IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-001771

BETWEEN	ROGER THOMAS PHILLIPS AND SUSAN PHILLIPS Plaintiffs
AND	LOUCAS PETROU First Defendant
AND	JAMES DOUGLAS ALEXANDER Second Defendant
AND	TERENCE HUGH ARNOLD Third Defendant
AND	NORTH SHORE CITY COUNCIL Fourth Defendant

Hearing: 28 September 2007

Counsel: J-M Trotman for plaintiffs
D Salmon & C Wilson for first, second and third defendants
A Thorn for fourth defendant

Judgment: 5 October 2007 at 12.30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 5 October 2007 at 12.30p.m. pursuant to Rule 540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors:
Neumegan & Co, PO Box 5968, Auckland for plaintiffs
Lee Salmon Long, PO Box 2026, Auckland for first, second and third defendants
Heaney & Co, PO Box 105391, Auckland for the fourth defendant

[1] This is a dispute over a single dwelling leaky building owned by the plaintiffs. They have applied to transfer this proceeding to the Weathertight Homes Tribunal. They say that a transfer is in the best interests of justice as it will be quicker and more cost effective than continuing this proceeding.

[2] The first to third defendants are the former owners and builders of the dwelling. They oppose transfer at this stage. They have applied to strike-out the claims against them on the grounds that they are time barred, and wish to have that application determined by this Court. They say that a decision on transfer should await a decision on their application to strike-out.

[3] The fourth defendant local authority agrees in principle to a transfer to the Weathertight Homes Tribunal, but only after it has had opportunity to interrogate all other parties prior to a transfer. It consents to the first to third defendants' application being heard in this Court ahead of transfer.

[4] The parties agree that the test to be applied is whether it is in the best interests of justice for the proceeding to be transferred at this point. In the course of argument it became apparent that the factors which the Court will need to balance in this application are possible delay and issues of procedural fairness (including costs).

[5] For the reasons I will now argue I decline the application to transfer at this time. It will be reconsidered, if still required, after the application to strike-out has been determined.

History

[6] The building at issue in this proceeding is a residential home in Castor Bay, Auckland. The first to third defendants are the former owners and builders. The fourth defendant is the local authority responsible for issuing the building consent and code of compliance certificate for the building. The fourth defendant issued a building consent in November 1995. There is a dispute as to when the building work was completed, but it was listed for sale on 10 September 1996, a cross lease

title was issued on 19 November 1996, and the fourth defendant issued a code of compliance certificate on 29 May 1997.

[7] The plaintiffs purchased the property from the first to third defendants under an agreement for sale and purchase dated 13 February 1998, which was settled on 6 March 1998. Shortly after settlement, the plaintiffs wrote to the first to third defendants about defects in the building, which included two specific problems about water ingress. The first to third defendants undertook some repair work pursuant to demand made on them under the agreement for sale and purchase. Between late 2000 and 2003 the plaintiffs identified further water issues in relation to the building.

[8] On 19 September 2006 the plaintiff lodged an application with the Weathertight Homes Resolution Service to make a claim under the Weathertight Homes Resolution Services Act 2002 (the 2002 Act). On 22 November 2006 a Weathertight Homes assessor provided a report identifying a number of defects in the building allowing water ingress or giving rise to damage as a consequence of water ingress. The claim was accepted, but not pursued.

[9] The 2002 Act was repealed and replaced by the Weathertight Homes Resolution Services Act 2006 (the 2006 Act) on 1 April 2007.

[10] On 4 April 2007 the plaintiffs issued this proceeding, pleading the defects originally identified between 1998 and 2003 and the further defects identified by the Weathertight Homes assessor. They alleged two breaches of warranty under the agreement for sale and purchase, and negligence, against the first to third defendants, and negligence against the fourth defendant. On 1 June 2007 they filed an amended statement of claim omitting one of the claims for alleged breach of warranty.

[11] The plaintiffs filed their application for transfer to the Weathertight Homes Tribunal (the Tribunal) on 31 August 2007. On the date of the first call of that application the first to third defendants filed an application to strike-out the plaintiffs' claim, or alternatively for summary judgment against the plaintiffs, alleging that the claims were time barred. At the commencement of this hearing counsel for the plaintiffs advised that the plaintiffs would not be pursuing their

remaining claim for breach of warranty in the Tribunal, should the claim be transferred. This removes one of the limitation arguments.

The competing arguments, and issues arising

[12] The application is brought under s 120 of the 2006 Act, the relevant parts of which read:

> 120 Transfer of proceedings from court
>
> …
>
> (2) If proceedings relating to a claim have been commenced in the High Court, a High Court Judge may, on the application of any party or on the Judge's own motion, order that the proceedings be transferred to adjudication.
>
> …
>
> (4) An order to transfer proceedings under subsection (1) or (2) may be made only if—
>
> (a) the parties to the proceedings agree to the transfer; or
>
> (b) the Judge making the order believes that the transfer is in the best interests of justice.

[13] The plaintiffs seek transfer on the grounds that the Tribunal has been established as a specialist tribunal for the specific purpose of resolving "leaky home" disputes and that resolution of their claim will be quicker and more cost effective in the Tribunal than in this Court. They wish to have the work done as soon as possible, but say that they are unable to fund the repair costs, and so seek an early determination. They also say that they brought this proceeding, rather than apply to have the claim adjudicated by the Tribunal, because they could claim wider remedies than were available in the Tribunal at the time.

[14] The first to third defendants say that they will be prejudiced by a transfer at this point. They say that they stand to lose procedural rights if the proceeding is transferred before their application is determined, and that the grounds relied upon by the plaintiffs are not sufficient to justify denial of these rights. They say that their application to strike-out or alternatively for summary judgment has merit, and can be advanced swiftly and without undue delay. They say that the plaintiffs have

drawn them into the more costly interlocutory procedures of this Court and a transfer prior to determination of their application would deny them a right to recover some of these costs if they are successful (as the Tribunal awards costs only in exceptional circumstances).

[15] The fourth defendant (which I will refer to as the Council) also opposes immediate transfer, on the grounds of loss of procedural rights. It says that it wishes to interrogate the other parties, and that there is no express right to do so in the Tribunal's procedures. It says that the grounds being advanced by the plaintiffs do not justify transfer ahead of its right to pursue interrogatories. The fourth defendant also wishes to bring an application to strike-out based on limitation defences in the event that the Court does not order immediate transfer.

Discussion – is it in the interests of justice to order transfer now?

[16] As is usual where the Court is asked to determine a matter in the interests of justice, the Court has to identify relevant competing interests and make an assessment of their respective merits.

[17] It is understandable that the plaintiffs should wish to obtain the earliest possible determination of their claim. This objective is expressly recognised in s 3 of the 2006 Act which states:

> 3 Purpose of this Act
>
> The purpose of this Act is to provide owners of dwelling houses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

[18] Nevertheless, it is not mandatory for parties to use the Tribunal, and it is relevant that the plaintiffs chose to issue their proceeding in this Court. They have explained that choice on two grounds. First, they say that until 1 April 2007 they were not able to claim for potential (as against actual) damage, but that this has been overcome by passing of and extension of relief available under s 50 of the 2006 Act. Secondly, they say that they wish to bring a claim for general damages (they seek a sum of $20,000), and that was not available until the enactment of the Weathertight Homes Resolution Services (Remedies) Amendment Act 2007, which came into

force on 29 August 2007. Their application for transfer was made two days after that.

[19] Although I do not regard this as determinative of the application, I am not convinced as to the reasons for commencing in this Court. Although the 2006 Act did not come into force until April 2007, it was passed on 18 December 2006. The plaintiffs appear to have planned to issue in this Court notwithstanding the pending change to the relief that could be claimed. Their counsel recognised this by concentrating her argument on the Tribunal's inability to award general damages until August 2007. However, even that does not provide great support to the argument. The amendment to the 2006 Act in August 2007 was a response to the decision of this Court in *Hartley v Balemi* (HC Auckland, CIV 2006-404-2589, 29 March 2007, Stevens J), which found that general damages were not available under the 2002 Act. That was only four working days ahead of this proceeding being filed. It seems unlikely that the plaintiffs decided to bring their claim in this Court only at that point and as a result of that decision, particularly as the claim for general damages ($20,000) is modest by comparison with the damages sought for repair (estimated at that time to be in the order of $350,000).

[20] Whilst I do not rule out the possibility of some uncertainty as to the relief available to the plaintiffs in the Tribunal at the time this proceeding was issued, it seems to me that there has been a change of mind on the part of the plaintiffs or their advisors. That is of course their right (recognised in the provision for transfer) but it adds force to the defendants' argument that they must accept consequences of the election they made.

[21] I turn to consider the plaintiffs' arguments as to delay. Counsel submitted that the defendants' application would be determined far more quickly in the Tribunal than in this Court. She referred to advice obtained from the Tribunal of a practice direction that the first conference is to be convened within 15-25 working days of a respondent being served, that the average time for first conferences was 21 working days, and that currently the Tribunal was not suffering any delays at any stage of its process.

[22] I am not persuaded that this advice means that the defendants' application for strike-out will necessarily be determined substantively within the 25 day timeframe. Counsel for the defendants referred me to procedural orders made by the Tribunal which suggest that it would be unlikely to hear and determine a defended application for removal under s 112 of the 2006 Act (the Tribunal's equivalent of strike-out) at the preliminary conference. This accords with the provision in s 65 of the 2006 Act for a preliminary conference of the parties as soon as practicable "*to consider making, and (if possible) make procedural and other decisions …*". Further, whilst the 2006 Act prescribes statutory timeframes (for responding to an adjudication claim and for a determination following that response) it also provides for extension of time (for providing a response) if the Tribunal considers that additional time is reasonably required.

[23] If I order transfer at this point the plaintiffs will still have to prepare their opposition to the application, and the Tribunal will need to ensure that there is adequate hearing time.

[24] The significance of this factor will therefore depend on when any application might be heard in this Court. At the commencement of this hearing I informed counsel that time was likely to be available in mid to late November. Even if the Tribunal is able to hear a defended application before then, I suspect that it is unlikely to be much before that.

[25] Counsel for the plaintiffs argued that transfer should be ordered as the Tribunal was the specialist forum for deciding these issues. She relied on two decisions under the 2006 Act: *The Eden II Trust & Ors v Redwood Group Limited & Ors* (District Court, Auckland, CIV 2003-004-1613, 29 March 2007, Judge Hubble) and a decision of Adjudicator John Green in *K Webster & Ors v Collins Paper Haulage & Ors* Weathertight Homes Resolution Service Procedural Order No. 8, 1 December 2006 which Judge Hubble adopted in his decision.

[26] I do not read these decisons as requiring a transfer due to the Tribunal's specialist nature. Whilst they endorse the use of the Tribunal they were clearly decided on their particular facts. In *K Webster & Ors v Collins Paper Haulage &*

Ors Mr Green declined an application to transfer to the High Court in face of "a deliberate and considered decision [by the claimants] to have their claims determined by judication under the Act". In *The Eden II Trust & Ors v Redwood Group Limited & Ors* Judge Hubble was faced with an application to transfer from the District Court to the Weathertight Homes Resolution Service. The case involved a multi-unit building. After 55 unit holders had filed claims with the Weathertight Homes Resolution Service seven representative owners had commenced the District Court proceeding hoping for an earlier decision on liability, leaving the developer to pursue that down the chain of third party proceeding. Those seven claimants sought to "return to the fold" of the claimants in the Weathertight Homes Resolution Service after a ruling on appeal that liability and quantum were to be heard together.

[27] In my view the argument for use of the Tribunal as the specialist forum will apply with greater force after the strike-out has been decided. I do not accept that it requires transfer at this point.

[28] The plaintiffs' financial circumstances were put forward as a significant factor in seeking an early transfer. In a first affidavit filed in support of the application the plaintiff Roger Phillips stated that since filing this proceeding the plaintiffs have obtained tenders for remedial work, the average of which is $470,000 exclusive of GST, on top of which they will have to meet legal and expert costs. Mr Phillips said that he is organising finance to meet these costs, with a view to having repairs commence within six weeks. He claimed that the plaintiffs do not have the income to service the required borrowing, even with the support of income from a family trust. He said that the plaintiffs are retired, and their only income is from government superannuation, a private pension, and the family trust.

[29] In support of this contention Mr Phillips referred to two properties owned by the family trust, producing between them income of $700 per week. He said that the trustees (who are the plaintiffs) intended to sell one of the trust properties to subsidise part of the cost of repairs, but said that they would still struggle to meet interest repayments even on a reduced amount of borrowing (estimated to be in the order of $170,000). He referred to loss of income from the trust as a result of the sale, and having to move into the other property whilst repairs to Castor Bay were

being undertaken. He mentioned a term deposit of approximately $100,000 but did not expect that much of that would be available to pay for the remedial work as they were using that money to fund their legal and expert costs. He said that the income from the private pension (referred to without identifying the amount) was used to meet a small mortgage over the trust property into which they intended moving. He did not identify the amount of that payment. The inference to be taken from his evidence is that there is little available from that pension to fund repair costs.

[30] Counsel for the first to third defendants submitted, justifiably in my view, that the plaintiffs had not demonstrated that they were unable to proceed with repairs before their claim is resolved. He pointed to a lack of candour in their initial evidence (set out above). In an affidavit in reply to Mr Phillips' first affidavit the third defendant produced evidence of two further properties (in addition to the Castor Bay property, and the two owned by the trust) registered in the plaintiffs' names. In an affidavit sworn and filed on the morning of the hearing Mr Phillips acknowledged that the two further properties are also owned by the family trust, and produce income of $730 per week before payment of outgoings. He also mentioned a further property owned by a company of which the plaintiffs are shareholders and directors, although claiming that that property sustains an annual loss by reason of mortgage payments being greater than rental. There is no suggestion that this additional income is not available to the plaintiffs, or that these further assets of the trust cannot be utilised by them as well. In addition, although Mr Phillips refers again to the plaintiffs' private pension income, he gives no evidence as to what that is.

[31] Where a case is being advanced on the basis of lack of ability to fund repairs, I would have expected full and frank disclosure at the outset. Although I accept that the indicated repair costs are substantial I am not persuaded that the plaintiffs are necessarily unable to fund the repair work pending determination of the claim. If successful, of course, their funding costs can form another element of their claim.

[32] Finally on the issue of delay, Counsel for the first to third defendants submitted that it was unreasonable for the plaintiffs to demand urgency when they had delayed significantly in bringing their claim. This is perhaps explicable initially by the steps taken by the plaintiffs to attempt to repair the specific problems as they

arose. However, there is no evidence before the Court to explain what happened between the time that repair work was undertaken in 2003 and the application made to the Weathertight Homes Resolution Service in September 2006. The plaintiffs do not plead any new defects arising ahead of that application. Whilst their wish to effect repairs (and thereby put a stop to any continuing damage) is understandable, that wish alone should not dictate the outcome of this application, particularly in the absence of an adequate explanation of the time it has taken for them to get to this point.

[33] As against those matters, counsel for the first to third defendants submitted that the defendants will lose valuable procedural rights if the claim is transferred now. They ask that a decision on transfer be deferred until their application to strike-out can be determined. They say that they have at least an arguable case that the claims are time barred both under s 4 of the Limitation Act 1950 and under s 393 of the Building Act 2004. They say they are potentially prejudiced by lack of specific procedure for strike-out in the Tribunal. They also say they would be prejudiced by being denied a potential right to costs if their application was successful.

[34] Counsel for the plaintiffs argued that there was no merit to the strike-out application, and that the Tribunal was just as qualified as this Court to determine that matter. She argued in relation to the 6 year limitation period under the Limitation Act 1950 that the present defects had not emerged until the assessor's report in November 2006. In relation to the 10 year limitation period under the Building Act 2004 she referred to evidence of work being paid for in November and December 1996. She also argued that s 37 of the 2006 Act sets the date of application to the Weathertight Homes Resolution Service (19 September 2006) as the date of the commencement of all proceedings for limitation purposes.

[35] It is sufficient for this application that I am satisfied that the first to third defendants have an arguable basis for their limitation arguments both in terms of when construction of the dwelling was practically completed and as to when defects were discoverable. I also doubt the plaintiffs' interpretation of s 37 of the 2006 Act. In the absence of explicit words to widen its application I consider it likely that that section applies only to proceedings under the 2006 Act. That will no doubt be a

matter for the application for strike-out. I also note the first to third defendants' position that the point may well end up in this Court either by referral from the Tribunal or on appeal. It takes nothing away from the expertise of the Tribunal to say that this is a matter better left with this Court, which has at least equivalent expertise in dealing with strike out applications based on limitation defences.

[36] Counsel for the first to third defendants argued that his clients were potentially prejudiced by an immediate transfer in three respects. The first was the lack of an express power of strike out (or summary judgment). Whilst that is so, the Tribunal has a power akin to strike out in its power to remove parties under s 112 of the 2006 Act. A similar argument was raised but not pursued in *Kay v Dickson Lonergan Ltd* HC Auckland CIV 2005-483-201, 31 May 2006. Ellen France J noted in relation to the equivalent section of the 2002 Act that the relevant principles for strike-out equate with those applying in the District and High Courts, in other words the power is to be exercised sparingly and in clear cases. Indeed, it could be said that the test under s 112 (*that it is fair and appropriate in the circumstances to do so*) is of wider scope than a strike-out in this Court, and thus of benefit to the plaintiffs. Nevertheless I can accept that there is potential prejudice to the defendants in that the extent of the power under s 112 has not yet been conclusively determined whereas the procedures in this Court are well established.

[37] The second aspect of prejudice is that the Tribunal may not have power to strike-out parts of the claim only, given the wording of s 112. Counsel for the first to third defendants recognised the possibility that defects identified in the assessor's report of November 2006 may be found not to have been reasonably discoverable, and so be within the limitation period even if the remainder of the claim was not. Neither counsel was able to point to any determination by the Tribunal on this point. Again I accept the potential for some prejudice to the defendants if the Tribunal was to decide that it a claim could not be struck out entirely.

[38] The third factor is the first to third defendants' argument in relation to costs. Put briefly, they say that the plaintiffs have put them to significant costs on interlocutory matters in this Court, and it would be unfair to deny them the right to take the further interlocutory step of strike-out and seek costs in relation to that in

this Court. The plaintiffs contend that this should not be a consideration as the Tribunal does have power to award costs.

[39] I consider that the first to third defendants are prejudiced in this respect. Whilst the Tribunal has power to award costs, it is only in exceptional circumstances. I do not see that the limitation points are so clear that the Tribunal would necessarily take the view that the plaintiffs were unreasonable in bringing the proceeding.

[40] Finally, in respect to the first to third defendants, I do not accept the plaintiffs' argument that their application to strike-out has been brought out of time. The only timetable order to date has been in relation to applications arising out of discovery.

[41] This leads me to the fourth defendant's opposition on the grounds that it seeks interrogatories, and that interrogatories may not be available in the Tribunal.

[42] Counsel for the plaintiffs was unable to point me to any express power to require answers to interrogatories. She referred to s 125 of the 2006 Act, and submitted that by that section the Tribunal was given the powers of the District Court. I am not persuaded that that is the effect of that section. It appears to relate just to powers of the District Court in relation to any proceedings arising under the 2006 Act which are brought in that Court. If this were the only argument against transfer I might have decided this differently. However, having regard to the view that I have taken in relation to the first to third defendants' application, and the fact that the administration of interrogatories can be accommodated within the same general timeframe, I accept it as a further factor for declining transfer.

[43] In summary, I come to the view that as a matter of fairness between the parties, and therefore in the interests of justice overall, the application to transfer should be adjourned until the first to third defendants' application to strike-out has been determined. I do so for the following reasons:

a) The plaintiffs elected to commence their proceeding in this Court, which gives the defendants certain procedural rights;

b) There is no presumption that leaky building cases are to be determined in the Tribunal (it is a matter to be determined on the facts of each case);

c) Whilst the Tribunal has the expertise to determine a strike-out application, its specialist jurisdiction does not give it any greater expertise than this Court, particularly when dealing with matters such as strike-out;

d) There is no clear time advantage in having the strike-out determined in the Tribunal rather than in this Court (particularly having regard to the plaintiffs' possible argument as to the application of s 37 of the 2006 Act);

e) There is a possible procedural prejudice to the first to third defendants in ordering transfer at this stage;

f) By leaving the proceeding in this Court pending determination of the application to strike-out, there will also be opportunity for the fourth defendant to administer interrogatories.

Decision

[44] The plaintiffs' application for transfer to the Weathertight Homes Tribunal is adjourned pending determination of the first to third defendants' application for strike-out or summary judgment, any similar application that the fourth defendant may bring, and administration of interrogatories.

[45] As the defendants have been successful in opposing immediate transfer the defendants are entitled to costs on this application on a 2B basis together with disbursements as fixed by the Registrar.

Further directions

[46] At a case management conference on 2 October 2007 counsel agreed to a timetable to apply to any application to strike-out or for summary judgment based on limitation defences which the fourth defendant might bring should the application for immediate transfer be declined. I now make the following timetable directions as indicated in my minute of that conference:

i **Applications to strike-out plaintiffs' claim and/or for leave and for summary judgment against plaintiffs:**

a) The fourth defendant is to file and serve its application and any supporting affidavits by **10 October 2007**;

b) The plaintiffs are to file and serve their notice of opposition to both applications and any affidavits supporting that opposition by **24 October 2007**;

c) The fourth defendant is to file and serve any notice of opposition to the first to third defendants' application by **24 October 2007**;

d) The defendants are to file and serve any affidavits in reply to the plaintiffs' affidavits in opposition by **2 November 2007**;

e) The first to third defendants are to file and serve any affidavit in reply to the first to fourth defendants' opposition to their application by **2 November**;

f) The applications are to be listed for a defended hearing at **10.00am on 26 November 2007** (one day to be allocated);

g) The defendants are to file and serve their synopses of submissions, and documents required by r251A (including a paginated bundle of affidavits and exhibits) by **16 November 2007**;

h) The plaintiffs are to file and serve their synopsis of argument together with any further documents required under r251A, by **21 November 2007**;

i) Electronic copies of the synopses of argument are to be provided in advance of the hearing (by arrangement with the case officer, Ms Ng).

ii **Interrogatories:**

a) The fourth defendant is to serve any notice to answer interrogatories by **5pm on 5 October 2007** (although given that this decision is being released a day later than I had anticipated, I will consider extending this to **8 October 2007** if it is not possible for the fourth defendant to complete the notices today);

b) Parties served with notices to answer interrogatories are to file and serve their response by **24 October 2007**;

c) Any applications arising out of the answers to interrogatories are to be filed and served by **20 November 2007** and listed for hearing on **26 November 2007**;

d) Any notice of opposition to any application in respect of interrogatories is to be filed and served by **20 November 2007.**

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Associate Judge Abbott