IN THE WEATHERTIGHT HOMES TRIBUNAL

CLAIM NO. TRI-2008-101-000107

BETWEEN	**BLAIR COUSINS** Claimants
AND	**PLASTER SYSTEMS LTD** First Respondent
AND	**INVERCARGILL CITY COUNCIL** Second Respondent
AND	**WESNEY & DUFFY LTD NOW OMEGA ALUMINIUM SOUTHLAND LTD** Third Respondent

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PROCEDURAL ORDER 3

Dated 23 January 2009

Background

1. The first respondent is a supplier, inter alia, of a cladding product being the "Insulclad" cladding used on this property.

2. The claimants decided to upgrade their 1950's house in Bluff. The claimant, Mr Cousins was the designer and undertook much of the building work. He subcontracted out some work to sub trades.

3. The cladding system was installed by a Mr Payne, an accredited installer of the Insulclad cladding system. He is now deceased. This claim is against the manufacturer of the system.

Grounds for removal

4. S.112 of the Weathertight Homes Resolution Services Act 2006 (hereinafter referred to as ''the Act") provides:

> **112 removal of party from proceedings**
>
> (1) The tribunal may, on the application of any party or on its own initiative, order that a person be struck out as a party to adjudication proceedings if the tribunal considers it fair and appropriate in all the circumstances to do so.

5. The first respondent had applied for removal from the proceedings and makes various submissions on what amounts to "fair and appropriate in all of the circumstances" pursuant to s112.

What are the criteria for removal?

6. The criteria for joinder was traversed by Harrison J. in *Auckland City Council v WHRS and Dennerly,* High Court, Auckland Registry CIV-2004-404-004407,

28 September 2004. (Although considering the provisions of the 2002 Act, the wording is identical to that in the 2006 Act.)

7. There do not appear to be any High Court decisions on removal under the Act. Mr Rea, counsel for the first respondent, submitted the underlying principles for joinder and removal are the same and the relevant statutory provisions (sections111 and 112) being couched in similar terms, with the discretion in s111 expressed as "*any reason*" that makes it "desirable" for a party to be joined. In *Dennerly* (supra) Harrison J at [29] noted that in relation to "desirability' criteria under s111, an adjudicator is to take in to account:

   - delay (caused in that case by joinder);
   - the amount of the claim at issue;.
   - liability for costs.

Factors as to what is fair and appropriate

8. The first respondent submitted that the following factors should be taken into account in assessing the fairness and appropriateness of the first respondent remaining a party:

   - the marginal nature of the claim against the first respondent;
   - the relatively small quantum of the claim ($17,734 quantified as against the first respondent);
   - the substantial costs likely to be incurred in order to defend the claim;
   - the limitation on cost orders in the Tribunal.

9. Mr Rea submitted that these broader factors were to be taken into account the Tribunal was not to be limited to High Court Rules criteria. The relevant High Court Rule is Rule 186 which provides:

   "186 Striking out pleading

   Without prejudice to the inherent jurisdiction of the Court in that regard, where a pleading –

(a) *Discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; or*

(b) *Is likely to cause prejudice, embarrassment, or delay in the proceeding; or*

(c) *Is otherwise an abuse of the process of the Court, -*

the Court may at any stage of the proceeding, on such terms as it thinks fit, order the whole or any part of the pleading be struck out".

10. The discretion given to the Tribunal under s.112 is wider than that set out in the High Court Rules. As a matter of simple construction the words *"fair and appropriate"* encompass but are not limited by the narrower strike out criteria set out above. The Tribunal accepts the first respondent's argument that the criteria for removal are analogous with but not identical to the principles applicable in strike out applications in the High Court/ District Court.

11. In coming to this conclusion the tribunal is following the decision of Justice Asher in *Kells v Auckland City Council and ORS*, High Court Auckland Registry CIV 2008-404-1812,30 May 2008 where His Honour stated:

"[33] Consistent with a claim under the act not equating to the filing of the civil proceedings in Court, a number of provisions illustrate that the approach to the joinder of parties under the Weathertight Homes Act is different to that in civil proceedings."

The "tenable evidence" test

13. In *Dennerly* (supra) at [28] the Court held there had to be " tenable evidence" of a party's alleged breach of duty together with evidence of a causative link to the estimated costs of remedial work required.

"Tenable" is defined in the Shorter Oxford as;

"Able to be maintained against attack or objection; defensible…"

14. Clearly tenability is one of the critical factor in determining if, in the circumstances, it is fair or appropriate to remove a party. However “untenable” does not require the party applying for removal to jump the bar of “will not succeed”. That is too high. And that is not what the Court held on the facts in *Dennerly* (supra). It would mean having parties put to expense when the case against them is at best tenuous. It runs counter to the purpose of the Act where the process is designed to be speedy and cost effective (S3).

15. In Weathertight Homes claims a major task of the adjudication process is the determination of the scope of any liability and its apportionment amongst liable respondents. Eligibility re weathertightness has already been determined by the Chief Executive pursuant to s.48 of the Act after a full evaluation of the assessor’s report. (This decision can only be reviewed by the Chair in accordance with s49). Once made the Tribunal does not have jurisdiction to revisit the issue at the adjudication hearing.

Evidential Foundation

16. In *Dennerly* (supra) Justice Harrison stated: “*a party for joinder would have to lay an evidential foundation”* [31].

17. Earlier at [27] His Honour said there had to be an arguable factual foundation to justify joinder. Equally where a party is seeking removal that party has to produce sufficiently compelling evidence to establish the claim against it is unlikely to succeed.

18. In this claim as in claims before the Tribunal the Tribunal has the advantage of the factual matrix set out in an experts report and usually well delineated by the assessor. In the words of s 31 of the Act, the assessor has ‘‘knowledge, skills and experience” and his/her report provides sufficient expert factual information to have enabled the Chief Executive, pursuant to S48 of the Act, to make his/her evaluation concerning eligibility criteria.

19. The Tribunal needs to weigh up a range of factors including, but not necessarily limited to:

(a) likelihood of success against the party seeking removal;

(b) the nature and quality of the evidence as to the liability for the leaks in the building, i.e. the "tenability" test;

(c) the relative significance of the allegations of breach of duty in the context of the overall claim;

(d) the possible amount of any award against the party applying for removal;

(e) the proportionality of that liability with the costs likely to be incurred;

(f) likelihood of delay (see *Kells* [48]);

(g) undue complexity caused by a proliferation of parties.

20. On the point of proportionality in *Dennerly* (supra), where the High Court declined to overturn the adjudicator's decision not to join the architect, the Court indicated a potential of attribution of fault of less than 50% liability for remediation could properly be taken into account. Justice Harrison stated:

> *"[28] A proposition that one or more of the other parties involved in the project **may** have owed and breached duties ..was insufficient to justify joinder. Council was bound to point the adjudicator to tenable evidence both of breach by the architects and of a causative link to the estimated costs of remedial work. A cursory evaluation of the assessor's report indicates that less than 50% of the remedial expense might possibly be attributable to architectural negligence."* (Emphasis added).

The Evidence

21. The evidence in this case concerning wathertightness is primarily contained in the two assessor's reports undertaken by Mr Faris of Faris Consulting Limited in March 2004 and October 2007.

22. Plaster Systems Ltd supplies cladding systems exclusively to applicators licensed by the company. At no point was it directly involved in the installation of the cladding system.

23. To justify the continuation of Plaster Systems Ltd as a respondent in this claim there needs to be evidence of a systemic failure of the cladding system itself. Neither of these reports indicates there has been such a failure. There has been no attempt to adduce such evidence.

24. Mr Rea referred to the Tribunal decision in *Osborne v. Greenlees & Ors* (TRI 2008-101-0063, 9 October2008) as to the nature of evidence required to support allegations of systemic product failure. These same criteria are applied here.

25. Each of the faults detailed in the two reports indicates problems as to weathertightness arose from applicator faults. For instance in the Assessors Report dated 24 June 2004, page 8 the assessor notes:

> "*When assessed against the standard detailing of Plaster Systems Insulclad cladding system data sheets the construction appears to differ especially as to cill* [sic] *and jamb*".

26. These comments were repeated in page 13 of the Assessors Report dated the 31 October 2007.

> *"As detailed under 5.3 of the original reporting, it is my view that neither the original cladding system or the subsequent remedial work have been carried out in compliance with Regulations E2 and B2 of the Building Act, or the requirements of NZS3604."*
> *"Further, it is my view that the installation of the cladding system is not in accord with the manufacturer's published specification data".*

27. There was an allegation against the first respondent that it owed a duty of care to the claimants to ensure that the licensed applicator, Mr Payne, had

adequate knowledge of the first respondent products. There is no evidence to suggest that Mr Payne did not receive the appropriate instruction from the company. In the absence of any evidence to support this contention the Tribunal, having some familiarity with the company requirements for licensing applicators infers appropriate instruction was given.

28. With regard to supervision, Plaster Systems Ltd expressly excluded itself from liability in the written guarantee given to the first respondent dated 19 October 1995, the provision being:

> *"The Material Components Guarantee" provided (inter alia):*
> *"On – site application beyond our control and Plaster Systems Limited can not guarantee workmanship or the correct preparation and application of its Insulclad system. The licensed Contractor will, on request, provide a separate guarantee for their workmanship."*

Mr Payne did issue a separate guarantee for workmanship.

29. The evidence is that the contractual terms between the parties expressly precluded liability for workmanship. The claimant's submission on this point fails.

30. The Tribunal finds the first respondent did not act in any supervisory capacity with regards to installation nor was it required to carry out an inspection. Whilst the applicator in this case was licensed by the first respondent he was not an employee of that company and remained an independent contractor.

Conclusion

31. What is the likelihood of success of a claim against Plaster Systems Limited? On the basis of the evidence outlined above it could only be described as extremely low. What was the nature and quality of the evidence indicating that company's liability for leaks, i.e. the tenability test? There was no evidence. Taking into account all relevant factors the Tribunal holds it is fair and

appropriate in all the circumstances to remove the first respondent from these proceedings.

DATED at Wellington this 23rd day of January 2009.

Christopher Ruthe
Tribunal Member