

**IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000129**

BETWEEN	BRETT HAWKINS AND SANDRA HAWKINS AS TRUSTEES OF HAWKINS FAMILY TRUST Claimants
AND	ANTHONY ROY HEUTHORST AND TANIA CLARKE MASLIN First Respondent
AND	GORDON CLARKE Second Respondent
AND	PAUL FELS Third Respondent (Not served and claim withdrawn)
AND	AUCKLAND COUNCIL Fourth Respondent
AND	MAINLINE TEXTURES LIMITED Fifth Respondent

DETERMINATION AS TO WITHDRAWAL DATE
Dated 26 October 2012

- [1] Brett and Sandra Hawkins are the owners of a leaky house in Rubens Lane, West Harbour. In October 2003, they filed an application for an assessor's report with the Department of Building and Housing (DBH) and in June 2005 they filed for adjudication under the Weathertight Homes Resolution Services Act 2002. After the Weathertight Homes Resolution Services Act 2006 was passed Mr and Mrs Hawkins decided to withdraw their claim under the 2002 Act in order to file with the Tribunal.
- [2] Section 148 of the 2006 Act provides that claims can be withdrawn from adjudication under the 2002 Act for the purpose of the claimants making an application to the Tribunal. Section 152(4) of the 2006 Act further provides that if an application is filed with the Tribunal within a year from when the claim is withdrawn the claimants are able to rely on the date they first filed for an assessor's report in relation to any limitation defences.
- [3] Mr and Mrs Hawkins' notice of withdrawal under the 2002 Act adjudication was dated 6 November 2007, it was filed with DBH on 14 November 2007 and it was processed and entered into DBH's computer system on 19 November 2007. Mr and Mrs Hawkins then filed their application with the Tribunal on 18 November 2008.
- [4] The issue to be determined is whether the claim was made to the Tribunal within one year of the claim being withdrawn from adjudication under the 2002 Act. In particular, the question to be asked is whether it is the date the claim was filed with DBH that is the date of the withdrawal or whether it is the date that the withdrawal was processed and entered into the DBH's computer system.

LEGISLATIVE PROVISIONS

- [5] Section 148 of the 2006 Act provides that a claim can be withdrawn from adjudication under the 2002 Act at the claimants' discretion in order for a claim to be filed with the Tribunal. Section 148(3) states:

Withdrawal of the kind contemplated by subsection (2) may be done at the claimant's discretion, and without complying with section 30 of the former Act, but may be done for the purpose only of enabling the claimant, as soon as is practicable —

- (a) to make an application to the tribunal, under section 62, to have the withdrawn claim adjudicated, in accordance with section 150 or 153(1)(a); or
- (b) to be part of, or to join, a new claim, brought, under section 19, 20, or 21, in respect of the same dwellinghouse, common areas, or both, in accordance with section 153(1)(b).

- [6] Section 152 of the 2006 Act provides that if within a year after the claim is withdrawn from the 2002 Act a claim is filed with the Tribunal, s 37 of the Act applies. Section 37 of the 2006 Act in turn provides that for the purposes of the Limitation Act 2010 and any other enactment that imposes a limitation period, the making of an application for an assessor's report has the effect as if it were the filing of proceedings in the court.

- [7] The effect of these provisions is that if a claim is filed with the Tribunal within one year after it was withdrawn from adjudication under the 2002 Act the claimants can rely on the date they filed their application for an assessor's report in order to stop the clock running for any limitation period. If

however, the claim is not filed with the Tribunal within one year of the earlier adjudication being withdrawn, all parties agree that, the claimants are unable to rely on the date they filed for the assessor's report. The relevant date for any limitation period in these circumstances will be the date they filed their claim with the Tribunal.

CHRONOLOGY

- [8] Before reaching a decision on the withdrawal date, it is helpful to set out a chronology of the relevant events in relation to the construction of the house and the progression of the claim.

EVENT	DATE
Building consent issued	23 May 1994
CCC issued	30 May 1995
Application to DBH for an assessor's report	8 October 2003
Assessor's report completed	16 June 2004
Notice of adjudication filed under 2002 Act	2 June 2005
Claim put on hold for claimants to investigate remedial work	21 August 2006
Notice of withdrawal of claim under 2002 Act dated	6 November 2007
Withdrawal of claim filed with DBH	14 November 2007
Withdrawal processed and entered into DBH IT System	19 November 2007
Interim claim filed with the Tribunal	18 November 2008
Interim claim registered into Tribunal system and put on hold at claimants request so they could undertake remedial work	1 December 2008
Final application to Tribunal and particulars of claim filed. Remedial work still not done	18 May 2012

[9] As can be seen from the above chronology Mr and Mrs Hawkins home is now over 17 years old. The remedial work has not been completed although the claim has effectively been on hold for the majority of the last six years, at Mr and Mrs Hawkins request, so that they could complete the remedial work before proceeding with their claim.

WHAT DATE WAS THE CLAIM WITHDRAWN FROM ADJUDICATION UNDER THE 2002 ACT?

[10] Ms Wroe, counsel for the claimants, submits that the claim was not withdrawn from adjudication under the 2002 Act until it was processed by DBH and entered into its computer system. She says simply passing the notice of withdrawal to DBH had no legal effect until it had been processed. She accordingly submits that the withdrawal date is 19 November 2007 which is the date DBH entered the claim into the system.

[11] I note that the entry of the withdrawal into the system clearly records that the withdrawal was received on 14 November 2007. Ms Wroe however submits that it would be unfair in the circumstances of this case for the date of receipt to be the withdrawal date as Mr and Mrs Hawkins were subsequently advised by a DBH claims advisor that they had until 19 November 2008 to file their Tribunal claim.

[12] Mr Cowan for the first respondent and Ms Dillon for the fourth respondent both acknowledge that there is no definition of file or filing in the interpretation provisions of the 2006 Act. In addition there is no definition of when a claim is deemed to be withdrawn. They accordingly submit that the Tribunal should be guided by relevant definitions either under the District Court Rules 2009 or the High Court Rules 2008.

- [13] Ms Dillon goes further and submits that as there are no specific rules in the 2006 Act, the District Court Rules apply. This however is a misinterpretation of s 125 of the 2006 Act. That section only applies to regulating the practice and procedure of District Courts in proceedings under the 2006 Act. While I accept that the District Court and High Court Rules can provide some guidance to the Tribunal in determining what the date of filing should be deemed to be section 152(4) of the 2006 Act does not refer to the date the withdrawal is filed but the date the claim is withdrawn.
- [14] Counsel for the first and fourth respondents submit that it would be inconsistent for the date of receipt of an application to be considered the filing date but the processing date to be considered the effective date in relation to a withdrawal. They accordingly say the date of withdrawal, in the circumstances of this case, must be the date of the receipt of the notice of withdrawal by the intended recipient.
- [15] Withdrawal of a claim from the 2002 Act adjudication, in order to file with the Tribunal, did not require consent of the parties or leave of the Tribunal. It was something that claimants could do as of right. Unlike other withdrawals of claim no action, other than filing the notice of withdrawal, was required to perfect the withdrawal. In these circumstances I consider that the act of registering the withdrawal into DBH's computer system was an administrative act only, in much the same way as registering an application for an assessor's report into the computer system.
- [16] Applications for assessor's reports are deemed to be made on the date they are received by DBH (now part of the Ministry of Innovation and Employment). In addition any application to

the Tribunal is deemed to be filed on the date a completed application is received by the Tribunal not the date it is entered into the computer system and processed.

[17] I therefore find that Mr and Mrs Hawkins 2002 Act claim was withdrawn on 14 November 2007, the date the notice of withdrawal was received by DBH. Of particular relevance is the fact that when the administrative steps were taken it was clearly recorded in DBH's system that the withdrawal had been received on 14 November 2007. It is unfortunate for the claimants that DBH's records were misinterpreted by a subsequent claims adviser who then gave Mr and Mrs Hawkins incorrect information. However the fact that incorrect information may have been subsequently provided is not determinative of the withdrawal date.

[18] I accordingly conclude that the claim was withdrawn on 14 November 2007. Therefore as the claim with the Tribunal was not filed until 18 November 2008 it was not filed within one year of the claim being withdrawn. This means that for limitation purposes the claimants cannot rely on the date they filed for an assessor's report. The relevant date for determining any limitation periods is therefore 18 November 2008 being the date the claim was filed with the Tribunal.

[19] There is no dispute that any acts or omissions upon which the claims against all current parties are based must have occurred on or before 30 May 1995 when the CCC issued. This is more than 10 years before the date the claim was filed with the Tribunal. Any claim against all current respondents is therefore limitation barred under s 91(2) of the Building Act 1991.

[20] As the claims against all parties are clearly limitation barred all respondents are removed as parties from this claim pursuant to s 112 of the 2006 Act.

[21] I note that even if I had concluded that the withdrawn date was the date the notice of withdrawal was processed by DBH, rather than the date it was filed, the respondents would still have a strong case for arguing they should be removed, or the claim should not proceed, on a number of other grounds. Firstly it could be argued that Mr and Mrs Hawkins did not file their claim with the Tribunal as soon as practicable after it was withdrawn as required by s 148. The claim filed with the Tribunal in 2008 was only an interim and non-quantified claim which the claimants requested be put on hold so that they could carry out the remedial work. They did not file a quantified claim until May 2012 and that claim is still based on estimates.

[22] Secondly the respondents may be able to argue they have been seriously prejudiced by an inordinate and inexcusable delay on the part of the claimants. I accept the delay is inordinate and to date no good excuse has been provided for the length of the delay. The key issue would therefore be whether the respondents can establish serious prejudice.

[23] I note that all parties filed briefs of evidence in the 2002 adjudication and the claim was ready to proceed to hearing once the claimants confirmed what quantum they were claiming. There were several adjournments of the timetable for the claimants to do this prior to the claim being put on hold in August 2006 for the claimants to carry out remedial work. Apart from withdrawing their 2002 Act claim and filing an interim claim with the Tribunal the claimants did not actively progress the claim from then until May 2012. Even though

the claimants requested the claim be delayed in order for remedial work to be done that work has still not commenced. The house is now over 17 years old and some of its components may be at, or nearing, the end of their normal life expectancy. It also appears that little if any maintenance has been carried out in the last eight years. There accordingly could be significant issues of betterment or failure to mitigate loss.

[24] In all of the above circumstances the respondents may also be able to argue that the Tribunal should decline to deal with the claim pursuant to s 118 of the 2006 Act as the claimants are not pursuing the matter in good faith. However given my finding on the withdrawal date further argument on these issues is not required.

Summary and Conclusion

[25] All of the respondents are removed for the reasons outlined in paragraphs [15] to [20]. The claim is accordingly terminated.

DATED this 26th day of October 2012

P A McConnell
Tribunal Chair