IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2022-100-001

BETWEEN	**JAMES P COONEY & PAUL M DEMPSEY** Claimants
AND	**CHRISTCHURCH CITY COUNCIL** First Respondent
AND	**PAUL MAURICE FOLEY** Second Respondent (Removed)
AND	**KEITH IVAN MILNE** Third Respondent

PROCEDURAL ORDER 6
Joinder application
Dated 14 April 2023

Introduction

[1] The first respondent, Christchurch City Council, has applied to join Keith Ivan Milne as a respondent to this claim.

Principles applicable to joinder applications

[2] Joinder applications are made under s 111 of the Weathertight Homes Resolution Services Act 2006 (the Act). This section provides that the Tribunal may order a person to be joined as a respondent if it considers that:

(a) the person ought to be bound by an order of the Tribunal; or

(b) the person's interests are affected by the proceedings; or

(c) for any other reason it is desirable that the person be joined as a respondent.

[3] Harrison J in *Auckland City Council v Weathertight Homes Resolution Service* concluded that in order for a party to be joined to a Tribunal claim there needs to be tenable evidence of that party's alleged breach of duty together with evidence of a causative link to the estimated cost of remedial work.[1]

[4] Ellis J in *Yun v Waitakere City Council* accepted that it was appropriate for the Tribunal to consider and assess the evidence before it when considering applications to join new parties[2]. She noted that the Tribunal must perform an active gatekeeping role in terms of both the joinder and removal of parties to enable claims to be heard and determined in an expeditious and cost-effective way, subject to the requirements of fairness.

[5] In *Thomson v Christchurch City Council*,[3] Gendall J concluded that unless the proposition for joinder was "clearly wrong or unsustainable"

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[1] *Auckland City Council v Weathertight Homes Resolution Services* HC Auckland CIV-2004-404-4407, 28 September 2004.
[2] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[3] *Thomson v Christchurch City Council* HC Christchurch CIV-2010-409-2298, 28 March 2011.

(which would involve a close enquiry of all the surrounding factors), it would be premature to decline a joinder application.

[6] The test for joinder therefore illustrates that evidence showing tenability is essential in supporting an application to join a party. There needs to be both a factual and legal foundation for the claim made against the proposed party and where evidence is produced, the application for joinder is likely to succeed unless the claim itself is clearly wrong or unsustainable. This requirement is set out in the Chair's Directions for Standard Dwellinghouse Claims (August 2015) at [8.2].

Background

[7] This claim concerns alleged defects in an extension added to the claimants' house at 93 Taylors Mistake Road, Scarborough, Christchurch. The extension to the house was built in 2001–2002.

[8] The original construction is time-barred and is not part of this claim.

[9] The claimants purchased the property in 2010, signing an agreement for sale and purchase on 13 May 2010.

[10] The agreement was subject to a satisfactory pre-purchase building report.

[11] A report was obtained by the claimants from NZHIC (Christchurch) Ltd, (company number 2168813). That company traded under the name "The NZ House Inspection Company".

[12] NZHIC (Christchurch) Ltd was incorporated on 2 September 2008.

[13] In May 2010, the directors of that company were Rodney John Burrows and Keith Ivan Milne.

[14] NZHIC (Christchurch) Limited changed its name to Inspection Services (2015) Limited on 14 September 2015 and was removed from the Register of Companies on 1 March 2016.

[15] NZHIC (Christchurch) Limited issued a report on the claimants' property dated 17 May 2010. The author of that report was Keith Ivan Milne. The report is attached as Appendix D to the Council's application for joinder.

[16] The report notes:

- House is in generally good condition.
- Some cracks were noted to exterior cladding and repair is advised. Moisture levels where tested were good.
- House has been built in the style that has had problems with moisture ingress and regular inspection is advised with prompt attention to any defects found. Cracks noted should be repaired and repainting carried out when warranty expires.
- Levels [of moisture] were found to be – ok in all areas checked.
- Possible causes for moisture – not applicable.
- Further investigation recommended? – No.
- External structure and cladding – wall cladding – condition – generally good / comment – some cracks noted.
- External structure and cladding – flashings – condition – good / comment – appear sound.
- External window check – flashings – head flashing noted / comment – in good order.

[17] The report contains a number of limitations and exclusions. While mentioning some areas that may require maintenance, the report concludes that the property (or as concerns this application, the extension to the property), is relatively sound and does not warrant further investigation or raise significant concern.

[18] Three Assessor's reports have been issued in relation to this property as follows:

(a) An eligibility report dated 21 August 2012;

(b) A follow-up full report dated 4 November 2012;

(c) An addendum report dated 7 September 2022.

[19] The Assessors' reports identify a number of weathertightness defects present in the extension to the claimants' home. They include:

(a) The junctions between the addition's plaster and the existing dwelling have generally failed for weathertightness;

(b) Uncapped parapets have allowed moisture penetration and resultant decay;

(c) The mid-floor addition's en-suite roof (southwest elevation) junction with the original dwelling has been a source of leakage;

(d) The conservatory's addition to the lounge has leaked where it is abutted to the original dwelling;

(e) The roof above the music room has leaked at the junctions to the adjacent family room skylight;

(f) Balcony balustrade to wall junctions have leaked causing decay to wall framing in the storage shed below;

(g) Sill flashings have not been installed under the windows and have allowed moisture ingress resulting in decayed timber framing;

(h) The single outlet to the balcony has leaked causing decay to wall framing in the storage shed below;

(i) Roof water from the top roof and roof over bedroom 1 both discharge onto the balcony exacerbating the leak via the outlet.

[20] Following receipt of the pre-purchase inspection report by the claimants, they declared their agreement unconditional and proceeded to settle that purchase. There is, therefore, evidence of reliance on that report.

[21] Further detail of defects causing current damage to the property are set out at paragraph [8.2] of the Assessor's follow up report dated 4 November 2012.

[22] The Council note that the author of the pre-purchase inspection report was a director and shareholder of NZHIC (Christchurch) Limited at the time the report was provided. It goes on to note that Mr Milne is described as having "a minimum of ten years' experience in the building industry".

[23] Council makes the point, which is accepted, that the claimants could reasonably place reliance on Mr Milne's experience when receiving the report.

Discussion

[24] In this application there are two key issues. They are:

(a) Whether the report arguably failed to identify defects subsequently identified by the Assessors, whether the report should have identified those defects and do any such failures lead to a legal liability;

(b) Whether Mr Milne can be personally liable as either the director of NZHIC (Christchurch) Limited or the author of the report.

[25] The pre-purchase inspection report contains various exclusions or limitations, noting that, for example, invasive testing was not undertaken

and that items that are concealed, contained, inaccessible or cannot be seen due to walls, ceilings, floor installations, soils, vegetation, furniture, stored items, systems, appliances, vehicles or any other object will not be inspected or included in the report.

[26] The report records that it does not cover any buildings suffering from "rotting homes, leaky homes and toxic mould situations, areas that the inspector believes to be potential problem areas are checked with a non-invasive moisture meter". It notes that it can only detect rotting of framing by invasive testing which means removing the wall linings. This would not be done without the written consent of the owner. It is not in issue that such invasive testing was not done.

[27] It then goes on to note that:

> We will consider Weather Tightness, regardless of age; however it will not be measured against appendix A of the Standards or to E2/AS1 of the Building Code, Matrix and Evaluation, as this would be subject to a specialist report.

[28] The exclusions and limitations are somewhat contradictory or unclear.

[29] For present purposes it is arguable, based on the extent of defects identified by the Assessors in the three reports obtained by the claimants, that the report is negligent.

[30] Without expressing more than an initial view on the matter, it is arguable that the following defects identified in the Assessor's follow-up full report of 4 November 2012, could have and should have been identified or noted by the pre-purchase report. Reference is to paragraph [8.2] of that report. It is considered arguable that the following deficiencies should have been noted – deficiency A, B, C, D, E, F (if access to the roof was provided), G, H, I, J (if access to the roof was available), K, L, M, P and Q. In relation to those defects, many of them could have been identifiable from a visual inspection.

[31] This is not a case where the pre-purchase building inspector has been called to answer for defects which were only identified many years later. The prepurchase inspection report was obtained in May 2010 and

by August 2012 the claimants had an eligibility report from the Assessor raising significant and concerning issues. Many of those defects would have been in existence at the time the pre-purchase inspection was undertaken and it is arguable that many were readily identifiable on visual inspection.

Legal basis for joinder

[32] The Council considers that there are claims in negligent misstatement or for breach of the Fair Trading Act 1986.

[33] The Council effectively seeks an indemnity or contribution for any amount it is ordered to pay to the claimants pursuant to s 17(1) of the Law Reform Act 1936 and s 72 of the Act, as well as an award under s 43 of the Fair Trading Act.

[34] The situation is that the Council seeks an indemnity or contribution from Mr Milne for any amount it is ordered to pay the claimants despite there being no claim by the claimants against Mr Milne. The Council's claim against Mr Milne is based on the allegedly negligent or defective pre-purchase building inspection report.

[35] In relation to the negligent misstatement cause of action, the Council must contend that Mr Milne is liable as a concurrent tortfeasor with it. Hence, it is said that Mr Milne must be liable to indemnify or contribute to any losses for which the Council is liable under s 17(1) of the Law Reform Act and s 72 of the Act.

[36] The challenge on a negligent misstatement action is that the Council is unable to show that it relied on Mr Milne's allegedly negligent statements.

[37] These issues were canvased in *Wang v Auckland City Council*.[4]

[38] That decision held that the Council was able to seek a claim in contribution or indemnity under s 17 of the Law Reform Act,

[4] Procedural Order 5 (Application for Removal by Second and Third respondents), TRI 2017-100-0011 (21 February 2018).

notwithstanding that it was unable to show reliance by it on the report produced by a pre-purchase inspection company.

[39] Under s 17(1)(c) of the Law Reform Act, any tortfeasor liable for damage may recover contribution from "any other tortfeasor" who "would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise…".

[40] It would therefore appear that the Council can recover a contribution from Mr Milne (assuming his personal liability is established), whether or not Mr Milne was sued by the claimants directly.

[41] The allegedly negligent acts are different. Against Council it is alleged that it failed in its consenting, inspecting and certifying role as the relevant territorial authority.

[42] As against Mr Milne, it is alleged that his report was negligently prepared. The elements of the claim in negligent misstatement are arguably met, Mr Milne is arguably imposed with a duty of care when preparing the report for the claimants, the report was arguably negligent and the claimants arguably relied on it, causing them loss.

[43] Both parties allegedly committed different wrongs at different times, both wrongs causing harm to the claimants. However, under s 17(1)(c), they do not need to be joint tortfeasors.

[44] The liability of tortfeasors must, however, be in respect of the "same damage".[5] Hence, the fact that the wrongs were separate but caused the same damage to the claimants (being economic loss) is sufficient to provide a route to relief against Mr Milne as a contributor or indemnifier to the Council.

[45] In *Hotchin*, the learned Chief Justice observed that the "same damage" need not be "substantially or materially similar", nor need it arise out of the same circumstances or fault, nor be the same measure. Nor does it turn on the cause of action.

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[5] *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, per Elias CJ at [137]–[140].

[46] *Hepburn v Cunningham Contracts Ltd*[6] was a claim by a purchaser of a leaky home against an individual who provided a pre-purchase inspection report. That report was found to be defective. The purchaser's claim succeeded in breach of reasonable care (both in contract and tort) and under s 9 of the Fair Trading Act. In determining a fair measure of damage, the Court adopted the cost of repair which was higher than the diminution in value of the home.

[47] *Steel v Spence Consultants Ltd* was another case by purchasers against a company and an individual who prepared a pre-purchase moisture assessment report.[7] The claim was in negligent misstatement and under s 9 of the Fair Trading Act. The purchaser's claim succeeded under s 9 and would have succeeded in negligent misstatement, but for a disclaimer. The measure of damage was the diminution of the value of the house, which had already been sold.

[48] Accordingly, damages in leaky home actions can be awarded on a loss of value or a cost of repair basis, for negligence or negligent misstatement depending on what is regarded as fair.

[49] Applying the Chief Justice's test in *Hotchin*, I find that the harm to the claimants arising from the alleged breaches by the Council on the one hand and Mr Milne on the other, is in substance the same. There is the "same damage" here in terms of s 17(1)(c) of the Law Reform Act, so it would appear that the Council can seek contribution under that Act from Mr Milne.

[50] I find that Mr Milne could face a claim in contribution or indemnity from the Council arising from his alleged breach by preparation of an allegedly negligent pre-purchase building report. Such a finding provides the basis to conclude that there is a legally tenable cause of action against Mr Milne.

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[6] *Hepburn v Cunningham Contracts Ltd* [2013] NZHC 210.
[7] *Steel v Spence Consultants Ltd* [2016] NZHC 398.

[51] Under the Fair Trading Act, Mr Milne can also be liable for misleading and deceptive conduct.

[52] The Supreme Court in *Red Eagle Corp Ltd v Ellis*[8] addressed liability for misleading reports under s 9 of the Fair Trading Act. At [28] the Court stated:

> "It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected…Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation — that is, with the characteristics known to the defendant or of which the defendant ought to have been aware — would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed."

[53] Once a s 9 breach is established, the Court must then look at whether relief is available. Again, in *Red Eagle*, the Supreme Court said at [29]:

> "Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has

[8] *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20.

> been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage…"

[54] In the present case, the claimants' decision to declare their agreement for sale and purchase unconditional is sufficient to find that arguably they were deceived by the misleading report and so, damage arose from the impugned report.

[55] Whilst noting that s 9 of the Fair Trading Act should not be used as a general warranty or a remedy against decisions found in hindsight to be unwise,[9] in *Hepburn v Cunningham Contracts Ltd* the Court did hold that liability under s 9 could follow for a pre-purchase report that was misleading. Noting that the property was "generally in good condition" when it was not, was misleading in *Hepburn*.

[56] This Tribunal in *Punjab Knoll Body Corporate 88305 v Wellington City Council*,[10] held that pre-purchase inspectors owed a duty under s 9 of

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[9] *Hepburn v Cunningham Contracts Ltd*, above n 6 at [158], quoting *DeForges v Wright* [1996] 2 NZLR 758 (HC) at 764.
[10] *Punjab Knoll Body Corporate 88305 v Wellington City Council* [2014] NZWHT Auckland 9

the Fair Trading Act to exercise reasonable skill and care in undertaking inspections and reporting on those inspections.[11] A reasonably skilled and careful inspector should identify significant and obviously observable weathertightness faults and risk features, and in respect of faults identified, communicate the full implications of those faults and therefore the extent of the weathertightness risks associated with the dwelling.

[57] It follows that liability under s 9 of the Fair Trading Act can attach to misleading pre-purchase inspection reports that are reasonably relied upon by claimants. I hold that it is arguable that the claimants here reasonably relied on the pre-purchase inspection report from NZHIC (Christchurch) Limited.

Personal liability

[58] The report was issued by NZHIC (Christchurch) Limited and not Mr Milne personally. In order for the Council or the claimants to have a direct cause of action against him, there must be evidence that he assumed a responsibility to the claimants or had a special relationship with them such that the corporate veil may be pierced rendering him potentially personally liable.

[59] Although not addressed in its application, it is necessary to consider whether Mr Milne did assume such a responsibility to the claimants such that he was effectively the *alter ego* of NZHIC (Christchurch) Limited.

[60] In support of the proposition that a director cannot be personally liable is the decision in *Trevor Ivory Ltd v Anderson*.[12] There the Court of Appeal allowed an appeal by the director against a finding of personal liability and negligence against him. The Court of Appeal recognised the separate personality of the limited liability company and considered that a director or employee would not be personally liable unless there was an assumption of responsibility, actual or imputed. This could arise where the

[11] At [56]
[12] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

director or employee exercised particular control or control over a particular operation or activity.

[61] The Court considered that these issues would depend upon the facts of the individual case and the degree of implicit assumption of responsibility. The Court noted that a sufficient assumption of responsibility might have arisen had Mr Ivory undertaken to do the work himself.

[62] By contrast, in *Steel v Spence Consultants*, Mr Spence was found personally liable for a defective pre-inspection report. The Court found him to be the *alter ego* of the company, given his sole directorship, majority shareholding and personal involvement in the inspection and production of the report, albeit that he did so on the letterhead of the company.

[63] In *Morton v Douglas Homes Ltd*,[13] the Court held that the degree of control a director exerts over the operations of the company determines the likelihood their personal carelessness will harm a third party and, therefore, whether they are subject to a duty of care. This is a factual inquiry, determined on a case by case basis.

[64] These decisions show that it is not in every case that a company director will owe a personal duty of care, even if it is a one-person company.

[65] The *Steel* case is factually similar to the claim here and shows that a personal duty of care is possible. A material distinguishing feature of *Trevor Ivory* is that the director there did not personally undertake the negligent work. In *Steel*, the author was not only a director and shareholder, but had personally and solely inspected the property and produced the report.

[66] In the present case, Mr Milne is one of two directors, but he alone inspected the property and he prepared the report given to the claimants to enable them to consider whether to declare the agreement

[13] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

unconditional. He was directly involved in the provision of the company's services and the claimants arguably relied on them.

[67] The report includes the statement that:

> The client understands that the house inspector has had a minimum of ten years' experience in the building industry and has had specific training in the procedures of house inspections by [the company].

[68] It is arguable that Mr Milne assumed a personal responsibility to the claimants when he produced the report on behalf of NZHIC (Christchurch) Limited. The *Steel v Spence Consultants Ltd* line of authority is the appropriate one to apply in the present case.

[69] I therefore find that there is an arguable claim that Mr Milne owed a direct personal liability to the claimants when he produced the report on behalf of NZHIC (Christchurch) Limited. It is arguable that the claimants relied on Mr Milne's experience and skills, those experience and skills being reinforced in the body of the report itself. Whether in fact Mr Milne did assume responsibility sufficient to give rise to a personal duty of care will of course need to be determined at adjudication. There is, however, enough evidence at this initial stage of this claim to hold that there is a tenable claim against him that should be determined at adjudication.

[70] There is another potential statutory route to relief that supports the Council's application being granted. Section 72 of the Act states:

> **72 Matters Tribunal may determine in adjudicating claim**
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> (1) In relation to any claim in respect of which an application has been made to the Tribunal to have it adjudicated, the Tribunal can determine—
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> (a) any liability to the claimant of any of the parties; and
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> (b) any remedies in relation to any liability determined.
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> (2) In relation to any liability determined, the Tribunal can also determine—
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> (a) any liability of any respondent to any other respondent; and
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> (b) remedies in relation to any liability determined.

[71] In *Minister of Education v Warren and Mahoney Architects Ltd*,[14] Bell AJ said at [60]:

> … All those facing claims under [the WHRS Act] are respondents, whether they are cited by the claimants at the outset or added later under s 111 on the application of other respondents. All respondents, including those joined by other respondents, may be held liable to the claimants and accordingly all have solidary liability. In *Body Corporate 85978 v Wellington City Council* the court said:
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> > Certainly conceptually, the joinder of further claimants increases the size of the claims, whereas joinder of additional respondents introduces the prospect of spreading the same extent of liability between a greater number of liable parties.

[72] The Associate Judge did not cite s 72 of the Act, but presumably had s 72(1)(a) in mind, giving the Tribunal the power to determine any liability to a claimant of "any of the parties". In respect of any such liability, the Tribunal may then determine the liability of "any respondent to any other respondent".

[73] Notwithstanding the absence of a formal pleading of a claim by the claimants against Mr Milne, the Tribunal could find Mr Milne liable to the claimants and grant relief in favour of the claimants against him. If so, the Tribunal would have the jurisdiction to find Mr Milne liable to the Council, whether under the Law Reform Act or otherwise.

Conclusion

[74] I find that the Council has a tenable claim against Mr Milne for indemnity or contribution under s 17(1)(c) of the Law Reform Act and/or s 72 of the Act, based on a tenable claim by the claimants in negligent misstatement or for breach of the Fair Trading Act 1986. It is appropriate to join Keith Ivan Milne to this claim.

Consequences of joinder

[75] The Tribunal will serve on Mr Milne this Procedural Order and all other earlier orders of this Tribunal and all other relevant documents

[14] *Minister of Education v Warren and Mahoney Architects Ltd* [2015] NZHC 2724.

concerning this claim including the WHRS Assessor's reports. A telephone case conference is scheduled for 9:30 am on 18 May 2023.

DATED this 14th day of April 2023

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P R Cogswell
Chair
Weathertight Homes Tribunal