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Third party costs

When more are not necessarily merrier.

THE STRENGTH OF CLAIMS AGAINST THIRD PARTIES SHOULD BE REVIEWED THROUGHOUT THE COURSE OF LITIGATION.

For a litigant, the council is the perfect target. It is solvent. It is not going to flee the country or hide its assets in a family trust. It cannot go bankrupt. It just sits there, collecting rates and rubbish, issuing building and resource consents, and making sure the public libraries are stocked with books.

Because it is so reliable, many claimants involved in multi-party construction litigation just sue the council. It is easier to leave it up to the council to join the other, potentially more risky parties, to the claim.

This leaves the council:

- With the burden of proving the case against the party it joined; and
- Exposed to having to pay that party's costs if the council does not succeed against them at trial.

There are a couple of interesting and contrasting recent High Court decisions where the question of the council's liability for third party costs has been considered.

The first case, *Body Corporate 326030 v Auckland Council* [2015] NZHC 3359, was a claim concerning alleged fire engineering defects. The claimants made their claim very close to the 10-year limitation period expiring. The council was forced to scramble to join parties within time and joined four. The council was one of three defendants. One of those defendants, the builder, was placed into liquidation during the life of the litigation.

At a meeting of experts, the claimants' expert was convinced that the building had at all times been code compliant. The claimants were forced to terminate their claim. They accepted that they were liable for the council's costs, but would not accept any responsibility for the costs of the four parties the council had joined.

If things worked out how the claimants wanted them to, they would pay the council's costs but the council would have to pay the costs of its four third parties ie, the council would have to pay three times more than it would recover. The council took the question of who should be responsible for the costs of its third parties to the court to decide.

The court found that the claim had the inevitable result of three of the four third parties being joined, and the claimants were responsible for their costs. That ruling put the council in a nice cost-neutral position.

The other case is *Weaver v HML Nominees Limited* [2016] NZHC 473, a building defects case involving failed remedial works. The council (and two other defendants) issued third party proceedings against a product supplier who made statements in support of the building consent application.

The court found that had the product been installed correctly it would have complied with the code and the supplier had not said anything wrong in its statements. It escaped liability.

The council had to pay the product supplier increased costs because the court found the council had no evidence to support its claim at trial. The council's own expert gave evidence that the supplier's product would have worked if it had been installed in accordance with the building consent.

The court made an uplift of costs of 50 percent because the council contributed unnecessarily to the length of the trial by pursuing an argument that lacked merit.

The lesson that can be taken from these decisions is that the strength of claims against third parties should be reviewed throughout the course of the litigation. It is especially important to consider whether the council can prove its third party claims at the time it is given the claimants' evidence and when it is preparing its own evidence.

If the third party claim looks weak, steps should be taken to settle with them by negotiation; with such negotiation involving the claimant if they can be said to have been the cause of the party being joined. **LG**