

No: 00150

**Under** the Weathertight Homes Resolution Services Act 2002

**In the matter of** An adjudication claim

**Between** **Shek Shing Yim**  
**and**  
**Man Chu Kark**  
Claimants

**And** **Gold Directory 1995 Limited / Mr. Johnny Hsu**  
  
First respondent

**And** **Michael Wong**  
  
Second Respondent  
(Struck out)

**And** **RH & JE Bennett**  
  
Third Respondent  
(Struck out)

**And** **Manukau City Council**  
  
Fourth respondent

**And** **Jae Min Son**  
  
Fifth respondent

**And** **B.W.Lee Housecheck Limited**  
  
Sixth respondent

**Determination of Adjudicator**  
**26<sup>th</sup> February 2004**

		Index	
Paragraph	Subject		Page
1.	Summary		2
2.	Preliminary Steps		3
3.	Representation at the hearing		4
4.	The Property and Claim		4
5.	The Hearing		5
6.	Application for Joinder and Removal of Parties		6
7.	Settlement Issues		9
8.	Orders		12

## 1. Summary

1.1. The claim is in respect of a dwelling which is a leaky building as defined by the Weathertight Homes Resolution Services Act 2002.

1.2. The reasonable cost of remedial work to the dwelling to remedy these defects has been estimated to be \$96,208.

1.3. At the hearing various applications for joinder and removal were dealt with. The most significant issue was whether or not the claim was settled prior to the hearing and if so, what was a reasonable time in which the agreed payments should be made.

1.4. It was determined that this claim was settled by the parties on or about 13 February 2004 in the amounts set out below. The amounts were ordered to be paid on or before 25 March 2004.

1.5. The amounts agreed to be paid in settlement by the parties:

Gold Directory 1995 Limited / Mr. Johnny Hsu	\$26,000
Manukau City Council	\$21,000
Jae Min Son	\$19,000
B.W.Lee Housecheck Limited	<u>\$20,000</u>
	\$86,000

1.6. The settlement figure of \$86,000 was acceptable to the claimants.

## 2. Preliminary Steps

2.1. On 20 October 2003 the claimants made application to the Weathertight Homes Resolution Service (**the WHR Service**) under the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) in respect of their property at 21B Eske Place, Howick.

2.2. An assessor's report gave an estimate of the cost of remedial work as \$96,208.

2.3. There were two Preliminary Conferences held and applications for the joinder and removal of parties were dealt with.

2.4. The respondents joined to the adjudication were Manukau City Council; Jae Min Son; and B.W. Lee / B. W. Lee Housecheck Limited.

### 3 Representation at the hearing

3.1 The hearing took place on 26 February 2004. All parties were present and/or represented. Those present were:

- Claimants: Mr Shek Shing Kim & Ms. Man Chu Kark.
- First Respondent: Gold Directory 1995 Limited represented by Mr. Johnny Hsu;
- Fourth Respondent: Manukau City Council represented by Ms. Helen Rice and Ms. Estee Tan of Heaney and Co.
- Fifth Respondent: Mr. Jinh Son represented his father, Mr. Jae Min Son (who was absent).
- Sixth Respondent: Mr. Brent Lee representing B W Lee Housecheck Limited and himself.

### 4 The Property and Claim

4.1 The property is at 21B Eske Place, Howick and is owned by the Claimants (**Yim and Kark**) and the residence there had been constructed in 1999 and was purchased by the Claimants from the previous owners by agreement dated 13 July 2000 taking possession about 5 September 2000.

4.2 The dwelling had been constructed by Gold Directory 1995 Limited with the application for building consent being lodged by it and signed by Mr. Johnny Hsu dated 30 April 1997. The Code Compliance Certificate was issued by the Manukau City Council dated 7 August 2000.

4.3 Before the Claimants completed their purchase they sought a pre-purchase 'builders' inspection check and their agreement included a condition on their "being satisfied with a building report". This report was undertaken by B. W. Lee Housecheck Limited and is dated 15 July 2000. On the basis of this report the agreement was declared unconditional and the purchase proceeded.

4.4 After the Claimants took possession they found defects in several areas of their house. They made further investigation and became concerned about the weathertightness of the dwelling and as a consequence have brought this adjudication claim in the manner described above.

## **5 The Hearing**

5.1 At the commencement of the hearing on 26 February 2004 I dealt with some matters that had come to my attention in the days immediately prior to the hearing. These matters are:

- (i). An application by counsel acting for the Fourth Respondent, Manukau City Council seeking confirmation that settlement had already been reached by the parties and fixing a time for payment;
- (ii). an application by the Fourth Respondent, Manukau City Council, to have Mr. Johnny Hsu joined personally to these proceedings; and
- (iii). an application by the Fifth Respondent, Mr. Brent Lee, to be removed personally from the proceedings.

5.2 A further issue arose from the submission by Mr. Jinoh Son on behalf of the Fifth Respondent dated 18 February 2004 where it was stated that the name of the respondent should be Son Construction Limited. This matter is dealt with below.

## **6 Applications for Joinder and Removal of Parties**

6.1 The first application was from the Fourth Respondent to have Mr. Johnny Hsu of Gold Directory 1995 Limited joined personally as a party to these proceedings. The submission, both written and oral, provided reasons why Mr. Hsu should be joined and contained relevant case law. In short the submission said that he should be joined because his involvement went beyond that of a company director.

6.2 The Fifth and Sixth Respondents and the Claimants supported the application to have Mr. Hsu joined as a party to these proceedings.

6.3 Mr. Hsu maintained that he did everything in the name of his company although the building consent plans were in his name and not that of his company. He also admitted at the hearing that "he paid for items and services with personal cheques".

6.4 I have been persuaded that Mr. Johnny Hsu has been personally involved with the construction of this dwelling to such a degree and in such a way as to justify making him a Respondent in a personal capacity. I therefore order that pursuant to s33 (1) (c) of the Act Mr. Hsu be joined as a respondent party to the proceedings. See orders below.

6.5 Because Mr. Hsu has been intimately involved in the case as representative of Gold Directory 1995 Limited, and in light of recent developments in the resolution of these proceedings there seems no good reason to serve separate notice upon him at this late stage.

6.6 The second application was from Mr. B.W. Lee for him to be removed personally as a party to these proceedings. In summary his reason was that it was his company, not him personally, which provided the service. The application was opposed by counsel for the Fourth Respondent.

6.7 When I gave my oral decision at the conclusion of the 26 February 2004 hearing I said that Mr. Lee's application to be removed in his personal capacity was refused. After further consideration of the evidence I have come to the view that I erred because all correspondence, the report prepared by him, and the facsimile accepting the settlement proposal were all in the name of B.W.Lee Housecheck Limited. This is consistent with Mr. Lee's argument for removal; his company is the correct party.

I consider that it is fair and appropriate in all the circumstances that Mr. Lee be removed as a party to these proceedings in accordance with s 34 of the Act. See orders below.

6.8 The third matter concerned the status of Mr. Jae Min Son. It was stated in a number of places in his submission dated 18 February 2004 that it was Son Construction Limited who should be the respondent party and not Mr. Son personally. I asked Mr. Jinh Son, who was representing his father, if he knew that this company had been struck off the Companies Register on 31 January 2002. He initially stated that he did not but later conceded that this was the case.

6.9 Further, the notice to be a party to these proceedings was issued to Mr. Son on 24 November 2003, and at the Preliminary Conference on 22 January 2003 no mention was made by Messrs. Son about the existence of a company, and it is not until the submission dated 18 February 2004 was received that this issue was raised. Also, no mention of the company was made in the offer to settle in the facsimile dated 13 February 2004, which was in the name of Mr. Jae Min Son.

6.10 I am satisfied firstly that Mr. Jae Min Son is the correct party and should not be removed as a party to these proceedings. Secondly, as the company was struck off in January 2002, it has no legal status and so cannot be joined as a party to these proceedings, at this stage. The relevant law can be found in s 33 (1) and s 34 of the Act.

6.11 It became apparent that there was an issue raised by Mr. Jinh Son as to whether he was his father's representative. See s 50 (1) of the Act. This became significant at the hearing when he sought an adjournment because of his father's illness.

6.12 It was clear at the Preliminary Conference that Mr. Jae Min Son could not speak English. With him was his son, who was speaking on his behalf, so I concluded that he was acting as his father's representative. I note that the submissions in Response from Jae Min Son are signed by Jinh Son. While apparently the offer to settle is signed by Jae Min Son, the facsimile has come from Jinh Son's workplace. All in all, Jinh Son has predominantly conducted his father's case.



6.13 I am satisfied beyond doubt that the son, Jino Son, is effectively the father's representative as allowed for in s 50 (1) of the Act and therefore, the absence of the father is not significant, and no adjournment is granted. See orders below.

## 7 Settlement Issues

7.1 The first issue was an application by Ms. Rice on behalf of the Fourth Respondent who submitted the dispute was settled on 13 February 2004. The application was supported by two sworn affidavits from Steven Ivor Jameson dated 26 February 2004.

7.2 I heard at length from all parties as to whether it was settled. The submission from Ms. Rice contained copies of correspondence from the First, Fifth and Sixth Respondents faxed to counsel for the Fourth Respondent on or about 13 February 2004.

7.3 The facsimiles stated that the Respondents individually agreed to pay the following:

Gold Directory 1995 Limited / Mr. Johnny Hsu	\$26,000
Manukau City Council	\$21,000
Jae Min Son	\$19,000
B.W.Lee Housecheck Limited	<u>\$20,000</u>
	\$86,000

7.4 At the hearing it became apparent that while the Fourth and Sixth Respondents were still accepting the settlement, as were the Claimants except for the issue of timing, Mr. Hsu (for himself and Gold Directory 1995 Limited) and Mr. Jae Min Son were not comfortable with confirming the settlement.

settlement amounts were conveyed to them by the solicitor acting for the Manukau City Council. Not unreasonably, such a short timespan was unacceptable to several of the Respondents.

7.10 In her submissions, Ms. Rice stated that:

"Even if the fifth respondent is correct in saying that there was no settlement because the timeframe for payment had not been agreed (which is contrary to the agreement reached that the respondents would make payment within a reasonable timeframe), there is authority to support the proposition that in the absence of agreement by the parties of a timeframe, the Court will impose a reasonable period of time".

7.11 In her submission Ms. Rice relied upon Halsbury's Laws of England (3<sup>rd</sup>. Ed) p103, para 182 which states that:

"...if a contract is silent as to time for performance of an act, the law applies that it is to be done within a reasonable time, and what period is reasonable is a question of fact.

She also relied upon several New Zealand authorities including *Feltex New Zealand Limited v Nielsen Property Management Limited [1974] 2 NZLR 292 (HC)*; *Edwards v McNutt (Unreported, Christchurch High Court, 5.5.99, Justice Hansen)* and *Shepherd & Ors v All Steel Services & Anor (Unreported, Auckland High Court, 12.10.00, Justice Hansen)*.

The submission also stated, *inter alia* that:  
".....it is submitted that a reasonable period of time would be four weeks".

7.12 I am persuaded by the submission from Ms. Rice that a reasonable period of time to settle this matter would be four weeks (from the date of the hearing). See orders below.

7.5 Mr. Jinoh Son was non-committal, meaning that he would not confirm acceptance of the settlement offer, neither would he indicate that it was withdrawn.

7.6 With regard to the First Respondent, Mr. Johnny Hsu, it was clear that he had changed his mind with him stating at the hearing that "he did not want to pay any money" or words to that effect. When questioned he indicated that he was willing and able to settle on or about 13 February 2004, but the resulting delay in finalising the payment deadline has resulted in his position changing. This appears to be the basis for his reluctance to confirm the settlement.

7.7 Mr. Hsu's willingness to settle around 12 or 13 February 2004 is confirmed in Mr. Lee's submission where he refers to five or six discussions that he had with Mr. Hsu around that time during which he indicated that he was prepared to settle for \$26,000.

7.8 So the central question remains. Was the matter settled? It is my conclusion from the written and oral submissions made that the Respondents had every intention to reach a settlement and that such a settlement was reached by **all** of the Respondent parties, except that a date for such settlement was not finalised. The Claimants conveyed their willingness to accept the combined offer from the Respondents for \$86,000 in a telephone conversation with Mr. Jameson on 13 February 2004 but they had a problem with the proposed timing of payments.

7.9 This raises the issue of the date of the settlement. The Claimants had been insisting that payments be made to them prior to 18 February 2004 which was 3 working days after the

7.13 I have also concluded that, in accepting the individual amounts to be paid in their communication on or about 13 February 2004, each of the Respondents have also indicated the proportion of liability that they each accept, which is reflected in the orders below.

## **8 Orders**

**I therefore make the following orders and directions:**

8.1 Mr. Johnny Hsu shall be joined as a Respondent party to these proceedings.

s 33 (1)

8.2 Mr. Brent Lee shall be removed as a Respondent party to these proceedings.

s 34

8.3 Mr. Jae Min Son is not to be removed as party nor is the company, Son Construction Limited to be joined as a Respondent party to these proceedings.

s 33 (1) & s 34

8.4 The application by Mr. Jae Min Son for an adjournment is dismissed.

s 36 (1) (a) & (i)

8.5 This claim was settled by the parties on or about 13 February 2004 in the amount set out in the orders below, and that a reasonable period for the payment of the agreed amounts is four weeks (from the date of the hearing).

ss 29, 42(1)

8.6 The First Respondents (Mr. Johnny Hsu and Gold Directory 1995 Limited) are to pay to the Claimants, Shek Shing Yim and Man Chu Kark the sum of \$26,000 on or before 25 March 2004.

s 42 (1)

8.7 The Fourth Respondent (Manukau City Council) is to pay to the Claimants, Shek Shing Yim and Man Chu Kark the sum of \$21,000 on or before 25 March 2004.

s 42 (1)

8.8 The Fifth Respondent (Mr. Jae Min Son) is to pay to the Claimants, Shek Shing Yim and Man Chu Kark the sum of \$19,000 on or before 25 March 2004.

s 42 (1)

8.9 The Sixth Respondent (B.W. Lee Housecheck Limited) is to pay to the Claimants, Shek Shing Yim and Man Chu Kark the sum of \$20,000 on or before 25 March 2004.

s 42 (1)

**DATED** the 26<sup>th</sup> day of February 2004

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**DAVID GATLEY  
ADJUDICATOR**

**STATEMENT OF CONSEQUENCES****IMPORTANT**

**Statement of consequences for a Respondent if a Respondent takes no steps in relation to an application to enforce the adjudicator's determination.**

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no steps to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including the recovery from any party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs arising from the enforcement.