

CLAIM FILE NO: 00765

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN NICOLE ODETTE MILLER-HARD

Claimant

AND MELANIE GAIL STEWART

First Respondent

AND ROBIN LAWRENCE FORD

Second Respondent

AND BAY BUILDING CERTIFIERS LIMITED

Third Respondent

AND No Fourth Respondent, the TAURANGA DISTRICT COUNCIL having been struck out.

AND No Fifth Respondent, GEOFFREY MORRISON having been struck out

AND RAY MARKLEW trading as MODERN TEXTURES

Sixth Respondent

AND HOWARD REID trading as LA BAIE BUILDERS

Seventh Respondent

(intitulation continued next page)

**SUPPLEMENTARY DETERMINATION OF ADJUDICATOR
(Dated 26th May 2004)**

AND DURASEAL TEXTURE SYSTEMS LIMITED

Eighth Respondent

AND ROSS MALCOLM trading as ARCHITECTURAL DIRECTIONS

Ninth Respondent

AND PLASTER SYSTEMS LIMITED

Tenth Respondent

1. BACKGROUND

- 1.1 On 26 April 2004 I published my Determination of the substantive issues in this matter, which set out the background to this adjudication. This Supplementary Determination takes over where my earlier Determination finished, so that the earlier Determination must be read as a part of this Supplementary Determination.
- 1.2 In paragraphs 1.15 and 1.16 of my Determination I mentioned that two applications for costs, from parties who had been struck out, had been received by Weathertight Homes Resolution Services. In paragraph 1.18, I set down a timetable for submissions in response and in reply to these two applications. This timetable required all submissions to be filed by 11 May 2004. After encountering some delays, this date was extended to 20 May 2004.
- 1.3 In this Supplementary Determination I will consider the applications for costs against the Claimant from the following parties:
- (a) Geoffrey Morrison;
 - (b) Tauranga District Council.

2. THE LAW RELATING TO THESE APPLICATIONS

- 2.1 The general rule in adjudications under the WHRS Act is that the parties meet their own costs and expenses, whilst the WHRS meets the costs of the adjudicator and the administration of the process. However, the adjudicator does have discretion to make an award of costs as outlined in s.43(1) of the WHRS Act, as follows:

An adjudicator 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 the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by –

- (a) bad faith on the part of that party; or
- (b) allegations or objections by that party that are without substantial merit.

3. GEOFFREY MORRISON

3.1 The application for costs from Mr Morrison was submitted to WHRS by letter dated 19 March 2004, and was comprised of two parts. Firstly, he claimed for the legal fees in relation to the conduct of his defence to the adjudication claims, being total fees of \$2,160.00; and secondly, he claimed for his expenses incurred when appearing as a witness at the adjudication hearing.

3.2 I have already dealt with the second part, and have fixed the amount of his witness expenses pursuant to clause 9 in the Schedule of the WHRS Act. This matter needs no further consideration or determination.

3.3 The submissions made by the Claimant in opposition to this application for costs raised two matters for my consideration, which were:

- (i) the WHRS Assessor had recommended that Mr Morrison should be a respondent in this adjudication, and
- (ii) that Mr Ford was saying that he had relied upon Mr Morrison's expertise, so that if Mr Ford had succeeded in his defence, the Claimant would have been left without a remedy.

3.4 It is one of the responsibilities of the WHRS Assessor, under s.10(1) of the WHRS Act, to give a view as to the persons who should be parties to the claim. In this case, on page 49 of his report, the Assessor listed Mr Morrison as being a person who should be a party to the claim. He describes Mr Morrison as the "original builder (labour contract to framing stage)", but his report does not actually criticise the framing or structural construction work. I would accept that the Assessor did say that Mr Morrison should be a party, but I cannot find any convincing reasoning within his report to justify this recommendation.

- 3.5 Mr Morrison had been a Third Party in the District Court proceedings, but had been removed as a party prior to the proceedings being transferred to the WHRS adjudication. Therefore, as the Claimant had requested the matter be transferred to this adjudication without Mr Morrison as a party, I must presume that she did not consider that he should have been a party.
- 3.6 The Claimant identified Mr Morrison in the Notice of Adjudication as the Fifth Respondent, alleging that he built the house and failed to build it in accordance with the specifications and the Building Code. But the Claimant knew, or should have known by then, that Mr Morrison was only a labour-only builder up to the framing stage.
- 3.7 In his submissions, Mr Tomaszuk says that the Claimant had opposed Mr Morrison's application to be removed as a party from this adjudication, as a result of Mr Ford's denial of liability on the basis that he relied upon Mr Morrison's expertise to carry out the initial construction in a proper and workmanlike manner and in accordance with the Building Code. Releasing Mr Morrison, says Mr Tomaszuk, would potentially have left the Claimant without any remedy should Mr Ford have succeeded in his defence that he was not the builder and relied upon Mr Morrison's expertise and workmanship.
- 3.8 The main purpose of adjudication under the WHRS Act is to determine the liability of each respondent to the claimant. As a secondary task, I can also determine liability of one respondent to another respondent. In this case the Claimant identified Mr Morrison as a respondent, which means that she was making a claim directly against Mr Morrison. She cannot now say that she included Mr Morrison as a party because she thought Mr Ford might bring a cross-claim against him, or because Mr Ford was using Mr Morrison as a defence. Mr Ford had withdrawn his cross-claim against Mr Morrison before this matter was transferred from the District Court. Mr Ford did not oppose the application by Mr Morrison to be removed from the adjudication.
- 3.9 This is a slightly unusual case in that it originated as a transfer of proceedings from the District Court. The Claimant asked for the transfer after Mr Morrison had been removed as a Third Party. She says that she joined Mr Morrison as a party in the Notice of Adjudication because it had been recommended by the WHRS Assessor. Normally, I would have considered this to be a good reason,

but not in this case. Mr Morrison's only possible liability must have arisen from failings in the original construction work, as he was not involved in any of the remedial work. The Claimant had already consented to his withdrawal as a party from the proceedings about the defects in the original construction. There was no new information or evidence that came to light that would justify a reconsideration of that earlier consent.

3.10 The Claimant's choice to nominate Mr Morrison as a respondent in this adjudication was made with slender justification. The claims against Mr Morrison were made at a time when the Claimant knew, or certainly should have known, that the claims were without substantial merit. I think that Mr Morrison was obliged to incur legal costs that were unnecessary under these circumstances.

3.11 Mr Morrison, however, has contributed to his own costs by not making his situation clear from the start. He did not attend the Preliminary Conference on 18 December 2003, and his application was slow in arriving. This must be taken into account when making an award of costs. I will order that the Claimant pays to Mr Morrison the amount of \$1,000.00 as a contribution towards his costs in this adjudication.

4. TAURANGA DISTRICT COUNCIL

4.1 The application for costs from the Council was submitted by Heaney & Co to WHRS on about 21 April 2004. The arguments submitted were that the claim was pursued in bad faith against the Council, whilst the allegations were without substantial merit.

4.2 The particulars given in support of these submissions included the following:

- The claimant was fully aware the Council had no involvement with the unauthorised and non-consented remedial building works (having arranged for those non-consented works to be undertaken) and yet opted to pursue the claim against the Council regardless of the lack of any factual basis upon which the claimant could rely to establish culpability on the part of the Council.
- There was no legal basis for the duty contended for by the claimant as succinctly put by the adjudicator in his ruling "*the duty does not extend to a responsibility to scour the city seeking out unauthorised building work; nor does the duty to inspect include extensive testing, or destructive testing, without just cause.*" Despite the lack of any merit or basis to the claim, the

claimant did everything possible to contrive a claim with a view to holding the Council into this proceeding. The Council was forced to incur further costs responding to the claimants numerous submissions.

- 4.3 The Claimant says that she had made her claims against the Council in the District Court relying upon the Council's overall statutory duty to her as the enforcement agency responsible for ensuring compliance with the Building Act 1991. She accepts that the claims against the Council in the District Court were withdrawn, but says that this was influenced primarily by the Council's refusal to participate in the proposed settlement conference which could not have proceeded without the Council's involvement.
- 4.4 It is submitted by the Claimant that the claims against the Council in this adjudication were made on the recommendation of the WHRS Assessor in his report, and that Council knew that remedial work was being undertaken but failed to take any steps to check on the adequacy or sufficiency of the remedial work. She concludes by suggesting that the Council could consider itself fortunate to have been released from the adjudication proceedings at an early stage.
- 4.5 Both the Claimant and the Council made extensive reference in their submissions to the happenings and events that took place when the matter was before the District Court. In my view, this is not really relevant to the application for costs in this WHRS adjudication. The settlement reached between these two parties on 14 October 2002 brought to an end that unfortunate chapter in their relationship. It serves no useful purpose to criticise the other side, or attempt to justify one's own behaviour and actions prior to that settlement.
- 4.6 When the Claimant issued the Notice of Adjudication, it was alleged that the Council was in breach of its statutory obligation in that it failed to inspect the remedial work after being invited to do so. I considered this when I reviewed the application for removal, and decided that there were insufficient grounds to justify that the Council should remain as a party in the adjudication. I have now heard a considerable body of evidence about the problems with this house, and nothing I have heard has caused me to change my view that the Council should not have been a party in this adjudication. Put another way, I am still of

the opinion that the allegations made against the Council were without substantial merit.

4.7 I am not persuaded that the Claimant had acted in bad faith when she identified the Council as a respondent in this adjudication. The Claimant was under the impression that the Council had visited the site, because it had issued a "Notice to Rectify" for the new bathroom window in early 2001. She was also under the impression that the Council had issued a Code Compliance Certificate for this new window, which should have necessitated another site visit. The fact that she was mistaken about both of these matters did not become apparent until the Hearing, but this does not alter her beliefs at the time she named the Council as a respondent in this adjudication.

4.8 Although I have concluded that the allegations that were made against the Council were without substantial merit, I do not think that the Claimant should be penalised in this instance for involving the Council in this adjudication. I was not satisfied at our Preliminary Conference that the Council should have been removed from this adjudication, and I needed further submissions and argument before I was persuaded to strike out the Council. This is not an appropriate case in which it can be said that the Claimant has acted unreasonably or without reasonable cause. The application for costs by the Council will not be allowed.

5. ORDERS

5.1 For the reasons set out in this Supplementary Determination, I make the following orders.

5.2 Ms Miller-Hard is ordered to pay to Mr Morrison the amount of \$1,000.00 as a contribution towards his costs in this adjudication, and this amount of \$1,000.00 will be paid within seven days of the date of this Determination.

[s.43 of WHRS Act]

5.3 The application for costs by the Tauranga District Council is dismissed.

[s.43 of WHRS Act]

5.4 No other orders are made, and the parties will meet their own costs in this matter.

5.5 Pursuant to s41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

DATED the 26th day of May 2004

A M R Dean
Adjudicator