IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-007886

BETWEEN	PETER JAMES ADAMS AND SUSAN MARGARET ADAMS Appellants
AND	AUCKLAND CITY COUNCIL First Respondent
AND	RONALD STEVENSON Second Respondent
AND	MICHAEL RAMSAY Third Respondent

Hearing: 5 May 2011

Appearances: T J Rainey & J P Wood for Appellants
P A Robertson & A G Campbell for First Respondent
P T Cavanagh QC for Second Respondent
Appearance of Third Respondent excused

Judgment: 10 June 2011 at 4:30 PM

JUDGMENT OF KEANE J

This judgment was delivered by me on 10 June 2011 at 4.30pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Rainey Law, Auckland for Appellants
Heaney & Co., Auckland for First Respondent
Hauraki Gulf Law (J Robertson), Waiheke Island, Auckland
Alistair MacLean, Barrister & Solicitor, Auckland; alistair@ktmlaw.co.nz

[1] In issue on this appeal is whether the Weathertight Homes Tribunal, on 4 November 2010, rightly dismissed as statute barred Mr and Mrs Adams' application to have their claim adjudicated under the Weathertight Homes Resolution Services Act 2006.

[2] Mr and Mrs Adams, the Tribunal held, were barred from advancing that application because in 2009, when they still had an eligible claim under the 2006 Act, they brought an equivalent proceeding in this Court. That proceeding had been struck out because it was out of time and, the Tribunal held, though this Court did not enter into that proceeding on its merits, the decision taken was conclusive for all purposes. It constituted a bar to Mr and Mrs Adams resuming their claim under the 2006 Act.

[3] This appeal turns on whether the Tribunal correctly interpreted the 2006 Act as it governed Mr and Mrs Adams' successive choices of forum and the extent to which their choice of this Court, though futile, was irrevocable. The time they have taken to pursue their remedies, and the effect on those against whom they claim, is in itself a consideration.

Sequence of events

[4] On 18 April 1995 Mr and Mrs Adams entered into a contract with Gemini Construction Limited, a company now struck off, to carry out extensive alterations to their house at Oneroa, Waiheke Island. The plans were prepared by Ronald Stevenson, a local architect. Michael Ramsay was the plastering contractor. The base building price was $120,500.

[5] On 24 February 1995 the Auckland City Council granted Mr and Mrs Adams a building consent and Gemini and its subcontractors completed the work by early 1996. The Auckland City inspected the work twice but did not, once it was complete, issue a code compliance certificate.

[6] In March 1996 Mr and Mrs Adams noticed water entering their house and took that up with Gemini and with Mr Stevenson, but without result. On 16

December 2002 they lodged a claim with the Weathertight Homes Resolution Service under the 2002 Act; the Act preceding that now in force.

[7] In a report, dated 31 July 2003, Mr and Mrs Adams' claim was assessed to be eligible for mediation or adjudication. Their home was not weathertight. The leaks discovered were arguably attributable to the alterations made within the preceding ten years. The remedial work called for was likely to cost at least $37,400. The actual cost was dependent on what was discovered during the repair.

[8] Mr and Mrs Adams did not pursue mediation, or adjudication. They had their home repaired at a total cost of $245,119. Then, in September 2009, in excess of six years later, they brought their proceeding in this Court to recover that cost of repair, and some other costs, and $25,000 general damages for stress and inconvenience.

[9] In late 2009 Mr and Mrs Adams repented that decision. They explored with those they had sued, the present respondents and Mr Easthope, Gemini's principal shareholder and director, a transfer of the proceeding to the Tribunal. The defendants did not consent. They first wanted Mr and Mrs Adams to make their claim more specific. They also wanted discovery. Their records were incomplete or even non-existent.

[10] On 8 June 2010 Mr and Mrs Adams applied to this Court for an order for transfer. That application was never set down. At a case conference on 30 June 2010, Associate Judge Bell declined their application and struck out their proceeding. It had been filed well in excess of the ten year limitation period fixed by s 393 of the Building Act 2004, which had expired in 2006. Mr and Mrs Adams' only recourse, he said, was to pursue any live claim they still had before the Tribunal.

[11] Mr and Mrs Adams then applied to the Tribunal to have their claim adjudicated on the basis that it remained an eligible claim under the 2006 Act. The Tribunal, however, in its decision, given on 4 November 2010, struck out their claim because this Court had struck out the alternative proceeding they had elected to pursue. That, the Tribunal held, barred them from adjudicative relief.

Tribunal decision

[12] The threshold issue before the Tribunal was whether Mr and Mrs Adams remained entitled under s 60(1) of the 2006 Act to have their claim adjudicated, or whether it was barred by s 60(5) because the 'subject matter' of their claim was, or as s 60(5) says 'is', 'the subject of proceedings ... initiated by the claimant in a Court'.

[13] Mr and Mrs Adams contended that their claim remained eligible to be adjudicated. They had pursued their proceeding in this Court, they said, as a matter of right. Though they then had an eligible claim under the 2006 Act, they said, they were not required to obtain the consent of the Tribunal to any transfer. Their claim had not then been taken to the point of an application for adjudication.

[14] Conversely, they said, the fact that they had brought their proceeding did not bar their claim. They were entitled to resume it as if they had never brought their proceeding, which had been struck out, before they applied for adjudication. That proceeding could never have been a parallel claim offending s 60(5), they said, and the Tribunal was entitled, indeed required, to receive and resolve their claim on its merit. This Court had merely struck their proceeding out.

[15] The Tribunal did not agree. Upholding the respondents, it held that Mr and Mrs Adams were bound by their shift of forum and the outcome. They were statute barred from pursuing their application for adjudication by s 60(5).

[16] To permit them to renew their claim after their proceeding had been struck out, the Tribunal held, had to be contrary to the purpose the 2002 and 2006 Acts shared, to provide relatively swift and inexpensive relief; and contrary as well to the finality principle, the principle that a claim can only be made, and resolved, once only. The Tribunal saw no need to consider whether it was barred more specifically by the doctrine of res judicata.

[17] The Tribunal left at large whether Mr and Mrs Adams' proceeding in this Court of itself extinguished their claim. It did hold that, because their claim and their

proceeding were essentially indistinguishable, this Court's decision was conclusive for all purposes; and that was so even though this Court did not go into the merits.

Submissions on appeal

[18] On this appeal Mr and Mrs Adams contend that the Tribunal's decision unjustly deprives them of any remedy. Their claim under the 2002 Act was well within time. It was accepted to be an eligible claim. It remained so under the 2006 Act. Section 60(5) cannot, they say, bar their application. Their ill advised and futile proceeding was struck out before they made it. As owners of a home that had proved leaky after alteration, they remain entitled under the 2006 Act to relatively swift and inexpensive relief.

[19] The Auckland City and Mr Stevenson (but not Mr Ramsay who abides the decision of the Court) rely on the Tribunal's decision; and for different but complementary reasons, which I combine to express their essence as I understand it to be.

[20] Mr and Mrs Adams' claim, they accept, may have remained eligible under the 2006 Act. But, they say, Mr and Mrs Adams did not pursue their claim. They elected, without obtaining any order for transfer from the Tribunal, to commence their proceeding. With or without an order for transfer, they say, Mr and Mrs Adams made an irrevocable election. They were then left only with their proceeding. Once the Associate Judge refused to transfer their proceeding to the Tribunal, moreover, and struck it out, that was an end to their right to apply for adjudication. That stood barred by s 60(5), or by the doctrine of res judicata in its narrower or wider senses.

[21] To permit Mr and Mrs Adams to pursue their claim before the Tribunal now, they say, has to offend the very purpose of 2006 Act that Mr and Mrs Adams invoke. Mr and Mrs Adams seek to resurrect, in excess of 15 years after they became aware that they had a claim to make, a claim that in tort they had to bring within six years, by March 2002, or a building claim they had to bring within ten years, by 2005.

[22] To the extent that the 2006 Act, s 60(5) principally, does not bar Mr and Mrs Adams' claim, they say, their present appeal ought to be dismissed because their application for adjudication offends the doctrine of res judicata or is more generally an abuse of process.

Right of appeal

[23] Mr and Mrs Adams' right of appeal is conferred by s 93(1), which says this:

> A party to a claim that has been determined by the Tribunal may appeal on a question of law or fact that arises from the determination.

[24] This Court may, under s 95, may confirm, modify or reverse the Tribunal's determination, or any part of it, and exercise any of the Tribunal's powers. This Court's decision has effect as if it were that of the Tribunal and is a final determination of the claim. That, however, has not prevented this Court from remitting to the Tribunal cases where the Tribunal has not itself fully and finally determined a claim on its merits.[1]

[25] In this instance the Tribunal only determined, at the threshold, and as a matter of law, that Mr and Mrs Adams' application was barred because their claim had been resolved once and for all in their prior proceeding. If I uphold that decision this decision will be final. If I do not uphold it, the effect will be that Mr and Mrs Adams will be entitled to pursue their application before the Tribunal, subject only to any question of irrevocable election, or as a result of the doctrine of res judicata, or any definite abuse of process.

[26] In saying that I do not ignore the fact that between December 2002, when Mr and Mrs Adams filed their claim under the 2002 Act, and September 2009, when they brought their proceeding, they rested inertly on the eligibility of their claim, and they attempted to shift forum twice. Whether that inertia, or those choices, are fatal depends on what the law permits or denies and not on any wider more discretionary response.

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[1] *Chee v Stareast Investment Limited* HC Auckland CIV 2009-404-5255, 1 April 2010; *Arakelian v Auckland City Council* HC Auckland CIV 2009-404-8107, 11 May 2010.

Eligible claim

[27] There is, on this appeal, no question that the claim Mr and Mrs Adams seek to pursue is one which, subject to s 60(5) and any provisions related, is a claim eligible for adjudication in the very basic sense that it is a claim within the purpose first of the 2002 and now of the 2006 Act:[2]

> ... 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.

[28] There is no question, secondly, that the claim Mr and Mrs Adams made under the 2002 Act was then deemed a civil proceeding for the purpose of any period of limitation.[3] Or that their claim was brought within time, if not as a claim in tort within six years, then as a building claim within ten years.[4] Or that when they filed their claim in 2002 time ceased to run for any limitation purpose; even the joinder of parties after a fresh claim against them would be time barred.[5]

[29] There is no question, thirdly, that on 1April 2007, the date on which the 2006 Act came into force and the 2002 Act ceased to have effect, Mr and Mrs Adams' claim remained good. As at that date it remained an eligible claim under the 2002 Act. It had not been 'withdrawn, terminated, or otherwise disposed of (for example, for resolution by a settlement agreement, or by an adjudicator's determination).'[6] The Tribunal had jurisdiction to consider it.[7]

[30] There is no question, fourthly, that in September 2009, when Mr and Mrs Adams brought their proceeding, their claim remained eligible for adjudication under the 2006 Act. They had not applied to withdraw it, an issue on which the respondents were entitled to be heard.[8] Nor, in initiating their proceeding, were they deemed to have withdrawn it, as would have been so had their claim then been before the

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2 Weathertight Homes Resolution Services Act 2002, s3; Weathertight Homes Resolution Services Act 2006, s 3.
3 Weathertight Homes Resolution Services Act 2002, s 55; Weathertight Homes Resolution Services Act 2006, s 37.
4 Limitation Act 1950, s 2A, s 4; Building Act 1991, s 90; Building Act 2004, s 391.
5 *Kells v Auckland City Council & Ors* HC Auckland CIV 2008-404-1812, 30 May 2008.
6 Weathertight Homes Resolution Services Act 2006, s 128(b).
7 Sections 134, 135, 139.
8 Weathertight Homes Resolution Services Act 2006, s 67.

Tribunal.[9] Nor had the Chief Executive terminated their claim on the basis that it was not being pursued.[10]

[31] Thus the issue becomes whether, because Mr and Mrs Adams did not apply to the Tribunal under s 62 to have their claim adjudicated, relying on the right conferred by s 60(1), until after their claim was struck out by this Court, s 60(5), as the Tribunal has held, bars them from applying. Or whether, even if s 60(5) is not a bar, election by estoppel, res judicata, or abuse of process bar them equally.

Section 60(5) bar and transfer and abandonment provisions

[32] The right to apply for adjudication under s 60(1) is subject to s 60(5); and it, so far as is relevant, says this:

> An owner of a dwellinghouse may not, ... 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 ...

[33] Section 60(5) on its face, as Mr and Mrs Adams say, only bars an application for adjudication, or an adjudication continuing, 'if, and to the extent that, the subject matter of the claim is the subject matter of" an existing parallel claim. Section 60(5) speaks in the present tense and conditionally. It does not also speak in the past tense or absolutely. On its face s 60(5) bars contemporary parallel claims but not sequential claims.

[34] Whether s 60(5) has that apparent effect is not, of course, to be resolved by looking at it alone. Regard must also be had to those provisions of the 2006 Act with which s 60(5) is linked, expressly or implicitly; those governing potentially first Mr and Mrs Adams' attempt to shift to this Court and then those governing their attempt

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9 Section 60(1).
10 Section 56.

to shift back to the Tribunal. Also, and finally, regard must be had to the purpose of the Act as a whole.[11]

Initiation of proceeding

[35] As to the attempt to shift to this Court, the only provision in point is s 119, which confers on the Tribunal a power of transfer to a Court of ordinary civil jurisdiction. It says this:

> The Tribunal may order a claim to be transferred to a District Court or the High Court in its ordinary civil jurisdiction if, in the Tribunal's view, it is more appropriate for a Court to determine the claim for all or any of the following reasons:
>
> (a) The claim presents undue complexity:
>
> (b) The claim presents a novel claim:
>
> (c) The subject matter of the claim is related to the subject matter of proceedings that are already before the Court.

[36] The question remains, however, whether s 119 comes into play where the claim made under the 2006 Act remains merely an eligible claim, not already the subject of an adjudication initiated concretely as s 62 requires.

[37] Section 119, like the other powers of transfer, lies in Subpart 9 of Part 1 of the 2006 Act, the 'miscellaneous provisions', which according to the 'overview' given in s 4(h) 'underpin the substantive provisions of Part 1'. Section 119 does not lie in Subparts 5, 7 or 8, which confer the Tribunal's powers to adjudicate. And Part 1 governs all claims from their inception, not just those for which there has been an application for adjudication under s 62.

[38] It seems to me, however, that the power of transfer can only sensibly be exercised by the Tribunal once it is seized of an application for adjudication. Its function is to adjudicate claims.[12] It does not begin to consider a claim until an application has been made.[13] Its powers assume an application.[14] It does not have

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11 Interpretation Act 1999, s 5.
12 Weathertight Homes Resolution Services Act 2006, s 57.
13 Section 65.
14 Section 73.

any wider responsibility to evaluate eligible claims not then the subject of an application for adjudication.

[39] Assuming that to be so, s 119 cannot have come into play when Mr and Mrs Adams began their proceeding, and their claim remained merely eligible. The inference has to be that they were then entitled, without the necessity for any order for transfer, to commence their proceeding. The more pertinent question may rather be what the effect of that was on their eligible claim. Section 61 is the only section in point. It defines the 'effect on other dispute resolution procedures' and it says this:

> (1) If a claimant who has applied to the Tribunal to have a claim adjudicated under this Act initiates proceedings of a kind referred to in s 60(5)(a) or (b) during the course of the adjudication, -
>
> (a) the claimant must notify the Tribunal; and
>
> (b) that notification is to be treated as a notice of withdrawal under s 67, and that section applies accordingly.
>
> (2) Nothing in this Act prevents the other parties to an adjudication from submitting any matter in relation to a claim to another dispute resolution procedure (for example, to the Courts, to arbitration, or to mediation).

[40] Section 61 confirms that, even where a claim is the subject of adjudication, a claimant may still elect without an order for transfer to turn to a Court of ordinary civil jurisdiction or to arbitration, but at a definite cost. The effect of doing so is to abandon the claim then subsisting under the 2006 Act. Here, too, s 61 says nothing, however, about the consequence for a claim that remains merely eligible. The inference has to be, in the absence of something specific, that such a claim remains eligible. On the face of it, therefore, Mr and Mrs Adams did not, by bringing their proceeding, forfeit the right, once their proceeding proved futile, to resume their claim.

Resumption of claim

[41] The question whether Mr and Mrs Adams could resume their claim depends also on s 60(6), which expressly qualifies s 60(5):

> Subsection (5) does not limit the power of any party to apply for proceedings to be transferred to adjudication under s 120 or agree that they be transferred under s 121.

[42] Section s 120 simply says that where a proceeding has been commenced in a Court of ordinary civil jurisdiction a Judge may on application, or himself or herself, order transfer. Section 121 permits transfer of an arbitral proceeding by agreement. Neither says more. Section 60(6) therefore, to my mind, adds only this. It affirms that a claimant may seek relief either by ordinary civil action or by a claim under the 2006 Act. It affirms that there can only ever be one claim subsisting. It affirms that, where the initial choice is a civil proceeding, the Tribunal may only assume jurisdiction by order of the Court or arbitral tribunal first seized. It cannot otherwise do so.

[43] Here, once again, Mr and Mrs Adams are able to say, however, notionally certainly, that they have no need for an order for transfer. Their claim, an eligible claim, already subsists and that entitles them to turn to the Tribunal and, if their claim is not barred by s 60(5), the Tribunal must resolve it. And so we come full circle.

Conclusions

[44] I conclude, therefore, and not without hesitation, that s 60(5) bars a claim for adjudication, when there is a subsisting parallel claim in a Court of ordinary jurisdiction. It does not bar an application after such a claim has been struck out, subject always to the doctrines of election, res judicata and abuse of process.

[45] I conclude, equally, that sections governing transfer and abandonment that apply to claims, the subject of an application for adjudication do not, on their face, apply to a claim that is merely eligible. Nor do they interrelate in such a way with s 60(5) in such a way as to suggest that, despite its language, it bars applications for adjudication where there is a past but spent civil or arbitral proceeding.

[46] The issue then becomes whether that is so offensive to the purpose of the Act, to provide relatively swift and inexpensive relief, that s 60(5) and those governing

transfer and abandonment ought still to be construed to capture merely eligible claims, because otherwise they might lie fallow indefinitely. Standing in the way of that conclusion, however, is s 56; the Chief Executive's power to terminate eligible claims that have not been pursued. The remedy the Act provides lies there.

Election, res judicata and abuse of process

[47] The final question is whether by electing to commence their proceeding in this Court Mr and Mrs Adams are barred from resuming their claim by application for adjudication by estoppel by election.[15] Or whether the decision of the Associate Judge to strike out that proceeding is conclusive for all purposes. Or whether Mr and Mrs Adams' attempt to resurrect their claim under the 2006 Act constitutes a collateral attack on that decision and is an abuse of process.[16]

[48] In this instance, I cannot see that by commencing the proceeding Mr and Mrs Adams are barred by estoppel by election from resuming their claim under the 2006 Act once the proceeding proved futile. By that choice of forum they made no election on which the respondents relied to their detriment. The respondents did not even become aware of Mr and Mrs Adams' claim against them under the 2006 Act, that had lain fallow since 2002, until they were served with the proceeding.

[49] Nor can I see that res judicata is engaged, or that there was any analogous abuse of process in Mr and Mrs Adams resuming their claim for adjudication. The general principles applying are as Elias CJ expressed them in *Lai v Chamberlains*:[17]

> In general, a decision of a Court can be challenged only by appeal to a superior Court. The principles of finality familiar to our law are rules of public policy based on considerations of fairness to litigants and the need to bring litigation to an end ... They are behind the substantive rules of res judicata which govern cause of action and issue estoppel. Those rules prevent a party to a final judgment challenging the decision in other proceedings between the parties or their privies.

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15 Laws of New Zealand, Estoppel at [71].

16 *Contact Energy Ltd v Attorney General* [2009] NZCA 35; *Johnson v Gore Wood & Co* [2001] 1 All ER 481, 490.

17 *Lai v Chamberlains* [2007] 2 NZLR 7, 36 at [58].

[50] As the Chief Justice then went on to say, those principles also underlie, in a broader way, the Court's inherent power to strike out proceedings as an abuse of process, especially where there is an attempt to obtain a result inconsistent with an earlier decision, or to raise issues that ought then to have been raised before such an earlier decision, even where the parties are not the same.[18]

[51] How far the two proceedings are exactly or sufficiently the same for this purpose can be crucial. The decision of the Court of Appeal in *Talyancich v Index Developments Ltd*[19] is a graphic illustration of how apparently similar cases may still be distinct from one another. There Turner J, whose subject this was, emphasised how closely the two cases said to be essentially indistinguishable must be compared and contrasted.

[52] In this case the Associate Judge gave his decision at a case conference. He struck out Mr and Mrs Adams' proceeding for the self evident reason that it was statute barred. It had been brought in this Court well outside the long stop limitation period in s 393 of the Building Act 2004; one issue that does not complicate Mr and Mrs Adams' claim under the 2006 Act. As the Associate Judge said himself, if Mr and Mrs Adams retained a live claim under the 2006 Act, their proper remedy lay there.

Conclusions

[53] I conclude that, despite the length of time that Mr and Mrs Adams rested inert on their claim under the 2002 Act, and despite their futile attempt to bring a proceeding in this Court, their claim remains eligible still for adjudication under the 2006 Act. Or, perhaps more accurately, I conclude, there is nothing to say that it does not. I conclude also that the fact that their proceeding was struck out has no bearing on that issue.

[54] I have reached this conclusion hesitantly because the respondents are right to say that the length of time Mr and Mrs Adams have taken to bring their claim to

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18 At [59].

19 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at [37] - [38].

hearing under the 2006 Act has been inordinate. The fact remains that they had, under s 393 of the Building Act 2004, or rather its predecessor, until March 2006 at least to bring their claim. Their claim, as the respondents accept, remained eligible for adjudication at least until September 2009. The delay of which the respondents are able to complain can only be the time that has passed since. It is significant but it is not completely inordinate.

[55] Nor can it be said that the respondents are any more prejudiced now than they were in 2009. The converse may well be the case. Until Mr and Mrs Adams began their proceeding the respondents were not aware of the claim that had been made against them, potentially anyway, in 2002. Nor were they equipped to respond to it. The respondents held back from having the proceeding struck out as time barred until they had completed discovery. In that sense they are now as well placed as Mr and Mrs Adams are.

[56] Mr and Mrs Adams succeed on their appeal. This is not a case, however, I consider, where they deserve costs. The issues that have had to be resolved by the Tribunal and on this appeal result from their inertia and their ill advised choices. They are not the creation of the respondents. I decline to make any order for costs.

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P.J. Keane J