WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO. TRI 2008-100-000019

BETWEEN	**PETER and TONY SPOONER FAMILY TRUST** Claimants
AND	**ELLE CEE DEVELOPMENTS LTD** First Respondent
AND	**CLIVE TIPPINS** Second Respondent
AND	**TAURANGA CITY COUNCIL** Third Respondent
AND	**COASTAL COATINGS LTD** Fourth Respondent
AND	**DANIEL McGOVERN** Fifth Respondent

PROCEDURAL ORDER NO 5
Dated 20 August 2008

Introduction

1. The third respondent, the Tauranga City Council ("Tauranga City"), has brought an application for removal under s 112 of the Weathertight Homes Resolution Services Act 2006. In the alternative it seeks an order terminating the adjudication proceedings under s 109.

2. Tauranga City contends that because the claim was not lodged with the WHRS within 10 years after the house was built, it is not an eligible claim under either ss 13(a) and 14 of the 2006 Act or under ss 7(1)(b) and (2)(a) of the Weathertight Homes Resolution Services Act 2002. It is thus argued that the Tribunal has no jurisdiction to determine the claim and it should accordingly be terminated.

3. The application is opposed by the claimants.

The Issues

4. The claim was lodged with the WHRS under the 2002 Act on 20 June 2005. In Procedural Order No. 2 dated 19 July 2007, the previous adjudicator held that the building work associated with the construction of the dwelling was completed on 12 May 1995 and that the claim therefore had been filed more than 10 years after the building work was completed. It was recorded that there was no dispute about these essential facts.

5. In his Memorandum No. 1 dated 31 May 2007 the same previous adjudicator held that he had no jurisdiction to re-consider the claim's eligibility under s 7(2) of the 2002 Act, once it had been accepted as eligible by the evaluation panel. He also refused to grant removal of any of the parties on the basis of the expiry of the 10 year long-stop limitation period in s 393(2) of the Building Act 2004.

6. The critical issue I must determine is whether I can reconsider the previous determination of the adjudicator of 31 May 2007 that the Tribunal has no jurisdiction to reconsider or to review eligibility. A second issue, dependent on the answer to the first issue framed above, is whether I should, as requested by Tauranga City, refer the issue of eligibility to the High Court pursuant to s 119 of the 2006 Act.

Analysis

7. The original claim was filed under the 2002 Act and found to be an eligible claim by the evaluation panel under s7(2) of the 2002 Act. The claim was subsequently withdrawn and re-filed under the transitional provisions of the 2006 Act (see s148 and150-152 of the 2006 Act).

8. Under the transitional provisions of the 2006 Act claims of this kind become claims for adjudication under s62 of the 2006 Act and are treated as eligible without the need for any fresh determination of eligibility under the 2006 Act. The good sense of this is apparent. The eligibility criteria under both Acts are essentially the same.

9. I am of course considering these issues as an adjudicator exercising powers under the 2006 Act. The question of the Tribunal's power to reconsider the determination of the previous adjudicator thus falls to be determined having regard to the scheme and purpose of the 2006 Act. Having said that, the scheme and philosophy of both Acts is very similar.

10. The purpose of the 2006 Act is set out in s 3. Leaky home owners are to be provided with speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to their building. Section 3 of the 2002 Act was in identical terms. Under s57 of the 2006 Act, adjudications must be managed to achieve the purpose of the Act as set out in s3.

11. No fresh arguments have been made or fresh evidence submitted by Tauranga City in support of what in reality is a second attempt to have the claim terminated on the grounds of lack of jurisdiction. Having regard to the very clear purpose set out in s3 and the statutory direction in s57, I can see no basis for my reconsidering the determination of the previous adjudicator that there is no jurisdiction to reconsider or to review eligibility. The re-litigating of the very same interlocutory issue is clearly contrary to the notion of a speedy and cost effective resolution procedure. It is immaterial that the earlier determination was made by an adjudicator exercising powers under the 2002 Act.

12. In opposing the application by Tauranga City the claimants contend that the previous adjudicator's determination that he had no jurisdiction to review eligibility is res judicata. In response to that contention, Tauranga City argue that it had not previously brought any application for removal and rely upon the recent decision of this Tribunal in *24 Bath Street v Hulena Architects Ltd* (67/2007, Final Order, [26 May 2008]).

13. I reject the submission of Tauranga City on these points. Whether the doctrine of res judicata/issue estoppel strictly applies is not necessary for me to determine (i.e. because the previous adjudicator's determination may not be regarded as final and/or the fact that Tauranga City itself has not previously brought an application for removal on the eligibility grounds). What is relevant and important is the wider principle underpinning the doctrine of res judicata/issue estoppel, namely the discouraging of relitigation. In a very recent Supreme Court decision *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 Elias CJ referred to the House of Lords decision *Arthur J S Hall & Co v Simons* [2002] 1AC615 at page 701 where Lord Hoffman noted the general public interest in the "same issue not being litigated over again". In her judgement in the *Z v Dental Complaints Assessment Committee* decision, Elias CJ refers to two purposes being served by discouraging relitigation; the first is protective of the interest of litigants who have obtained final

judgement and the second is concerned with the public interests in stilling controversies (at paragraph 58).

14. In the context of s3 of the 2006 Act these principles of discouraging relitigation have particular importance and application.

15. The decision of *24 Bath Street* can readily be distinguished. It provides no support for the application by Tauranga City. As the adjudicator makes clear in her decision in *24 Bath Street,* (at paragraph 5) it was not necessary for her to make a determination on whether the Tribunal has jurisdiction to review eligibility. The claim in the *24 Bath Street* case was terminated on an entirely different legal basis, namely a change in ownership of the dwelling house under s55.

16. In any event, I am of the view that under the 2006 Act I have no jurisdiction to reconsider or review the eligibility of a claim. This is so whether the claim is a transitional claim based on an evaluation panel's eligibility assessment under the 2002 Act, or an eligibility determination made under the 2006 Act by the Chief Executive.

17. Under the scheme of the 2006 Act, the question of determining eligibility is specifically entrusted to the Chief Executive Officer under s48. The Chair of the Tribunal has the power to reconsider the Chief Executive's decision (s49) but this is a circumscribed power. Eligible claim is defined in s8 by reference to s48 and 49.

18. The eligibility determination provisions are contained in sub-part 3 of Part 1 of the Act. This sub-part is separate from the Tribunal's adjudicative powers and functions set out in sub-part 5 (see in particular s72 and 73). The question of eligibility determination on the one hand, and adjudication on the other, are clearly quite separate processes.

19. The assessment of eligibility is based on the Assessor's report and is in essence an administrative decision that precedes the Tribunal's

adjudicative function to determine the legal and factual merits of the claim. In my view there is no basis for implying into the statutory scheme an additional power of reconsideration (i.e. beyond that expressly provided for under s49 and conferred upon the Chair) so as to allow the Tribunal, as part of its adjudicative function, to review or reconsider the issue. It would indeed be contrary to s3 to imply such a power.

20. The power to terminate proceedings contained in s109 is confined to the specific circumstances set out in that section, namely the circumstances in s60(5) or 60(1). Again, there is no suggestion in s109 that the Tribunal could terminate proceedings on the grounds that the eligibility criteria, despite having already been accepted, were not made out.

21. The particular circumstances of this case demonstrate clearly why it would be contrary to the statutory scheme and otherwise wrong to conclude that the Tribunal has jurisdiction to reconsider or review eligibility.

22. As the Chair of the authority determined in a recent eligibility decision namely *Dixonlane Apartments* (Claim no. 05554, Eligibility decision [11 August 2008]), it was not the intention of the 2006 Act to exclude claims from eligibility in the normal course of events when the claimant would have a potentially viable claim in a court. The Chair held that there was a clear statutory intention that there be consistency between the ten year long-stop provision in s393 of the Building Act 2004 and the ten year built by date in s14 of the 2006 Act. The same intention, namely to achieve consistency, is apparent in s7 of the 2002 Act (reflecting at that stage the equivalent ten year long-stop provision in s91 of the Building Act 1991).

23. Had the claimants here filed the claim in June 2005 in the ordinary courts against Tauranga City, the claim would not be limitation barred. This is because the code of compliance certificate was issued within ten years of that date, namely on 25 August 1996, as contemplated by s393(3)(a) of the Building Act 2004. However, to now hold that the claim is not eligible would mean that the claim could not be heard and determined at all. It is

now too late to file proceedings in the ordinary courts because the ten year limitation period has long expired.

24. Tauranga City further argues that if the Tribunal cannot rule on the issue of eligibility based on new information additional to that before the evaluation panel, Chief Executive and/or Chair, then this would be unjust for the parties' concerned. It is said that the parties will then be committed to a full hearing for what might eventuate to be an ineligible/invalid claim where hearing costs would be entirely wasted.

25. However, as I have already indicated, real injustice would arise if I were now to terminate the claim on the grounds of eligibility when the limitation period has long expired. Furthermore, to conclude that the Tribunal has no jurisdiction to reconsider or review eligibility once determined by the evaluation panel, Chief Executive and/or Chair, does not mean that the respondents cannot raise limitation defences; they clearly can. Having said that, the application of the binding High Court decision *Cromwell Plumbing* means that the limitation defence in s393 of the Building Act 2004 is not available in this case to Tauranga City or any other respondents against whom it may cross-claim. The previous adjudicator has already ruled on this issue (see procedural order no.2 of 19 July 2007).

Alternative Orders Sought

26. In the event that I should conclude (as I have) that the Tribunal cannot review or reconsider eligibility, Tauranga City applies in the alternative for the following orders:

    (a) An order that the claim be referred to the Chair to reconsider the evaluation panel's determination, pursuant to s49 of the 2006 Act; or

    (b) An order that the claim be referred to the High Court pursuant to s119 of the 2006 Act on the basis that the eligibility issue is a

novel issue. Tauranga City submit that the High Court could then consider both the evaluation panels' eligibility determination and the Tribunal's decision on this application as to its jurisdiction to reconsider/ review eligibility.

(a) Reconsideration by the Chair

27. Under s49 reconsideration can only be requested by a claimant and it must be done within 20 working days (s49 (1)). Under the transitional provisions of the 2006 Act claims originally filed with the 2002 Act and filed again under the 2006 Act proceed to adjudication on the basis that a fresh determination eligibility is not necessary.

28. There was no express power to reconsider eligibility under the 2002 Act once determined by the evaluation panel.

29. Again having regard to s3 of the 2006 Act, I can see no basis for effectively grafting onto the statute a further power (beyond that specifically provided for in s49) thereby giving the Tribunal, in its adjudicative capacity, the power to refer matters of eligibility back to the Chair. That would be to reshape rather than to clarify parliamentary intent. No such power exists. The application to refer the matter to the Chair is accordingly declined.

(b) Referral to the High Court

30. In my view it would not be appropriate to transfer this claim to the High Court under s119. It cannot be said that the issue is novel in the sense contemplated by the statute. There have now been a number of determinations under both the 2002 and 2006 Acts that the Tribunal has no jurisdiction to reconsider or review eligibility beyond the specific power conferred on the Chair under s49. Even if the issue should be considered novel, I would still exercise my discretion not to transfer.

31. The claim itself is not complex and has now been under way for some considerable time. In 2005 the claimants elected to come to the Tribunal rather than the ordinary courts. A transfer to the High Court would likely lead to further delays and in the circumstances here be contrary to the purpose of the 2006 Act as expressed in s3.

32. Accordingly the application to refer the matter to the High Court under s119 is also declined.

Conclusion

33. The applications by Tauranga City for removal and termination, or alternatively referral to the High Court and/or reconsideration by the Chair, are all declined.

34. The case officer is directed to liase with the parties to arrange for a further procedural conference (a telephone conference) to be held in early September 2008. The future direction of the claim, including the re-scheduling of mediation, will be addressed at that conference.

DATED the 20th day of August 2008.

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PJ Andrew

Tribunal Member