IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-074-86
[2013] NZWHT AUCKLAND 6

BETWEEN	**BODY CORPORATE NO 180379 UNIT OWNERS 1-5 AND 7-13 (Fox Street Complex)** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**ANTHONY JOHN GAPES** Second Respondent
AND	**REDWOOD GROUP NO 2 LIMITED** Third Respondent
AND	**GEOFFREY LIONEL WRIGG** Fourth Respondent
AND	**ABLE INSPECTIONS LIMITED** Fifth Respondent
AND	**CHRISTOPHER UNDERWOOD** Sixth Respondent
AND	**AUCKLAND PROPERTY RESTORATION LIMITED** Seventh Respondent
AND	**MARGARETE FULLEMANN** Eighth Respondent
AND	**EIGER LIMITED** Ninth Respondent

Hearing: 14 February 2013

Appearances: G M Illingworth QC and S E Wroe for Claimants
G J Christie and C M Fairnie for Auckland Council
J McBride for Gapes and Redwood Group No.2 Ltd
GJ Kohler for Fullemann and Eiger Ltd

Determination of status of 2002 Act claims,
application to dismiss for want of prosecution, and application for consolidation
12 March 2013

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[1] The claimants are the owners of a block of leaky apartments situated in Fox Street, Parnell. The respondents say that the individual claims concerning these apartments are a nullity because they were previously withdrawn so that a replacement multi-unit claim could be filed. All are agreed that this replacement claim was invalid. The claimants deny that their individual claims were withdrawn or discontinued and have applied to have them adjudicated.

[2] We need to determine whether the individual claims were in fact withdrawn or discontinued. If this is the case then it follows that the proceedings before us are a nullity.

Background

[3] Between October 2005 and July 2006 all but one of the unit owners in the Fox Apartment complex made claims under the Weathertight Homes Resolution Services Act 2002.

[4] On 6 June 2007, the unit owners held their body corporate AGM. Officials from the Department of Building and Housing (DBH) attended and gave a presentation to the unit owners about the various options they had for claims concerning their complex. This assistance and guidance was available pursuant to s 12 of the Weathertight Homes Resolution Services Act 2006.

[5] The unit owners passed a resolution that "all individual claims be withdrawn and re-filed as a class action claim under the WHRS Act 2006." It was intended that this course of action would allow the claimants to take advantage of the more streamlined procedures for multi-unit complexes under the 2006 Act.

[6] The 2006 Act includes transitional provisions which allow for claims filed under the 2002 Act to be withdrawn and re-filed under the 2006 Act. These transitional provisions are complex.

[7] On 23 August 2007, the unit owners and Body Corporate filed an application with the DBH that was intended to be a multi-unit complex claim.

Filed with the claim was a copy of the Body Corporate AGM minutes recording the resolution to withdraw the 2002 Act claims and re-file as a "class action." At the hearing it came to light that two different versions of the Body Corporate AGM minutes were provided to DBH. We are not persuaded that anything turns on this. We accept Mr Kohler's submission that both versions met the relevant statutory requirements.

[8] Under the 2006 Act there are two types of claims that can be made in respect of damage to a multi-unit complex. The criteria for a common areas only claim is set out in s 17 of the Act. It specifies that this type of claim can only be made where dwellinghouses in the complex have not been damaged. Damage must be limited to common areas. The other type of claim is the multi-unit complex claim. The criteria for this claim requires only that the penetration of water has caused damage to the complex (s 16).

[9] The unit owners intended to file a multi-unit complex claim. The units were leaking so the common areas process was not available. However on the claim form that was filled out, the box specifying that the claim was a common areas only claim was ticked in error.

[10] No one noticed the error and the unit owners and DBH proceeded as if a valid multi-unit claim had been filed. The appropriate fee was paid. The DBH eligibility decision check form noted that the claim was a multi-unit complex claim. Authorisation was provided for the invasive testing of individual units (not required for a common areas claim) and an assessor was engaged pursuant to s 31 of the 2006 Act. The assessor's report met the requirements of a report on a multi-unit complex.

[11] On 29 August 2007 each of the claimants received a letter from DBH which stated:

> **Closure of unit claim – included in multi-unit complex claim**
> **DBH Case Number: 04561**
> **Property: Fox Terraces, 5-7 Fox Street, Parnell, Auckland**
>
> You initially brought the above claim under the Weathertight Homes Resolution Services Act 2002.
>
> The body corporate has since brought a multi-unit complex claim under the Weathertight Homes Resolution Services Act 2006:

DBH case number: 05522
Claims advisor: Kate Ross

> In relation to the new multi-unit complex claim, you have given authority to a representative to bring the claim and for an assessor to carry out invasive testing on your unit.
>
> Since there cannot be two active claims for the same unit at one time, your original unit claim will now be closed and be dealt with as part of the new multi-unit complex claim.
>
> Your point of contact regarding the multi-unit complex claim will now be your representative. The representative and the claims advisor will be corresponding with each other regarding all claim matters.
>
> Please call me on 0800 324 477 if you have any queries about the closure.

[12] None of the claimants responded to this letter.

[13] In February 2011, an application for the adjudication of the multi-unit claim was filed in the Tribunal and served on the various respondents.

[14] A series of procedural conferences were held on the claim. Various parties were joined and removed as respondents. A timetable for mediation and the filing of responses was set.

[15] On 27 July 2011 we determined that the claim against the Auckland Council in respect of one of the units was statute barred because an assignment of the 2002 Act claim had been ineffective and the assignees (now owners) had not made a new claim prior to the expiry of the limitation period. The Body Corporate and affected unit owner appealed. On 30 March 2012, Fogarty J granted the appeal and set aside our determination.[1]

[16] In his judgment, Fogarty J observed that there was no evidence that the 2002 Act claims had ever been withdrawn. His Honour noted that the claim form in respect of the 2006 Act claim had been ticked as "Body Corporate claim for common areas only". He agreed with a submission that the form of the application should not be disregarded and substituted for the Court's own view as to what the applicants must have intended. He then referred the issue of the status of the 2006 Act claim back to the Tribunal.

[1] *Body Corporate 180379 v Auckland Council* [2012] NZHC 588.

[17] After receiving submissions from the claimants and various respondents, the Tribunal terminated the 2006 Act claim. All parties had submitted that the 2006 Act claim had been invalid. As Fogarty J had determined that the claim form had to be taken at face value, the claim had been invalid and a nullity from the start. We held that the 2002 Act claims remained on foot and that we would consider them once an application for adjudication was filed by each unit owner in terms of s 138(1) of the Act. Some respondents reserved their position as to the validity of the 2002 Act claims. The Council however did not and gave no indication that it disputed the continued existence of the 2002 Act claims.

[18] Applications for the adjudication of each of the 2002 Act claims were filed with the Tribunal on 12 September 2012 together with the requisite filing fees in respect of each claim.

[19] On 30 November 2012 the Council filed a protest to jurisdiction which asserted that the 2002 Act claims had been withdrawn, that this withdrawal was akin to a notice of discontinuance, and that there was no mechanism by which a withdrawn claim could be reopened. Consequently, the claimants, as a result of procedural errors, had no valid claim before the Tribunal and were now time barred from making a fresh claim. In addition and in the alternative, the Council submitted that the 2002 Act claims should be struck out for want of prosecution. Mr McBride and Mr Kohler filed similar submissions on behalf of other respondents.

[20] On 14 February 2013 we convened a hearing where the issue of whether the 2002 Act claims had been withdrawn or remained on foot was argued.

Statutory provisions for the withdrawal of claims.

[21] Claims under both the 2002 and 2006 Acts are divided into two stages, the pre-adjudication stage and the adjudication stage. The pre-adjudication stage is managed by the Department or Ministry responsible for housing. This stage is relatively informal. It commences when the owner of a dwellinghouse applies for an assessor's report. This is the "claim". If the claim meets certain eligibility criteria, an assessor's report is prepared.

Potential respondents are not notified at this stage. There is no prescribed method for the withdrawal or discontinuance of a pre-adjudication stage claim although section 141 in the transitional provisions permit claims to be withdrawn for the sole purpose of allowing claimants to be part of multi-unit complex claims.

[22] The adjudication stage is more prescribed. It is managed by the Tribunal and commences when an application for adjudication is lodged. The withdrawal of a claim that is in adjudication is governed by section 67 of the 2006 Act which provides for withdrawal by written notice and also provides an opportunity for objection by respondents.

Were the 2002 Act claims withdrawn?

The Claimants' position

[23] The claimants take the position that their 2002 Act claims were not validly withdrawn and wish to have those claims adjudicated. They submit that no notice of discontinuance or withdrawal was filed. They refute the suggestion that the resolution of 6 June 2007 was equivalent to a notice of discontinuance and say it was merely a record of intention. Because no valid multi-unit claim was filed to give effect to the resolution to withdraw and re-file, the resolution was frustrated. The claims were not withdrawn and remain on foot.

[24] The claimants say that the withdrawal and proposed re-filing were inextricably linked. It was never intended that there would be a withdrawal of the individual claims unless a valid multi-unit claim was filed. Because the purported multi-unit claim was a nullity, the closing of the files by DBH was incorrect and of no legal effect.

Respondents' Case

[25] The respondents' case is that the 2002 Act claims were withdrawn and the current proceedings, which rely on those claims, are a nullity.

[26] Two arguments were presented as to what constituted the withdrawal. It was submitted that the correct interpretation of s 141 of the 2006 Act is that when a 2002 Act claimant elects to participate in a new multi-unit claim, there is no discretion as to whether the earlier 2002 Act claim is withdrawn. Withdrawal is an automatic consequence of bringing the new claim, notwithstanding that the new claim is invalid.

[27] It was also submitted that the communication and correspondence between the claimants and the DBH constituted the "withdrawal". Because the 2002 Act claims had not reached the adjudication stage, there were no parties to the claim other than the claimants themselves. No one therefore needed to be notified or informed about the withdrawal. There can be no criticism concerning the form of the withdrawal as none was prescribed.

[28] The respondents submit that there is no statutory mechanism for re-opening a withdrawn claim. It follows that if the 2002 Act claims have been withdrawn, these proceedings are finished.

[29] The respondents refuted the argument that the acts of withdrawing the individual claims and re-filing as a multi-unit claim were inextricably linked. Emphasis was placed on the disjunctive nature of s 141. This provides that an individual claim may be withdrawn for the purpose of filing a multi-unit claim but also anticipates that such a claim may not be filed. Section 141(4) provides that the clock begins to run again in respect of limitation if a new claim is not brought within a year of the original claim being withdrawn. This subsection clearly anticipates that the withdrawal of a claim can exist independently of a new claim being lodged. Although the intention of the claimants had been to "pull out with one hand and put in with another" it is irrelevant that this did not happen. The "pull out" is effective even if the "put in" is not.

Assessment

[30] We accept that the claimants resolved to withdraw the 2002 Act claims and that they subsequently considered these claims to be withdrawn. They were under the impression that a multi-unit complex claim had been successfully filed in substitution. As noted earlier, the multi-unit claim had

progressed to the stage of being scheduled for mediation before the question of its validity arose.

[31] Fogarty J has determined that the 2006 Act claim was for common areas only. It was therefore a nullity. It follows that the assertion by DBH that there were two active claims giving rise to the need to close the 2002 Act claim was incorrect. There were not two active claims, there was only one. The other was a nullity.

[32] It has variously been suggested that the withdrawal was the filing of the new claim and that the withdrawal was the communication between DBH and the unit owners.

[33] The key documents relied on as constituting a withdrawal in terms of s 141 are the resolution to "withdraw and re-file" and the letter from DBH advising that as two active claims could not be maintained, the individual ones would be closed. Neither satisfy us that the claims were properly withdrawn.

[34] It is common ground between the parties that no particular form was required for the withdrawal of the claims. We accept the submission that section 141 allows for the possibility that a claim may be withdrawn without a new claim being filed in its place. The question is however whether this is what occurred in this case or whether, as the claimants suggest, the proposed withdrawal and re-filing were inextricably linked. Section 141 allows a year between withdrawal and re-filing. However, in this case the purported withdrawal and re-filing were part of the same act. Rather than 'pulling out' and intending, but failing, to 'put in' as Mr Christie suggests, there was but a failed attempt to 'put in'.

[35] There was no intention that the claims be withdrawn unless a valid "class action" claim was simultaneously also filed. It follows that the resolution relied on by the respondents as constituting the withdrawal was frustrated. The intention of the claimants evidenced by the resolution was not given effect even though the 2002 Act claims were subsequently treated as withdrawn by the DBH, the claimants and the respondents.

[36] The purpose of s 141 is to allow claimants with valid 2002 Act claims to substitute them for 2006 Act multi unit complex claims. The provision allowing the withdrawal of claims in s 141 exists to encourage and facilitate the conversion of 2002 Act to 2006 Act claims with an accompanying transfer of rights pursuant to the Limitation Act.

[37] The respondents seek to take advantage of an error in the conversion process, of which they themselves were unaware, to deprive the claimants of any remedy in respect of their leaky apartment complex. To find that this error has resulted in the claimants having no viable claim would be inequitable and unfair and contrary to the scheme of the Act which is to encourage the conversion of 2002 Act to 2006 Act claims.

[38] We do not accept that the filing of an invalid common areas claim had the consequence of discontinuing or withdrawing the valid 2002 Act claims. It follows that the 2002 Act claims remain on foot.

If the 2002 Act claims are still on foot, should they be dismissed for want of prosecution?

[39] We now turn to the issue of whether the claims should be dismissed for want of prosecution.

[40] The first, second and third respondents submit that if the 2002 Act claims have not been withdrawn, they should be struck out for want of prosecution. They rely on the judgment of French J in *Snelling v Christchurch City Council.*[2] There are three limbs to the test established in *Snelling.* These are:

(a) The claimants' delay in prosecuting the claim has been inordinate and inexcusable.
(b) The claimants' delay has caused serious prejudice to the party seeking removal.
(c) As a result, justice can no longer be done in the proceedings.

[2] *Snelling v Christchurch City Council* HC Christchurch, CIV-2010-409-2344, 9 August 2011.

[41] In her submissions Ms Fairnie sets out a chronology of events between August 1997 when the building was completed and February 2011 when the application for adjudication was lodged in respect of the invalid claim. This chronology shows that the claimants first obtained legal advice concerning the weathertightness issues with the building in mid 2004 and applied for assessor's reports between October 2005 and September 2006. It notes that leaks were experienced from 1997 onwards and alleges that the applications for assessor's reports were lodged some eight to nine years after leaks had first been discovered. Between four and five years then lapsed before the application for adjudication was made. It is submitted that this delay is unexplained and inexcusable and has given rise to prejudice.

[42] The claimants deny that their delay is inordinate and inexcusable and also deny that it has caused prejudice such that justice cannot be done in the proceedings.

[43] Linda Wong is the owner of unit six. In an affidavit she deposes that she purchased the unit in 1997 from the developer. She recounts her recollections of water ingress problems with her unit and the other units and the steps that were taken to resolve these. Ms Wong and her husband were the only unit owners not to file a 2002 Act claim. She says that it was not until 2006 that she appreciated there were systemic problems with the unit. She recalls that the developer repaired a problem with bottom level ranch sliding windows that were leaking "in the very early stages of owning the apartment." It was her understanding that after this problem was fixed, the moisture ingress issues relating to her unit were resolved.

[44] In *Cole v Pinnock,*[3] Venning J considered an appeal against a Tribunal decision that concerned the question of when a cause of action accrued in respect of a leaky home. His Honour noted that the state of knowledge regarding leaky home syndrome and the reasons for it was more limited in 2001 than two years later in 2003 and referred to comments made by William Young P in *Sunset Terraces* that widespread recognition of the leaky building problem did not occur prior to 2004 and to comments made

[3] *Cole v Pinnock* HC Auckland, CIV-2011-404-3743, 16 December 2011.

by Asher J in *Burns* that there was a fundamental change of understanding concerning the problem between 1997 and 2004.[4]

[45] Having regard to the sequence of events and the steps that were taken we do not consider that the claimants' delay in filing the 2002 Act claims was inordinate or inexcusable.

[46] An affidavit from Roger Henry Levie has been filed in support of the claimants. Mr Levie is the director of Lighthouse NZ Limited, a company that provides guidance and support to owners of leaky buildings. Mr Levie deposes that Lighthouse was engaged by the claimants in October 2007 and he describes the steps that were then taken to organise the repair of the building. He refers to a report obtained for the claimants in December 2007 in response to the complex nature of the building footprint and an issue that subsequently arose concerning the encroachment into Auckland City Council's property that would be caused by re-cladding the apartment buildings with the addition of a cavity. This necessitated negotiations in 2009 with the ACC following which a building consent was lodged in March 2010.

[47] This consent application was returned by the Auckland Council in August 2010 with a request for more information. In the same month, the owners resolved to proceed with a Tribunal claim in advance of repairs having been advised by Mr Levie to do so. Mr Levie was concerned that the likely repair costs had become unaffordable for the owners.

[48] We do not consider the delay in applying for adjudication was inordinate or inexcusable. It was not unreasonable for the claimants to have attempted to undertake repairs to the apartments before applying for adjudication. Neither was it unreasonable for them to abandon this course of action given the complexities that arose and the expense involved in the repair process.

[49] We now turn to the issue of prejudice. The Council complains that it has lost the opportunity to seek contribution from construction parties

[4] Above n3 at [40]-[41].

because these parties are unable to be identified because the developer destroyed its records in 2007, unaware that the proceedings were contemplated. This is the only prejudice claimed by the Council.

[50] Prejudice is also claimed by the second and third respondents Anthony Gapes and Redwood Group No 2 Limited. The prejudice Mr Gapes complains of is the inability to identify the parties that actually built the complex and claim contribution from them.

[51] Mr Gapes has deposed that he was unaware of the claim until it was filed with the Tribunal in February 2011, some five years after the 2002 Act claims had been made to the Department of Building and Housing. Mr Gapes says that in 2007 he authorised the destruction of old files following a decision to move his records to another location. As more than ten years had passed since the construction of the apartments the Fox apartment documents would have been destroyed at this time.

[52] Accordingly, Mr Gapes has no records or documents relating to the design, development, construction and remediation of the apartments. At the time the apartments were built, he was involved in a large number of residential developments using different builders, architects and development companies. He cannot now recall the identity of the main building contractor although thinks that it could be Practec Interiors or Practec Development Limited of which he was a director at one stage. Both the companies have been liquidated. The architect, Richard Priest Architects Limited, went into liquidation in June 2005.

[53] It is accepted that Mr Gapes and Redwood have been prejudiced by the claimants' delay in that the relevant documents were destroyed in the absence of knowledge that proceedings were contemplated. However, the allegation that Mr Gapes and Redwood and the Council would have been able to claim contributions from construction parties but for the 2007 document destruction is speculative. Mr Gapes acknowledges in his affidavit that the architect and two of the possible builders have been liquidated and struck off the Companies Office register. Although Mr Gapes says he would have objected to the removal of Practec Interiors from the

Companies Office register in 2009 had he been aware of the proceedings, it is unclear how this removal has prejudiced him as there is nothing to establish that a contribution might have been available from the now liquidated company.

[54] The overriding consideration is whether justice can be done.[5] Even where delays are considerable and blameworthy, if justice can be done despite the delay, then courts ought not to invoke the "grim penalty" of striking out.[6] Clearly there is some prejudicial effect arising out of mere effluxion of time and dimming of memories. But, due to the nature of latent defects in leaky building claims and the time it takes for damage to manifest, it is quite often that memories will have been dimmed by the time a claim reaches adjudication. Leaky home claims are therefore distinguishable from other claims. We determine that in these proceedings although delays are considerable justice can be done despite the delay. The prejudice that the respondents claim they may suffer has to be balanced against the substantial loss that the claimants allege they have suffered.

[55] We do not consider that the delay has prejudiced the ability of the Council, Mr Gapes or Redwood to conduct a defence to the claim to the extent that it can be said that justice can no longer be done in these proceedings. It is significant that the apartments have not been remediated so the opportunity to inspect and obtain expert evidence about defects still exists. The application to dismiss the claims for want of prosecution is dismissed.

[56] There remain a number of issues to resolve between the parties. These are:

i. Should the claims be consolidated pursuant to s 138(2) of the WHRS Act 2006?
ii. What is the status of the Body Corporate common property claim lodged with the DBH on 5 April 2006?
iii. Should the Watsons be removed as claimants in respect of Unit 2/B?

[5] *Lovie v Medical Assurance Society NZ Ltd* [1992] 2 NZLR 244 (HC).
[6] *Manaia House Partnership v Dodds and Henwood Builders Ltd* HC Whangarei, CP96/90, 5 March 1997.

[57] We are persuaded that the claims should be consolidated. However, the hearing will be organised to ensure that the respondents who are only involved with single units are not put to unnecessary cost and will only need to attend and be represented at the parts of the hearing relating to the unit and issues they are personally involved in.

[58] The balance of outstanding issues will be resolved at a later stage.

DATED this 12th day of March 2013

M A Roche
Tribunal Member

K D Kilgour
Tribunal Member