IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-2623

UNDER	the Weathertight Homes Resolution Services Act 2006
BETWEEN	DARYN PETER MCDONALD Appellant
AND	LUCY NORMA STANLEY AND MELONIE JANE STANLEY AS TRUSTEES OF THE LUCY STANLEY FAMILY TRUST Respondents

Hearing: 6 September 2011

Appearances: J P Scott for the Appellant
D J Powell and W Wang for the Respondents

Judgment: 16 September 2011

JUDGMENT OF PETERS J

This judgment was delivered by me on 16 September 2011 at 4:45 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors:

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[1] The appellant appeals from a final determination of the Weathertight Homes Tribunal ("tribunal") dated 31 March 2011 ("the determination") in respect of a dwellinghouse in Mairangi Bay, Auckland ("house").

[2] The tribunal found:

(a) that the house had been damaged as a result of water ingress;

(b) that the appellant was contracted to provide and install an "EIFS" or "Fosroc" cladding system ("cladding system"), and that the appellant supervised the installation of the cladding system;[1]

(c) that the water ingress or leaks resulted, at least in part, from poor workmanship in the installation of the cladding system; and

(d) that the appellant was liable for the full amount of the claim of $332,897.00.[2]

Approach on appeal

[3] A party to a determination of the tribunal may appeal on a question of law or fact arising from the determination.[3] The approach to be adopted on the appeal is that described by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[4] The appellant bears the onus of satisfying the appellate court that it should differ from the decision under appeal. The appellate court may interfere with the original decision if it considers that it is wrong. The appellate court is required to make its own assessment of the merits but in doing so is entitled to take into account that the first instance decision-maker had the advantage of seeing the witnesses give evidence.

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[1] *Stanley & Anor as trustees of the Lucy Stanley Family Trust v North Shore City Council* [2011] NZWHT Auckland 20 at [86].
[2] Ibid, at [89].
[3] Weathertight Homes Resolution Services Act 2006, s 93.
[4] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4], [5], [13] and [17].

Grounds of appeal

[4] The appellant does not dispute the tribunal's findings of fact that the house leaked for the reasons given in the determination. The issues on appeal go to whether the appellant personally is liable to the respondents.

[5] The first ground of appeal is that the tribunal erred in finding that the appellant, rather than McDonald Textures Limited (struck off) ("the company"), was contracted to supply and install the cladding system. Alternatively, it is alleged that the tribunal erred in failing to consider whether the company, as opposed to the appellant, *may* have been the party contracted to supply and install the cladding system and that the tribunal erred in failing to make enquiries on this point before it made a determination of liability.

[6] The second ground of appeal is that the tribunal erred in finding that the appellant was liable to the respondents in negligence.

Background

[7] In 1998, Ms L Stanley and Mr R Jones purchased a section and engaged a third party to design a house. Mr Jones was working for Placemakers at the time. Amongst other things, this gave him access to different tradespeople and the ability to take advantage of a staff buying scheme in respect of building materials.

[8] Ms Stanley and Mr Jones obtained building consent for the house and proceeded to have the house built. Mr Jones transferred his interest in the property to Ms Stanley in 2001. Ms Stanley later transferred the property to the respondents.

[9] In 2004, Ms Stanley or the respondents sought a code compliance certificate from the North Shore City Council. The Council declined to issue the certificate pending remedial works in respect of a variety of matters. A lack of weathertightness became apparent and the respondents brought a claim in the tribunal. The case was heard between 8 and 10 February 2011. The appellant was

not represented at the hearing. The determination records that the appellant took no part in the hearing other than to give evidence.[5]

Contracting party

[10] I turn now to the appellant's first ground of appeal, namely that the tribunal erred in finding that the appellant, rather than the company, was contracted to supply and install the cladding system, alternatively in failing to make enquiry on the point.

[11] The relevant paragraph of the determination is as follows:[6]

> [86] I accept Mr Jones' evidence that Mr McDonald was contracted to provide and install the EIFS cladding system. This included the proprietary flashings that came with the cladding. Mr Jones kept detailed chronological records of all money spent on building the house. This together with his clear recollection of certain events on site established that it was Mr McDonald that was contracted to do this work and that he supervised the workmen on site.

[12] There is a preliminary point to determine at the outset and that is whether the appellant should now be allowed to advance a case that the company was the contracting party. This issue arises because the appellant did not advance this point before the tribunal. The respondents' submit that the appellant is bound by his conduct of the case at first instance and cannot be heard to say now that the company, rather than he, was the contracting party.[7]

[13] Counsel for the appellant does not dispute that the appellant failed to advance this point at the hearing. He submits, however, that the appellant must be given some leeway to advance a fresh ground, given that he was self-represented at the hearing.

[14] I have read the evidence which the appellant filed in the proceeding, comprising six short affidavits, some with exhibits, and his evidence in cross

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[5] *Stanley & Anor*, above n 1 at [87].
[6] Ibid at [86].
[7] *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 95; *Realtycare Corporation Ltd v Cooper* (1989) 2 PRNZ 426 and *Smith v Coker* HC Hamilton CP70/90, 7 March 1996 at 19-22.

examination. At no point in any of this evidence did the appellant suggest that the company had supplied and installed the cladding system. In summary, the appellant's evidence was that he had nothing whatsoever to do with the supply and installation of the cladding system on the house and that he had been wrongly associated with the work.

[15] I accept the respondents' submission that the point which the appellant now seeks to advance could have been advanced at first instance and that, as a matter of principle, the Court does not permit a party to raise a fresh ground on an appeal, other than in an exceptional case. As it turns out, I am not satisfied that the tribunal erred in the respects the appellant contends. Even if the position were otherwise, I would have been loathe to allow the appellant to pursue the point. His doing so would cause prejudice to the respondents and possibly other parties before the tribunal and, as I say, reliance on this ground is entirely at odds with the case the appellant advanced to the tribunal.

[16] In any event, given the view I take of the evidence, I propose to address the substance of this ground of the appeal.

[17] Counsel for the appellant relied on two aspects of the evidence in support of the submission that the company, and not the appellant, was contracted to supply and install the cladding system.

[18] The first piece of evidence comprised bank statements for the company's current account, which the appellant put in evidence and which he had annotated recording the relevant payers and payees. Before the tribunal, the appellant relied on the statements as evidence that he had not been associated with the work. The statements did not disclose any payment to Fosroc for the supply of the cladding system. The appellant also asserted, to the same end, that he had no record of the job in his work diary or invoice books.

[19] The second piece of evidence on which counsel for the appellant relied was evidence given by a Mr Redgrove. Mr Jones and Mr Redgrove worked together and were each building houses at the same time. Mr Jones' evidence was that he and

Mr Redgrove each contracted the appellant to supply and install their cladding system. Parts of Mr Redgrove's evidence suggested that he may have contracted with the company. Mr Redgrove produced a quote and a business card, both of which he had received from "McDonald Textures Ltd". He also produced photocopies of labels on tins of plaster addressed to "McDonald Textures" (no Limited).

[20] Counsel for the appellant relied on this documentation as evidence that Ms Stanley and Mr Jones contracted with the company, rather than the appellant.

[21] With respect to counsel for the appellant, I do not consider any such conclusion can be drawn. The fact that McDonald Textures Limited may have given a quote for the supply and installation of Mr Redgrove's cladding system is of only marginal relevance in identifying the party with whom Ms Stanley and Mr Jones contracted. The bank statements referred to above are evidence that the company existed but I do not consider they go further than that. The fact that the appellant operated a company does not preclude the possibility that, on this particular occasion, he personally contracted with Ms Stanley and Mr Jones.

[22] The parts of Mr Jones' brief of evidence which concern the case against the appellant (in contract and tort) are as follows:

> 42. The Fourth Respondent, Darren McDonald, was the plasterer that Lucy and I contracted to carry out the external plastering ... He was responsible for the installation of the external cladding and all associated flashings.
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> 43. ...
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> 44. Mr McDonald was recommended by Fosroc as the best applicator on the North Shore. Mr McDonald called in to Placemakers and spoke to [Mr Redgrove] and me when he picked up our plans to price both houses. Ultimately, we both contracted Mr McDonald to plaster both our houses.
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> 45. ...
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> 46. I am not sure whether Mr McDonald personally carried out any of the work, or whether it was wholly carried out by his staff. I do not know whether [Mr] McDonald subcontracted out the job. He never told me that he did.

> 47. When [the builder] told me that he was almost ready for the cladding to start, I telephoned Mr McDonald. He said he would go and inspect the property to ensure it was ready to start. He rang me back and told me he had been held up on a previous job ... and that as soon as his team was available he would get to start work on the house. ...
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> 48. There was a big team of workers doing the plastering. I know that he did visit the site to supervise the works. I bumped into him while I was delivering building materials. I specifically recall a meeting with Mr McDonald on site where he commented on the colour of the plaster we had tinted up called Sunrise Cream. Lucy and I had given Mr McDonald the formula we had devised for the colour we wanted, and he had ordered it for us. ...
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> 49. Mr McDonald agreed to be paid in cash for the job ... The first payment was for $7,000 prior to him starting the job, so that he could order the materials from Fosroc. I paid in cash at his home in Woodlands Crescent, Browns Bay. I went around after work. He said he did not have a receipt book. I was reluctant to pay cash without a receipt, so I asked him to write a receipt on the back of an envelope and sign it in front of me to acknowledge receipt of payment. ... I was happy to go ahead with Mr McDonald because he had already completed the plastering of [Mr Redrgove's] house. Our house had been held up for about 8 weeks because of [the builder's] accident and a delay in obtaining resource consent from the Council.

[23] The receipt to which Mr Jones refers in [49] of his brief ("receipt") reads "Received $7,000 on 29/5/99 as part payment for polyclad system on house at [Mairangi Bay]." The appellant signed the receipt, making no reference to the company. Mr Jones gave evidence that his records showed a second payment of $8,500.00 to "Plaster Ext Darren" on 28 July 1999. There is no evidence of any receipt for this payment.

[24] Mr Jones also said in his evidence:

> 53. I have been in touch with Fosroc ... and they have confirmed to me that there is a 5 year coating warranty issued to Mr McDonald in respect of [the house] on 3 August 1999. However, they would not give me a copy as it is a contract between them and Mr McDonald. They said I would have to go through Mr McDonald to get it.

[25] In response to questions from the tribunal, Mr Jones gave evidence as follows:[8]

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[8] *Stanley & Anor as trustees of the Lucy Stanley Family Trust v North Shore City Council* Transcript of Hearing at page 269.

Q. Just going on from those questions that [counsel] was asking you, Mr Jones, you were saying that Mr McDonald's the one you contracted. From your memory did he actually carry out the work, or ... ?

A. He, from my memory, he had employers (sic) that were working for him. Daryn [the appellant] went to the site, I believe and inspected the site when the house was wrapped, to ensure that everything was ready to go for his guys to come on to actually take out the cladding of the house. So there was a delay so that delay was when Daryn phoned me and said the weather had held him up on another job and that he would get his guys around as soon as he could to start [the] work.

[26] Turning to the appellant's evidence, in his affidavit of 12 April 2010, the appellant stated that he had no record of the job, no memory of or quote for the job and no correspondence for the job. The appellant said "I state categorically that I did not do this job." Likewise in his affidavit of 19 May 2010. The appellant said "I was not the installer or plasterer that did this job, I did not lay a hand on this job".

[27] In his affidavit of 5 July 2010, the appellant suggested that Mr Jones may have contracted directly with one or more of the subcontractors the appellant often engaged. The appellant denied that he asked Fosroc to issue a warranty but he did not deny the warranty (which was not in evidence) was in his name. The appellant maintained that he had been wrongly associated with the job. The appellant's affidavits of 29 July 2010 and 14 October 2010 were to the same effect. In his affidavit of 14 October 2010, the appellant gave evidence that it was possible someone had forged his signature to the receipt.

[28] There was a change in the appellant's affidavit of 19 January 2011, when the appellant said:

> I did not work on these homes [the respondents' and Mr Redgrove's], I did not supervise any work on these homes and I did not profit from the cladding or plastering work on these homes. I may have put forward names for the labour content of these jobs. I sold/supplied materials only for these jobs.

[29] At the hearing the appellant gave evidence that his affidavits were true and correct, that he had no recollection of doing the work and that he always engaged subcontractors to work on jobs. The appellant accepted that he had received some

payment from Mr Jones but said the payment was for materials only. The appellant continued to deny that he had signed the receipt and denied that he had ever been involved in a "cash" job.

[30] The appellant also stated that he had teams of people that he arranged to do work, and that he routinely engaged one worker in particular whom all concerned recalled as having been on site. The appellant maintained, however, that he had not organised labour for the job and he denied supervising the job. The appellant's evidence was that he would have been on site only to make sure the subcontractors had sufficient materials and in connection with the tinting of the plaster.

[31] The tribunal's assessment of the appellant's evidence was as follows:

> [87] Mr McDonald chose not to take any part in the hearing other than giving evidence. I did not find his evidence persuasive. In the documents provided prior to the actual hearing he submitted that Mr Jones may have independently contracted his subcontractors to carry out this work. There is no evidence to support this. To the contrary the clear evidence is that the full amount was paid to Mr McDonald. Mr McDonald further submitted that he may have been used only as a means to get the material supplied. Again there is no evidence to support this. Mr McDonald's evidence at hearing was inconsistent and at times contradictory. It was also contrary to the documentary records that exist.
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> [88] Mr Jones' evidence in comparison was clear, consistent with the documentary record and with the other evidence before the Tribunal. Unlike Mr McDonald he could recall various events that happened including getting Mr McDonald to sign a receipt for a cash payment made. ...
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> [89] I am accordingly satisfied on the evidence presented that Mr McDonald was contracted to supply and install the EIFS cladding system. ...

Discussion

[32] The issue between the parties at the hearing was whether the appellant's evidence, namely that he had not been involved in this job beyond the supply of materials, was correct. That was the factual issue the tribunal was required to determine. The tribunal accepted Mr Jones' evidence and I consider it was correct in doing so.

[33] Mr Jones dealt with the appellant. The receipt was given by the appellant personally. The Fosroc warranty referred to above may have been relevant, but the power to obtain that document lay with the appellant. In my view, the tribunal's determination on this point was inevitable on the evidence available.

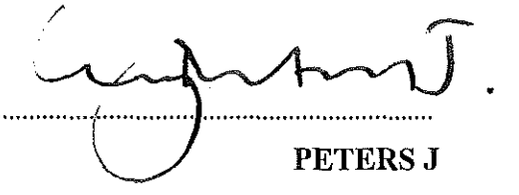
[34] I also reject the submission that the tribunal was obliged to enquire whether the company *may* have been contracted to do the work. Quite aside from the fact there was no evidence of the company's involvement with the installation of the cladding system, such an enquiry would have been entirely inconsistent with the case which the appellant advanced before the tribunal.

Liability in negligence

[35] Given the view I have reached on the appellant's contractual liability, it is unnecessary for me to consider the issue of the appellant's liability in negligence to the respondents.

Result

[36] I dismiss the appeal. The respondents, having succeeded, are entitled to costs on a 2B basis.



PETERS J