IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-739

IN THE MATTER OF	An appeal from a determination of the Weathertight Homes Tribunal under the Weathertight Homes Resolution Services Act 2006
BETWEEN	TRUSTEES EXECUTORS LTD First Appellant
AND	MIRANDA PATRICK Second Appellant
AND	WELLINGTON CITY COUNCIL First Respondent
AND	HEYHOE BUILDERS LTD Second Respondent
AND	GRW CONSULTANTS LTD TRADING AS FIRST WINDOWS & DOORS Fifth Respondent
AND	CHRISTOPHER HEYHOE Seventh Respondent
AND	MIRANDA JANE PATRICK Ninth Respondent

Hearing: 18-19 November 2008

Counsel: E J Horner and P N Ross for Appellants
F P Divich for First Respondent
S D Galloway for Second and Seventh Respondents
D J S Parker for Fifth Respondent

Judgment: 16 December 2008

JUDGMENT OF SIMON FRANCE J

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Introduction

[1] In 1993 Mr Simpson and Ms Patrick commenced a project to build a family home in Seatoun, Wellington. The house was completed in 1995, and the evidence of Ms Patrick is that moisture issues were apparent from the outset. Water was getting through the windows, and other traces were apparent.

[2] Various repairs were effected. A prolonged process, involving numerous visits by Council inspectors, preceded the issuing of a Certificate of Code Compliance in 1999. At that point, and for a period after, it was believed the problems had been fixed. During this period the property was transferred to Trustees Executors Limited under a family trust arrangement.

[3] In 2002 it is said that moisture issues reappeared. A claim was filed with the Weathertight Homes Resolution Service, and an independent assessor's report obtained. The claimants, Trustees Executors Limited and Ms Patrick, who seems to have been the person driving the claim, sought recompense from everyone involved

in the project – the draughtswoman, a plumber, the builder, the company which supplied the windows, and the Council.

[4] The claimants' position was that the cladding material was not fit for purpose. Their stance was that it needed removing, any water issues with the framing fixed, and then the house reclad in different material. That was not the opinion of the independent assessor, nor of the defendants. They were all of the view that the issues could be addressed by localised repairs. Offers to settle the claim for a little more than the cost of those repairs were rejected.

[5] The claim proceeded to a hearing involving the builder, the window supplier and the Council. The essential claim being that the cladding was unfit for purpose, the allegations of negligence took that primary focus. Against the Council the focus was first its inspection actions at the time of building. Second, there was reference to negligence in respect of the issuing of the Certificate of Code Compliance as regards the rating of the windows.

[6] Concerning the builder the claim was focussed on the inadequate cladding, and allegations of poor workmanship in installation and building. As regards the window supplier, who supplied the windows in response to an order and did not visit the site nor install them, it was alleged the company owed a duty to know the windows were to be of a higher specification than ordered given "local conditions in Wellington".

[7] The claim failed against the builder and window supplier because of a limitation defence. The evidence of the claimants, via Ms Patrick, was that leaks were apparent immediately. The claim was filed outside the six year Limitation Act 1950 period, and was rejected for that reason. Consideration of the merits of the claim as regards these defendants was therefore not undertaken.

[8] The Council also raised a Limitation Act defence but it was rejected because inspectors had made numerous site visits in 1998 and 1999 before issuing the Certificate of Code Compliance. The Council argued it owed no duty to the claimant trustee as a subsequent purchaser, but this also was rejected. However, the

adjudicator concluded that the Council had not been negligent in performing its functions.

A Liability Appeal

[9] Of the various legal issues that arose in the proceeding, only one is pursued by any of the parties on appeal. The claimant Trustees (and Ms Patrick who incurred costs liability because of a separate general damages claim) dispute the finding that the Council was not negligent. No challenge is made to the various Limitation Act 1950 decisions, nor to the finding that the Council owed a duty. I do not consider those matters further.

[10] The appeal is a general appeal. The principles enunciated in *Austin, Nichols & Co v Stichting Lodestar* [2008] 2 NZLR 141 apply.

[11] The builder and the window supplier are parties to the appeal only in the capacity of defending a costs award in their favour. However, the basis for awarding costs is that the claim lacked substantial merit. Accordingly, their submissions necessarily involved a close focus on the evidence. That in turn means they are relevant to the liability inquiry.

(i) The challenge on appeal

[12] The primary thrust of the appellants' case, presented by Ms Horner who was not counsel before the Tribunal, is that there are two areas in which the Tribunal erred in its conclusion that the Council was not negligent. First, it erred in rejecting the claim that the windows were not fit for purpose. Second, it erred in its conclusion that the Council did not act negligently as regards the improper installation of the cladding. There was evidence that at places the cladding and the paving touched. This meant the gap needed for moisture to escape was missing, and led to moisture damage. It was in relation to this defect that the judgment was in error.

(ii) The windows issue

[13] When building consent was sought in 1994/95, the Council decided that the property was situated in an area of risk because of the likely buffering it would take from the wind. Before issuing a building consent, it required that a structural engineer sign off on the plans. This was arranged and apparently the engineer indicated he had designed the building to meet a standard of 1.95 kPa (kilopascals).

[14] As part of its building consent the Council wrote this standard in, requiring that the building, including the cladding and windows, should meet a strength of 1.95 kPa.

[15] So to the windows. The claimants' case was that they leaked, and certainly in some stormy conditions it is apparent that water came in. At one point the independent assessor undertook hundreds of moisture readings. She noted high moisture readings adjacent to five windows.

[16] The claim advanced was that the windows did not meet the 1.95 kPa standard, as required by the Building Consent. Accordingly, it was alleged that the Council was negligent in issuing a Code Compliance Certificate when the windows did not meet the standard required by the building consent. It was accepted by the defendant that the Council had not sought a certificate from the supplier confirming that they met this standard.

[17] The claimants were facing a difficult task in that each of the three defendants had an interest in all the issues. Accordingly, each defendant called its own expert evidence on the topics. In total the evidence represented a formidable body of opinion contrary to the merits of the claim. Before detailing that evidence, I outline the claimants' case.

[18] The primary evidence was of course that of Ms Patrick, who described what she had seen as regards the windows. It has to be said that in my view her two written briefs were deficient in this area. They lacked any detail as to which windows had water issues, how those problems had manifested themselves, and in

what circumstances. This was remedied at trial by oral evidence led initially from her, but it does raise a query as to the evidential basis on which the claims were to be advanced. Presumably this detail was recorded elsewhere for the benefit of at least her experts and advisers, but I do observe that the transcript discloses that even at trial people were still trying to work out which five windows the assessor was talking about.

[19] The basis of the claimants' case was an appraisal it obtained in August 2004, referred to as the Joyce Report. That Report concluded that the cladding used on the house was unfit for the wind rating of the site. It recommended total replacement, a position the claimants maintained until a point in the actual hearing when it was abandoned. The opinion reached in the Joyce Report assumed the correctness of the wind rating previously made by the Council. I am unclear what the Council's rating actually was, other than that it assessed the site as being a special wind zone.

[20] The Joyce Report notes that the joinery on the house is labelled NZS4211. This is a building standard code. The Report explains that joinery manufactured to that standard has a "very high" wind zone classification. Very high is the equivalent of a 1.55 kPa rating. It is therefore argued that the joinery is not specified to the standard required by the building consent, and is therefore unfit for purpose. A similar analysis is applied to the cladding. The essence of the opinion is therefore that the building consent required a 1.95kPa standard. The joinery and cladding does not meet that. Therefore it is unfit for purpose and any damage occurring is because of this deficiency.

[21] The admissibility of the Joyce Report was contested, since the primary author did not testify. However, the main expert called for the claimants was a signatory to the Report, and was the supervisor of the author. I also note that the Managing Director of the firm in question filed a brief indicating that he agreed with the Report. Although it is unorthodox to have a further brief of that nature from the same firm, it does provide a further link to the initial report. Finally, I note that on 19 February, shortly before the hearing, and after the experts from all sides had met, the Managing Director, Mr Joyce, filed a further brief maintaining the position that an entire recladding was necessary.

[22] The main expert for the claimants was Mr David Cunningham. His evidence reflects the Joyce Report. In his evidence on the cladding, he also comments on the absence of control joints, which he says will lead to a failure of the cladding. It is said it is a failure that cannot be remedied. Concerning the window joinery, he comments first on installation issues. Mr Cunningham then says that the windows "are rated up to 1.55 kPa" which is 0.4 kPa less than that required by the building consent. Finally, his brief responds to the reports of the defendants' experts.

[23] I am of the view that Mr Cunningham's brief was inadequate if it was intended, along with the Report, to be the primary basis of the claimants' case. It is a mixture of general opinion and assertion, which pales in comparison with the detailed analysis contained in the opposing briefs. As an example, one of the defendants' experts, Mr Peter Lalas, conducted his own wind assessment of the site. The process he used is carefully described, as are the measurements he obtained. His conclusion is that the original Council assessment of a special zone is incorrect by some distance. In his opinion the site is only an "H" zone site (high wind). On the relevant scale, high wind is one level below the VH standard which the Joyce Report accepts the joinery is designed for.

[24] The Council's assessment had been that the wind rating was above even "VH", and therefore off the scale altogether and in a specific zone needing particularised standards.

[25] Mr Cunningham's response to this evidence of Mr Lalas was:

> The wind zone was already known and the permit documentation noted a requirement for all structural components to withstand a wind loading of 1.95 kPa.

[26] The latter part is of course true, and the first part is correct if "known" is read in the sense of "believed to be". What Mr Cunningham's instructions were is not known to me, so what follows is not a criticism of him. The point must be made, however, that if, as it seems, his was the evidence that was to establish the claimants' case about the windows, it needed to tackle this evidence of Mr Lalas. Mr Lalas' testing and results wholly undermined the proposition that the inadequate rating of the windows was a cause of water damage. I have not seen an explanation in the

evidence of the process originally undertaken by the Council to reach its assessment, and there seems to have been no effort by the claimants to defend that assessment in the face of this contrary evidence. In my opinion Mr Lalas' brief is impressive. It is written clearly and explains well the steps he took in reaching his assessment. His expertise supporting the evidence is established, and it simply could not be ignored by the claimants. Nor could an undefended assessment by a Council officer, who was not called to explain the process, be relied upon as countering the evidence.

[27] There were disputes about the windows other than as to their fitness for the site. Whether the five high moisture readings noted by the assessor were attributable to faults with the windows, or were because window spaces are natural repositories for water coming from other defects, was one such dispute. So too was the capacity of the windows installed. There was no evidence from the claimants to show that the windows could not withstand pressure to the prescribed level of 1.95 kPa. It seemed to be assumed that 1.55kPa was their limit because that was the relevant building standard, but an expert called by the window suppliers indicated that a design of 1.55 kPa would not necessarily fail at anything above that pressure. Related to this, Mr Lalas gave evidence as to what signs, none of which were present, would be expected had the materials been unfit for purpose as alleged.

[28] In his decision on this aspect the adjudicator concluded:

> There is no evidence that the windows failed to meet the relevant performance standards. (There was extensive evidence proving that they did.)

[29] To the extent that Mr Cunningham adopted the Joyce Report, it could be said there was some evidence. However, it was unconvincing evidence in the face of the wealth of contrary evidence, which was far more specific and compelling in its reasoning. Further, early on Mr Cunningham accepted he lacked expertise in this specific area, which some would have seen as the end of the issue there and then.

[30] The sentiment expressed by the adjudicator in his conclusion cited above accords with my own assessment of the evidence. There is no basis on which it could have been found the windows were unfit for purpose, or that an inadequate specification was the cause of damage.

[31] Before leaving the windows issue, I comment briefly on the alleged specific breach. The allegation against the Council was that it was negligent in not checking that the windows met the standard required by the building consent. The Council called considerable opinion evidence on what the reasonable inspector would do, and what might or should have been seen, or not seen, at this site. There was no such evidence from the claimants. The evidence was supportive of that which had occurred, and in many other areas of challenge dismissed the proposition that the inspectors should have been aware of issues. In cross-examination, however, one expert accepted that it would have been prudent for an inspector to obtain a manufacturer's specification concerning the kPa rating of the windows.

[32] It is understandable that Ms Horner on appeal should focus on this concession, as it is the best evidence available to the claimants in support of an allegation of default in issuing the Certificate. Whether standing alone it would suffice to establish a breach of duty is far from certain. It is evidence of a step that might have been taken, and so only one factor to consider amongst an analysis of what was done. Undertaking that analysis now is not required given the other deficits in the claimants' case already identified. The claimants' case fails to establish the windows did not meet the standard, let alone that they were a source of damage.

(iii) Cladding

[33] The single issue on appeal concerning the cladding is the claim that the adjudicator erred in finding that there was not more extensive damage caused by the cladding touching the ground.

[34] It is common ground that the cladding used on the house needs a gap between the bottom of it, and the ground. This allows internal moisture to escape, and enables a process of drying. An added complication in this case was that where the gap was missing, it was because paving was placed right up to the cladding. This not only prevented moisture from escaping but also allowed pools of water to form against the outside of the cladding. This in turn allowed water to seep in, with the potential to rot the framing, especially what is known as the bottom-plate.

[35] In May 1999, before the Certificate was issued, the Council had issued a Notice to Rectify that dealt with various matters. Included in the list was the following condition:

> Ground clearances outside garage and entry foyer do not comply. A secondary flow path is required to be provided to remove water in adverse conditions from this area.

[36] The claimants' case against the Council, if it was to contend for negligence in the issuing of the Certificate of Code Compliance, needed to address this Notice. It did not. I was not taken to any evidence, nor have I seen any in my perusal of the evidence, that contested the adequacy of the remedy required by the Council, or suggested that the required work was not carried out before the Certificate was issued. It is not, therefore, clear to me how this claim against the Council was to succeed.

[37] Ms Horner sought to counter this by submitting there were areas other than those covered by the Notice where the cladding touched the ground. However, the appellant could not take me to any evidence that established the existence of these other areas, and that must be the end of it.

[38] There is no substance in this challenge and I do not discuss it further.

(iv) Other errors

[39] The appellant contested other findings in the adjudication. The first was a finding that the faults were all discoverable by 1995. I remain uncertain as to why this was a focus given there was no challenge to the limitation findings, and the relevant Council conduct occurred in 1998/99. I apprehend it may have to do with counterclaims that were not addressed because the Tribunal did not need to do so. For the same reason I do not consider it further.

[40] The next challenge concerned a finding by the adjudicator as to the knowledge of the Trustees in relation to the defects at the time they purchased the property. There was actually no evidence from the Trustees at all. The adjudicator

appears to infer knowledge by virtue of unspecified provisions in the standard agreement for sale and purchase. What knowledge the Trustees were thereby assumed to have, and how such knowledge was relevant to the claim, was not explored. It is an aspect of the judgment under appeal I am unclear about, but it does not seem to me to be relevant to the appeal.

[41] The other two claimed errors are addressed in the preceding discussion.

(v) Conclusion

[42] In my view the outcome reached by the adjudicator was, on the basis of the evidence filed, the only decision open to him. The defendants' evidence was on its face strong. However, the prior issue is that the claimants' evidence was inadequate in itself to establish the claims it sought to support.

[43] The appeal in relation to the Council's liability is dismissed.

B Costs

(i) An award at all?

(a) No substantial merit

[44] The scheme of the Weathertight Homes Resolution Services Act 2006 is that costs lie where they fall unless the adjudicator considers that unnecessary expense has been incurred by reason of:

a) bad faith; or

b) allegations or objections that are without substantial merit.

[45] Not surprisingly, perhaps, given the observations in the first part of this judgment, the adjudicator decided that the second limb of "no substantial merit" was made out.

[46] On appeal I take the approach that the existence or otherwise of "substantial merit" is a matter subject to general appellate review. However, if that is properly found to exist, the decision whether to award costs is an exercise of discretion and so subject to the normal appellate rules applying to such decisions.

[47] Concerning substantial merit, it is necessary to comment only on those matters not already addressed. The adjudicator held that no evidence was advanced by the claimants that could provide an answer to the limitation defences of the builder and window supplier. It appears the claimants' argument was that the leaks that appeared in 2002 were fresh damage arising from unknown latent defects, and so therefore could be the subject of fresh claims. However, as the adjudicator held, no evidence seems to have been presented that would support such an analysis. I have observed earlier that there was generally a vagueness in the evidence about the detail of what happened in 1995. That vagueness would inevitably have made it difficult to present an analysis of how what occurred in 2002 was different.

[48] Ms Horner submitted that an unsuccessful pre-hearing strikeout by the defendants told against any suggestion that the claimants' case lacked merit. A major focus of that strike out was the limitation defence. I do not consider this argument assists the appellant. Indeed it has the opposite effect. The pre-hearing Ruling in issue rejects the strike out application in relation to limitations because the claimants said they had evidence that would show that the failure of the cladding to meet the wind zone rating of the site led to fatigue cracking which takes some time to develop. Further, the promised evidence was to show that the earlier leaks were "quite different types of damage".

[49] As discussed earlier, the claimants' evidence does not establish either of these. Indeed, having reread both the Joyce Report and Mr Cunningham's evidence, it does not appear that any attempt was made to lead such evidence. This is a factor

that must be relevant to the costs discretion, given it was the basis on which the strike out was successfully defended.

[50] There is no doubt at all in my mind that the test of no substantial merit is made out in relation to the claimants' case.

(b) Exercise of discretion

[51] The second question is that, given the threshold is met, should an award of costs be made notwithstanding the scheme of the Act is that generally costs should lie where they fall. I remind myself that an appellate Court will not interfere with the exercise of this discretion unless there has been an error of principle or the decision reached is plainly wrong. Obviously 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 a discretion to be exercised.

[52] The issues that I see as important are whether the appellants should have known about the weakness of their case, and whether they pursued litigation in defiance of common sense. Concerning "should have known", I have noted already that the brief of the claimants' primary expert is of concern to me in the way it addressed the defendants' experts evidence. It was a very generalised rejection, primarily entailing a dogged reassertion of the claimants' position, rather than undertaking any serious attempt to grapple with, or answer, the contrary propositions and evidence being advanced. I cited an example earlier. To take another, in response to comments about the state of the house:

> "It does not matter what was observed. The fact is that it is not in compliance with the Building Code and has been mentioned by the WHRS assessor as a possible source of water penetration via osmosis from the ground."

[53] This response is typical of what I see as an argumentative approach that does not reflect an understanding of the role that the evidence needed to perform for the claimants, nor of the role that an expert should be playing. In other places there are statements such as that "patched cracks can clearly be seen" in response to a report

which disputes this. Identification of where those cracks are would have been of more assistance once it was known their existence and relevance was disputed.

[54] Ms Horner stressed that the claimants acted all along with the support of expert advice. The defendants counter by saying that it should have been obvious from the experts' meeting ten days before the hearing that the claimants' expert was going to yield on the need for a total recladding. Certainly the report of the experts' meeting suggests that Mr Cunningham agreed that localised repairs were an adequate remedy. However, several days later the principal of Mr Cunningham's firm did write a further brief reasserting the need for recladding. This supports the view that the claim remained based on expert advice.

[55] As best I can assess it with hindsight, it was not a case of wilfully proceeding without any foundation, but rather a failure to recognise the inadequacies in one's own evidence. These were inadequacies that could have been identified prior to exposure at the hearing.

[56] Reflecting this viewpoint is what actually did occur at the hearing. Essentially on the first day the claimants were forced to accept that localised repair rather than total recladding was a suitable remedy. This removed a significant potential liability from the defendants, and if done earlier would no doubt have influenced the course of the proceedings.

[57] To explain this further, the judgment under appeal describes the original claim prior to this concession as being for $1.2 million. This is also what the defendants understood the claim to be. On appeal Ms Horner submits that it is incorrect, and is a misreading of the statement of claim, which was for a little over $800,000. Taking even that figure to be correct, the abandoned recladding argument accounted for about three-quarters of the claim, which illustrates its centrality in the way the case was prepared by the parties.

[58] Concerning this issue of the size of the claim, initially I read it the same way (i.e. $1.2 million), and indeed after reading the statement of claim again was still of that view. Further consideration, however, has led me to accept the claimants'

argument, but I do so having noted the obscurity in which the true figure was shrouded. (I note for the benefit of the parties that my changed view is sourced in paragraph [63] of the statement of claim.) Without claiming to have exactly got it right, my understanding in broad terms is that the claim involved:

a) $600,000 to reclad (cf $80,000 for repairs)

b) $55,000 for expenses to date;

c) $4,000 to remove mould;

d) $20,000 in lost rental;

e) $80,000 for permanent diminution in value;

f) $80,000 general damages claimed separately by Ms Patrick.

[59] Some aspects of these figures require comment. The lost rental and mould removal claims are related. A sample from a ceiling tile in a downstairs room had been sent for analysis, and *Stachbotrys* was detected in the sample in dangerous amounts. Ms Patrick received advice to vacate the house as a consequence and she did so. A month later, however, the firm which did the testing of the ceiling tile made a site visit and took further readings. These readings showed there to be no reason for concern, the levels being no more than normal. Notwithstanding this, Ms Patrick maintained the view it was unsafe to return, and considered it unsafe to rent the property to anyone else either. It is of course open to anyone to put their health first, but the evidential basis for maintaining the claim of lost rental is not apparent. There was no evidence to contradict the assessment of the specialist firm that the house was safe and habitable. Ms Horner pointed to advice from Mr Cunningham, but no claim of expertise could be made there. It is another example of an evidential deficit.

[60] There was dispute, and indeed some uncertainty, as to whether others of the claims were maintained or abandoned during the hearing, and if so in relation to which defendant. None of the claims had any particular merit, and, for example, a claim under the Consumer Guarantees Act 1993 always had to fail. The issue of

whether or not claims were abandoned at the hearing seems to be of little relevance now and I do not consider it further.

[61] Another point of dispute was the effect of a Calderbank letter sent by the defendants. It was disputed whether the communication met the terms of such a letter, and whether such letters should anyway be of any force or effect in the context of claims under this Act.

[62] The communication in issue was sent on 24 January, about a month before the hearing. The letter noted a rejection by the claimants, without reason it was considered, of an offer of $90,000, which itself was on top of $5,000 already paid. Notice was given of an intention to seek full costs. The arguments that would be made by the defendants in support of such a submission are then set out, as is the defendants' general position on each of the heads of claim. The letter notes the evidence available to the defendants and expresses an opinion as to the unpreparedness of the claimants' expert.

[63] In my view the adjudicator was entitled to take account of the letter. Its exact nature and terms are less significant that its general effect, which is to confirm the offer and to identify both the defendants' position on matters and its concerns over whether the claimants' case is ready. In my view the letter is an accurate encapsulation of what was to happen. The offer of $90,000 was very reasonable and, for the reasons already discussed, I have not seen any evidence that would have made it reasonable for the claimants to reject it.

[64] As for errors of principle, complaint was taken with the adjudicator's reliance on the criteria in Rule 48C of the High Court Rules. However, I do not see any difficulty with what occurred. The Act is clear that the District Courts Rules apply, and the adjudicator acknowledged that and applied the scale from those Rules. It is difficult to see how in seeking assistance from the criteria set out in Rule 48C as to how he might exercise a broadly worded costs discretion, the adjudicator erred.

[65] Other issues were taken with the adjudicator's costs reasons. I do not see any of them as affecting the essential assessment I must make, which is whether it was

open and reasonable for the adjudicator to exercise his discretion to make an award of costs. I consider it was, and for the record note my agreement with that decision.

[66] I conclude by noting that it appears this case was the first where costs under this Act have been awarded. The other cases to which I was referred seem very different in their individual merits, and I did not find them of assistance. The Act gives the power to award costs, but only if one of two situations exists. In policy terms, whilst one must be by 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 the balance between these competing concerns by limiting the capacity to order costs to situations where:

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 costs to others through pursuing arguments that lack substantial merit. The fact of a very reasonable settlement offer not long before the hearing should also be borne in mind by any who might see the decision as having precedent value.

(ii) Quantum

[68] Section 125(3) of the Weathertight Homes Resolution Services Act 2006 provides that the District Courts Rules apply with all necessary modifications. The figure under appeal is around $150,000. It is made up first of an award, on a 3C basis, of solicitor costs to each of the three defendants. That amounted to $30,000 each, and did not include any allowance for second counsel. The balance of the total comes from full reimbursement of experts' fees.

[69] Three issues arise:

a) was it open to allow claims for expert expenses incurred prior to the filing of the claim?

b) if so, was it correct to allow full recovery?

c) was it correct to assess costs on a 3C basis?

[70] The first issue stems from the transfer of the original claim from the previous Act to the new Act. The process by which this is done is to withdraw the original claim and file a new one. Ms Horner submitted there was no power to order recovery in relation to expenses incurred prior to the refiling of the new claim under the new Act. The adjudicator had accepted the correctness of this submission, but had then nevertheless failed to apportion the expenses.

[71] The result contended for by the claimants would be surprising, given that the decision to transfer the proceedings to the new Act seems to be within the sole control of the claimants. I am satisfied the situation is not as claimed. Section 151 of the Act states that Part 1 of the Act (which includes the power to award costs) applies to all steps taken in relation to a withdrawn claim as if it were a claim filed under the present Act. Accordingly, it was open to allow recovery of expenses incurred in response to the withdrawn claim.

[72] The three defendants called several experts between them. In my view none were unnecessary, and each was a reasonable decision given the size of the claim actually faced, let alone the higher claim apparently faced. Each defendant faced liability on a different basis, and needed to respond. The recovery of the costs in engaging the experts is justified.

[73] Concerning solicitors' costs, Rule 46 of the District Courts Rules provides that the Category (1, 2 or 3) is to be fixed by reference to the complexity and significance of the proceeding. Category 3 is reserved for cases which by reason of

their complexity or significance require counsel to have special skill and experience. "Special" may be contrasted with "average" which is the label used for Category 2.

[74] As for the time band, the standard allocation is "B", which reflects a normal amount of time for the steps required. The contrast is "C", which is for cases where it is reasonable to spend a comparatively large amount of time.

[75] In assessing the adjudicator's decision, I note without criticism that the difference between the two assessments was not considered. The adjudicator gave as his reasons the fluidity of the claim, and the lack of clarity. These reasons go directly to the time allocation – "B" or "C" – but less so to the complexity issue. The issues here were not especially complex, even though they included questions of limitation and duty of care. Whether a duty existed certainly involved consideration of legal issues, but not ones of particular novelty. The limitation issues were standard for such arguments.

[76] Accordingly, I am of the view that a Category 2 assessment was the correct label. To this extent the adjudication is varied but otherwise the appeal is dismissed.

Conclusion

[77] The liability appeal is dismissed.

[78] The costs appeal is allowed to the extent that the category is varied from Category 3 to Category 2 but is otherwise dismissed. There was no dispute taken with the adjudicator's assessment, so the analysis at paragraph [67] of his costs ruling should be applied on a Category 2 basis.

[79] The defendants are entitled to costs on the appeal. As with the original hearing there was a degree of overlap, but each faced separate liability and their interests were different. Likewise on the appeal, each had a separate order to defend although on costs there was a sensible recognition of common points. If the parties cannot agree memoranda should be filed. Given the date when the judgment is being issued, the respondents should file any claim for costs by February 13 and the appellant has two weeks to reply.

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Simon France J

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