IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1533

UNDER	Part 1 of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for review
BETWEEN	LOUKAS SOTERI PETROU Applicant
AND	WEATHERTIGHT HOMES RESOLUTION SERVICE First Respondent
AND	AUCKLAND CITY COUNCIL Second Respondent
AND	PHILIP PILKINGTON Third Respondent
AND	THE ADJUDICATOR APPOINTED UNDER THE WEATHERTIGHT HOMES RESOLUTION SERVICES ACT 2002 Fourth Respondent
AND	RALPH JAMES TOWNLEY & ROBYN SIRCOMBE-TOWNLEY Fifth Respondent

Hearing: 23 September 2009

Appearances: J Long and C I Wilson for Applicant
D J Heaney SC and C Goode for Second, Third and Fifth Respondents
The First and fourth Respondents abide the decision of the Court

Judgment: 24 November 2009

RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by me on 24 November 2009
at 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Lee Salmon Long, PO Box 2026, Auckland 1140
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Introduction

[1] This application for judicial review by Mr L S Petrou raises an issue about who may pursue claims before the Weathertight Homes Resolution Service under the Weathertight Homes Resolution Services Act 2002 (the Act).

[2] The original claimants under the Act (Mr and Mrs Townley) have settled with two of the original respondents (Auckland City Council and Mr Pilkington). In terms of the settlement agreement, the Council and Mr Pilkington now wish to pursue claims against Mr Petrou who is the only other remaining respondent.

[3] In a decision issued on 16 February 2009, an adjudicator in the Weathertight Homes Resolution Service, Mr John Green, determined that the claims could proceed. Mr Petrou challenges that ruling essentially on the grounds that the Council and Mr Pilkington took an absolute assignment of Mr and Mrs Townley's rights to bring a claim under the Act and the Weathertight Homes Resolution Service no longer has jurisdiction to entertain such a claim since the Act permits claims only by the owners of leaky buildings.

[4] The Act continues to apply to Mr and Mrs Townley's claim despite its repeal by the Weathertight Homes Resolution Services Act 2006 by virtue of the transitional provisions in that Act (ss 147 and 148).

Background

[5] At all material times, Mr and Mrs Townley owned a residential dwelling at St Heliers which was built for them by Mr Pilkington. On 18 January 2007 Mr and Mrs Townley commenced a claim under the Act against several parties including the Council and Mr Pilkington. They sought to recover $378,968 for remedial costs and other losses along with general damages of $40,000, a total of $418,968.

[6] Mr Petrou was not initially joined to the claim but was later joined as a respondent on 17 September 2007 upon the application of the Council. The Council alleges Mr Petrou acted as a project manager and breached a duty of care owed to Mr and Mrs Townley. The Council seeks contribution from Mr Petrou under the Law Reform Act 1936 against any liability the Council may have towards the Townleys. Mr Petrou denies the allegations against him.

[7] On 16 April 2008 the Council and Mr Pilkington entered into a settlement agreement with Mr and Mrs Townley, in terms of which the Council paid them $125,000 and Mr Pilkington paid them $150,000, a total of $275,000. The balance of Mr and Mrs Townley's claim therefore amounts to $103,968 plus the $40,000 claimed for general damages, a total of $143,968.

[8] The terms of the settlement agreement are not straightforward. Recital E states:

> The claimants have made a claim against the parties to this agreement and those named in the proceeding. The parties to this agreement wish to settle the proceeding and the claim amongst themselves but not against any other person or party who is not a party to this agreement.

[9] Clauses 2 to 12 of the agreement provide:

> 2. This settlement is between the claimants and the assignees set out below. The parties hereto specifically record that this settlement contemplates the claimants and the assignees continuing with the action against one or more other parties.
>
> - The assignees for the purposes of this agreement are:
>
> (a) The council.
>
> (b) The carpenter [Mr Pilkington].
>
> 3. The assignees will advance to the claimants the sum set out in the first schedule attached to this agreement (**the payment schedule**). The sum is (GST inclusive if any) by way of an advance against any damages the claimants may eventually recover whether at a hearing or in settlement of the proceeding. This advance is non-refundable by the claimants regardless of the outcome of the proceeding.
>
> 4. The parties shall severally make the payments (GST inclusive if any) by the date(s) specified in the payment schedule in full and final settlement of the proceeding and any claim made or that could be made in relation to or in any way arising directly or indirectly out of the property and/or

the building by the claimants or any other party against a party that has made payment and upon both the assignees making the payment referred to in the payment schedule those parties shall be fully discharged from any and all liability for the property and/or the building.

5. The claimants agree that entry into this agreement by the assignees and the making of the advance provided for above, settles all claims made or that could be made by the claimants against the assignees and the claimants are not entitled to any further payment for recovery from the assignees except as hereafter provided.

6. The parties record that their intention in entering into this agreement is that the assignees be in the same position as if it were an insurer making a payment to the claimants under an insurance policy in respect of the loss and damage the claimants have suffered, who are then entitled to pursue the full amount of the claim against the other non-settling parties (defined below) without any deduction for the amount advanced by the assignees. To the extent that any other clauses are inconsistent with this intention, they are subject to, and should be read with such modifications as may be necessary to achieve consistency with, this overriding intention.

    - The non-settling parties are all parties in the claim not a party to this agreement or any other party against whom a party to this agreement may have a claim.

7. At any trial or hearing of this matter or any other representation required to pursue recovery hereunder, the assignees will be represented by the party set out below and those costs will be borne between/amongst the assignees as set out below:

    (a) Representation of assignees for recovery hearing and trial purposes shall be Heaney & Co.

    (b) The costs shall be borne by the council.

8. The claimants hereby assign to the assignees the claimants entitlement to recover damages against the non-settling parties.

9. Any amounts recovered against the non-settling parties shall be distributed in the order of priority in which they are listed:

    (a) To meet and reimburse all of the costs incurred by the assignees in pursuing recovery against the non-settling parties from the date of assignment.

    (b) If as a result of the continued litigation the assignees or one of the assignees have to pay any amount to any party, by way of contribution or cross claim, payment or repayment of these amounts to the carpenter or the council respectively.

    (c) If as a result of this agreement the assignees or one of the assignees have to pay any amount to the claimants as a result of an indemnity in this agreement, payment or repayment of that amount.

(d) $25,000 to the council.

(e) $250,000 to the assignees on a pro-rata basis two-fifths to the council and three-fifths to the carpenter.

(f) The remainder to the claimants.

10. It is agreed that the assignees will not profit from this agreement and in the event that the assignees recovers more than they have paid (including their legal and expert costs subject to clause 9(a) above), the excess recovered shall be paid to the claimants.

11. The claimants agree to Instruct their expert witnesses to be available to give evidence at any hearing if called upon by the assignees at the council's cost and the claimants agree to co-operate in all respects to give evidence at any hearing if called upon by the assignees. Robyne Townley shall not be required to give evidence.

12. The assignees agree to indemnify the claimants for any amounts the claimants may become liable to pay the non-settling parties by way of costs. The carpenter will pay six-elevenths and the council will pay five-elevenths of such costs. The assignees will not settle any claims against the non-settling parties without the consent of the claimants.

[10] Paragraphs 13 to 17 of the agreement then set out the procedures to be followed if the assignment is held to be wholly or partly ineffective. In that event, the claimants agree to continue to pursue their claim against the non-settling parties and any other parties the assignees might specify; the claimants give the assignees full authority to conduct the litigation in the names of, and on behalf of the claimants. The proceedings are to be under the control of the Council which would also meet the legal costs involved including the costs of expert witnesses. Paragraphs 9 to 12 of the agreement would otherwise continue to apply.

[11] The key features of clauses 2 to 12 for present purposes are:

a) The Council and Mr Pilkington agree to pay to Mr and Mrs Townley the total sum of $275,000. (Although the payments are expressed in clause 3 as an advance, the payments were non-refundable and constituted an advance against any damages the Townleys might recover rather than a loan).

b) The agreed payments were made in full and final settlement of any claims as between Mr and Mrs Townley, the Council and Mr Pilkington.

c) Clause 6 records that the parties intended, in entering the agreement, that the Council and Mr Pilkington are to be treated as if they were an insurer making a payment to Mr and Mrs Townley under an insurance policy with Mr and Mrs Townley being entitled to pursue the full amount of their claim against the non-settling parties without any deduction for the amounts advanced to them by the Council and Mr Pilkington. Significantly, this clause is expressed as setting out the "overriding intention" of the parties and, to the extent that any other clauses are inconsistent with that intention, those clauses are intended to be subject to, and read with, such modifications as might be necessary to achieve consistency with the overriding intention.

d) Under clause 7, the Council's solicitors are to represent Mr and Mrs Townley in connection with litigation to pursue recovery under the agreement and the Council is to bear the costs of that representation.

e) Under clause 8, Mr and Mrs Townley agree to assign to the Council and Mr Pilkington their entitlement to recover damages from the non-settling parties.

f) Any sums recovered against the non-settling parties are to be distributed in terms of clause 9 in order of priority: costs incurred by the Council and Mr Pilkington in pursuing recovery; reimbursement to the Council and Mr Pilkington of any sums they might be ordered to pay in the proceedings or to provide by way of an indemnity to Mr and Mrs Townley; an amount of $25,000 to the Council, $250,000 to the Council and Mr Pilkington on a pro-rata basis (two-fifths to the Council and three-fifths to Mr Pilkington) and any remainder to Mr and Mrs Townley.

g) The Council and Mr Pilkington acknowledge that they will not profit from the agreement (perhaps mindful of any claim of maintenance or champerty).

h) Mr and Mrs Townley agree to instruct their expert witnesses to give evidence at the hearing at the cost of the Council. Mr Townley agrees to give evidence and otherwise co-operate with the proceedings as requested by the Council and Mr Pilkington.

i) The Council and Mr Pilkington agree to indemnify Mr and Mrs Townley from any amounts they might become liable to pay to the non-settling parties by way of costs.

j) The Council and Mr Pilkington agree not to settle any claims against the non-settling parties without the consent of Mr and Mrs Townley.

The pleadings for adjudication under the Act

The amended claim

[12] After the settlement agreement was concluded, an amended claim under the Act dated 8 October 2008 was lodged. The commencing words of the amended claim are expressed as if the Council and Mr Pilkington are bringing the claim. But the body of the document is otherwise expressed as if Mr and Mrs Townley are bringing it. In paragraphs 25 and 26 of the amended claim, Mr and Mrs Townley acknowledge receiving a total of $275,000 from the Council and Mr Pilkington and state that they have assigned their rights against Mr Petrou to the Council and Mr Pilkington. Paragraph 31, in setting out the cause of action in negligence against Mr Petrou commences with the Council asserting the cause of action but in terms that Mr Petrou owed a duty of care to Mr and Mrs Townley. The prayer for relief is expressed to be in the name of Mr and Mrs Townley. They seek judgment against Mr Petrou for $103,968 being the amount of their claim ($378,968) less the $275,000 received from the Council and Mr Pilkington. In addition, Mr and Mrs Townley each claim $20,000 for general damages. Their total amended claim is for $143,968 ($103,968 plus the general damages claim of $40,000).

The amended cross-claim

[13] An amended cross-claim (also dated 8 October 2008) was filed under the Act by the Council and Mr Pilkington against Mr Petrou. This is brought in the name of the Council and Mr Pilkington. It seeks contribution from Mr Petrou under s 17(1)(c) Law Reform Act 1936 in respect of the payments of $275,000 made to Mr and Mrs Townley. The amended cross-claim also recites that the Council and

Mr Pilkington have taken an assignment of Mr and Mrs Townley's claim against Mr Petrou as a term of the settlement reached. In addition to the claim to indemnity in respect of the sum of $275,000, the Council and Mr Pilkington also seek judgment from Mr Petrou for the difference between the amount of the claim by Mr and Mrs Townley and $275,000 (that is, the sum of $143,968).

The adjudicator's decision

[14] Mr Petrou applied to be removed from the claim. He says the adjudicator declined to remove him from the claim without affording him any or any adequate opportunity to be heard. The relevant parts of the adjudicator's decision are:

> 2.3 The seventh respondent's application for removal can be dealt with in short order. There is simply no provision in the Weathertight Homes Resolution Services Act 2002 that brings a properly brought claim to an end upon an assignment of the claimant's rights under that claim. The Council and the first respondent, as assignees of the claimants, maintain a claim in the amount of $103,968.00 from the seventh respondent. The claim is brought on the ground of breach of the duty of care claimed to have been owed by the seventh respondent to the claimants in his capacity as the alleged project manager. The first and second respondents also bring a claim in their own rights against the seventh respondent for contribution pursuant to section 17(1)(c) of the Law Reform Act 1936 in respect of the payments made by them to the claimants of $275,000.00 ($125,000.00 by the first respondent and $150,000 by the second respondent).
>
> 2.4 There have been a number of claims in this jurisdiction that have been assigned by the claimants to one or more of the respondents as a result of settlement negotiations including inter alia, Claim Nos. 00545 and 00185.
>
> 2.5 Accordingly, the application by the seventh for removal as a party to the adjudication proceedings is declined ...

Grounds for judicial review

[15] The essence of the argument presented by Mr Long on behalf of Mr Petrou was that the effect of the settlement agreement was to assign absolutely the claim by Mr and Mrs Townley to the Council and Mr Pilkington. He submitted that Mr and Mrs Townley had no further claim they could lawfully bring. Since only owners of dwellinghouses could bring or pursue claims under the Act, there was no jurisdiction

for claims to be brought by the Council and Mr Pilkington. Any such claims would have to be brought in the general courts. Mr Petrou also challenged the process adopted by the adjudicator in determining the issues under review but Mr Long acknowledged that the real issue was that of jurisdiction. A ruling on that point was requested rather than referring the matter back to the adjudicator for further consideration.

Discussion

[16] There can be no question that a claim under the Act may only be brought by the "owner" of the dwellinghouse concerned. Section 7 of the Act provides:

> **7 Criteria for eligibility of claims for mediation and adjudication services**
>
> (1) A claim may be dealt with under this Act only if—
>
> (a) it is a claim by the owner of the dwellinghouse concerned; and
> (b) it is an eligible claim in terms of subsection (2).
>
> (2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:
>
> (a) the dwellinghouse to which the claim relates must—
>
> (i) have been built; or
> (ii) have been subject to alterations that give rise to the claim—
>
> within the period of 10 years immediately preceding the date that an application is made to the chief executive under section 9(1); and
>
> (b) the dwellinghouse is a leaky building; and
> (c) damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building.

[17] Section 5 provides that, unless the context otherwise requires:

> **owner**, in relation to a dwellinghouse, includes a shareholder of a company, the principal purpose of which is to own the dwellinghouse or the dwellinghouses within the building concerned.

[18] The definition of "owner" is non-exclusive and its meaning is to be viewed in context but there is no indication in the Act of any intention to include assignees of an owner. The adjudicator's approach that there is no indication to the contrary is incorrect in law. The scheme of the Act is to enable the owners of dwellinghouses to bring claims. To permit third party assignees to do so would not be consistent with that scheme.

[19] A similar approach is adopted in the 2006 Act where an almost identical definition of owner is adopted and a key component of the eligibility criteria is that the claimant must own the dwellinghouse: ss 14-18.

[20] Mr Long referred to s 29 of the Act which provides:

29 Jurisdiction of adjudicators

> (1) In relation to any claim that has been referred to adjudication, the adjudicator is to determine—
>
> (a) the liability (if any) of any of the parties to the claimant; and
> (b) remedies in relation to any liability determined under paragraph (a).
>
> (2) In relation to any liability determined under subsection (1)(a), the adjudicator may also determine—
>
> (a) the liability (if any) of any respondent to any other respondent; and
> (b) remedies in relation to any liability determined under paragraph (a).

[21] Mr Heaney SC for the Council and Mr Pilkington did not suggest that an "owner" could include an assignee. Rather, he submitted that once a claim by an owner was accepted as an eligible claim under s 7, then it remained an eligible claim despite any subsequent assignment of the cause of action.

[22] On this point, I accept Mr Long's submission that the initial acceptance of an owner's claim as being eligible under s 7 does not control the jurisdiction of the adjudicator at all times thereafter. The critical time to determine jurisdiction to proceed to adjudication is at the time jurisdiction is exercised. It is essential that at the time of adjudication, the claimant is still an "owner". That is clear from s 29. If

there were an absolute assignment to a person or entity who is not a legal or equitable owner, the terms of the assignment may be such as to deprive the adjudicator of jurisdiction. However, any such assignment must be absolute in the sense that all the assignor's rights in respect of the claim are assigned without qualification to a third party with no ownership interest in the dwellinghouse at issue.

[23] A cause of action is, in law, a chose in action which may be assigned. An absolute assignment of a chose in action effects an immediate transfer of the chose from the assignor to the assignee. The chose no longer belongs to the assignor and the assignor cannot sue on the cause of action constituting the chose: *Public Trustee v Till* [2001] 2 NZLR 508 at [86]; 6 *Halsbury's Laws of England* (4 ed) at [21]; *Laws of New Zealand: Choses in Action* at [5] and [20]; and s 50 Property Law Act 2007. It is a matter of construction whether an assignment is absolute and not merely by way of charge.

[24] Mr Long submitted that on the true construction of the settlement agreement, Mr and Mrs Townley had absolutely assigned their cause of action to the Council and Mr Pilkington and had thereby lost any right to bring a claim as the owners of the property under the Act. Mr Long relied particularly on clause 8 of the agreement which he submitted was expressed in unqualified terms.

[25] Mr Long's point would be sound if clause 8 of the settlement agreement were construed on its own. However, it is axiomatic that the true meaning of an agreement must be established by consideration of the whole agreement in its factual context. It is apparent that clauses 6 and 8 of the agreement cannot stand together. Clause 6 clearly expresses the intention of the parties that the payments made by the Council and Mr Pilkington to Mr and Mrs Townley are to be treated as if they were payments by an insurer under an insurance policy. In other words, the Council and Mr Pilkington are to have the usual rights of subrogation afforded to an insurer who meets a claim by an insured under an insurance policy. Clause 6 goes on to stipulate that the Council and Mr Pilkington are to have the right to pursue the full amount of Mr and Mrs Townley's claim against the non-settling parties without any deduction for the amount advanced by them to Mr and Mrs Townley. The Council would

control the proceedings and pay the costs. The Townleys are obliged to co-operate with the Council and Mr Pilkington in bringing the claim.

[26] There is a fundamental difference between an assignment of a chose in action and the doctrine of subrogation. Rights of subrogation vest by operation of law rather than as the product of express agreement: *MacGillivray on Insurance Law* (3ed 2008) at [22-011]. Subrogation means literally the substitution of one person for another and arises in insurance cases as an incident of the contract of indemnity. Upon payment to the insured of a loss covered by the policy of insurance, the insurer is entitled to receive the benefit of the rights and remedies of the insured against third parties and is entitled to exercise those rights in the name of the insured to seek compensation for the loss from third parties.

[27] In contradistinction from the consequences of an assignment of a person's rights of action, the insurer is not entitled to bring the action in its own name. It remains an action belonging to the insured: *MacGillivray* [22-001-22-002] and [22-043]. The insurer has the right to control the proceeding and to recover its loss from the proceeds. Any surplus belongs to the insured. Ordinarily, the insurer will bear the costs of bringing the proceeding under the subrogated rights although sometimes the costs are shared between the insured and the insurer where the insured also seeks to recover uninsured losses.

[28] With the exception of clause 8, the provisions of clauses 2 to 12 are consistent with the Council and Mr Pilkington pursuing the claim in the name of Mr and Mrs Townley as if the Council and Mr Pilkington had a right of subrogation. The interest of the Council and Mr Pilkington is to recover the amounts paid to Mr and Mrs Townley while the interest of the Townleys is to pursue the balance of their claim. That is consistent with clauses 2, 6, 7, 9, 10, 11 and 12 in particular.

[29] On this footing, there is an obvious inconsistency between clause 6 (which essentially proceeds as if the Council and Mr Pilkington had rights of subrogation against the non-settling parties) and clause 8 which, taken on its own, would constitute an absolute assignment of the cause of action to the Council and Mr Pilkington. But, clause 6 deals with the inconsistency by stating that any clauses

inconsistent with the intention expressed in that clause are subject to it and and must be read with any modifications necessary to achieve consistency with the "overriding intention" expressed in it. It must follow that the overriding intention as expressed in clause 6 must prevail over the apparent inconsistency of the assignment effected by clause 8.

[30] The amended pleadings before the adjudicator are not altogether consistent with the settlement agreement. The amended claim commences as if it has been brought by the Council and Mr Pilkington; acknowledges the assignment and the payments; and then concludes as if it is a claim by Mr and Mrs Townley for the balance of $143,968. The amended cross-claim is, appropriately, brought in the name of the Council and Mr Pilkington and claims contribution from Mr Petrou under the Law Reform Act for the sum of $275,000 paid by the Council and Mr Pilkington to Mr and Mrs Townley but also claims judgment for the balance of the claim brought by Mr and Mrs Townley, i.e. for the sum of $143,968.

[31] However, I am satisfied that the deficiencies of the pleading are capable of remedy in order to be consistent with the terms of the settlement agreement. The proper course is for an amended claim to be filed by Mr and Mrs Townley in their name alone setting out their total losses, acknowledging the $275,000 received from the Council and Mr Pilkington and claiming the balance of $143,968 from Mr Petrou. The adjudicator would then decide the issue of liability and quantum under s 29(1). If liability is established, it would be necessary for the adjudicator to make a finding as to the full extent of the losses sustained by Mr and Mrs Townley (before allowing for the $275,000 paid) so the Council and Mr Pilkington may properly pursue their cross-claim.

[32] The cross-claim should also be amended so that the Council and Mr Pilkington may pursue contribution or indemnity from Mr Petrou under s 29(2) for the $275,000 they have paid. In view of the settlement Mr and Mrs Townley have reached with the Council and Mr Pilkington, the Townleys could not recover any further sum against those parties. It is not possible therefore for the Council and Mr Pilkington to include in their cross-claim against Mr Petrou any greater sum than the $275,000 paid plus costs. Mr Petrou is not bound to accept that the $275,000

paid to Mr and Mrs Townley by the Council and Mr Pilkington was a proper and reasonable settlement for them to reach. It remains open to him to dispute that issue.

[33] I am satisfied that a claim and cross-claim (modified as I have suggested) are properly brought within s 29(1) and s 29(2) respectively. Notwithstanding Mr Long's submission to the contrary, I am satisfied that this outcome is entirely consistent with s 3 of the Act which provides:

> **3 Purpose**
>
> The purpose of this Act is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings

[34] As Heath J observed in *Body Corporate No 16113 v Auckland City Council* [2008] 1 NZLR 838 at [49], it is in the public interest to encourage genuine settlements of the kind involved in the present case. That is particularly so in relation to the many outstanding disputes involving leaky homes in Auckland and elsewhere in this country. Fortunately, the Council and Mr Pilkington have avoided falling foul of the consequences of an absolute assignment but care will be needed in similar cases to avoid that risk by careful documentation of the terms of settlement.

Conclusion

[35] For these reasons, the application for judicial review is dismissed. There will be an order for costs on a 2B basis against the applicant in favour of the second and third respondents.

A P Randerson J
Chief High Court Judge