CLAIM NO: 3483

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **JAMES RICHARD MORTON and JENNIFER DIANE MORTON**

Claimants

AND **MICHAEL MARSHALL**

First Respondent

Hearing: 13 February 2006

Appearances: Mr & Mrs Morton in person

No appearance by Mr Marshall

Determination: 16 June 2006

DETERMINATION

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BACKGROUND

[1] James Richard and Jennifer Diane Morton ("the Claimants") filed a claim under the Weathertight Homes Resolution Services Act 2002 ("the Act") on 12 May 2005. A WHRS Assessor's Report was completed by mid July 2005 and as a result the claim was held to be "eligible" because the alterations to the Claimants' premises allowed water to penetrate the dwellinghouse thereby making it a "leaky building" as defined in the Act. The alterations were carried out less than 10 years ago and resulted in damage to the dwellinghouse.

[2] Formal mediation was not attempted but rather the Claimants completed and filed a Notice of Adjudication dated 15 September 2005, naming as the sole Respondent Michael Marshall who is identified as the "builder", and sought the sum of $15,500.00, being the cost of remedial work as estimated by the WHRS Assessor.

[3] The first attempt to serve the usual documents upon Mr Marshall was not successful but it did result in a letter from one "B. R. Marshall" who among other things mentioned that "Demic Construction" was in receivership. Some time was spent tracking down Mr Marshall but he was eventually served, this being confirmed by the fact that on 28 October 2005 he called the WHRS Case Manager and discussed the claim with him. At the same time he gave his address as 15 Noel Rogers Place, Palmerston North. All subsequent papers relating to these proceedings from then on were sent to him at that given address.

[4] A preliminary conference by telephone was arranged and took place on 8 November 2005. The standard "Procedural Order No. 1" with accompanying "Guidance Notes" was sent out to both the Claimants and the First Respondent before the conference. Mr Marshall took part in the preliminary conference and confirmed that his building company "Demic Construction Ltd" ("the Company") was in liquidation and said he would attempt to get relevant documents from the liquidators. A second Procedural

Order recording the outcome and steps to follow the preliminary conference was issued on the same day; it covered, among other things, the providing of relevant documents by the parties and a timetable up to the hearing date, with a site inspection being offered to Mr Marshall, and resolution of the dispute between the parties by way of mediation being encouraged.

[5] A letter to the Case Manager from Mr Marshall (Exhibit 5) was received by facsimile on 19 December 2005. It indicated that he had not been able to obtain the information he sought from the "receivers", and went onto say that he would "not fight this case anyway". He referred to the consequences of the liquidation for him personally and the prospect of him being placed in personal bankruptcy. Interestingly the letter included the sentence "the Mortons would do best in spending the (money) they owe me and fixing the situation". He concluded the letter by stating that he would not attend any hearing unless summonsed. No documents have subsequently been received from Mr Marshall.

[6] A pre-hearing teleconference took place on 3 February 2006. Final arrangements were made for a site inspection and hearing to follow; Mr Marshall did not participate in the teleconference although notified of it.

HEARING

[7] I inspected the dwelling at 9.00am on 13 February 2006, together with Mr & Mrs Morton and Mr Watt, the WHRS Assessor. Mr Marshall did not attend. After a lengthy inspection of the dwelling, in particular the alteration with the leaking problems, we retired to the Dannevirke District Court where a 3-hour hearing commenced at 11.00am. I was satisfied that Mr Marshall was aware of the hearing details and that he had, as indicated previously, decided not to participate in the hearing. At the commencement of the hearing the Claimants agreed pursuant to s 40(1)(b) to my having a reasonable extension of time in which to complete the determination.

[8] It was clarified that the Claimants were seeking the sum of $15,500.00; they acknowledged that they currently hold approximately $5,000.00 which

Mr Marshall considered was owed to him. In fact his letter referred to above stated that he was owed $9,000.00 but I preferred the evidence of the Claimants on the point. Evidence was given by Mr Morton and Mr Watt.

MATERIAL FACTS

[9] The Claimants purchased the premises in 1992 or 1993. It is a stand-alone two-storey dwelling aged approximately 40 years. They had been considering alterations (in particular adding a two storey structure to the side of their existing house, parallel to the street, plus a new garage) and so approached the Respondent Michael Marshall who was the Skyline Garage agent and erector for Palmerston North and surrounding districts. Mr Morton is the Skyline Garage sales agent for Dannevirke; the erection of garages he sold was carried out by Mr Marshall (or his company) and so the men had a working relationship, which I understood to be "comfortable".

[10] The Claimants discussed their idea of alterations with Mr Marshall after which they concluded that a two-storied addition as such would be too expensive. (At some stage the building of a new garage was put aside). Mr Marshall came up with the concept of using a Skyline "structure" which utilised the roof space and dormer windows to provide further room upstairs. He prepared the four pages of drawings which are Appendix 6 of the Assessor's Report. He also provided a quotation (No. 2634) which is Exhibit 1 (with an amended version being Exhibit 2).

[11] There is no application for a Building Consent on the Tararua District Council file but a letter dated 26 January 2006 from Mr Mackay, Building Officer (Exhibit 13) confirms that "Building Consent No. 204120 for additions to (the Claimants') dwelling … was taken out by Mr Mike Marshall". Appendix 2 of the Assessor's Report includes the "Building Consent Form" (which is dated 16 January 2002) and related documents. The "Owner" is named as "J & J Morton", while the "Builder" is "Demic Construction" (sic). The "Application Checklist" for the Building Consent has on it a machine receipt for the filing fees which is in the name of "Demic Const".

[12] Work started towards the end of January 2002 with Mr Marshall normally present onsite; he had an apprentice and sometimes there were other workers onsite. The territorial authority has no record of its inspections of the site but the Building Officer Mr Mackay states in the aforementioned Tararua District Council letter (Exhibit 13) that he had discussions with Mr Marshall "onsite at least two times during construction".

[13] Mr Morton was self-employed at the time so was present onsite in the early stages of construction including helping dig the holes for the piles. Soon after work started there was a problem with the positioning of the south wall of the new structure, and when the first "downpour" happened there was serious leaking. Flashings were fitted but more water entered the dwelling at the next rainfall.

[14] To briefly summarise the evidence the project became a "sorry saga" with problems both with weathertightness and also with other aspects of the construction work. It dragged on and in March 2003 included the need to make modification to the roof trusses following a consulting engineer's report.

[15] The WHRS Assessor's Report in section 5 "Site Investigation" sets out his observations of the problems with the alteration and the consequential effects upon the original dwelling. In his "Conclusions" in section 6 the assessor identifies the cause of the water entering the dwellinghouse to be "the fixing of the roof and flashings has not been carried out in 'a tradesman-like manner' and water is able to enter the dwelling in several places". He goes on to set out the detail of the damage and repairs required and concludes by estimating the cost of repairs to make the dwelling weathertight to be $15,500.00 (including GST) as at 14 July 2005. His estimate for rectifying the "non-weathertightness" poor workmanship is given in Appendix 4 of his Report as $4,900.00 (including GST). No Code Compliance Certificate has been issued.

LEGAL ISSUE

[16] The claim is made against "Michael Marshall" ("Builder"). The assessor in his report identifies as "the person … who should be (a party) to the claim …" as: "Builder Mike Marshall t/a Demic Construction Ltd". This reference to "Demic Construction Ltd" together with the statement "Demic Construction is in receivership" in the letter dated 3 October 2005 from "B. R. Marshall", referred to above, alerted me to an important legal issue which goes to the heart of the question of liability in this claim. Who actually was "the builder"? Michael Marshall personally or Demic Construction Ltd? This question may seem trivial and unimportant, but from a legal perspective it is all-important for the reasons set out below. Claims brought under the Weathertight Homes Resolution Service, while "informal" and "non-legalistic" in their procedure and format, must be dealt with "in accordance with principles of law" (s 42(1) of the Act), and the question of who is actually liable when the person who does work is a limited liability company has to be considered and answered.

[17] People engaging in business for hundreds of years have had the option of forming a limited liability company to be the legal vehicle of their enterprise. As well as medium and large companies many tens of thousands of small traders and tradespeople form and operate as "limited liability companies". Many such small businesspeople who operate as a limited liability company have no other employees and in effect are "sole traders". Whether or not they have employees is irrelevant but it needs to be understood that the rights and obligations which go with operating a business as a limited liability company can be undertaken by small businesses. Often the customers of such small businesses or tradesmen are either not aware that the individual they are dealing with trades as a limited liability company, or they do not realise the possible "legal" implications.

[18] One of the most significant consequences of trading as a limited liability company is that companies at law are treated as "persons" so they can enter into contracts, own property and chattels, issue legal proceedings etc. Therefore the individual who is the main shareholder or "owner" of a company is not usually personally liable for the debts of the company

because the company itself is. This means that when the issue arises as to who is liable for a particular debt as between a company and its "owner" then it is necessary to look carefully at the evidence, especially the documentary evidence.

[19] In this case it is clear that the Claimants dealt with "Michael Marshall"; it was he that they had discussions with regarding the proposed alterations, it was he who provided the basic drawings and quotation, and he who ultimately did the work or was mostly onsite when the work was being undertaken by his employee or employees. However the quotation (Exhibits 1 and 2, referred to above) and the various invoice/statements produced as exhibits (Exhibits 6, 7, 8 and 10) are all under the heading "Demic Construction Ltd"; in fact the invoices are headed "In account with … Demic Construction Ltd". In addition Exhibit 4, an undated facsimile sent to Mr Mackay at Tararua District Council is headed "DEMIC CONSTRUCTION LTD". All the aforementioned quotations and invoice/statements have the name "Mike Marshall" in brackets under the company's name, while the facsimile header also has his name without brackets underneath the company name.

[20] As referred to above the Tararua District Council "Building Consent Form" dated 16 January 2002 describes the builder as "Demic Construction" and the machine receipt for the Building Consent filing fees is attributed to "Demic Const". Mr Morton confirmed in his oral evidence that the Claimants' cheques for the job were paid to the company.

[21] My conclusion after considering the aforementioned documentary evidence, is that the contract to carry out the work the subject of this claim was at law entered into between the Claimants and Demic Construction Ltd, not Mr Marshall personally. However this is not the end of the matter and there are additional legal issues I must consider before reaching a final decision on the claim.

[22] In some circumstances an officer or employee of a company may be found to have personal liability to a third party, which might include a client or customer of the company, or a party who (in the case of building defects)

suffers a loss as a result of some error or omission on the part of the company, even though that party does not, or did not, have a contract with the company.

[23] Over the years the issue has come up in a number of "building defect" cases and been considered by our Court of Appeal. I do not think it will be helpful in this particular case to go through all the relevant decisions and come up with a detailed legal analysis. The important issue here is to provide the (self-represented) parties with a legally sound decision so they know where they stand.

[24] Conveniently in 1999 our Court of Appeal summarised the relevant principles relating to the personal liability of a company officer in a case called Mahon v Crockett [(1999) 8 NZCLC, 262,045]. The dispute which underlay the claim being considered in that case did arise out of property developments but was centred on a disagreement over development profits.

[25] The learned Court of Appeal Judge who delivered its judgment referred to three well known relevant cases, being one earlier New Zealand Court of Appeal decision and two overseas cases, and clarified that:

> *"Those cases all dealt with the liability of directors of companies personally as distinct from that of the companies of which they were directors. All three cases arose in circumstances where the allegations were of tortious liability and all emphasised that before there could be personal liability on the part of a director there had to be proof on an objective basis that the director concerned had assumed a personal responsibility".*

[26] He went on to say that:

> *"There are two things to be said about these cases and the approach to problems of this kind. The first is that limited liability means what it says. Secondly, companies, by their nature, must act through human agency and mere actions on*

behalf of a company do not of themselves provide a basis for alleging that the agent, by whom the company has acted, has thereby become subject to a personal responsibility."

[27] Applying these comments to the situation as between the Claimants and Mr Marshall/Demic Construction Ltd the Judge's comments mean that Mr Marshall cannot be found personally liable just because he actually drew the drawings, obtained the Building Consent, worked on the site, and generally supervised the project.

[28] The Judge went onto say that "before personal liability can be established it is necessary to prove that there was an actual assumption of liability".

[29] Because the present claim arises from a contract between the Claimants and Demic Construction Ltd the Court of Appeal Judge's remarks on claims arising from a contract are particularly relevant. He stated that ",,,.for the purposes of contract, before a litigant can establish personal liability as distinct from corporate liability it must be established that there was a contract and that that contract unequivocally involved the company officer or agent accepting a personal liability apart from any liability which might exist on the (company) with which he or she was associated". His comments relevant to the present dispute concluded by clarifying that a claimant in the position of Mr & Mrs Morton would have to establish that the contract they entered into with Demic Construction Ltd involved Mr Marshall accepting a personal liability apart from the company's liability, and that establishing such a contract (whereby Mr Marshall accepted personal liability) had to be done against "the assumption that limited liability is intended to achieve just that". In other words, the Claimants in this matter would have to satisfy me that the contract entered into between them and Demic Construction Ltd in effect included Mr Marshall accepting personal liability (in addition to the company's own liability), despite the fact that the contract was with a limited liability company.

[30] I have carefully reviewed the evidence, oral and documentary, in this matter and am satisfied that there is nothing in that evidence to indicate that

Mr Marshall assumed personal responsibility, expressly or impliedly. It may well be that the subtleties of company law were not at the forefront of the minds of the Claimants or Mr Marshall at the time the contract was entered into but the documentary evidence is clear that the contract was with Demic Construction Ltd and it is that company which has failed to build a reasonably sound structure and use good materials and workmanlike practices, in accordance with the Building Code, as was required. There is no question that the contract has been breached and that the Claimants are entitled to damages in the nature of the cost of remediation and repairs. However the problem for the Claimants is that the company has gone into liquidation and accordingly is unable to meet its responsibilities.

[31] Exhibit 11 is a NZ Companies Office search of the company which shows that it was placed in liquidation on 25 July 2005. Exhibit 12 is a "liquidator's six monthly report" (Naylor Lawrence & Associates) dated 1 February 2006. In the report the liquidator Mr Naylor sets out the situation at that date including that his lawyers have obtained a judgment against Mr Marshall personally for the total sum of $118,368.04, this arising out of a transaction in May 2005 in which money was transferred to Mr Marshall personally from another of his companies which had a close relationship with Demic Construction Ltd. At the date of the letter the liquidator reported that Mr Marshall had not paid the judgment and that he had instructed the commencement of bankruptcy proceedings against Mr Marshall.

[32] It may be that in the last three months or so Mr Marshall has been personally bankrupted but the possibility of bankruptcy has not affected my decision above, which is that the contract was between the Claimants and the company and that Mr Marshall assumed no personal liability which would justify making an order against him personally.

[33] The Claimants will be disappointed with the outcome of their claim. I alerted them to the problem with their claim being directed against Mr Marshall when it became apparent that the claim was more properly one against his company, but of course there was no point in bringing such a claim because

two months before their Notice of Adjudication was signed the company had been placed in liquidation so was effectively "dead".

[34] Mr Marshall himself suggests a possible partial solution to the Claimants when in his facsimile to the Case Manager received on 19 December 2005 (Exhibit 5), he stated that "the Mortons would do best in spending the (money) they owe me and fixing the situation". They have to decide, perhaps with some legal advice, whether they take up his suggestion. However from a strictly legal point of view, while there is no doubt that the Claimants have a justified claim against the company (which they are unable to pursue to the desired conclusion because of the company's liquidation) I have no alternative but to formally dismiss their claim brought against Mr Marshall personally.

[35] Having concluded that a claim against Mr Marshall personally could not be sustained there is no point in going through the WHRS Assessor's Report and the evidence contained within it in detail because I have had to dismiss the claim. It will be scant consolation to the Claimants but the evidence provided in the Assessor's Report leaves me in no doubt that their claim against the company was well founded and would have succeeded. That said, the reality of enforcing orders for the payment of money in any jurisdiction including the courts is that if an individual is bankrupt or a company is in liquidation then all that is available for unsecured creditors (which the Claimants would be) is usually a small proportional payout.

ORDER

(1) The claim by James and Jennifer Morton against Michael Marshall is hereby dismissed. (s 36(1)(i))

DATED the 16th day of June 2006

P D SKINNER
Chief Adjudicator