IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-002515

BETWEEN	JOHN GIRVAN AND KATHLEEN GIRVAN Plaintiff
AND	ANDREW BRIGGS AND NATALIE NICHOLS First Defendants
AND	RONALD NICHOLS Second Defendant
AND	NORTH SHORE CITY COUNCIL Third Defendant
AND	ASHLEY JORDON Fourth Defendant

Hearing: 13 February 2009

Appearances: L C Black for First and Second Defendants in support
D A Cowan for Plaintiff in reply

Judgment: 20 February 2009 at 3pm

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 20 February 2009 at 3 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date……

Solicitors: Heany & Co, PO box 105381, Auckland
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Corban Revell, PO Box 21-180, Waitakere City

[1] The plaintiffs purchased a property at 17A Sharon Road, Browns Bay from the first defendants in February 2002. In April 2007, following concerns as to whether the home on the property was weathertight, they commissioned a report from Advanced Building Inspections Limited. On receiving that report, they obtained a further report from Prendos Limited. The report they obtained from Prendos Limited advised the plaintiffs on remedial repair options necessary to ensure that their home is weathertight and free from structural defects. The plaintiffs estimate the cost of repairs amounts to $424,035.85. They bring these proceedings against the first defendants for breach of contract and negligence as co-developers, against the second defendant for negligence as a builder and developer, against the third defendant claiming negligence in carrying out the third defendant's obligations as the territorial authority responsible for administering the building controls, and against the fourth defendants for negligence as the builder. The third defendant has issued a third party notice against Graham Bamba, who was the plaintiff's building surveyor and property inspector, alleging negligence in the way he carried out that responsibility and seeking contribution from him.

[2] The first and second defendants apply to transfer these proceedings to the Weathertight Homes Tribunal ("the Tribunal") pursuant to s 120 of the Weathertight Homes Resolution Services Act 2006. The application is opposed by the plaintiffs. The third defendant, fourth defendant and third party neither consent nor oppose the application.

[3] The jurisdiction to transfer these proceedings to the Weathertight Homes Tribunal is contained in s 120 of the Weathertight Homes Resolution Services Act 2006. That section provides as follows:

> Transfer of proceedings from court
>
> (1) If proceedings relating to a claim have been commenced in a District Court, a District Court Judge may, on the application of any party, or on the Judge's own motion, order that the proceedings be transferred to adjudication.
>
> (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.

(3) If proceedings are transferred under subsection (1) or (2), the tribunal may have regard to any notes of evidence transmitted to it by the Judge, and it is not necessary for that evidence to be given again in the adjudication unless the tribunal requires it.

(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.

[4] Counsel agree that the test to be applied in determining this application is set forth in s 120(4)(b) and that the Court must be satisfied the transfer is in the best interests of justice.

Case for defendants in support of application

[5] The defendants rely upon the following as justifying a transfer in the best interests of justice:

a) The Weathertight Homes Tribunal is a specialist tribunal set up to determine leaky building claims. The proceedings relate to a stand alone dwelling as opposed to a multi-unit complex. The plaintiff will not be attending to the repairs until these proceedings have been determined. Consequently, a quick resolution is in the plaintiffs' interests.

b) At a case management conference held on 26 June 2008, directions were made relating to disclosure and discovery and the proceedings were adjourned to a further case management conference to be held on 4 November 2008 when consideration was to be given to arranging a judicial settlement conference, allocating a trial date and arranging for proceedings to be set down for hearing and considering pre-trial programmes for exchange of briefs. At the conference on 4 November 2008, counsel agreed to defer further steps in these proceedings

pending the outcome of the defendants' application for transfer of these proceedings to the Weathertight Homes Tribunal. However, further directions were made relating to discovery and inspection. It would seem that following the third defendants' issue of the third party notice, all parties have now been joined to these proceedings. If this application for transfer is declined, it is likely that at the next judicial case management conference, directions will be made setting the case down for hearing, allocating a fixture, and allocating a judicial settlement conference. It is estimated that the hearing of this case will take between five to seven days. It is most unlikely that a fixture for five to seven days can be allocated for hearing the proceedings in this Court before 2010.

c) If the proceedings are transferred to the Weathertight Homes Tribunal, the proceedings will be referred to an adjudicator who will conduct a case management conference almost immediately. At that conference the adjudicator will assess the evidence and consider whether an assessor's report is necessary. An assessor's report will take up to three months. Thus, a further conference is likely to be arranged following the obtaining of that report. At the next conference the adjudicator is likely to direct the mediation which could take place fairly quickly with a hearing towards the end of this year or at the latest, the beginning of next year. Consequently, counsel for the defendant emphasise that a hearing will take place sooner if the proceedings are transferred to the Weathertight Homes Resolution Service. In the circumstances of this case delayed justice adds considerable strain on the parties and delays repairs and renovations that are required to the plaintiffs' dwelling.

d) The Weathertight Homes Resolution Service is required, in terms of s 57, to manage adjudication proceedings in a manner that tends best to ensure that they are speedy, flexible and cost effective. It is pointed out that to a certain extent the Tribunal acts in an inquisitorial way. The Tribunal can arrange for additional parties to be joined without

going through the expensive process involved in the joinder of parties in the High Court proceedings. In this respect, counsel relied upon the decision of Asher J in *Kells v Auckland City Council* (HC Auck CIV 2008-404-1812, 30 May 2008). In that case, at paragraph [38], Asher J stated:

> Mr Allan sought to rely on High Court cases relating to claims for contribution, which involved the joinder of third parties at a later stage in the proceedings. However, the joinder of third parties and contributions in the sense used in s 17 of the Law Reform Act 1936 does not arise under the Weathertight Homes Act. There is indeed no provision for the joinder of third parties in the Weathertight Homes Act. There is only one type of party, and all are treated the same in procedural terms, in stark contrast to civil proceedings in a Court. Under s 72(1) of the Weathertight Homes Act, the Tribunal can determine any liability to the claimant of any of the parties, and also determine under s 72(2) any liability of any respondent to any other respondent. All parties, whenever joined and however joined, have the same status. Duties of "contribution" in the Law Reform Act 1936 sense are not mentioned.

Case for plaintiffs in opposition

[6] In opposing the application, counsel for the plaintiffs pointed out:

a) The plaintiffs are contemplating issuing interrogatories for the purpose of establishing the roles of the various defendants in the construction of the dwelling at 17A Sharon Road and, in particular, the role of the fourth defendant and whether the fourth defendant was the project manager. It was submitted on behalf of the plaintiffs that there was some doubt as to the jurisdiction of the Weathertight Homes Tribunal to enforce interrogatories.

b) It was also pointed out on behalf of the plaintiffs that the jurisdiction vested in the Weathertight Homes Tribunal to award costs is restricted by the wording of s 91 of the Weathertight Homes Resolution Services Act 2006 to those cases where the Tribunal considers a party has caused costs and expenses to be incurred unnecessarily by bad faith or the making of allegations or objections that are without

substantial merit. In contrast, the High Court rules would entitle a successful plaintiff to costs. Thus, the plaintiff, although successful in proceedings before the Weathertight Homes Tribunal, may not be able to recover costs.

c) It was also pointed out that awards for general damages which are being claimed by the plaintiff in these proceedings are normally in proceedings before the Weathertight Homes Tribunal limited to under $10,000 whereas the plaintiff in these proceedings seeks general damages of $20,000.

Decision

[7] At the hearing before me, reference was made to some of the defendants electing not to continue with counsel because of the costs involved. Counsel, however, agreed that both the Weathertight Homes Tribunal and the High Court would take adequate and appropriate steps to ensure an unrepresented party was not disadvantaged. Although emphasis was placed by counsel for the defendants on the Weathertight Homes Resolution Tribunal being a specialised tribunal with a statutory requirement to manage the proceedings in a manner best to ensure that they are speedy, flexible and cost effective, counsel conceded that the tribunal was not in a better position than the High Court to ensure justice to the parties. Pursuant to rule 1.2, the High Court must interpret the High Court rules so as "to secure the just, speedy and inexpensive determination of any proceedings or interlocutory application." Counsel for the defendants did not advance a claim that costs would be saved by transferring these proceedings to the Weathertight Homes Tribunal.

[8] It must be accepted that the Weathertight Homes Tribunal will be able to resolve these proceedings by early 2010 at the latest whereas the High Court is not likely to commence the hearing of these proceedings until at least mid 2010. Consequently, I will accept that the tribunal will complete the hearing of these proceedings sooner than the High Court. It is a trite but true observation that "justice delayed is justice denied" and the ability of the Weathertight Homes Tribunal to conclude these proceedings sooner than the High Court must be a significant factor

justifying transferring these proceedings to the Weathertight Homes Tribunal as being in the best interests of justice.

[9] However, although the Tribunal will probably determine these proceedings sooner than the High Court, an appeal from such determination can delay the finalisation of the proceedings. In this case an appeal from the Weathertight Homes Tribunal will be heard by the High Court pursuant to s 93 of the Weathertight Homes Resolution Services Act 2006. There is a limited right of appeal to the Court of Appeal from the High Court's decision on appeal from the Weathertight Homes Tribunal. Such appeal can be brought by leave as the Weathertight Homes Tribunal would be considered an inferior court for the purposes of s 67 of the Judicature Act 1908 for the reasons set forth in *Waikato Bay of Plenty District Law Society v Harris* [2006] 3 NZLR 755, pages 784-786, paragraphs [141]-[153].

[10] In contrast, if the proceedings remain in this Court, there is a direct appeal to the Court of Appeal without leave. In summary, there is a risk of further delays because of the chances of two appeals being to the High Court and the Court of Appeal if the proceedings are transferred. Whereas if the proceedings remain in this Court, there will only be one appeal to the Court of Appeal. Whether the proceedings remain in this Court or are transferred to the Weathertight Homes Tribunal, appeals from the Court of Appeal in respect of such proceedings are only by leave to the Supreme Court.

[11] Section 91 of the Weathertight Homes Resolution Services Act 2006 does significantly affect the right of the plaintiff to recover costs in the event of the plaintiffs' claim against the defendants being successful. To recover costs in the High Court the plaintiff does not need to establish bad faith on the part of the other parties or that allegations or objections made by those parties are without substantial merit. The High Court applies comprehensive rules with regard to costs. Pursuant to those rules, a successful party is normally entitled to costs. Those costs are determined applying appropriate daily recovery rates to the time considered reasonable for each step, and reflect the complexity and significance of the proceedings. Counsel anticipate that the hearing of this case, whether in the High Court or before the Weathertight Homes Tribunal, will take some days.

Consequently, costs the plaintiff would be entitled to if successful in the High Court could be considerable. The failure of the plaintiff, in the event these proceedings are transferred to the Weathertight Homes Tribunal, to recover those costs if successful, cannot be underestimated and could result in a serious injustice. Indeed, it is possible that the plaintiff, although successful, could be unable to afford the cost of repairs because of the inability to recover an adequate amount of costs. The inability to recover adequate costs, together with what is said to be the very conservative approach of the Weathertight Homes Tribunal to awards of damages, could therefore result in a very serious injustice to the plaintiff who, although successful before the tribunal, will have any damages substantially reduced because of the inability to recover costs.

[12] Consequently, I conclude that the inability of the Weathertight Homes Tribunal to make an adequate award of costs in favour of the plaintiff if the plaintiff is successful, must outweigh other factors such as the chance that the Tribunal will deal with the matter sooner than the High Court, and results in a conclusion that the transfer of these proceedings to the Weathertight Homes Tribunal could cause an injustice to the plaintiff. Consequently, I conclude that a transfer is not in the best interests of justice and the defendants application must be dismissed.

[13] As the plaintiffs have been successful, they are entitled to costs on a 2B basis with disbursements as fixed by the registrar.

[14] I direct that the registrar arrange a further case management conference by telephone before J P Doogue Associate Judge to amongst other things, arrange for the proceedings to be set down for hearing, allocating a trial date, making directions for the hearing and arranging a judicial settlement conference.

Associate Judge Robinson