

CLAIM NO: TRI-2007-101-000002

UNDER the Weathertight Homes Resolution
Services Act 2006

IN THE MATTER of an adjudication

BETWEEN Helen Priscilla Kidd

Claimant

AND Brian Anthony Grumball

First Respondent

ORDER TERMINATING PROCEEDINGS

Dated 8 October 2007

1. Conference

- 1.1 I held a telephone conference on 8 October 2007.
- 1.2 A schedule showing the names and addresses of the parties and their counsel or representatives is attached.

2. Jurisdiction

- 2.1 The claim is made under the transitional provisions of the Act.
- 2.2 The claimant's right to apply for adjudication is governed by s 60 Weathertight Homes Resolution Act 2006. (All references are to this Act unless otherwise stated.)
- 2.3 Restrictions to the right in s 60(1) are set out in subsections (5), (7) and (8).
- 2.4 The relevant parts of subsection (5) are:

An owner of a dwellinghouse may not, however, apply to have an eligible claim adjudicated, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of –

(a) ...

(b) proceedings initiated by the claimant By way of

i. proceedings in a court or Disputes Tribunal.

- 2.5 On 30 August 2005 the Disputes Tribunal in Dunedin (file DR 2005-012-450) dismissed claims on the same matter against PA & CR Grumball Ltd and Brian and Colleen Grumball personally.
- 2.6 The claimant provided a copy of that decision to the Tribunal with a letter saying that the claimant disagreed with the referee's findings.
- 2.7 The claimant submitted that the referee did not listen properly, appeared confused and the claimant disagrees with her findings. There is no mention of any steps taken to deal with the adverse decision at the time.
- 2.8 On 10 August 2007 the claimant further submitted that the Disputes Tribunal had decided in the respondent's favour on two main grounds, neither of which was correct.

- 2.9 The Act provides for a barrier to an application if a claim is underway elsewhere (s 60(5)) and treats a notice of a claim commenced elsewhere after the claim is filed as the basis of a withdrawal of the claim (s 61(1)).
- 2.10 The Act does not specifically provide for the situation when a decision on the same facts has already been made elsewhere.
- 2.11 The way in which a previous decision in a matter can be used is set out in the Evidence Act 2006.
- 2.12 Section 50 provides:

(1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

(2) This section does not affect the operation of —

(a)

a judgment in rem; or

(b)

the law relating to res judicata or issue estoppel; or

(c)

the law relating to an action on, or the enforcement of, a judgment

- 2.13 This case is one of those contemplated by ss (2).
- 2.14 The way in which these exceptions are applied is well set out in Chapter 4 of Cross on Evidence, 1.1.

A judicial determination may have the effect of precluding a person from disputing the determination in subsequent proceedings in one of four ways. First, because the cause of action in the subsequent proceedings no longer exists: it has been subsumed in the earlier judgment — it is res judicata. This means that the successful party cannot bring a fresh suit on the same cause of action claiming, for example, further loss suffered following the original judgment. There is no discretion to deny the application of the doctrine of res judicata because of special circumstances. Second, it prevents an unsuccessful party attempting, in a subsequent proceeding, to impeach the judgment — cause of action estoppel.

Third, any party in the original proceeding will be prevented from subsequently relitigating an issue which has been finally determined against him or her in the original proceeding — issue estoppel. Finally, in certain circumstances which do not fall within either of the preceding categories, the Court may act to prevent a party from litigating an issue when to do so would amount to an abuse of process.

2.15 In *Hamilton v O'Donnell Brick and Tile Ltd & ors* TRI-2007-101-22 the Chair of the Weathertight Homes Tribunal said:

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 are:

- Public policy - that is it is in the interests 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 that person 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 must involve 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. 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 both the legal issues and the subject matter of the claim in the Disputes Tribunal are the same as in the claim in the Weathertight Homes Tribunal.

2.16 Having read the Disputes Tribunal decision and the submissions of the applicant it appears that this dispute has already been decided by a tribunal of competent jurisdiction.

2.17 My views on the situation were provided to the claimant who had no further submissions to make. The respondent agreed that termination was the proper outcome in this matter.

2.18 For the reasons given the claim is hereby terminated.

DATED the 8th day of October 2007

Roger Pitchforth

Tribunal Member