

**IN THE WEATHERTIGHT HOMES TRIBUNAL  
TRI 2009-100-000104**

**BETWEEN**      **KIM YOUG PHON and KAO YUN**  
Claimants

**AND**            **WAITAKERE CITY COUNCIL**  
First Respondent  
(Removed)

**AND**            **MODERN HOME DEVELOPMENTS  
LIMITED**  
Second Respondent

**AND**            **DESIGN & BUILD CO LIMITED**  
Third Respondent  
(Removed)

**AND**            **DOUG KAILL**  
Fourth Respondent  
(Removed)

**AND**            **BARRY WALSH**  
Fifth Respondent

**AND**            **BRETT MCWILLIAMS**  
Sixth Respondent

**AND**            **WEI WEI ZHANG**  
Seventh Respondent

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**PROCEDURAL ORDER 7  
Dated 20 August 2010**

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## **Application for removal by the Waitakere City Council and Doug Kaill**

1. The Waitakere City Council and Doug Kaill have both applied to be removed as parties to this claim. Doug Kaill's company Design and Build Co Limited did the design work for the dwelling but was involved up to building consent stage only. The claim against the Council is also confined to its role in issuing the building consent as a private certifier carried out the inspections during construction.
2. Both the Council and Mr Kaill accept they owed the claimants a duty of care but deny they breached that duty of care. Alternatively if they did breach any duty of care there is no causative link between any such breach and the causes of leaks and subsequent damage. In particular they submit that all of the deficiencies, or breaches of duty of care, alleged against them were either covered by the James Hardie technical literature, or alternatively that they have not contributed to the dwelling leaking. They submit that the defects which have caused the leaks are due to the failure by those involved in construction to follow the plans as drawn, the technical literature or accepted building practices.
3. The claimants oppose the application for removal on the basis that if the allegations as contained in the amended statement of claim are accepted as correct then there is an arguable claim against the Council and the designer. Mr Rainey on behalf of the claimants also submits that the claimants' experts support the allegations contained in the amended statement of claim. To remove the parties they submit would require me to make conclusions on disputed issues of fact

which are not appropriate in the context of a removal application.

### **Discussion**

3. Section 112 of the Weathertight Homes Resolution Services Act 2006 (the Act) provides that the Tribunal may order that a person be removed from adjudication proceedings if the Tribunal considers it fair and appropriate in all the circumstances to do so. The matters the Tribunal needs to weigh up in considering applications for removal include, but are not necessarily limited to:
  - Whether there is a reasonable cause of action disclosed in the claim documents
  - The likelihood of success against the party seeking removal
  - Whether the application is vexatious or frivolous,
  - Whether the claims being made are relevant and intelligible
  - The likelihood of prejudice or delay
  - Whether there are any issues of undue complexity caused by a proliferation of parties
  
4. In *Auckland City Council v Unit owners in Stonemason Apartment 27 Falcon Street, Parnell*<sup>1</sup> (*Stonemasons*) Andrews J concluded that removal applications should proceed on the assumption that the facts as pleaded are true. This does not mean that the facts pleaded do not need to be reasonable otherwise it would be open to the applicant to make unmeritorious allegations.
  
5. While the High Court has made it clear that there needs to be an evidential basis to support claims otherwise a party should

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<sup>1</sup> HC Auckland, CIV- 2009-404-3118, 11 December 2009, Andrews J.

not be joined to a claim,<sup>2</sup> Cooper J in *Fenton v Building Code Consultants Ltd*<sup>3</sup> concluded that different considerations apply to removal applications. He further concluded that s 112 is not intended to give the Tribunal a wider jurisdiction to strike out claims than possessed by the High and District Courts. Therefore the primary consideration is whether or not there is an arguable cause of action against the party seeking removal. There is, he concluded, no duty on the claimant to adduce evidence directed to that question because the questions should be answered on the basis that the pleaded facts are correct.

6. One of the difficulties that the Tribunal faces in applying this test is that the WHT is not primarily a court of pleadings but is investigative in its approach and claims can proceed on the basis of evidence provided with the application for adjudication rather than on the basis of pleaded facts. Claimants when filing their claims are required to not only articulate their claim against the other parties but also to file the assessor's report prepared in relation to the property and the technical evidence supporting their claim. If there are no formal pleadings the test however can be whether the claim is capable of succeeding based either on the pleaded facts or the information and evidence provided by the claimants and other parties in the course of the adjudication to date.
7. The background to the removal applications is also relevant to their consideration and in particular whether it is appropriate to accept pleaded facts as being correct if such pleadings are not supported by the detailed report of the claimants' own experts. At the preliminary conference convened on this claim both the Council and Mr Kaill raised the need for further

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<sup>2</sup> *Auckland City Council v WHRS and Dennerly* HC Auckland, CIV -2004-404-4407, 28 September 2004, Harrison J.

particulars of the claim against them. At that stage there were no particular deficiencies in the plans noted in the assessor's report or in the claimants' documents or claim. Mr Rainey indicated at that conference that if in the opinion of the claimants' expert the design work and issuing of the building consent were not contributing factors to the dwelling leaking, the claimants was likely to withdraw their claim against the Council and the designer. This concession was recorded in Procedural Order No 1.

8. The claimants subsequently filed their expert's report. Their expert records six key areas or defects which have caused leaks. These are:
  - Inadequate installation of the cladding system.
  - Insufficiently waterproofed horizontal surfaces of the balustrade walls.
  - Inadequately terminated membrane to the eastern balcony.
  - Inadequately sealed or flashed penetrations through the cladding.
  - Insufficiently constructed cladding base detail including a lack of cladding and floor clearances to adjacent ground.
  - A lack of weathertight flashings and inadequate installation of window and joinery.
  
9. There were in addition two further defects identified by the claimants' expert which could be issues of future likely damage. These relate to the plant on polystyrene details and the roof to wall junctions. Neither of these are primarily design issues.

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<sup>3</sup> HC Auckland, CIV-2009-404-6348, 15 March 2010.

10. As a consequence at the second case conference Ms Martin, counsel for the Council, requested that further particulars of the claim against the Council be provided as it was unclear as to the allegations being made against the Council. The claimants' counsel at that conference agreed to file a further report or brief from their expert, Mr Wilson of Maynard Marks, and also an amended claim. This was recorded in Procedural Order no 4 and the claimants were directed to file that information by 21 June 2010.
11. Mr Rainey on behalf of the claimants then submitted there was no need for the claimants to file any further report, brief or information from Maynard Marks as he believed the report already filed dated March 2010 provided sufficient details and particulars of the claim against the Council and the designer.
12. In Procedural Order No 5, I noted that the defects as detailed in both the claimants' expert's report and the assessor's report primarily related to workmanship issues or failure to follow plans and specifications. There were no specific defects or allegations being made to implicate the design as being a cause of the leaks and resulting damage. In addition the defects listed in the statement of claim related to construction or workmanship issues rather than design. I therefore directed the claimants to file further information from Mr Wilson together with further particulars of their claim. I also noted that unless this was done then any applications for removal filed by the Council and the designer would likely be successful.
13. The claimants then filed their second amended statement of claim which contained more specific and detailed allegations of the defects they were alleging against both the Council and the designer. They did not however provide any supporting

documentation or report from their expert to support the additional defects pleaded in their amended claim as they agreed to do at the case conference. To the contrary the claimants' expert in his report provides little, if any, support for the allegations that the majority of defects pleaded against the designer and the Council were either defects or causative of leaks. In addition Mr Wilson specifically states that several of the design deficiencies alleged against the designer and the Council in the amended statement of claim dated 7 July 2010 were covered in the James Hardie technical literature.

14. Mr Rainey both in the amended statement of claim and the claimants' opposition to the removal applications appears to have disregarded the appropriate legal tests as set out in *North Shore City Council v Body Corporate 188529 & Ors.*<sup>4</sup> (*Sunset Terraces*). The Court of Appeal in that case upheld Heath J's conclusion that Councils, in issuing building consents, and designers in preparing the plans, were entitled to assume that a reasonable builder would have access to and rely on the manufacturer's specifications and that this documentation did not need to be replicated by the designer in the plans.
15. Mr Rainey however submits that Mr Kaill was negligent in not providing details in the plans that were already covered in the technical literature and that the Council was negligent in issuing a building consent for such plans. This argument is not tenable and cannot succeed in light of the Court of Appeal's decision upholding Heath J's conclusions in *Sunset Terraces*. In addition the claimants allege that the Council was negligent due to failure by the designer to define cladding clearance details even though their own expert states that the

Council had imposed a condition on the building consent that stated the minimum floor to external ground clearances. In addition Mr Wilson states that the James Hardie material specified standard details for the base of the cladding.

16. The only design defect not covered by the technical literature detailed in Mr Wilson's report is the failure to detail how the various penetrations through the cladding should be sealed. This however is not a defect which the claimants are alleging against the designer or the Council in the amended statement of claim.
17. I acknowledge that Mr Rainey is correct with his submission that *Fenton* is authority for the proposition that the Tribunal should accept, for the purposes of removal applications, that allegations and the statement of claim are correct. I also accept that in *Stonemasons Andrews J* concluded that the Tribunal should not require a party opposing an application for removal to produce the evidence in support of their opposition. However I do not consider either of these cases provide support for the view that claimants can legitimately oppose an application for removal by amending their claim to include allegations that have no evidential support and in particular are not supported by their own or established legal precedent.
18. In this claim the claimants have filed their expert's report and the claimants also agreed to file further expert evidence to support their claim against the Council and Mr Kaill. They were accordingly directed to do so and a timetable was set to enable this information to be provided prior to the timeframe within which parties could apply to be removed. Rather than doing this the claimants have amended their pleadings to

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<sup>4</sup> CA673-2008, 22 March 2010 (*Sunset Terraces*).



include a number of allegations which are not supported by either their expert's report or the assessor's report. This is despite the fact that the claimants' counsel agreed that if their expert concluded that the design issues were not a contributing cause to the dwelling leaking the claim against these two parties would most likely be withdrawn. Pleading matters against parties which are unsupported by evidence and contrary to established legal precedent should not legitimately be used to oppose an application for removal. To do so could be considered to be an abuse of the Tribunal processes which amounts to bad faith.

19. It is of course possible the claimants have additional evidence to support their pleadings. However after agreeing to provide this expert evidence, and being directed to do so on two occasions, they have failed to do so. Therefore I am faced with a situation where the claimants' amended pleadings are either not supported by their own expert's report, or inconsistent with the clear principles set out in *Sunset Terraces* on designers' liability and the liability of territorial authorities in granting building consent.
20. In summary therefore I conclude that the majority of the design deficiencies alleged by the claimants against Mr Kaill and the Council were matters covered in the James Hardie or other technical literature. The Court of Appeal has accepted that there is no need for these details to be replicated in building consent documentation. Any alleged deficiencies not covered by the technical literature have either not been implicated as causes of leaks by Mr Wilson, or have not been pleaded against the Council or Mr Kaill.
21. I accordingly conclude that body of case authority establishes that the claims against Mr Kaill and the Council are so

untenable that they are unlikely to succeed. They are accordingly removed as parties to these proceedings. I also remove Design and Build Co Ltd as that company has been struck off the companies register.

### **Costs**

22. The Council has applied for costs should it be successful in its application for removal. The following timetable is set to deal with any costs application as a result of these orders:

- The Council and Mr Kaill will have until Friday 3 September 2010 to file either further submissions in support of the application for costs or an application for costs.
- The claimants will have until Friday 17 September 2010 to file any response or opposition to the application.
- The applicants will then have until 30 September 2010 to file a reply.

### **Application for Removal by Brett McWilliams**

23. Brett McWilliams has applied to be removed as he advises the documentation relied on by the Tribunal in joining him to this claim relates to 14 Beach Road and not 16 Beach Road, which is the subject of this adjudication. He submits that Shoretex, the company contracted to do this work had no involvement with 16 Beach Road. That application for removal is opposed by Wei Wei Zhang, the seventh respondent, and Modern Home Development Limited, the second respondent. Ms Zhang deposes that the numbering on the invoices is incorrect and that it was 16 Beach Road

that Mr McWilliams, or his company carried out the work on and not 14 Beach Road. She has also produced evidence to show that it was Plaster Tech that carried out the texture coating work at 14 Beach Road not Mr McWilliams.

24. Mr McWilliams disputes this evidence and further submits that while Shortex entered into a contract with Modern Homes neither he nor Shortex were physically involved in carrying out or supervising the work as it was subcontracted to another person.
25. There is clearly a factual dispute between Mr McWilliams and Ms Zhang both as to which house Shoretex was engaged to plaster and whether Mr McWilliams was personally involved. This dispute cannot be resolved in the context of a removal application. Mr McWilliams has accordingly failed to establish that the claim against him is so untenable that it is unlikely to succeed. His application for removal accordingly fails. Mr McWilliams may however be entitled to seek costs against Ms Zhang and Modern Homes Development Limited should the Tribunal ultimately conclude that there is no substance to the opposition they have raised to Mr McWilliams removal.

### **Application for Removal by Barry Walsh**

26. Barry Walsh accepts that Walsh Builders Limited was contracted by Modern Homes to supply labour to build the house at 16 Beach Road. Mr Walsh however states that because Walsh Builders had several projects already in progress at the time they contracted the concrete slab layer, together with a hammer hand to build the house on a labour-only contract. Mr Walsh submits that Modern Homes together with its project manager and supervisor, James McLean, organised all materials and sub-trades and gave directions on

the building of the house. He submits he had no input into the construction of the house at 16 Beach Road either by organising material, working on site or directing the contractors or employees of Walsh Builders Limited who were employed on site.

27. The application for removal is opposed by Wei Wei Zhang, Modern Home Developments Limited and the claimants. In support of the opposition Ms Zhang states that Mr Walsh attended site to view the progress of the building work and to ask for payment of services. She states that for example when the framing was finished Mr Walsh came on site to inspect it and to ask for a progress payment to be made. She submits that she made all payments to the building work at 14 and 16 Beach Road to Mr Walsh when he was visiting the site to view the progress of the building work. She also said that she personally signed the receipt for payment and says that she was contracting with him personally. This however is contrary to the information provided by Ms Zhang and Mr McLean at the preliminary conference when they advised they had contracted with Barry Walsh of Barry Walsh Builders Trust Limited to do the building work at the property. Whilst that appears to be the incorrect company it was clear at the preliminary conference that Ms Zhang and Mr McLean were aware they were contracting a company to undertake the work rather than Mr Walsh personally.

28. The information before the Tribunal tends to support the claim by Mr Walsh that he contracted through a company. The issue that is in dispute however is the role of Mr Walsh in the construction work. Mr Walsh says he was not involved in carrying out the work or supervising it. Ms Zhang says that he was. This is clearly a factual dispute which I cannot resolve

on the papers in the context of a removal application. The application for removal accordingly fails.

**DATED** this 20<sup>th</sup> day of August 2010

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P A McConnell  
Tribunal Chair