



SUMMARY

Case: Cousins v Plaster Systems Ltd & Ors – Procedural Order No. 3

File No: TRI 2008-101-000107/ DBH 00321

Court: WHT

Adjudicator: C Ruthe

Date of Decision: 23 January 2009

Background

The claimant upgraded his house in which he designed and undertook much of the building work himself. Some of the work however was subcontracted out to sub-trades. The first respondent, Plaster Systems Ltd, is a supplier of the cladding product used on the subject dwelling. Mr Payne installed the cladding (an accredited installer of the Insulclad cladding system – now deceased). Plaster Systems applied to the Tribunal to be removed from these proceedings pursuant to section 112 of the Weathertight Homes Resolution Services Act 2006.

Material Facts (in relation to the removal application)

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

The claimants' claim against Plaster Systems Ltd was that:

- Plaster Systems Ltd owed a duty of care to the claimants to ensure that the licensed applicator, Mr Payne, had adequate knowledge of their products.

Criteria for Removal

The discretion given to the Tribunal under section 112 in determining whether a party ought to be removed from the proceedings, is wider than that set out in Rule 186 of the High Court Rules. The words "*fair and appropriate*" in section 112 encompasses, but are not limited by, the narrower strike out criteria set out in Rule 186. The Tribunal therefore accepted the argument made on behalf of Plaster Systems Ltd that the criteria for removal are analogous with, but not identical to the principles applicable in strike-out applications in the District and High Courts.

In *Auckland City Council v WHRS & Dennerly*, Harrison J 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. The Tribunal must therefore weigh up a range of factors including, but not necessarily limited to:

- The likelihood of success against the party seeking removal;
- The nature and quality of the evidence as to the liability for the leaks in the building – ie the "tenability" test (as in *Auckland City Council v WHRS & Dennerly* – 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);
- The relative significance of the allegations of breach of duty in the context of the overall claim;

- The possible amount of any award against the party applying for removal;
- The proportionality of that liability with the costs likely to be incurred;
- Likelihood of delay (as in *Kells v Auckland City Council & Ors*)
- Undue complexity caused by a proliferation

Summary of Decision

- There needed to be evidence of a systemic failure of the cladding system itself. No such failure was pointed out by the two assessor's reports and there was no attempt to adduce such evidence. Instead those reports detailed that each of the faults that caused weathertightness issues arose from applicator faults.
- There was no evidence to suggest that Mr Payne did not receive the appropriate instruction from the company. In the absence of such evidence and in having some familiarity with the company's requirements for licensing applicators, the Tribunal inferred that appropriate instruction was given.
- Plaster Systems Ltd expressly excluded itself from liability in a written guarantee dated 19 October 1995. The contractual terms between the parties therefore expressly precluded liability for workmanship
- Plaster Systems Ltd did not act in any supervisory capacity with regards to installation nor was it required to carry out an inspection.
- Although Mr Payne was licensed as an applicator by Plaster Systems Ltd, he was not an employee of that company as he remained an independent contractor

Result

Taking into account all the relevant factors, the Tribunal held that it was fair and appropriate in all the circumstances to remove Plaster Systems Ltd from these proceedings.