EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV 2014-004-001614
[2016] NZDC 19484

BETWEEN	SWEDISH TORP LIMITED Plaintiff
AND	ALAN STANDING First Defendant
AND	KEITH STANDING Second Defendant
AND	AUCKLAND COUNCIL Third Defendant
AND	CONQRA CONTRACTING (2005) LTD Fourth Defendant

Hearing: 27 September 2016

Appearances: Ms Amaranathan for Applicants (First/Second Defendants)
Mr Maloney for Respondent (Plaintiff)

Judgment: 4 October 2016

DECISION OF JUDGE G M HARRISON

The application

[1] The plaintiff company owns a property at 52B Silverton Avenue, Wai O Taiki Bay, Auckland. Its two directors now apparently reside in Sweden.

[2] The plaintiff proposed the relocation of an existing house on to a block basement to be built on the property. In March 2008 the plaintiff (STL) engaged the first defendant to undertake the drainage works on the property commencing with replacing the concrete public sewer main pipe with a vitclay pipe as required by Council regulations when a building was being constructed over a sewer main. The

second defendant is the first defendant's son and assisted his father with some of the drainage work.

[3] After completion of the work and at times of torrential rain the downstairs area of the dwelling flooded, causing damage for which STL now seeks to recover.

[4] The Standings now apply to strike out the claim against them. Neither the third nor fourth defendant took part in the hearing.

[5] On 13 September 2013 Ross Parton, one of the directors of STL, made complaints against Alan Standing to the Plumbers Gasfitters and Drainlayers Board (the board) under s 90 of the Plumbers Gasfitters and Drainlayers Act 2006 (the Act).

[6] The Registrar appointed an investigator pursuant to his obligation to do so under s 91. Section 92 provides that the investigator must determine whether in his opinion the complaint should be considered by the board and report his findings to the board.

[7] The investigator has extensive powers including to enter land and premises for the purpose of inspection and inquiry, and may serve written notice on any person requiring the production of documents or any information that the investigator might require.

[8] Mr FC Jones, the investigator, reported to the board on 4 February 2014. He recommended that the complaint should not be considered by the board. He determined that no fault could be attributed to the work of the Standings which complied with the New Zealand Building Regulations, and was inspected and passed.

[9] Mr Parton was dissatisfied with this decision. He asked for it to be reviewed and the investigation was reopened on 24 March 2014. Mr Jones again conducted the investigation, this time directed specifically at –

(i) Mr A Standings awareness and involvement with the setting of the levels.

(ii) Mr A Standing's awareness and involvement with the additional storm water flooding sewer main.

(iii) Mr A Standing's knowledge and/or instruction to install a non-return valve prior to the flood.

[10] In his final report dated 6 June 2014 Mr Jones concluded that Mr Standing was not at fault in any respect. He determined that the complaint should not be considered by the board.

[11] The first investigation was carried out over a period of four and a half months and included obtaining information from all interested parties, the interviewing of other witnesses and the researching of Council records. The second investigation took place over a period of approximately eight weeks and involved interviewing both Alan and Keith Standing, Mr Parton and three other people not previously interviewed.

[12] The reports were prepared after in depth investigation and analysis and in accordance with the requirements of the Act.

[13] Section 162 provides that any person dissatisfied with a specific decision may appeal to this Court. Section 162(1)(f) provides that one of the decisions that may be appealed is a decision under "sub Part 1 of Part 3". This includes s 100(2) which includes a decision by the investigator not to refer the complaint to the board. Neither Mr Parton nor STL exercised its right of appeal. STL then commenced proceedings against Alan Standing and Auckland Council in the Disputes Tribunal which was transferred to this Court.

Is there an issue estoppel?

[14] The plaintiff does not oppose the strike out application on the grounds that the facts at issue before the investigator are different from the facts at issue before the Court in the current claim.

[15] The application is advanced on the basis that the claim in this Court amounts to an abuse of process and should be struck out accordingly.

[16] My researches have located the decision of the English Court of Appeal in *Christou v Haringey London Borough Council* [2014] QB 131. This was a case based in employment law where the claimants were employed by the local authority as social workers. A child for whom the claimants had responsibility died and the claimants were subsequently subjected to disciplinary proceedings. The claimants were given written warnings but maintained their employment. Fresh disciplinary proceedings were later commenced against them and they were summarily dismissed for gross misconduct. They brought claims for unfair dismissal on a number of grounds and, relevantly for this matter, on the ground that they had already been disciplined once for the same matters and should not have been subjected to double jeopardy. Subsequent appeals were unsuccessful, leading to the appeal to the Court of Appeal.

[17] Lord Justice Elias, who delivered the unanimous decision of the Court, said:

> [39] The doctrine of res judicata provides that where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision save on appeal. A party can set up an estoppel against his opponent to prevent him from seeking to reopen what has already been determined. This is a rigorous rule with few exceptions (fraud is one).
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> [40] The twin principles underlying this doctrine have been often espoused: they are the need for finality in litigation and that a party should not be vexed by being twice subjected to the same litigation. …

[18] The plaintiff accepts the defendants' formulation of the key issue for determination, being whether "there was a final decision by a New Zealand judicial tribunal of competent authority over the matter in question and over the parties to (or privy to) it".

[19] The plaintiff submits that the defendants' argument fails in two essential ways, firstly that the decision of the investigator was not a final decision by a New Zealand judicial tribunal of competent authority, and that it was not a decision over the subject matter of the litigation.

[20] In addressing the issue of whether the investigator held the necessary authority to make a binding decision, both parties referred to a decision of Williams J in *X v Y* [1996] 2 NZLR 196 in which he tentatively suggested in an obiter comment that the Medical Practitioners Disciplinary Committee was a judicial tribunal for the purposes of issue estoppel. It seems to me that the *Christou* decision puts the matter beyond doubt. Elias LJ goes on to say:

> [41] There is no doubt that some domestic tribunals set up by contractual agreement will constitute judicial bodies whose determinations will be judicial in the relevant sense. The leading textbook on the subject, Spencer Bower and Handley, *Res Judicata*, 4th ed. (2009), para 2.05 observes:
>
> > Every domestic tribunal including any arbitrator or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, Court order, or statute is a "judicial tribunal" for present purposes, and its awards and decisions conclusive unless set aside.
>
> (underlining added)

[21] Mr Parton and/or STL, having a commonality of interest, elected to engage the Plumbers Gasfitters and Drainlayers Board, and its investigator, and received two decisions concluding that the Standings were not at fault.

[22] I have underlined the word "statute" in the above quote because, clearly, the inspector was a person with authority to hear and determine a dispute by authority of the statute.

[23] I am satisfied therefore that the inspector fulfils the definition of being a "judicial tribunal".

[24] I am reinforced in that conclusion by *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, where the doctrine (of res judicata) was held to apply to a determination of a planning application. Lord Bridge of Harwick, with whom the other members of the appellate committee agreed, observed, at p 289, that the principle will apply:

> Where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right .. unless an intention

> to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

[25] Plainly that is the situation in this case. The Act has created a specific jurisdiction, which the plaintiff elected to trigger, for the determination of issues which establish the existence of legal rights. The inspector had the power to find that Alan Standing was at fault which would have established a legal right for STL to pursue remedies that flowed from that.

[26] In the *Christou* decision Elias LJ went on to conclude that in the appeal before her the exercise of the disciplinary power by the employer was not an adjudication, nor was it properly regarded as "determining a dispute". The Lord Justice concluded:

> [51] The critical question is not the formality of the procedures, but rather whether they operate independently of the parties such that it is appropriate to describe their function as an adjudication between the parties.

[27] Clearly in this case, the investigator was operating independently of the parties and his findings amounted to an adjudication between them.

[28] I therefore reject the plaintiff's first submission. But the matter does not end there. It must still be determined whether the inspector's decision covered the issues which are the subject matter of this litigation.

[29] Paragraph 48 of the amended statement of claim alleges essentially five respects in which the first defendant was liable for the damage caused by the flooding. The first is that Alan Standing did not install a non-return valve (NRV) but the report of the investigator of 6 June 2014 concluded that the failure to do so did not breach any mandatory provisions of the New Zealand Building Code and the inspector concluded that there was a breakdown in communication between Mr Parton and Mr Standing as to whether the NRV was to be installed by him. At p 157 of the defendants' bundle of documents (p 14 of the report) the investigator determines that Alan Standing had no input into the setting of levels for the drainage which was apparently confirmed by three independent interviewees. Paragraph 48(b)-(d) of the amended statement of claim all related to the setting of correct levels and at p 158 (p 15 of the report) the investigator determined "Mr A Standing had no

responsibility in setting levels". Paragraph 48(e) of the amended statement of claim alleges that Mr Standing deviated from Council approved plans by changing the direction of a London valve on the site without consent and deviated from Council approved plans. This was dealt with at p 120 (para 4 of the report of 4 February 2014) where the investigator accepted Mr Standing's explanation as follows:

> Mr Standing stated that originally the house junction he installed on the 225 mm sewer was right hand in accordance with the original drainage plan. This was later altered to left hand to enable 100 mm house foul water pipe to connect to the junction. Mr Standing informed the investigator that the position of house drainage was different to the original information. Rather than passing over the sewer it was at a lower level.

[30] At paragraph 27(d) of his report the investigator said:

> Mr Standing was asked to replace this junction by Mr Parton. He was instructed to change this from right hand as originally installed to left hand to enable house foul water line to be coupled to sewer junction.

[31] The final allegations of cl 48(f) and (g) are less specific but the important finding of the investigator was that Mr Standing's work was inspected and passed by Council. In my view that effectively determines those two issues.

[32] As far as Mr Keith Standing is concerned, the allegations against him are essentially the same as those against his father, and he is entitled to the benefit of the investigator's findings to the same extent as his father.

[33] The plaintiff has not identified any issue that requires determination in the proceedings in this Court that was not otherwise dealt with by the investigator in his two reports. Consequently, I am of the view that all issues raised against the Standings were determined by the investigator.

Res judicata/abuse of process

[34] Ms Amaranathan advanced the case for the Standings on the basis that the proceeding in this Court was an abuse of its process. That is not necessarily so because a litigant estopped from proceeding by the application of the doctrine of res judicata has not necessarily committed an abuse of the process of the Court.

[35] Lord Justice Elias dealt with this dichotomy in the *Christou* case by referring to a decision of Lord Millett in *Johnson v Gore Wood and Co* [2002] 2AC 1, 58-59. The distinction lies in his Lordship's following statement:

> While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law applicable in all save exceptional circumstances, the doctrine now under consideration (of abuse of process) can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression.

[36] Lord Justice Elias concluded:

> [56] In fact I do not think that it (the doctrine of abuse of process) is strictly applicable in a case of this kind any more than the doctrine of res judicata. Essentially they are related doctrines operating in the area of adjudication. But it is perhaps of little moment whether this doctrine applies or not.

Conclusion

[37] In the end, the Standings can set up an estoppel against STL by reason of the prior determination of the same issues by a judicial tribunal. For the reasons I have given they are entitled to do so and the causes of action against them are struck out.

[38] The position of the third and fourth defendants is uncertain. The claims against them are referred to a case management conference.

[39] The first and second defendants having succeeded, it follows that they are entitled to costs assessed on a 2B basis against the plaintiff. In the case of disagreement I reserve leave on this issue for memoranda to be filed.

G M Harrison
District Court Judge