IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2018-425-101
[2019] NZHC 1223

IN THE MATTER	of an originating application
UNDER THE	Insolvency Act 2006
BETWEEN	QUEENSTOWN LAKES DISTRICT COUNCIL Applicant
AND	OFFICIAL ASSIGNEE Respondent

Hearing: 30 May 2019

Appearances: F P Divich for Applicant
D M L Dingwall for Respondent

Judgment: 31 May 2019

JUDGMENT OF ASSOCIATE JUDGE LESTER

Introduction

[1] The Queenstown Lakes District Council ("the Council") appeals a decision of the Official Assignee ("OA") rejecting its proof of debt filed in the bankruptcy of Philip Stanley Morrison ("Mr Morrison").

Procedural Matters

[2] This matter is being dealt with by way of an originating application. The OA has advised that she will abide the outcome of the Court's decision but has filed memoranda and a supporting affidavit explaining how the decision to reject the

Council's proof of debt was reached, addressing the quantum of the applicant's claim and the question of costs.

Background

[3] Mr Morrison, along with a company called AJ Stevens Holdings Ltd, developed as the "S & M Partnership" a residential development in Queenstown ("the development"). Proceedings were issued by the owners of the development against Andrew John Stevens personally (he being the director and shareholder of AJ Stevens Holdings Ltd), the Council and other parties, including Mr Morrison.

[4] The proceedings issued in the High Court on 3 July 2012 alleged that the development was a leaky building, the claim having previously been advanced by the owners through the Weathertight Homes Resolution Service.

[5] The Assessor's report prepared under the Weathertight Homes Resolution Services Act 2006 ("the Act") is produced in this proceeding.

[6] The Council on 7 September 2012 filed cross claims against the defendants in the High Court proceeding. Mr Morrison filed no defence to the cross claim.

[7] The High Court proceeding was set down for a hearing commencing 24 March 2014. The claim was settled at mediation on 5 March 2014. Mr Morrison did not attend the mediation. The mediation agreement expressly preserves the Council's right to pursue its cross claim against Mr Morrison.

[8] The Council obtained a formal proof date for its cross claim against Mr Morrison scheduled for 1 April 2014. However, the Council immediately before the hearing learnt that Mr Morrison had been bankrupted by another creditor on 5 February 2014, explaining his non-attendance at the mediation.

[9] The Council, rather than seeking leave to pursue the formal proof hearing against Mr Morrison, elected to file a proof of debt in Mr Morrison's bankruptcy.

[10] A proof of debt was duly filed and there was correspondence between the Council and the OA in April and May 2014 as to the supporting detail provided by the Council. However, as is the usual practice in the absence of there being any recovery into the bankrupt's estate, the OA did not make any decision about the status of the proof of debt.

[11] Mr Morrison was discharged from bankruptcy on 9 December 2017. In September 2018 the OA received funds into the bankrupt estate. The following month the OA, it seems without contacting the Council again, rejected the Council's proof of debt on the basis that insufficient information had been supplied to support the proof of debt.

[12] The Council as a means of providing a precis/summary of its claim against Mr Morrison provided the OA in 2014 with a copy of the statement of claim filed by the owners of the Queenstown property, along with an explanatory email as to the Council's right to seek contribution from Mr Morrison.

[13] What, however, was not sent was anything in the way of expert reports or affidavit evidence in support of the Council's claim. I do note that the OA was aware that the matter had been set down for a formal proof hearing and the Council would have prepared or been in the course of preparing some evidence to support the formal proof hearing when it learnt of Mr Morrison's bankruptcy.

[14] Be that as it may, the proof of debt was rejected, leaving the Council to have to challenge the rejection through the vehicle of this appeal and the OA's view being that once it has made a decision in respect of a proof of debt, it is functus officio and has no power to reconsider the decision. Counsel for the Council did not suggest that that was not the case.

The Council's claim

[15] I accept the onus of establishing a provable claim remains with the creditor.[1]

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1 *H Investments Ltd (in liq) v Official Assignee* [2018] NZCA 76 at [46]-[47].

[16] As a preliminary point I note that agreement has been reached between the Council and the OA as to the quantum of the Council's claim. That amount is $444,000 based on Mr Morrison having a liability of 20 per cent of the amount that the parties who contributed to the settlement agreed to pay at mediation.

[17] I note that Mr Stevens, who attended the mediation, paid $150,000 towards the settlement. It will be recalled that Mr Stevens' company was in partnership with Mr Morrison. That Mr Stevens in his personal capacity paid $150,000 in respect of the claim made against him and Mr Morrison is some support for the Council's position that the developers were liable to contribute to the cost of rectifying the property.

[18] Counsel for the Council seeks the order reversing the OA's decision on the following grounds:

(a) The Council and Mr Morrison were concurrent tortfeasors in respect of the development.

(b) Mr Morrison was the developer of the development.

(c) Mr Morrison owed and breached a non-delegable duty of care causing damage to the owners of units in the development.

(d) The Council settled its joint and several liability to the owners of units in the development.

(e) The amount the Council paid in settlement of its joint and several liability was reasonable.

(f) Pursuant to 17 of the Law Reform Act 1936, the Council had a valid claim for contribution from Mr Morrison.

(g) The Council made that claim before Mr Morrison was bankrupted.

Discussion

[19] In a second amended statement of claim dated 20 December 2013, the claim in relation to the Queenstown property was not quite $2,360,000 including GST. The claim was settled with a total payment of $1,430,000 including GST. The Council's contribution was $780,000.

[20] Given the amount claimed, the proximity of a lengthy High Court trial, the detailed nature of the matters in issue, and the Council's advice that it was at real risk in relation to the weathertightness issues of the property, the amount the Council paid was, in my opinion, reasonable.

[21] It seems clear that the Council and Mr Morrison were concurrent tortfeasors. Mr Morrison was a developer of the Queenstown development given he and Mr Stevens' company were the owners of the land that was developed, and the partnership carried out the development. The building consent for the project was issued to the S & M Partnership.

[22] A substantial assessor's report dated 3 December 2010 in respect of the Queenstown property has been produced. It sets out detailed issues with weathertightness.

[23] Under the heading "where and why does it leak", the assessor identified seven main reasons why the building leaked. Briefly, they were:

(a) The concrete decks to the property had nominal fall, did not have a tanking system or membrane coating, and were only painted and the paint had degraded. The specified upstand flashings were not installed as specified, or not at all, allowing moisture to enter the building, and the step section between the unit floor levels and the deck levels was insufficient.

(b) The exterior cladding system was changed from the specified horizontal corrugate colour steel to fibre cement sheet, which was of inadequate thickness and not adequately painted to prevent moisture

entering the building. In some places the fibre cement sheet had been fitted hard down, or almost hard down, on the deck allowing moisture wicking and uplift of moisture into the timber framing.

(c) The deck balustrade was not constructed as detailed in the consent drawings.

(d) The storm water discharge from the decks was inadequate.

(e) The exterior precast panels had significant cracks and patching, and there were locations where the exterior panels were retaining ground up to 1.5 m causing moisture entry.

(f) Exterior aluminium joinery – there were inadequate flashings to most of the doors in the development.

[24] The actual report is some hundreds of pages with photographs. Many, if not all, of the reasons why the property was not weathertight, at the very least arguably represented a failure by the Council to properly inspect the property during its construction. While it denied liability in the mediated settlement, it was at least arguable that the Council was in breach of its duties to the unit owners and Ms Divich appearing for the Council confirmed that the expert evidence received by the Council was that it had significant risk in that regard. The Council was well advised to mitigate its losses by settling at mediation.

[25] It is long established that the Council as the territorial authority owed duties of care to the original owners and subsequent owners of the property. It is also clear that Mr Morrison as a developer also owed the owners of the development a non-delegable duty of care.[2]

[26] Both the Council and Mr Morrison arguably breached their duties to the owners of the Queenstown property. There is no obvious reason for the leaks other than them being caused by the substandard supervision/inspection of the build by both

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2 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

the developer and the Council. Both owed duties in tort and accordingly, both the Council and Mr Morrison were concurrent tortfeasors in respect of the property.

[27] This is a typical case where contribution under the Law Reform Act 1936 would be ordered.

[28] The Council made its claim against Mr Morrison well before his bankruptcy. I also take into account that Mr Morrison did not take any steps to defend the cross claim against him, and as I have noted, the director of the company with which Mr Morrison was a partner contributed to the settlement at mediation.

[29] The amount payable by the Council pursuant to the mediation agreement provides a fixed starting point to assess the value of the proof of debt.

[30] Counsel for the Council has provided authorities in relation to the apportionment of liability between developers and local authorities with there being a number of cases fixing the contribution at 80 per cent to the developer and 20 per cent to the Council.[3] That apportionment has been agreed between the parties and given it is in line with authority, it is appropriate.

[31] Accordingly, in the circumstances, I consider it appropriate to allow the application to reverse the OA's decision. The Court may consider evidence and information that was not available to the OA at the time of the original decision.[4]

[32] Of course, the Court has had the benefit of full evidence filed in support of the proof of debt which was not before the OA and so the exercise the Court has had to carry out is very different from the one that confronted the OA. The allowing of the appeal involves no criticism of the OA.

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3 *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Body Corporate 160361 & Ors v BC 2004 Ltd & BC 2009 Ltd & Ors* [2015] NZHC 1803.

4 *Official Assignee v Kirkham* HC Auckland B701/95, 8 October 2003 at [8]; *Holdgate v Official Assignee* HC Auckland B1545-IM96, 23 August 2000 at [22]; *SB Properties Ltd (in liq) v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633 at [53] to [57]; *H Investments Ltd v Official Assignee* [2017] NZHC 996 at [47].

Order

[33] Accordingly, there is an ***order*** reversing the OA's decision made on or about 16 October 2018 to reject the Council's proof of debt.

Costs

[34] The Council seeks that costs be paid from the bankrupt estate. The OA opposes that on the grounds that her original decision was correct on the basis of the material that had been supplied by the applicant. While the OA could well have gone back to the Council and requested further evidence when it reviewed the proof of debt in September 2018 given the proof of debt had been filed over four years earlier, the OA had in 2014 requested material in support of the proof of debt which was not supplied.

[35] I consider it appropriate that there be no order as to costs.

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Associate Judge Lester

Solicitors:
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Insolvency & Trustee Service, Christchurch