IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000091
[2010] NZWHT AUCKLAND 35

	BETWEEN	PETER JAMES ADAMS AND SUSAN MARGARET ADAMS Claimants
	AND	TERENCE EASTHOPE First Respondent
	AND	AUCKLAND CITY COUNCIL Second Respondent
	AND	RONALD STEVENSON Third Respondent
	AND	MICHAEL RAMSEY Fourth Respondent

Hearing: On the papers

Appearances: T J Rainey for the claimants
No appearance by first respondent
P Robertson for second respondent
P T Cavanaugh QC for third respondent
J P Koning for fourth respondent

Decision: 4 November 2010

DETERMINATION AS TO JURISDICTION
Adjudicators: R M Carter and P A McConnell

INTRODUCTION

[1] Peter and Susan Adams are the owners of a house at 3A Waikare Road, Oneroa, Waiheke Island. In 1995 they arranged for additions and alterations to the dwelling. Unfortunately those alterations leaked and so Mr and Mrs Adams lodged an application under the Weathertight Homes Resolution Services Act 2002, in December 2002. They completed the remedial work and filed proceedings in the High Court in December 2009. Those proceedings were struck out in June 2010 because they were limitation barred under section 393 of the Building Act. Mr and Mrs Adams now seek to apply for adjudication of their claim in the Tribunal.

THE ISSUES

[2] The issues that need to be determined are:

- Are Mr and Mrs Adams precluded from filing an application for adjudication in the Tribunal by section 60(5) of the Weathertight Homes Resolution Services Act 2006 (the Act)? If not -
- Does the High Court decision striking out the proceedings create a *res judicata* or issue estoppel situation, preventing the claimants from having the substance of their claim adjudicated in the Tribunal?

FACTUAL BACKGROUND

[3] In 1995 Mr and Mrs Adams arranged for extensive alterations to be carried out to the house at 3A Waikare Road. Construction work took place during 1995 and 1996. While several inspections were carried out by the Council, no final inspection was called for and no Code Compliance Certificate was issued. However

the construction work was completed in February 1996, the claimants later noted in their particulars of claim.

[4] In March 1996 Mr and Mrs Adams noticed water entering the property and contacted Terence Easthope, the first respondent. Leaks continued and on 16 December 2002 a claim was filed with the Weathertight Homes Resolution Service (WHRS). Mr McIntyre, the assessor contracted by the WHRS, concluded in a report dated 31 July 2003 that the claim met the statutory criteria as a leaky home.

[5] Mr and Mrs Adams arranged for remedial work to be carried out at a cost of approximately $245,000. Mr and Mrs Adams then filed proceedings in the High Court by statement of claim dated 16 September 2009 seeking to recover the remedial costs together with consequential costs and interest, from Mr Easthope the builder, the Auckland City Council, Mr Stevenson the architect, and Mr Ramsey the plumber.

[6] Mr Rainey, counsel for the claimants, appears to accept that at the time the claimants filed their claim with the High Court, their counsel should reasonably have known it would be limitation barred. It was well established by that time that while the claimants could rely on the 16 December 2002 date for any limitation periods in the Tribunal, that was not the relevant date for High Court proceedings. Any act or omission on which the claim could be based occurred more than ten years before the claim was filed with the Court.

[7] On 30 June 2010, Associate Judge R M Bell issued the following minute:

> "This matter was called for directions but after discussion with counsel, it is apparent that this proceeding has been lodged in this Court in 2009 when all the building work and local authority work was completed no later than 1996. That makes this case completely out of time under s 393 of the Building Act. Ms Cato suggests the matter should be transferred to the Weathertight Homes Tribunal. I do not accept that submission. As

> the matter is clearly out of time, no useful purpose would be served to allow this proceeding to continue. If the plaintiffs have proceedings alive in the Weathertight Homes Tribunal they are, of course, free to maintain them but no good purpose would be served by keeping this proceeding alive, and it is struck out."

[8] On 9 August 2010 Mr and Mrs Adams lodged a claim with the Weathertight Homes Tribunal. A preliminary conference was convened on 2 September 2010 and all parties agreed that the Tribunal should, as a preliminary issue, determine whether it had jurisdiction to deal with this claim. A timetable was set for filing submissions and the parties agreed the matter could appropriately be dealt with without an actual hearing.

Are Mr and Mrs Adams precluded from filing an application for adjudication by section 60(5) of the Weathertight Homes Resolution Services Act 2006?

[9] Section 60(5) and (6) of the Act provide:

> **60 Right to apply for adjudication of claims**
>
> (5) An owner of a dwellinghouse may not, however, apply to have an eligible claim adjudicated, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of—
>
> (a) an arbitration that has already commenced; or
>
> (b) proceedings initiated by the claimant (including by way of counterclaim) by way of—
>
> (i) proceedings in a court or a Disputes Tribunal; or
>
> (ii) proceedings under section 177 of the Building Act 2004.
>
> (6) Subsection (5) does not limit the power of any party to apply for proceedings to be transferred to adjudication under section 120 or agree that they be transferred under section 121.

[10] The questions raised by the claimants in their claim with the Tribunal are almost identical to the questions raised by the claimants in their claim in the High Court. The issue therefore is whether the above subsections prevent the claimant from applying for adjudication in the Tribunal when their claim has already been struck out in the High Court.

[11] Mr Rainey submitted that section 60(5) must be interpreted in the light of the purposes of the Act set out in section 3 of the 2006 legislation. He submitted that to the extent that there is any ambiguity, the matter must be resolved in the favour of the claimants. Unless section 60 clearly and unambiguously precludes them from pursuing their rights to adjudication in the Tribunal, the Tribunal must conclude that it has jurisdiction.

[12] Mr Rainey submitted that the purpose of section 60(5) was to prevent a claimant from issuing parallel proceedings in the Tribunal at the same time as seeking to have the claim adjudicated by way of arbitration or in a court or the Disputes Tribunal. It does not, he submits, prevent a claimant from seeking adjudication in the Tribunal when the earlier proceedings have been discontinued or struck out. As the proceedings were struck out in the High Court, the subject matter of the claim is no longer the subject of proceedings before it, so section 60(5) ceases to have application. The section speaks in the present tense of a claim that "is" the subject of the proceedings. It does not say "is or has been" Mr Rainey noted.

[13] Mr Rainey further submits that section 60(5) cannot be interpreted as an automatic termination of any eligible claim so as to preclude an adjudication being commenced after the subject matter of the eligible claim is no longer a subject of proceedings. The 'eligible claim' remains and is not terminated; it is just that the claimants cannot commence or continue with an adjudication for as long as their claim is the subject of proceedings before a Court.

[14] In response, Mr Cavanaugh QC submitted that the intent of section 60(5) was not only to prevent parallel proceedings but also to prevent re-litigation in different jurisdictions. That is a necessary implication, he wrote. He submitted this interpretation accords with the purpose of the Act in section 3, which is to provide access to speedy, flexible and cost effective procedures for the adjudication of

claims. A claimant has a choice, to file in the Tribunal or the High Court, (or to go to arbitration or the Disputes Tribunal), Mr Cavanaugh submitted. Having chosen the Court, the claimant cannot re-litigate in the Tribunal if he is unsuccessful in the Court. Mr Cavanaugh also noted that rather than the claim's having been discontinued - that is voluntarily withdrawn - in the High Court, it was struck out. He submitted that while section 60(5) may not preclude claims that have been discontinued in the High Court from being filed with the Tribunal, it does preclude claims that had been struck out from being re-filed elsewhere.

[15] Mr Koning also made submissions along these lines. Both Mr Cavanaugh and Mr Koning submitted that this was a case where *res judicata* and issue estoppel applied. Both counsel also raised defences or arguments under the Limitation Act 1950. Mr Rainey replied to those submissions.

[16] The Weathertight Homes Tribunal provides an alternative forum to the courts for resolving disputes regarding leaky homes. Claimants, after obtaining an assessor's report under the Act, have the option of either filing proceedings with the High Court or lodging applications for adjudication with the Tribunal. There is also provision under the Act for claims to be transferred from the Court to the Tribunal or from the Tribunal to the Court, in appropriate circumstances. Where claimants wish to withdraw a claim from adjudication, for example in order to file proceedings in the Court, section 67 provides that it can only be done with the consent of all parties or by order of the Tribunal.

[17] Having carefully considered counsels' well constructed arguments, we conclude that the intent of the Act is to preclude claimants either simultaneously or sequentially applying for claims to be adjudicated through both the Courts and the Tribunal except in the circumstances set out in sections 119 to 121 of the Act. We acknowledge that this will have significant ramifications for Mr and

Mrs Adams, but we agree with Mr Cavanaugh QC and Mr Koning that section 60(5) should not be interpreted so as to prevent parallel proceedings but to allow re-litigation. Where parties have already been put to the expense of defending a claim in the High Court, it is not efficient or cost effective for the parties to have the same claim brought and argued in the Tribunal. Allowing re-litigation is not consistent with the purposes of the Act which is to provide speedy, flexible and cost effective procedures for the resolution of claims relating to leaky buildings. The purpose of section 60(5) is in part to preclude the same claim being litigated in two different jurisdictions.

[18] The claimants chose to pursue their claim in the High Court. We consider it would be unfair to the respondents to allow the claimants to re-litigate the same subject matter in the Tribunal after they have been unsuccessful in the Court. Such a development would be contrary to the public interest. We are of the view that once an action is commenced in the High Court the only way the claim can come to the Tribunal is by way of a transfer under section 120 and possibly also where the claim in the Court is withdrawn and a new claim is filed with the Tribunal.

[19] Neither of these situations applies here. The claimants did not withdraw their High Court proceedings and then apply to the Tribunal. Having filed in the Court they were in the process of applying for transfer when their claim was struck out. They then filed new proceedings in the Tribunal. In this respect the Tribunal notes the High Court's statement that: "If the plaintiffs have proceedings alive in the Weathertight Homes Tribunal they are, of course, free to maintain them..." In fact, the plaintiffs did not have proceedings alive in the Tribunal. Even under the narrow interpretation Mr Rainey seeks to have the Tribunal adopt, they would have been prevented by section 60 from lodging such proceedings in the Tribunal at the same time.

[20] We disagree with Mr Rainey's comment in his original submission that the Court denied the claimants the opportunity to have the proceedings transferred to the Tribunal pursuant to section 120 'on the basis that they would be free to commence adjudication proceedings in the Tribunal'. That was not what the High Court said.

[21] In summary we conclude that the effect of section 60(5) is that the claimants cannot simultaneously or consecutively file effectively the same claim in both the High Court and the Tribunal. The Tribunal therefore has no jurisdiction to deal with the claim and it is therefore dismissed.

[22] Having reached this conclusion in relation to the effect of section 60(5) it is not necessary for us to deal in any more detail with the arguments regarding *res judicata* or issue estoppel. In addition there is no necessity for us to deal with the allegations that the claim is limitation barred under section 6 of the Limitation Act.

DATED this 4th day of November 2010

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R M Carter	P A McConnell
Tribunal Member	**Tribunal Chair**