

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2010-404-7840  
[2016] NZHC 192**

BETWEEN

BODY CORPORATE 330324  
First Plaintiff

MATTHEW NICHOLAS BROWN, HUI  
QUIN PAN, BIN XU and NAU XU; YUN  
YUNG PANG; GILES INVESTMENT  
HOLDINGS LIMITED; ZHOU SHEN;  
MALCOLM JAMES HOLMES and  
NELSON KEITH HOLMES; BOON  
HAO –YEUNG; QIONG LI; THOMAS  
Second plaintiffs

continued over

AND

AUCKLAND COUNCIL  
First Defendant

WHL LIMITED (in liquidation)  
Second Defendant

DOWNER NEW ZEALAND LIMITED  
(formerly known as Downer Edi Works  
Limited  
Third Defendant

continued over

Hearing: 9 February 2016

Counsel: HAH MacFarlane for sixth defendant/first third party/applicant  
SB Mitchell for respondent

Judgment: 17 February 2016

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**JUDGMENT OF FAIRE J**

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This judgment was delivered by me on 17 February 2016 at 3 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

JOHN LOWNDES and PEGGY  
LOWNDES; SIU WING CHAN and;  
BRENDA MARIE TURLEY; WON  
SUN SHIM; ZHI MING ZHANG,  
XIAO-LIN GE and WILLIAM  
LIEW; NICOLA FAYE BAUGHEN;  
MARY BERNADETTE TAY; AN-  
YU LIU; LAI FONG JOE and  
NORMAN JOE; DANIEL ROBERT  
OUNG and KELLY JANE BORWN;  
MURRAY GRAHAM CHANDLER;  
LI CHU HU; LI-CHENG WANG;  
MEHRDAD ESKANDARI NEJAD  
and SAU MUN CHAU; COLIN  
NEIL LATTER and MARILYN  
KAYE SHALLARD; LUCIANA  
BERTOLUCCI; ALEXIS TANSEAU  
and RAYMONDE TANSEAU; THI  
KIM PHONG TRINH; WENYUN  
YU; CLAUDIA URSUAL WYSS  
and EMIL TELLENBACH;  
DNGYUAN YANG and JUNHUA  
LI; TAEHOON KIM and HYUN OK  
KIM; YUHANG GAO; CAIQING  
WU; MICHAEL DESMOND ORR;  
JIANXUN ZHANG; TAT HON  
WONG and SWEE TING TEOH;  
MGW1 LIMITED; HOW LONG  
POH and POH LIM YAP; FANG LI;  
ESHA'S INVESTMENTS  
LIMITED; TERENCE KEITH  
JOHN ERASITO and LUCY MARY  
ERASITO; WEI ZHONG WANG  
and JIAN SHEN; KWOK KIN  
LAM; BOCK HWAN KIM; ZHI  
QIANG GUAN; KIRAN DAHYA  
LALA and SHASHI KIRAN LALA;  
MINSHAN REN; DIANE CHEN;  
HAILONG WANG and CANHONG  
CHENG; GARY RONALD  
HENDRICK; LAN YAO; BRETT  
GREGGORY PALMER; CHRIS  
NOEL BAILEY; ROBERT MCGILL,  
NINA MORISSETTE and HPJ  
TRUSTEES NO 5 LIMITED; AZ  
PROJECTS LIMITED; STEPHANIE  
JANE HOLMES; ZUE YAN LI;  
JONG BOON SUH KIM, YONG  
KYUN SUH and JRF TRUSTEE  
COMPANY LIMITED; ARAGON

ST-CHARLES; GHAIK KHOON  
THE; TAI-CHEN CHIU and MAI-  
RUNG TSAI; YOLANDE MEI YEH  
WAN; SIEW WAH PHOON;  
XIANG QUESTION HUANG; DE  
PING REN and YING SONG;  
STEVE HEIARII JACQUES  
POMMIER and HIRIATA  
TEARERE TANIA POMMIER;  
GILLIAM MARGARET ELLIS;  
CHING-HUA YU; JUN CHEN and  
PINGZHEN ZHOU; YI WEI;  
ZHENNAN WEI and CHUNHONG  
CHEN; EDMOND JISSANG and  
LUCIANA JISSANG; GREEN  
DOOR PROPERTIES LIMITED;  
ALBERTO BACATAN NOGOY and  
MARIA FLORA MURIEL NOGOY;  
YANFU ZHAO; 1628 TRUSTEE  
CO LIMITED; TRYSTAN DAE  
KYU WHANG and KWANG HEE  
LEE; ROIMATA BEATRICE  
MARAMA and ALBERT UEVA  
TERAI; KUEN-RONG SHEN and  
TSUI-PING KUO; DANIEL YEE  
KUUI CHOI; ZEST PACIFIC  
INVESTMENTS LIMITED; YIN-  
CHUN WU; PAOLO GIOVANNIE  
DELMONTE and RAFAELLA  
MARIA SANTINI; PIK-YING  
CHAN; SHUQIANG LI; JUNYAO  
ZHAO; YOUNG YOUP KIM and  
YOUNG HEE KIM; HONJUN  
WANG and MUKTI ARYAWAN;  
WANQING HUAN; NEW  
ZEALAND PROPERTY  
MANAGEMENT & INVESTOR  
SERVICES LIMITED; GRACE  
TSUN-CHUNG CHAN; ; YA LAN  
HUANG; RAMONITO MALLARI  
VASQUEZ, ROWENA NAGUIT  
VASQUEZ and RONNEL NAGUIT  
VASQUEZ; PHILIPPE BIENAIME  
and MARIE-ODILE GABRIELLE  
BERTHOMIER BIENAIME;  
MURIEL JEAN LILBURN,  
LOUISA JEAN GORDON,  
PHILLIPPA KATE LILBURN and  
PAUL STEPHEN COE; HOCK  
HENG TAN and SAY FONG

CHEW; WEI HAN and DUO LU;  
CARYN FRANCES HAYNES;  
OLIN MICHAEL LIDDALL and  
CAROL JOY LIDDALL; ROBERT  
CHRISTOPHER LOUDEN and  
DONNA JEANNETTE LOUDEN;  
JINGWEN LU and XUE QING LU;  
DOUGLAS BRUCE HICKSON and  
MARJORIE MCGILLIVRAY;  
RITCHIE INVESTMENTS  
LIMITED; LING PANG and LING  
JIANG WANG; CHANJIAO YIN;  
JINGHUA SHEN; ETIENNE  
YERSIN and ELIANE YERSIN;  
TEPAU YVES ARAI; CHE TSUEN  
LAI; PAUL JAMES FEENEY and  
FRANCIS JAN FEENEY; YAN LIN;  
ALPHONSE NUFOUY, THERESE  
NUFOUY, GASTON NUFOUY and  
IVAN NUFOUY; FEN LIN and LAI-  
CHI CHUANG; SHIU TSEUNG  
YAN and CHOR WAN HO YAN;  
LOREN CHU *discontinued*); MITHRA  
EBENEZER VIJAYASENAN,  
PREMILA VIJAYASENAN and  
GIBSON SHEAT TRUSTEES  
LIMITED; CATHERINE ANNE  
ADDIS; YE CHEN; QING LIN;  
AMALEX INC LIMITED; SUI KIN  
LO and YIM HING CHAN, SIRI  
ALANA MCKELVIE; WELLESLEY  
LAND CO LIMITED; XIUFANG  
CHEN; GUANGMING YANG and  
ZHENGZHEN HU; COLIN BRUCE  
ECCLES, SUSAN MARY ECCLES  
and DIPROSE MILLER TRUSTEES  
LIMITED; DEALEX LIMITED;  
EVELYN SUET MEI CHOW; ;  
BARBARA RAABE and KM  
BUCHANAN TRUSTEE  
COMPANY LIMITED; PEPE  
WONG LISSON and HORTENSE  
LISSON; CHAO ZHAO and LIN  
LIN; JIANMING JIANG and PING  
WANG; SEA CHANT  
INVESTMENTS LIMITED; COLIN  
FAUX and ELIZABETH ANNE  
FAUX; QIONG DUAN; CEMACK  
INVESTMENTS LIMITED; SANG  
HYUN CHOI and GIL JA CHOI;

LIFOUICINE JOHNSTON;  
PACIFIC LANKA LIMITED;  
MILAX GAGATES LIMITED;  
JULIE HE; A FU PAN and  
PEIMING IN; BRIAN EDWARD  
BIDDLE and LAURENCE  
WILLIAM ROBERTS; EMAD AL-  
JUBBAWEY, JENAN SAMAKA and  
ONEHUNGA TRUSTEE  
COMPANY LIMITED; AKEEL  
ALKUBAISY, HAIFA SAID and  
ONEHUNGA TRUSTEE  
COMPANY LIMITED; DING LI;  
NGOC VINH NGUYEN; ERICA  
VILMA VACCARELLA;  
FRANKLIN SUI, DEYANNA SUI  
and YANN SUI; ZHUOPING XIE;  
DIPAK KUMAR SHAH and NITA  
DIPAK SHAH; WEIMIN XU;  
SHULING ZHAO; KYUNG OK  
CHOI and EUN MI LEE; YOUNG  
SOOK HONG and SOO KYUNG  
CHAE; VICTOR WONG and  
PATRICK WONG; HAZELMAN  
PROPERTIES LIMITED; XUFENG  
LI; YUEN YUEN TSUI; LAM  
TSUI; MASASHI SAKAMOTO;  
KANTILAL TEJSHI SHAH and  
SARLA KANTILAL SHAH; HYUN  
BAE KIM and HEA OK PARK KIM;  
FRANCESCO TRIMBOLI and  
RICHARD JAMES BARNETT; LU  
XIA and QIANTANG XIA; JUNLI  
HUANG and JINRUI OU; JOSEPH  
CHONEL and FLORA CHONEL;  
QIN TRUSTEE COMPANY  
LIMITED as assignee of BIANLING  
YANG; CHENG-JUNG FAN;  
MYUNG JOO CHUNG; JOSELYN  
GERARD DE CONCEICAO;  
CHUAN HE; XIANGQIN WANG  
and CHAO XU; YUANHUA LI;  
SIMON CLYDE MALE and  
CHRISTINE ANNE MALE;  
BINGXIN CAI and ZHIBIN WEI;  
NICOLE LIAO; HORTENSE LAUX  
and JAMES LAU; ZILIANG YANG;  
PIRIPI HARAWIRA TAIAPA and  
LINDA MARY TAIAPA [discontinued];  
JIM LIN formerly named as JUN HE

; YI PAN, A FU PAN and PEI MING  
IN; JOHN NIGEL DUNN; ERNEST  
LOU and LY-LEN LOU; JINGMING  
YANG as assignee of the cause of  
action of JINHUA DAI and  
JINGTING JIANG; AND DANIEL  
ADIN SHIRLEY, PAUL SHIRLEY  
and LINDSAY ROBYN SHIRLEY  
and ERIC ZHU  
Second Plaintiffs

**Defendants continued**

CCSNZ LIMITED (formerly known  
as Symonite New Zealand Limited  
Fourth Defendant/Fourth Third Party

TYCO NEW ZEALAND LIMITED  
(trading as Climatech)  
Sixth Defendant/First Third Party

TAL LIMITED  
Fifth Defendant/Second Third Party

AND

1280899 LIMITED (formerly known  
as Auckland Height Services  
Limited)  
Third Third Party

ARCHITECTURAL WINDOW  
SOLUTIONS LIMITED  
Fifth Third Party

MacMILLAN PLUMBING  
LIMITED  
Sixth Third Party

POSITIVE INSTALLATION  
LIMITED  
Seventh Third Party/Fourth Party

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### Introduction

[1] This proceeding concerns a claim by the owners of a building made up of an eight-storey car park and a further 21 levels of apartments located in central Auckland, this building is known as City Gardens.

[2] The plaintiffs, who are the Body Corporate together with the unit owners, allege that the building has been constructed with a multitude of defects. They seek damages which include an economic loss claim in excess of \$32,000,000, plus general damages slightly in excess of \$4,000,000.

[3] For the purposes of the application which I am considering in this judgment the economic loss claim includes a claim in relation to ventilation matters of \$2,196,332.79.

[4] The claim was brought against the Council, first defendant, the head contract Watts & Hughes Ltd, second defendant (now named as WHL Ltd in the proceeding), two major subcontractors Downer New Zealand Ltd and Symonite New Zealand Ltd, the third and fourth defendants, and the tiling subcontractor, the fifth defendant.

[5] After the proceeding was issued, the claim was amended on 3 May 2012 to introduce issues relating to ventilation. That resulted in WHL Ltd and the Council joining Tyco New Zealand Ltd (trading as Climatech and referred to from here as Climatech) as a third party to each of their claims. The Council and WHL Ltd cross-claimed against each other in respect of the matter raised in the amendment. At the time, the plaintiffs did not sue Climatech, who was a subcontractor.

[6] Climatech was the mechanical ventilation subcontractor. The amendment which led to its joinder as a third party arose from the plaintiffs alleging that each of the Council and WHL Ltd are liable for certain defects in the design and construction of the building. As against WHL Ltd, those defects included defect 't' and defect 'u', both of which pertain to the bathroom extract fan system. They are referred to in this judgment as the "ventilation defects".

[7] In mid-2015, the plaintiffs amended their claim and removed the ventilation defects from the particulars claimed against the Council, although the plaintiffs maintained their general claims of negligent inspection and negligent issuance of code compliance certificates.

[8] On 24 June 2015, WHL Ltd was placed into liquidation. On 26 August 2015, WHL Ltd assigned its causes of action and rights to contribution in the proceeding in relation to the claim against Climatech to the first plaintiff and served notice of assignment on Climatech.

[9] A close of pleadings date had been fixed for this proceeding as 26 September 2014 in anticipation of a trial to commence on 20 July 2015. The trial date was subsequently adjourned by Muir J. No alteration to the close of pleadings date was made. Accordingly, the plaintiffs sought leave from Fogarty J to file an amended statement of claim which referred to the assignment of the cause of action and sought the joinder of Climatech as sixth defendant in respect of the assigned cause of action. An order granting leave was made on 13 October 2015. An amended statement of claim was filed the following day.



[10] The amended statement of claim filed by the plaintiffs on 13 October 2015 contains two assigned causes of action against the sixth defendant. The first is a claim for losses in negligence. The second is for contribution as a concurrent tortfeasor. Both causes of action rely on the claim that Climatech breached a duty of care when it performed the ventilation work in such a way that the ventilation defects occurred.

[11] Also filed on the same day as the amended statement of claim was the application which I must now deal with, that is the application by Climatech to file a cross-claim against the Council.

### **The Application**

[12] Climatech, in its position as the sixth defendant, applies for leave to file a cross-claim against the first defendant, the Council. It relies on r 4.18 of the High Court Rules and, because it is made after the close of pleadings date, r 7.7.

[13] Climatech is concerned that if the cross-claim is not allowed, it must then rely on the WHL Ltd cross-claim against the Council to seek contribution. Climatech notes that the WHL Ltd cross-claim refers to defects in the City Garden Apartments generally, without further particularising the ventilation defects. This is, presumably, why Climatech seeks leave to file a cross-claim of its own against the Council.

[14] In the proposed cross-claim, Climatech seeks that if it should be found liable as a concurrent tortfeasor on the basis of the allegations in the claim made by WHL Ltd (as assigned to the first plaintiff) in respect of the ventilation defects, that the Council is also responsible as a concurrent tortfeasor for the same losses.

[15] Climatech asserts this claim on the grounds that the Council was at all material times the territorial authority responsible for performing duties and exercising powers under the Building Act 1991.<sup>1</sup> In particular, the Council in the building consent approval processes, issued code compliance certificates. As a result, the Council owed the plaintiffs a duty to exercise reasonable skill and care

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<sup>1</sup> This Act has now been replaced by the Building Act 2004.

when performing its functions under the Building Act. Climatech submits that the Council breached this duty of care by issuing the code compliance certificates either without becoming aware of defects which were reasonably discoverable, or without requiring these defects to be remediated.

### **Climatech's Submissions**

[16] Climatech frames its submissions having regard to r 7.7. It submits that under the rule and relevant authority,<sup>2</sup> the test that must be met is whether granting leave:

- (a) would be in the interests of justice;
- (b) would not significantly prejudice other parties; and
- (c) would not cause significant delay.

[17] Climatech submits that the cross-claim is not statute barred under the Building Act 2004, s 393(2). In asserting this, Climatech relies on the decision of Fogarty J in *Body Corporate 330324 v Auckland City Council* (referred to from here as “*Downer*”), which related to parties in the present case.<sup>3</sup>

[18] Climatech submits that Fogarty J’s reasoning that cross-claims are not causes of action between defendants and therefore do not fall under s 393, applies in this case.

[19] Climatech submits that even if s 393 of the Building Act is found to apply, and therefore the claim under s 17 of the Law Reform Act 1936 is deemed to be out of time, Climatech’s claim for equitable contribution can survive the longstop.

### **Council's Submissions**

[20] The Council opposes the granting of leave for Climatech to file a cross-claim.

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<sup>2</sup> *Elders Pastoral v Marr* (1987) 2 PRNZ 383 (CA) at 385.

<sup>3</sup> *Body Corporate 330324 v Auckland City Council* [2015] NZHC 995.

[21] The Council submits that the effective position of Climatech in the proceeding is as a third party, as it is only if WHL Ltd is found liable that the Court will consider whether Climatech is liable. Therefore, the Council submits, there is no standing for Climatech to issue a cross-claim against the Council.

[22] The Council submits that *Downer* does not apply, as the claim in this case is, in effect, a fourth party claim rather than a cross-claim. Therefore, the longstop provisions of the Building Act apply, and the claim is statute barred.

[23] The Council submits that if Climatech wished to pursue a claim against the Council it should have issued a fourth party claim at the time when it was joined as a third party by WHL Ltd.

## **Analysis**

### *Cross-claim or fourth party claim?*

[24] Climatech was brought into the proceeding by WHL Ltd, who issued a third party claim against it. WHL Ltd then assigned the causes of action against Climatech to the first plaintiff. The plaintiffs were then granted leave to add Climatech as the sixth defendant.

[25] The Council argues that despite Climatech being named as a defendant, the proposed cross-claim is, in effect, still a fourth party claim. This submission assumes that the words in rr 4.4 and 4.5 "...who is not a party to the proceeding..." must be read as "...who is not a party to the third party (or fourth party) proceeding..." In short, that the words do not include all parties in the entire proceeding.

[26] Climatech argues that the second cause of action against it, relating to a breach of a duty of care owed to the plaintiffs, is exactly the nature of claim that would give rise to a cross-claim between defendants.

[27] The plaintiffs have received an assignment of the chose in action of WHL Ltd, which is more particularly described in the recitals to the deed of assignment as:

The Assignor has agreed to assign to the Assignee the Assignor's third party claim and any other claim the Assignor may have against Climatech in relation to the construction of City Gardens and proceeds of any damages or compensation awarded under such claims claim on certain terms. The Assignor and Assignee wish to record the terms of their agreement.

[28] Where there has been an assignment, the practice has been for an assignee to join the assignor as a co-defendant with the debtor if the assignor is uncooperative with the debtor.<sup>4</sup> That then creates a position where the assignee sues as the assignor and also the debtor. By joining Climatech as a defendant, the plaintiffs have achieved the same position here, meaning that both WHL Ltd as assignor and Climatech as the debtor are sued as defendants.

[29] However, the rights which the plaintiffs are exercising under the assignment are, in terms of s 50(1) of the Property Law Act 2007, "...all the rights of the assignor in relation to the thing in action".

[30] That leads me to conclude that Climatech, as a named defendant as a result of the assignment, is not a defendant for the purposes of issuing cross-notice pursuant to r 4.18 of the High Court Rules. Its claim against the defendant Council has to start from the premise that it is claiming as a third party against the defendant Council. Nothing has changed as a result of its joinder as a defendant. I therefore conclude that the pleading position of the parties immediately prior to the order joining Climatech as a defendant is what the court will have to rule upon when this matter comes to trial.

[31] Climatech's position is different from that considered by the Court in *Downer*. In *Downer* the plaintiffs have a direct cause of action against Downer. Here, the plaintiffs' cause of action is dependent on an assignment.

[32] The application by Climatech does not suggest that it should be allowed to file a fourth party claim against the Council; therefore, I do not consider that issue.

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<sup>4</sup> *Bowdens Patents Syndicates Ltd v Herbert Smith & Company* [1904] 2 Ch 86 at 91 per Warrington J.

*Is an order required?*

[33] I am satisfied that the issues raised by WHL Ltd's cross-claim against the Council, the third party proceeding against Climatech, and Climatech's defence to the third party claim sufficiently address issues of contribution and indemnity in respect of the plaintiffs' claim against WHL Ltd. As the claim against Climatech relates only to what WHL Ltd is found responsible for, I consider that the current pleadings sufficiently address the issues and there is no risk of injustice if Climatech is unable to file the cross-claim claim.

[34] I was not provided with a statement of defence by the Council to WHL Ltd' cross-claim. Therefore, I assume, in light of r 4.20, that the Council does not wish to raise an affirmative defence to the cross-claim.

[35] If I am wrong in this respect and the pleadings as they stand do not sufficiently address the issues of contribution and indemnity, the trial judge has sufficient discretion under r 4.22 to make the appropriate order for contribution.

### **Conclusion**

[36] In conclusion, the plaintiffs received an assignment of the third party claim against Climatech from WHL Ltd. The plaintiffs have no direct cause of action against Climatech.

[37] Climatech is unable to file a cross-claim against the Council.

[38] Accordingly, leave is not granted for Climatech to file a cross-claim against the Council.

### **Costs**

[39] Although the defendant has been successful, my overall conclusion hopefully clarifies the precise issues involving the first defendant and the sixth defendant/first third party. In short, both attain benefit.

[40] Accordingly, I conclude that costs should follow the result of the final determination between the first defendant and the sixth defendant/first third party. The issues of costs is reserved for this purpose.

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JA Faire J

Solicitors: Hesketh Henry, Auckland  
Heaney & Partners, Auckland