

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000017
[2013] NZWHT AUCKLAND 5**

BETWEEN **OLIVIA LEE**
 Claimant

AND **WHANGAREI DISTRICT**
 COUNCIL
 First Respondent

AND **K J FUNG**
 Second Respondent

AND **ALTHERM ALUMINIUM**
 NORTHLAND LIMITED
 Third Respondent

AND **NORTHLAND WATERPROOFING**
 SOLUTIONS LIMITED
 Fourth Respondent

AND **DESIGN METAL ROOFING**
 LIMITED
 Fifth Respondent

DETERMINATION
Dated 7 March 2013

CONTENTS

Introduction	3
Issues.....	4
Statutory provision.....	5
How is “the subject matter of the claim” in s 60(5) to be interpreted?	5
What was the subject matter of Ms Lee’s counterclaim or defence to the various claims in the courts and at arbitration?	7
Ms Lee’s counterclaim against Composite Cladding and Signage Manufacture and Installations Limited.....	7
Ms Lee’s counterclaim against Rob Littlejohn Builders Limited.....	9
What is the subject matter of Ms Lee’s claim filed with the Tribunal?	10
Should I terminate the claim pursuant to section 109?	13
Abuse of process	13
Application for transfer to the High Court.....	14
Conclusion	15

Introduction

[1] Ms Lee has a leaky home. She lodged a claim in the Tribunal for \$460,000, made up of an amount towards the repair of her home, of \$430,000, plus general damages of \$30,000. Ms Lee's claim, lodged on 10 March 2010, named the existing five respondents.

[2] Ms Lee has been involved in various proceedings in relation to her home. Before she brought her claim in the Tribunal, in 2008 Ms Lee was involved in a Disputes Tribunal hearing between herself and Tukaha Builders Limited which carried out certain work in the course of construction of her house. (That case also involved Wayne Openshaw, but that claim was struck out as a result of his having been judged bankrupt.) The Disputes Tribunal decision was the subject of a limited appeal in the District Court brought by Mr Varron Armstrong, the shareholder/director of Tukaha Builders.

[3] Ms Lee initiated adjudication under the Construction Contracts Act 2002 on 1 July 2008 against Rob Littlejohn Builders Limited (RLBL), which took part in the construction of her house on a labour only basis. The adjudicator Dr David Gatley found in favour of the respondent RLBL and ordered Ms Lee to pay it \$58,895.22 plus interest. Ms Lee lodged an appeal against Dr Gatley's determination and counterclaimed. Those proceedings in the High Court against RLBL have been stayed pending arbitration.

[4] On 27 October 2009 Judge David J Harvey issued a judgment in the District Court.¹ This case arose because Composite Cladding & Signage Manufacture and Installations Ltd (CCS), the cladding installer, sued Ms Lee for partial non-payment of its contract price. Ms Lee counterclaimed against CCS.

[5] Ms Lee appealed Judge Harvey's decision in the District Court. Her appeal was successful to the extent that the High Court referred the matter

¹ *Composite Cladding & Signage Manufacture and Installations Ltd v Lee* DC Whangarei, CIV-2008-088-562, 27 October 2009.

back to the District Court for re-hearing of Ms Lee's counterclaim.² After the re-hearing, Judge M-E Sharp issued a further judgment.³

[6] Ms Lee lodged an appeal against Judge Sharp's decision also. Before her appeal against Judge Sharp's decision was heard, Ms Lee applied to adduce further evidence when the appeal was heard. Wylie J declined this application.⁴ Also, in an oral judgment, Lang J declined an application by Ms Lee for an order staying enforcement of judgments.⁵ Ms Lee appealed to the Court of Appeal and the stay was granted. Ms Lee's appeal against Judge Sharp's decision has been heard in the High Court.⁶

[7] Now that the appeal against Judge Sharp's decision has been heard, Ms Lee intends to initiate the arbitration against RLBL. The proceedings in the Tribunal have remained adjourned for the CCS and RLBL matters to be dealt with.

[8] On 21 November 2012 the Tribunal issued a timetable for dealing with the issue of whether the Tribunal claim is able to continue in light of s 60(5) Weathertight Homes Resolution Services Act 2006 (the Act) or whether it should be terminated under s 109.

Issues

[9] The issues I need to decide are:

- i. How is "the subject matter of the claim" in s 60(5) to be interpreted?
- ii. What was the subject matter of Ms Lee's counterclaim or defence to the various claims in the courts and at arbitration?
- iii. What is the subject matter of Ms Lee's claim filed with the Tribunal?
- iv. Should I terminate Ms Lee's claim pursuant to s 109?

² *Lee v Composite Cladding & Signage Manufacture and Installations Ltd* HC Whangarei, CIV-2009-488-828, 16 December 2010.

³ *Composite Cladding & Signage Manufacture and Installation Ltd v Lee* DC Auckland, CIV-2008-088-562, 16 August 2012.

⁴ *Lee v Composite Cladding & Signage Manufacture and Installation Ltd* [2012] NZHC 3189.

⁵ *Lee v Composite Cladding & Signage Manufacture and Installation Ltd* [2012] NZHC 3164.

⁶ *Lee v Composite Cladding & Signage Manufacture and Installation Ltd* [2013] NZHC 354.

Statutory provision

[10] Subsections (1)-(6) of s 60 of the Weathertight Homes Resolution Services Act 2006 are as follows:

60 Right to apply for adjudication of claims

- (1) The owner of a dwellinghouse has the right to apply to the tribunal to have the claim adjudicated if it is an eligible claim.
- (2) Subsection (1) has effect despite any provision of any existing agreement or contract that requires or provides for—
 - (a) the submission to arbitration of any matter; or
 - (b) the making of an arbitral award as a condition precedent to the pursuit of any other proceedings or remedy.
- (3) **Existing agreement or contract**, in subsection (2), means one entered into before 27 November 2002.
- (4) However, the right referred to in subsection (1), and its exercise, are restricted by subsections (5), (7), and (8).
- (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.

How is “the subject matter of the claim” in s 60(5) to be interpreted?

[11] The essence of the issue before me is the meaning of the words “the subject matter of the claim” in s 60(5). The phrase “subject matter” is

not defined in the Act. The most relevant of the definitions in the Shorter Oxford English Dictionary are:⁷

The subject or theme of a book, speech etc, a topic; the substance of a book, speech etc, as opposed to its form or style; and a matter treated in writing, discussion, a lawsuit etc.

[12] In Black's Law Dictionary,⁸ "subject matter" is defined as "the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute".

[13] "The claim" is defined in the Act. It means:

A claim by the owner of a dwellinghouse that the owner believes has been penetrated by water because of some aspect of its design, construction, or alteration, or of materials used, which has suffered damage as a consequence of its penetration by water.

[14] Also, the words "the subject matter of the claim" should be interpreted having regard to the purpose of the Act, which is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings.

[15] Having regard to all the above considerations, I conclude that the section should be interpreted in a way that gives a reasonably wide meaning to the words "the subject matter of the claim". In my view the phrase should be interpreted as the matter being dealt with in the lawsuit, the matter presented for consideration, the substance of the thing in dispute, taking a reasonably wide view of those phrases.

⁷ *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, New York) Vol 2.

⁸ Garner BA *Black's Law Dictionary* (9th ed, West, St Paul).

What was the subject matter of Ms Lee’s counterclaim or defence to the various claims in the courts and at arbitration?

Ms Lee’s counterclaim against Composite Cladding and Signage Manufacture and Installations Limited

[16] In her statement of counterclaim against CSS, Ms Lee alleged that CCS’s work was defective and in breach of contract. She alleged that there were defects, shortcomings in installation or damage caused by CSS in respect of a vent drainage hole; the vermin proof lower end of panel; untreated adjustment packers; the panel walls; the sealing; 66 panels; the cleanup; the front deck waterproof membrane; the bedroom four aluminium joinery; some waterproof paint; and the envelope corner of panels. Ms Lee stated that as a result, the front deck waterproof membrane, the bedroom four aluminium joinery and the paint needed repair, and all panels needed to be replaced with fold envelope corner panels, including the 66 damaged panels. The packers needed to be replaced with treated battens as per the consented documents, including the drainage hole and vermin proof panel. Ms Lee sought \$306,323.55 and general damages of \$25,000.00 and costs.

[17] Ms Lee’s counterclaim against CCS is described in various judgments. Judge Harvey stated that: “Ms Lee attempts to lay responsibility for the water damage and “leaky home problem” at the door of the plaintiff (CCS)”.⁹

[18] In her decision Judge Sharp stated that Ms Lee alleged that negligent installation of the outer cladding by CCS is the cause of her home leaking.¹⁰ Wylie J comprehensively set out the background in his judgment on Ms Lee’s application for leave to adduce further evidence when her appeal against Judge Sharp’s decision was heard. His Honour wrote:¹¹

Ms Lee failed to pay CCS for its work, and it sued her for \$53,979.40. In October 2008, she counterclaimed against CCS. She claimed that the house leaked. She alleged that the leaks were due to CCS’s negligent installation of the aluminium cladding.

⁹ Above n1 at [126].

¹⁰ Above n3 at [54].

¹¹ Above n4 at [11].

[19] Wylie J stated that:¹²

Here, it is and has been Ms Lee's stance from the outset that her house leaks because the aluminium panels installed by CCS were installed negligently, and in breach of relevant building requirements.

[20] His Honour declined to allow three new affidavits to be introduced at the appeal. In disallowing two of these, which were designed to provide evidence of the likely cost of repairing the defective horizontal timber battens, His Honour stated:¹³

Again, there is a problem for Ms Lee. Both Mr Gill and Mr White gave evidence at the trial. Their evidence was focussed on the costs of a full re-clad of the house. It was not broken down into fixing parts of the dwelling.

[21] All the judges involved so far, at first instance and appeal, have stated that Ms Lee alleged that it was CCS's negligence that caused the leaks and damage to her house. In addition it is clear that Ms Lee was claiming for the costs of a full re-clad, from CCS.

[22] Ms Lee was not the initiator of the legal action against CCS, but she did initiate the proceedings against RLBL, under the Construction Contracts Act. Ms Lee had not paid either company in full. However, s 60(5) does not have regard to whether an arbitration has been initiated by the claimant or another person, and likewise the subsection does not make any distinction between proceedings initiated by the claimant in a Disputes Tribunal or a court and those brought by the claimant by way of counterclaim. In my view the fact that in the court proceedings, Ms Lee has brought counterclaims is a neutral factor.

[23] I conclude that the subject matter of the counterclaim against CCS was a claim for the cost of a re-clad of Ms Lee's home due to damage from leaks caused by faulty construction or materials. It is clear from the District Court decisions and High Court appeals that Ms Lee alleged that CCS was

¹² Above n4 at [24].

¹³ Above n4 at [38].

responsible for the leaks in and the resulting damage, to her home and her financial loss.

Ms Lee's counterclaim against Rob Littlejohn Builders Limited

[24] The following were the issues for determination in the adjudication of Ms Lee's claim under the Construction Contracts Act 2002 (CCA) against RLBL:

- i. Whether a valid payment schedule was provided by Ms Lee to RLBL within the time-frame provided by the CCA and the Construction Contracts Regulations 2003.
- ii. Whether practical completion/substantial completion occurred on 20 December 2007 when RLBL issued its payment claim.
- iii. Whether Ms Lee had breached the contract by entering into possession on 18 December 2007; and
- iv. Whether Ms Lee was liable to RLBL for the payment claim plus penalty interest in accordance with paragraph [53] of their contract.

[25] Through her solicitor, Ms Lee submitted that the overwhelming evidence showed that RLBL breached the provisions of the contract and was negligent performing its duties.

[26] Following the adjudicator's decision in favour of RLBL, Ms Lee maintained a counterclaim against RLBL. On 23 March 2009 Ms Lee filed an amended counterclaim including a fresh cause of action. In it she alluded to previously alleged defects concerning the stairs, skirting boards, scotia boards, locks, timber frame walls, finishes, work site, balustrades, internal gutters, drainage system and overflows. She now stated that there was no rainwater head built according to the approved plan, the overflow size was inadequate, and an overflow had been built without approval and consent. There were numerous inadequacies with the falls. Ms Lee also alleged that the north east and south east balconies were not constructed in accordance with the approved drawings. Boundary joists used untreated timber and inadequately treated timber, whereas the consented plan indicated H3.2 timber. A handrail was wrongly built. Ms Lee claimed under the Fair Trading Act 1986 and the Consumer Guarantees Act 1993, alleging that false misrepresentations had been made.

[27] Ms Lee sought \$242,605.92 for specified damages, \$113,355.58 being a refund, \$75,000 for stress, \$54,000 for lost income, \$250,000 for diminished value of the house, \$200,000 for unexpected responsibility and \$40,000 for general damages. This added up to \$974,961.50, an amount referred to in the High Court. Ms Lee also sought interest and costs. The amounts sought included amounts for repairs and for loss resulting from alleged false representations and deceptive conduct on RLBL's part. Ms Lee emphasised that if RLBL had employed an experienced project manager, her house would not have become a leaky home.

[28] I conclude that the subject matter of Ms Lee's claim against RLBL is her overall loss arising from RLBL's alleged negligence and misconduct, including the costs of reinstating the cladding to the house, based on allegations of defects resulting from faulty construction work, and failure to manage the project.

What is the subject matter of Ms Lee's claim filed with the Tribunal?

[29] In the Tribunal, in the application form, Ms Lee claims special damages for remedial work of \$430,000, and general damages of \$30,000 plus interest and costs from each respondent. The statement of claim sets out a list of defects under the headings Windows and Doors, Balconies, Cladding, and Roof Defects.

[30] Mr Beresford has submitted that the subject matter of the claims against the Council, Altherm Aluminium Northland Limited and Northland Waterproofing Solutions Limited is different from the subject matter of the claims against CCS and RLBL. In summary Mr Beresford submits that the particular defects alleged against those parties are different from the defects Ms Lee alleges that CCS and RLBL are responsible for, and Mr Beresford submits that Ms Lee has had no other opportunity to sue those parties.

[31] Mr Swanepoel, representing Northland Waterproofing Solutions Limited, on the other hand, submits that the subject matter of the counterclaims Ms Lee has brought against CCS and RLBL is the same subject matter as the claims against his client in the Tribunal, the fourth respondent Northland Waterproofing Solutions Limited, and the other respondents in the Tribunal. Mr Swanepoel's submissions have been

supported by Ms Parker, counsel for Whangarei District Council, and by Mr Percy, managing director of Altherm Aluminium Northland Limited.

[32] Many of the defects alleged in the Tribunal claim are the same as those alleged in Ms Lee's counterclaims against CCS and RLBL. Ms Lee's claim against CCS was based on defective installation of the cladding. This is also alleged in the Tribunal. It is one of the defects the Council is alleged to have failed to identify when carrying out its inspections. Ms Lee also alleged that Mr Fung's drawings lacked sufficient detail in this respect.

[33] Ms Lee's claim against RLBL contained numerous allegations of building defects, listed above, many of them likely to cause leaks and damage. The claim against Altherm Aluminium in the Tribunal, besides failure to install the windows and doors adequately, includes inadequate installation of the balustrades. Replacing the balustrades is part of Ms Lee's claim against RLBL. Likewise, the claims against Northland Waterproofing Solutions in the Tribunal include allegations that the decks had not been adequately waterproofed and the roof gutters were wrongly built and inadequately waterproofed – these matters too are part of Ms Lee's claim against RLBL. (Ms Lee's claims against the Design Metal Roofing, alleging defective installation of the roof, have been withdrawn, as have her claims against the designer Mr Fung).

[34] Further, in her Tribunal claim Ms Lee relies on the WHRS assessor Mr Dalton's report, the same evidence on which she was relying in her claim in the District Court against CCS. Ms Lee is alleging negligent construction of her home in the Tribunal, negligence in the construction being one of the counterclaims she alleged in the District Court.

[35] Mr Beresford also submits that for the claims to have the same subject matter, the claim in the Tribunal must be against the same respondents in the courts. In that respect I accept Mr Swanepoel's submission that the omission of the words 'between the same parties' in s 60(5) is deliberate.

[36] The identity of the parties against whom claims are made is not definitive of the subject matter. Among other things the purpose of s 60(5) is to prevent claimants bringing a series of claims against different parties in

different jurisdictions. To do so is inconsistent with the purposes of the Act. In addition it would require different courts and tribunals to decide the same issues of fact. For example, for Ms Lee to have a chance of success in the Tribunal would require the Tribunal to make a different decision from that already made by the District and High Court as to what Ms Lee's role was in the construction and whether she was contributorily negligent. Re-deciding issues of fact already determined by a superior Court is not appropriate.

[37] Ms Lee sought the costs of a full re-clad in her counterclaim against CCS in the District Court. She has also made ever-wider allegations against RLBL, culminating in an allegation that RLBL was negligent in not appointing a project manager and that had it done so, the house would have been properly built and not leak.

[38] Further, the amount of Ms Lee's claim against Whangarei District Council, Altherm Aluminium Northland Limited and Northland Waterproofing Solutions Limited in the Tribunal, is \$430,000 for remedial costs to repair the building, plus \$30,000 general damages, plus interest and costs. She seeks the same amount for remedial work from each respondent. Judge Sharp recorded that Ms Lee had been advised that her home needs to be fully re-clad at a cost of \$601,096.75. Ms Lee sought \$422,769.93 of that, plus consequential losses of \$49,051.16 and general damages of \$30,000 from CCS. (The amount of her counterclaim was also reported in the Court of Appeal judgment as \$557,000.) Mr Beresford has submitted that the difference between \$601,096, the amount needed to repair the house, and \$430,000, the amount sought in the Tribunal, shows that the Tribunal claim is a different negligence claim. But Ms Lee is not seeking the full amount of \$601,096 in the Tribunal. The loss for which she is seeking compensation in the Tribunal is the same or very similar to that which she was seeking in her counterclaim against CCS.

[39] I conclude that the subject matter of Ms Lee's claim in the Tribunal includes the same subject matter as her counterclaim against CCS. It also includes some of the subject matter in her very wide claim against RLBL.

[40] Accordingly I decide that Ms Lee may not continue her adjudication proceedings in the Tribunal because the subject matter of her claim is the subject matter of proceedings brought by her by way of counterclaim in the District Court and the High Court, and in an arbitration that will have already

commenced if the Tribunal claim resumes. I do not consider that the qualifying or limiting words “to the extent that” in s 60(5) mean Ms Lee can pursue her claims against CCS and RLBL in the High Court, and then ‘plug the gaps’ by pursuing other parties in the Tribunal for defects that may not already have been fully covered, if she does not succeed in court.

Should I terminate the claim pursuant to section 109?

[41] Section 109 provides that the Tribunal must terminate adjudication proceedings if it considers that they should not be continued in terms of s 60(5). I accordingly direct that Ms Lee’s claim with the Weathertight Homes Tribunal is terminated forthwith.

Abuse of process

[42] Allowing Ms Lee to continue her claim in the Tribunal may also be an abuse of process. While I do not make a final decision on this aspect, the following aspects are relevant in my view.

[43] In *Hooft van Huijsduijnen v Woodley*,¹⁴ Ronald Young J stated that there are two overriding questions in any abuse of process claim:

- a) Whether manifest unfairness or injustice would result to a party; and
- b) Whether the administration of justice will be brought into disrepute.

[44] In his judgment Ronald Young J also referred to factors that will be relevant in determining whether there has been an abuse of process. They are a consideration of the identity of the issues, the context of the two sets of proceedings, whether there is a right of appeal, and whether the proceedings were initiated by a party seeking a ruling inconsistent with an earlier judgment or whether the issue is raised in defence.

[45] Concerning the context, the counterclaims against CCS and RLBL and the proceedings in the Tribunal all arise from the simple fact that the claimant’s house is a leaky home. The issues overlap. In *Chamberlain v*

¹⁴ *Hooft van Huijsduijnen v Woodley* [2012] NZHC 2685.

Lai,¹⁵ the Supreme Court stated that although cause of action and issue estoppel apply only to proceedings between the same parties, the courts have been prepared to find abuse of process in cases entailing collateral challenge by a party to an earlier determination in fresh proceedings with a different party.

[46] In her judgment, Judge Sharp stated that if she was wrong in her finding that any breaches by CCS were not the cause of Ms Lee's loss, Judge Sharp would have found that Ms Lee's loss was largely of her own making. For Ms Lee to succeed in the Tribunal would require a decision contrary to this finding in the District Court. Ms Lee cannot pursue the same or similar arguments in two different jurisdictions and expect a different result.

[47] Mr Percy, managing director of Altherm Aluminium Northland Limited, the third respondent, in response to Mr Beresford's submissions, wrote: "This case is farcical! In breach of fair play, and a waste of taxpayer and private individual's money." That is a clear indication of the danger that the administration of justice will be brought into disrepute if the Tribunal proceedings went ahead after the numerous court hearings so far and after the litigation and arbitration involving CCS and RLBL are finally resolved.

Application for transfer to the High Court

[48] In his reply to Mr Swanepoel's submissions, Mr Beresford has submitted that if the Tribunal considers it has no jurisdiction to hear Ms Lee's claim, the appropriate course would be for the Tribunal to transfer her claim to the High Court under s 119. Mr Beresford submits that it would be appropriate to make an order if the Tribunal has doubts as to its jurisdiction because the issue that has arisen under s 60(5) would not be an issue in the High Court. The High Court would be in a better position to determine the claim on its merits. Ms Parker, supported by Mr Swanepoel, has opposed this submission.

[49] Section 119 enables the Tribunal to transfer a claim to the District Court or High Court if in the Tribunal's view it is more appropriate for a court to determine the claim because the claim is unduly complex or novel or the

¹⁵ *Chamberlain v Lai* [2006] NZSC 70, [2007] 2 NZLR 7 (SC).

subject matter of the claim is related to the subject matter of proceedings that are already before the court.

[50] I have found in this order that the subject matter of Ms Lee's claim in the Tribunal claim is the same as the subject matter of her counterclaim in the District Court. The subject matter of the case against RLBL is also closely related to the subject matter of the Tribunal claim, including the claim against the Council. The RLBL matter in the High Court is going to arbitration. In my view it would be inappropriate for me to exercise my discretion to transfer Ms Lee's claim to the High Court, as issues of *res judicata*, fairness and abuse of process would still arise, quite possibly leading to yet more disputation.

Conclusion

[51] For all the reasons set out above, I order that Ms Lee should not continue these adjudication proceedings in the Tribunal and her claim is hereby terminated.

DATED this 7th day of March 2013

R M Carter

Tribunal Member