IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000018
[2010] NZWHT AUCKLAND 25

	BETWEEN	NOEL DEAN AND DYMPNA DUNWORTH Claimants
	AND	NEIL MCLACHLAN First Respondent
	AND	DVK ROOFING AND WATERPROOFING CO LIMITED Second Respondent

Hearing: 15 July 2010

Decision: 21 July 2010

DETERMINATION AS TO SERVICE
Adjudicator: P A McConnell

INTRODUCTION

[1] The second respondent in this claim, DVK Roofing and Waterproofing Co Limited (DVK) lodged an appeal against the Tribunal determination dated 18 March 2010. The first ground of the appeal was that the decision was made in breach of natural justice and contravenes section 27 of the Bill of Rights Act 1990 as the appellant was not served with notice of the date of hearing and therefore had no opportunity to be heard.

[2] Judge Gittos in an oral judgment delivered on 8 June 2010 remitted the appeal back to the Weathertight Homes Tribunal to determine whether service was properly effected. He further directed that if it was determined that service had not been properly effected the Tribunal should then consider whether a re-hearing was appropriate.

[3] A hearing was convened at the Tribunal on Thursday 15 July 2010 for submissions to be made on whether service had been effected. In advance of that hearing:

- The Tribunal distributed a service table recording the documents that had been served during the adjudication of this claim together with the address for service and method of service. That service table is attached to this determination together with the accompanying documents.
- Mr Herzog, on behalf of DVK, filed a statement of evidence of Igor Arekelian, the director of DVK. Attached to that statement of evidence were two High Court decisions namely *Chee v Stareast Investment Ltd* HC Auckland, CIV-2009-404-5255, 1 April 2010, Wylie J; and *Arakelian v Auckland City Council,* HC Auckland, CIV-2009-404-8107, 11 May 2010, White J.

THE ISSUE

[4] The issue I need to determine, as directed by Judge Gittos, is whether service has been properly effected. If I conclude that service was not properly effected then I need to consider whether a re-hearing before the Tribunal is appropriate.

DVK'S CASE

[5] Mr Herzog, on behalf of DVK, submitted that at no time had the notice of hearing or the application to the Tribunal been brought to the notice of DVK. He submitted that the Tribunal required proof of knowledge in order to conclude that service had been properly effected. In this regard his submission was that it was unsafe to rely on the Tribunal's administrative file and the information contained in the attached service table as all that information was hearsay. He submitted the only reliable evidence before the Tribunal was the statement of Igor Arakelian and that the effect of this evidence was that DVK had no knowledge of the proceedings until on or after 24 February 2010 when its lawyer made enquiries of the Tribunal. This however is not what Mr Arakelian says in his statement of evidence.

[6] In Mr Herzog's opinion failure to grant a re-hearing would be a clear breach of natural justice as it would deny his client the right to be heard.

The Claimants' Case

[7] The claimants oppose the application for re-hearing and submit that service on DVK was in accordance with the Weathertight Homes Resolution Services Act 2006 (the Act) and that the Tribunal has adequate proof of service. Ms Dunworth on behalf of the claimants submits that it would be contrary to natural justice, and the purposes of the Act, to grant a re-hearing of the matter when service has clearly been effected. She submits that the statement of

evidence of Igor Arakelian does not provide any reasonable evidence that service was not effected or that Mr Arakelian, or other representatives of DVK had no knowledge of the proceedings.

[8] She submitted it would be extraordinary if the 35 emails referred to in the service table and the 12 courier packages were not received by DVK given the fact that the courier deliveries were correctly addressed to the address for service of the company and the emails were sent to the email address of the company. She submitted the paper trail on the administration file of the Tribunal should be accepted as reliable evidence and it would be contrary to the purposes of the Act to provide speedy, flexible and cost-effective procedures for the resolution of claims to grant DVK a re-hearing in these circumstances.

Discussion

[9] I accept that the Tribunal is bound by the principles of natural justice and that natural justice requires a party to be given adequate notice of a claim being made against it. Natural justice also requires a party to be given the opportunity to be heard in relation to a claim in which it is a party. The issue therefore in this claim is whether DVK has been given the opportunity to be heard.

[10] Relevant to this issue are the specific provisions of the Act which relate to service on, and non-attendance of, a party.

[11] Section 117 of the Act provides that:

> **117 Service of notices**
> Any notice or any other document required to be served on, or given to, any person under this Act, or under any regulation made under this Act, is sufficiently served or given if—
> (a) the notice or document is delivered to that person; or
> (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
> (c) the notice or document is posted in a letter addressed to the person at that person's usual or last known place of residence or business in New Zealand; or
> (d) the notice or document is sent in any manner approved for the purpose by the chair.

[12] Section 74 of the Act provides that a party's failure to act or to attend or to participate in the Tribunal proceedings does not affect the Tribunal's power to determine the claim against it. Section 75 goes on to say that the Tribunal may draw inferences from the parties' failures to act and in those circumstances to determine the claim on the available information. In particular it states:

> **75 Tribunal may draw inferences from parties' failures to act and determine claim based on available information**
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> If any failure of the kind referred to in section 74 occurs in adjudication proceedings, the tribunal may—
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> (a) draw from the failure any reasonable inferences it thinks fit; and
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> (b) determine the claim concerned on the basis of the information available to it; and
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> (c) give any weight it thinks fit to information that—
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> (i) it asked for, or directed to be provided; but
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> (ii) was provided later than requested or directed.

[13] Section 117, as outlined above, provides that service is sufficient if the notice or document is posted or left at the party's usual or last known place of residence or business. The Tribunal records show that 13 different documents were couriered to the current address for service of DVK. The documentary record on the Tribunal file suggests that all were delivered to that address and none of the documents were returned. Both the notice of original service and notice of the hearing were sent by track and trace courier. The courier company noted that the original service documents were delivered to DVK at 9.35am on 17 March 2010. The NZ Post Courier record also shows that the notice of hearing was delivered at 10.58am on 6 January 2010 and signed for by what appeared to be "Dharmen".

[14] The record also shows that all of the Procedural Orders, notice of telephone conferences and mediation were both emailed and couriered to DVK. There is no record of non-delivery of any of these items, and according to the case manager none of these emails bounced back.

[15] Whilst Mr Herzog submitted that none of this documentation, was actually received by DVK, this is not what Mr Arakelian says in his statement of evidence. What Mr Arakelian says is that DVK only became aware of the fact that a final determination was made against him in this case on 24 February 2010 when his lawyer made enquiries of the Tribunal. In fact when enquiries were made with the Tribunal the final determination had not been issued but Mr Herzog was advised that the matter had been heard and a determination would be issued shortly. He was sent a copy of that determination on 18 March 2010 when it was issued.

[16] Nowhere in his statement of evidence does Mr Arakelian state that the various notices couriered to the company were not in fact received by the company. Nor does he state that none of the 35 email communications sent to DVK@xtra.co.nz were received. When questioned further at the hearing Mr Arakelian suggested that he had not seen these emails and that the company sometimes had problems with its emails. He however advised that it was not him that cleared the emails. He acknowledged he had not obtained a statement of evidence from the various staff members who were responsible for opening emails. Nor did he obtain evidence to support the submission made by counsel that none of these emails were received. It would have been relatively straight forward for Mr Arekelian to have got an information technology expert to examine the hard drive of the company's computer to provide a record of incoming emails on the dates in question, as outlined on the service record.

[17] Whilst email communications may not be accepted as appropriate service in the absence of an order for substituted service, the Tribunal record also shows that both the original application, several Procedural Orders providing notice of the hearing dates and the notice of hearing were couriered to DVK. Whilst technically much of this documentation could be regarded as documentary hearsay it does in my opinion provide sufficient proof for the Tribunal to have

deemed that service had been effected in accordance with the Act. I do not accept Mr Herzog's submission that that information should be discounted as the only reliable evidence is the statement of Mr Arakelian. As already stated Mr Arakelian's statement is equivocal, at best, as to whether or not the various documents couriered were received by DVK. It does not state that the documents were not delivered but only states he only became aware that a final determination had been made against the company when his lawyer was sent a copy on 18 March 2010.

[18] There have been several High Court decisions as to what is required to effect service in terms of s387 of the Companies Act. In *Croxley Stationery Ltd v Tourism Marine Ltd*[1] Master Lang, as he then was, concluded that a demand had been validly served if it had been affixed to the door of the registered office or the gate of the property. He went on to say that it is preferable but not mandatory that the document be served personally on a director or at least on an occupant of the registered office.

[19] In the current case there is sufficient evidence to establish that at least two of the documents were delivered to the registered office of DVK. There is also evidence that other documents were couriered to that address and left at the registered office. Osborne AJ in *Re Spanbild New Zealand Ltd*[2] stated that:

> "I see strength in the proposition that service of the statutory demand by leaving it at the company's registered office constituted sufficient service and did not require further Court direction. Any further inquiry as to whether the documents so served came to the actual attention of a director or officer of the company is arguably beside the point in determining the validity of service – to enter such an inquiry appears to put a gloss on the plain words of s387(1)(c) of the Act. I consider that there is some attraction to the view that the legislature, by s387(1)(c) of the Act, must be taken to have intended that the creditor need look no

[1] HC Auckland CIV-2003-404-4384, 5 November 2003.
[2] HC Invercargill, CIV-2010-425-191, 27 May 2010.

> further than a Companies Register in order to determine whether it might effect service."

[20] A similar interpretation is appropriate in relation to s117 of the Weathertight Homes Resolution Services Act 2006. It provides that any notice or document required to be served is sufficiently served or given if it is delivered to that person (or company), left at the last known place or residence or business or posted in a letter addressed to the usual last known place or residence or business. In this case the application, Procedural Orders and notices of conferences, mediation and hearing were couriered to DVK's address for service and delivered to the premises. In addition the same documents were emailed to the company's email address. It would defy logic to conclude that none of these documents were in fact received.

[21] I accordingly conclude that both the original notice of service and the notice of the hearing were served in accordance with the Act. Whilst I do not accept that knowledge of the proceedings is a prerequisite I conclude that it is more likely than not that DVK did have knowledge of the proceedings. If it did not it would only be because its officers deliberately chose not to read the contents of the numerous couriers and emails that were sent to his company. I accordingly conclude that service was properly effected.

[22] In relation to the second ground of the appeal, I would note that Mr Herzog attended the hearing inadequately prepared to address this issue given the fact that he acknowledged he had read nothing other than the appeal decision. Whilst Mr Herzog submitted that the Tribunal was wrong in fact and law in finding any liability against DVK he was unable to articulate specifically how the Tribunal was wrong in fact and law as he had not read either the application filed by the claimants or any of the evidence presented by them or by the other parties in the adjudication. In addition he neither obtained a copy of the audio recording nor read the transcript of the Tribunal

hearing. It was also apparent during the course of the hearing that Mr Herzog had not read the Tribunal determination in any degree of detail as he was unaware of a number of the issues traversed in that determination.

[23] When this issue was put to Mr Herzog at the hearing he submitted there was no need for him to have read anything other than the Tribunal decision. He appeared to be suggesting that the Tribunal was under an obligation to summarise or traverse all the evidence provided in the course of the adjudication in the Tribunal decision and also to provide full and detailed reasoning for every factual conclusion reached even though the claim against DVK effectively proceeded on a formal proof basis.

[24] At the very least I would have assumed that counsel would have ensured that he was familiar with the evidence provided against his client, if not in advance of lodging the appeal then in advance of any hearing on that appeal. Without an assessment of the claim against his client and the evidence and expert reports filed in support of the claim, it would be difficult to determine whether the Tribunal decision was wrong in fact and law.

[25] However as I have concluded that service on DVK was properly effected it is not necessary for me to consider whether a re-hearing before the Tribunal is appropriate. Judge Gittos stated that the second ground of appeal need not be pursued if the Tribunal finds that service was properly effected.

DATED this 21st day of July 2010

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P A McConnell
Tribunal Chair