IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000102
[2014] NZWHT AUCKLAND 1

BETWEEN	**KENNETH ASHLEY MILNE & GILLIAN PATRICIA MILNE & UNIT OWNERS OF 10-13** Claimants
AND	**KAPITI COAST DISTRICT COUNCIL** First Respondent
AND	**RAYMOND JAMES BARRY CLEVELY** Second Respondent
AND	**KAPITI COATINGS LIMITED** Third Respondent
AND	**RA 1986 LIMITED** Fourth Respondent
AND	**COMESKY GRANT ARCHITECTS LIMITED** Fifth Respondent
AND	**W HARRIS BUILDERS LIMITED** Sixth Respondent
AND	**WILLIAM HARRIS** Seventh Respondent
AND	**DONALD DRING** Eighth Respondent
AND	**STOANZ LIMITED** Ninth Respondent
AND	**PROTECH ROOFING LIMITED (Removed)** Tenth Respondent
AND	**TILE "N" STYLE LIMITED** Eleventh Respondent
AND	**ALISTAIR BEATTIE** Twelfth Respondent
AND	**GARY KOORNNEEF** Thirteenth Respondent

AND	**TREVOR WALKER** Fourteenth Respondent
AND	**WAYNE CORNELIUS** Fifteenth Respondent
AND	**STEPHEN GOODFELLOW GRANT** Sixteenth Respondent

DETERMINATION ON COSTS
(Application by Protech Roofing Limited, the Tenth Respondent,)
Dated 11 March 2014

Introduction

[1] In December 2013 the claim was settled by the relevant parties signing a settlement agreement. This followed a mediation held on 26 November 2013.

[2] The tenth respondent, Protech Roofing Limited (PRL), was not a party to the settlement agreement. In Procedural Order 13 dated 19 December 2013, the Tribunal granted PRL's application for removal.

[3] Two of the directors of PRL, namely Anna Clisby and David Clisby, signed the settlement agreement, but in their capacity as partners of the DL and AL Clisby Partnership. That partnership is a separate and distinct legal entity from the company, PRL.

[4] PRL now seeks costs against the first respondent, the Kapiti Coast District Council, pursuant to s 91 of the Weathertight Homes Resolution Services Act 2006 (the Act). PRL contends that the claim against it was never capable of success because the company had not been incorporated at the time that the alleged negligent construction work was carried out and it never had any involvement at all with construction.

Relevant Law

[5] Section 91(1) of the Weathertight Homes Resolution Services Act 2006 provides that:

> **91 Costs of adjudication proceedings**
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> (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
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> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.

> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[6] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily. This presumption is only overcome if either bad faith or allegations that lack substantial merit have caused unnecessary costs or expenses to a party.

[7] In *Trustees Executors Ltd v Wellington City Council*[1] Simon France J observed that:

> [66] In policy terms, whilst one must be wary of establishing disincentives to the use of an important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
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> a) unnecessary expense; has been caused by;
> b) a case without substantial merit.
>
> [67] I see no reason to apply any gloss to the legislatively struck balance. The outcome in this case should not be seen as sending any message other than that the Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary cost to others through pursuing arguments that lack substantial merit.

[8] His Honour considered that meeting a threshold test of no substantial merit "must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still discretion to be exercised."[2] The important issue is whether the weakness of the case was apparent and whether litigation was pursued in defiance of common sense.[3]

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[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[2] Above n 1 at [51].
[3] Above n 1 at [52].

[9] In *Clearwater Cove Apartments Body Corporate No 170989 v Auckland Council*[4] the High Court approved the Tribunal's observation in *Phon v Modern Home Developments Ltd*[5] that the bar for establishing "substantial merit" should not be set too high. The Tribunal should have the ability to award costs against a party making allegations which that party ought reasonably to have known they could not establish.

The case for PRL

[10] PRL notes that the Council has been a party to the claim from its commencement and represented throughout by lawyers. It made its application to join PRL after the first case management conference in which it was pointed out that PRL had not been incorporated at the time of the construction of the relevant units.[6] At all times, the details of the publicly available certificate of incorporation, which establishes the date of PRL's incorporation as 9 December 2006, should have been known to the Council and its advisors.

[11] The construction of the Marine Parade Apartments was completed in 2003. Thus, it should have been obvious to the Council, had it done some elementary homework, that PRL could never have been liable for the defects in construction as alleged by the claimants.

[12] PRL contends that the fact that the partnership DG and AL Clisby Partnership trading as Protech Roofing ("the Clisby Partnership") undertook the roofing work at the Marine Parade Apartments, is entirely irrelevant to the application for costs. PRL is a separate legal entity, and the costs it has incurred "are its alone".

[13] PRL has three directors and three shareholders: Anna Clisby, David Clisby and Benjamin Clisby. Benjamin Clisby was never a partner in Clisby Partners. If the Tribunal were to take into account the potential claim against Clisby Partners when determining whether to award costs in favour of PRL, it would be causing the three directors and shareholders, one of

[4] *Clearwater Cove Apartments Body Corporate No 170989 v Auckland Council* [2013] NZHC 2824.
[5] *Phon v Modern Home Developments Ltd* [2011] NZWHT Auckland 24.
[6] Procedural Order 1 at [5].

whom was never a partner of Clisby Partners, to take on the untested legal liability of the partnership, the essence of injustice.

[14] PRL further notes that its directors made the Tribunal and the Council aware that PRL had been wrongly joined to the claim. Those directors volunteered the information as to who actually carried out the roofing work, despite having no legal obligation to do so.

[15] PRL contends that despite being on notice that PRL could not possibly have any liability, the Council did not apply to have the company, PRL, removed from the claim. Instead it applied to join David and Benjamin Clisby joined as partners of Clisby Partners. Again, the Council named the wrong party.

[16] In a memorandum filed with the Tribunal dated 18 November 2013, the Council stated that "depending on when the roofing work was undertaken, it may be that the earlier partnership is the appropriate party".

[17] In its pre-mediation response to the claim dated 21 November 2013, the Council maintained its allegations against PRL. It was not until a subsequent removal application was made by PRL that the Council conceded the point and did not object to the Tribunal granting an order for removal.

[18] Against that background, PRL contends that it has incurred costs unnecessarily and that the threshold in s 91 of the Act has been met. PRL seeks indemnity costs of $6,102, or alternatively increased and/or scale costs. In its reply submissions dated 7 March 2014, PRL accepts that scale mediation costs are not claimable.

The case for the Council

[19] The Council says that PRL has not met the threshold in s 91 – that is, it is not established that PRL incurred costs unnecessarily as a result of the allegations made by the Council that were without substantial merit. The costs incurred did not relate to PRL but rather to the directors of the company in their capacity as partners of the Clisby Partnership. The

partners admitted their role in the construction of the roof. It would be wrong to allow PRL to obtain costs against the Council via the "backdoor".

[20] The Council submits that in its cost schedule PRL has conceded that some of the costs incurred relate to the Clisby Partnership and not PRL. The Council contends that the balance of the costs were not costs unnecessarily incurred by PRL. Instead, such costs were incurred by the Clisby Partnership in opposing the application for its joinder, preparing for and attending at mediation to resolve the claim, participating in subsequent negotiations and then entering into a settlement agreement.

[21] The Council also notes that the costs schedule includes costs of preparing and attending mediation on behalf of the partners of the Clisby Partnership, PRL and the twelfth respondent. Neither the District Court Rules nor the High Court Rules provide for costs associated for preparing for and attending a mediation. Mediation is a voluntary process and there is no good reason for such costs to be recoverable in the Tribunal.

[22] The Council says that at best the costs claimed are for the account of the Clisby Partnership and the allegations against the partnership were not unjustified. The Partnership did carry out the roofing work and there was tenable evidence to support the contention that the work was defective and caused moisture ingress.

Analysis

[23] As the Tribunal noted in Procedural Order 12,[7] the fact that PRL was not incorporated at the time of construction ought to have been identified at the time the Council made its application for joinder of the company. However, when the Council did subsequently become aware that PRL could not have any legal responsibility, it took steps to join the partners to the claim.

[24] I accept that the Council did not seek to have PRL removed once it was on notice about the issue of the date of incorporation and that the Council again acted incorrectly in failing to accurately name the relevant partners involved in construction. However, I do not accept that these

[7] Procedural Order 12 dated 20 November 2013 at [5].

failings[8] led to any unnecessary costs being incurred by PRL. These matters are essentially irrelevant.

[25] PRL did not engage its legal advisors until relatively late in the piece and after Mrs Clisby had discovered the issue of the date of incorporation. Given the nature of the disclosures made by Mrs Clisby (i.e. that the Clisby Partnership undertook the roofing work at the apartments) it must have been obvious to the solicitors from the time they were engaged by Mrs Clisby (whether on behalf of PRL or otherwise), that the liability of the partners of the Clisby Partnership was a fundamental issue to address. Any costs incurred from the time of engagement would in all likelihood have related to the real issue of the liability of the partnership rather than the side issue of the ongoing involvement of PRL.

[26] The fact of the disclosure made by Mrs Clisby is of direct relevance to the application for costs and the assertion to the contrary made by counsel for PRL is, in my view, incorrect. Once the Council was on notice of the role of the partnership in construction it must have been obvious to all that the Council were going to pursue the partners and to seek to hold them liable for defects in construction of the roof. While it may have been entirely legitimate to seek to have PRL removed, it would surely have been a priority for the solicitors to have given Mrs Clisby advice about any liability she and Mr David Clisby had as partners in the Clisby Partnership. It is clear that the partners were given legal advice; they were ultimately a party to the settlement agreement. I acknowledge that at the time of the mediation the partners of the Clisby Partnership were not parties to the proceedings. However, as the Tribunal noted in Procedural Order 12 dated 20 November 2013 the mediation provided an opportunity for discussion of the issue of the identity of the party responsible for the roofing and to seek a resolution.[9]

[27] In my view the threshold in s 91 has not been met. Costs were not unnecessarily incurred as a result of PRL being wrongly named as a party in the first instance. I accept the submission of the Council that the costs claimed must relate principally to advice given to the directors of PRL in their capacity as partners of the Clisby Partnership. These costs, which relate in

[8] It is by no means clear that it was incumbent on the Council to seek to have PRL removed but it is not necessary for me to rule on that issue.
[9] Procedural Order 12 (Application for Joinder of Mr Benjamin Clisby and Mr David Clisby) dated 20 November 2013.

substantial measure to preparation for and attendance at mediation, were not incurred unnecessarily by PRL. I note in this regard that the solicitors engaged by PRL and/or the Clisby Partnership were not engaged until after PRL's first removal application had been determined.[10] Neither the Council nor PRL appears to have been aware at that stage of the issue of the date of incorporation.

[28] In its submissions in reply dated 7 March 2014, PRL denies the allegations made by the Council that the partnership attended the mediation. PRL contends that all advice was given to the directors as directors of PRL. However, it is clear from the narrative provided, that a substantial proportion of the time spent by the solicitors related to addressing the substantive issue of liability. When the solicitors were first approached by Mrs Clisby, PRL had an unassailable defence. I accept that the solicitors would have needed to spend some time addressing that issue (i.e. confirming and satisfying themselves that PRL did have such a defence), but once that relatively simple issue had been clarified then there would have been little point in incurring further costs on behalf of PRL. The complicating factor and the substantive issue to be addressed was the liability of the partners. Even though the initial application to join the partners was refused (principally because of the late stage of the application),[11] from the time the solicitors were first engaged, and throughout November and December 2013 when the mediation and settlement took place, the liability of the partnership must, as the Tribunal understands it, have been the live issue.

[29] Even if I am wrong in my analysis, so that it could be said that some costs were incurred unnecessarily by PRL as a result of it being wrongly joined in the first instance, I would exercise my discretion to refuse an award of costs. In a multi-party claim such as this one it is perhaps inevitable that issues will arise as to the correct legal entity which should be named as the respondent party in these proceedings. This must be particularly the case when the events at issue took place some considerable time ago. The Council did not investigate matters as thoroughly as it should have but that is not the test for an award of costs. It cannot be said that the Council's pursuit of the partners of the Clisby Partnership lacked substantial merit;

[10] Procedural Order 11 dated 15 October 2013.
[11] Procedural Order 12 dated 20 November 2013.

there was an arguable case that the partners of the Clisby Partnership had some liability.

[30] I accept that Mrs Clisby was under no obligation to disclose the information about the role of the partnership in construction. To her credit, she elected to do so. Ultimately, this probably resulted in an expedited resolution of the proceedings. However, none of those factors establish that costs were unnecessarily incurred by PRL.

[31] For all of the above reasons, the application for costs by PRL is declined.

DATED this 11th day of March 2014

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P J Andrew
Tribunal Member