entitled to call witnesses and ask for the recall of witnesses already heard if he wishes to have them cross-examined.

30 On that basis then, I do not find that it is unlawful to proceed with the issues pertaining to Mr Nachum. Furthermore, it would not be fair and appropriate to order the removal of Mr Nachum at this stage in the proceedings.

[7] I was concerned that Mr Nachum may have a difficulty similar to that discussed in *Hitex Plastering Ltd v Santa Barbara Homes Ltd* [2002] 3 NZLR 695 where a party declined to take part in an arbitration process and found that the High Court was not prepared to ignore a properly completed process. The result was:-

> [31] Santa Barbara's application for an order refusing the recognition and enforcement of the arbitration award is declined. Hitex's application for an order to enforce the award of John Green, arbitrator, dated 5 February 2002, by entry as a judgment is granted.

[8] All opportunities offered to Mr Nachum to take part in the Tribunal process were declined.

[9] Accordingly, I proceed to deal with the claim against Mr Nachum.

Council's Claim

[10] The Council seeks a contribution from Mr Nachum on the grounds that he was in control of the building work. The uncontested evidence of Mr Debney makes this clear.

[11] The Council canvassed the evidence previously heard to show that Mr Nachum set up the construction of the units to facilitate the early release of the deposit money. They say that Mr Nachum instructed and controlled the project at every level from inception to completion. He pursued his own mission and instructed that work be carried out in a way that would be cheaper and/or was negligent and he failed to correct the defects. This, says the Council, demonstrates both an assumption of personal responsibility and negligence by omission, such as poor supervision and control, which has proved to be a cause of the loss.

[12] The Council submits that Mr Nachum assumed personal responsibility and is personally liable for the claimants' loss. The Council therefore submits that Mr Nachum should indemnify it to the extent of 80–100%.

[13] I have already dealt in the previous decision with the extent of the Council's liability. I see no need to adjust their percentage of liability.

[14] They invite me to draw inferences as permitted by s 75 and submit that I could draw adverse inferences.[1] I accept that I have that power.

[15] The building that Mr Nachum supervised was badly built, defective and leaked. It lacked engineering supervision. Mr Nachum is largely responsible for its defects. He should be liable to the claimants for these defects. Mr Nachum is jointly and severally liable to the claimants for the sum of $449,807.00 payable forthwith.

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[1] *Francis Mining Company Limited v West Coast District Council* CP 114/99, HC Christchurch, John Hansen J at para 94 and the judgments relied on in that judgment.

[16] In addition to the rights of recovery provided for in the interim decision, the Council is entitled to recover up to $314,864.90 from Mr Nachum for any amount paid to the claimants in excess of $134,942.10.

Mark Debney's and Wadestown Developments Limited's Claims

[17] Mr Debney and Wadestown both seek a contribution from Mr Nachum on the grounds that Mr Nachum was in total and effective control of the building.

[18] Evidence of the control includes the purchase of the land for development, commissioning plans, obtaining a building consent for four dwellings and directing who should be employed on site. Mr Nachum persuaded Mr Debney to form Wadestown for the purposes of the building and arranged for the appointment of a project manager for the company. The project managers appointed by Mr Nachum and Mr Nachum himself, both regularly attended the site and directed the company and Mr Debney as to what should be done.

[19] This evidence was not disputed.

[20] Mr Debney and Wadestown seek indemnity from Mr Nachum.

[21] Based on the evidence, I find that Mr Nachum was jointly responsible for the building and accordingly should be liable for half the builder's share of the amount awarded.

[22] In addition to the rights of recovery provided for in the interim decision, Mark Andrew Debney and Wadestown Developments Limited are entitled to recover up to $157,432.45 from Hayim Nachum for any amount paid to the claimants in excess of $157,432.45.

[23] Similarly Hayim Nachum is entitled to recover from Mark Andrew Debney and Wadestown Developments Limited up to $157,432.45 for any amount paid to the claimants in excess of $157,432.45.

Costs Determinations

[24] On 13 May 2009 I issued Procedural Order No 9 ordering the third respondent, the Wellington City Council, to pay witness' expenses to one of its witnesses, Mr Colin White.

[25] On 18 June 2009 in Procedural Order No 10 I declined an application for the rescission of the order as to witness expenses.

[26] On 23 June 2009 I made a determination as to costs.

[27] In that decision I ordered the third respondent, Council to pay the claimants $10,666.00, the second respondent $2,560.00 and the seventh and eighth respondents jointly $6,250.00.

Stay of Execution

[28] The Council seeks a stay of execution. The claimants oppose the application.

[29] The difficulty that the Council faces is the status of the decisions already made and the jurisdiction of the Tribunal to revisit the decisions. The question is whether the Tribunal can revisit the decision or whether it is *functus officio*[2] and the other parties are entitled to rely on the finality of the determination.

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[2] "Latin 'having performed his or her office' (Of an officer or official body) without further authority of legal competence because the duties and functions of the original commission have been fully accomplished." Bryan A Garner (ed) *Black's Law Dictionary* (8th edition, St Paul, 2004), 696. In other

[30] The Council first argued that the Tribunal is not *functus officio* by virtue of having made the decision on the matters outlined above. The grounds for this are that there remain issues of liability as between the respondents and the apportionment of the amount awarded to the claimants.

[31] The alternate argument was that if the Tribunal is *functus officio* then it should stay the orders.

[32] The Council argues that the District Court Rules, High Court Rules and Court of Appeal (Civil) Rules provide that in the respective courts the court may stay an execution of an order either on the grounds of miscarriage of justice or pending an appeal.

[33] The Council refers to the various rules allowing courts appealed to, to make orders as to a stay of execution.

Appeal Periods

[34] The Council raises the issue of appeal periods and seeks a deferral of the previous decisions so that an appeal period can run in respect of all issues from the same date. They submit that this is important for other parties.

Discussion

[35] The purpose of the Act, as set out in s 3, is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings.

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words, this phrase refers to the lack of authority of a judge or indeed an adjudicator to rehear a case after it has rendered judgment.

[36] Many claims are like the present case where there are multiple parties and multiple interests. In many cases the interests of the respondents will depend on the liability of one or more of them to the claimant for the leaky home.

[37] On some occasions it may be the most efficient method of dealing with disputes to deal with the matter in stages. There is nothing in the statute which prevents this. In reality, many claims are dealt with before the main hearing by way of application for joinder and removal. This flexible process has been developed by the Tribunal pursuant to the purposes of the Act.

[38] The Council's view of the situation has changed over time. In its memorandum of 18 December 2008 the Council said:-

> 3 The claim as far as all other respondents is virtually at an end, and the closing submissions are due by 5 pm Friday 19 December 2008.
>
> 5 The council is content for the tribunal to make any decisions in respect of the council, and for that matter in respect of the other respondents regarding the claimants, without making any factual findings at all concerning Mr Nachum at this point.
>
> 7 It is considered Mr Nachum's involvement in the development does not need to be the subject of any factual findings in order to resolve matters of fact and law amongst the other parties.

[39] The only mention of court rules in the Weathertight Homes Resolution Services Act 2006 is in s 125 which discusses the way in which rules can be made for the District Court when dealing with weathertight issues. The Tribunal manages its own procedures within the bounds of the Act. There is no specific provision dealing with staying of executions.

[40] In relation to the Court of Appeal Rules raised as an example by the Council, *McGechan on Procedure* says at para CR 5.03:-

After judgment

Once judgment is delivered, the Court is functus officio and its powers are generally restricted to the correction or amendment of errors in its reasons for judgment, or any sealed order: *Valentines Properties Ltd v Huntco Corp Ltd* (2000) 15 PRNZ 6 (CA); *Prior v Parshelf 45 Ltd (in rec)* [2000] 1 NZLR 385; (1999) 15 PRNZ 262 (CA).

[41] I would expect the situation to be the same in this Tribunal.

[42] Even if the criteria submitted by the Council were the proper criteria, there is no indication of either a miscarriage of justice or an appeal. It would seem that the proper approach is to seek appropriate orders from the appeal court if and when an appeal is lodged.

[43] The question arises in the present matter as to the status of interim or partial decisions.

[44] Similar situations arise under the Arbitration Act 1996. In *Opotiki Packing and Coolstorage Limited v Opotiki Fruitgrowers Co-op Ltd (in rec)* [2003] 1 NZLR 205 Fisher J noted at 231:-

> As a general principle issue estoppel applies where the award is interim or final so long as the award purports finally to resolve the issue in question, With respect to that issue the arbitrator is *functus officio*.

[45] I think the same situation arises here. The decision in relation to the claim is completed so far as the claimants are concerned. To reopen, stay or defer the decision would be unfair to the claimant and outside my powers.

[46] The outstanding matters were clearly signalled; they have been argued and in this final determination are dealt with.

[47] It is not for me to determine whether appeals are in or out of time nor to create uncertainty by not providing final decision on issues where appropriate.

[48] I conclude that I do not have the powers to deal with matters in the way that the Council requests. If I did, there does not seem to be any good reason for changing the timing of the decision.

Summary

[49] In summary, this order makes no changes to the orders made against the third respondent, the Council.

[50] Hayim Nachum's request for this matter not to be considered by the Tribunal is declined.

[51] Hayim Nachum is jointly and severally liable to the claimants for the amount of the claim, namely $449,807.00 payable forthwith.

[52] In addition to the rights of recovery provided for in the interim decision, Mark Andrew Debney and Wadestown Developments Limited are entitled to recover up to $157,432.45 from Hayim Nachum for any amount paid to the claimants in excess of $157,432.45.

[53] Similarly Hayim Nachum is entitled to recover from Mark Andrew Debney and Wadestown Developments Limited up to $157,432.45 for any amount paid to the claimants in excess of $157,432.45.

DATED the 21st day of September 2009.

Roger Pitchforth
Tribunal Member