IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000099
[2011] NZWHT AUCKLAND 68

BETWEEN	**DAVID GEORGE AND KAREN JEAN STRICKLAND** Claimants
AND	**ANDRE JARGEN GAENSICKE** First Respondent
AND	**IAN SHARPLIN** Second Respondent
AND	**AUCKLAND COUNCIL** Third Respondent
AND	**SHINGLE & SHAKE ROOFING LIMITED** Fourth Respondent
AND	**KEVIN GRANT BURROWS** Fifth Respondent
AND	**ROGER JAMES FRANKS** **Sixth Respondent**
AND	**KARL ROLAND GAENSICKE** Seventh Respondent
AND	**DAVID PIKE** **(Removed)** Eighth Respondent
AND	**BRIAN DOUGLAS MCINNARNEY** **(Removed)** Ninth Respondent
AND	**FRANCIS MCNABNEYAND WILLIAM MCNABNEY** **(Removed)** Tenth Respondents

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COST DECISION
Adjudicator: P A McConnell

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[1] Shingle and Shake Roofing Limited have applied for costs against the claimants. It submits it has incurred costs unnecessarily by the claimants pursuing a claim against it that lacked substantial merit and was never going to succeed. It submits that the initial claim against it amounted to a fishing expedition because it was alleged that SSR was responsible for ten defects but by the time of the hearing this was whittled down to one. The sole remaining issue related to the lack of ventilation outlets and SSR submits that fell outside the Tribunals jurisdiction in that it was not a weathertightness defect and, in any event, there was little, if any, evidence to support the allegation.

[2] The claimants oppose the application for costs. They say the documentary information available pointed to SSR having a much greater role in the roof construction than what was in fact the case. Fuller information on various parties' involvement in construction was not adequately clarified until after the failed mediation. The claimants say that it became apparent after that time that the claim against SSR was confined to substrate issues. These issues were refined once further information became available and the claimants submit the issue that proceeded to hearing was fully supported by expert evidence.

The Issues

[3] The issues I need to decide are:

- has SSR incurred costs unnecessarily by the claimants pursuing allegations against it that were without substantial merit, and if so
- whether I should exercise my discretion to award costs.

The Tribunal's jurisdiction to award costs

[4] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) to make an award of costs:

> **91 Costs of adjudication proceedings**
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> (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
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> (a) Bad faith on the part of that party; or
>
> (b) Allegations or objections by that party that are without substantial merit.
>
> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[5] There is a clear presumption in the Act that costs lie where they fall unless they are incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. Bad faith is not being alleged in this case. The onus is on the party seeking costs to demonstrate that the threshold for granting costs has been met. It is only once that onus is met that the discretion to award costs arises.

[6] Underlying section 91 is the principle that a party should not be allowed to cause unnecessary costs to other parties by pursuing arguments that lack substantial merit or are made in bad faith. For this reason the bar for establishing "without substantial merit" should not be set too high. The Tribunal should have the ability to award costs against parties making allegations which they ought reasonably to know they cannot establish. However, in determining the question of substantial merit one should do so without applying hindsight.[1]

[1] *White v Rodney District Council* HC Auckland CIV-2009-404-1880, 12 March 2010.

[7] Where allegations are made against a party which have no evidential support costs can, and in many cases will be, awarded. However, I accept that costs incurred in the preliminary stages of claims should not be considered as being incurred unnecessarily where there are genuinely disputed issues of fact and law, or where the information is incomplete and inconsistent, if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

[8] It also needs to be noted that claimants who are subsequent purchasers have little, if any, first-hand knowledge of who was involved in construction and when work was done. At times it is inevitable that they name parties in claims based on documents or information received which ultimately ends up being unreliable. Provided they acknowledge this in a timely way, and do not proceed with claims against parties for which they have no evidential basis, the threshold for awarding costs will not be met.

Have costs been incurred unnecessarily by the claimants pursuing claims against SSR that were without substantial merit?

[9] The claimants in this claim are subsequent purchasers. They had no first-hand knowledge of what work was done when, and by whom. There was, however, tenable evidence of defects in the installation of the substrate to the membrane roof sections. The claimants were reliant on the documents that still existed and information received from other people as to who carried out the work. At the time of filing the claim with the Tribunal they understood SSR had been involved in both the installation of the plywood substrate as well as the roofing membrane. Therefore it was not unreasonable for them to name SSR as a party when they filed their claim.

[10] It was not until after mediation that it was confirmed that the only plywood substrate SSR installed was under the shingled roof sections which have not been implicated in the leaks. SSR however also installed the membrane roof and there was some evidence that deficiencies in the substrate contributed to leaks and damage. From that time the only claims being pursed against SSR were the popping of the inappropriate nails in the substrate and the lack of ventilation outlets. The claimants however dropped any claim against SSR in relation to nails prior to the hearing as was evidenced by the reply brief filed by their expert, Mr Wilson.

[11] SSR have failed to establish that up until that point they incurred any costs unnecessarily as a result of the claimants pursing claims against it that were without substantial merit. The claimants acted reasonably on the information available and aspects of the claim against SSR were dropped as further information became available. While the claim was not formally amended, it was clear that by the time of the hearing the claim against SSR related to its failure to ensure ventilation outlets had been installed in the substrate prior to the installation of the membrane.

[12] The claimants suggest that SSR by implication accepted that there was a tenable claim against it as it did not file an application for removal. Counsel for SSR however submits it was too late for SSR to apply to be removed by the time they had been instructed as the timetable for joinder and removals was past. I do not accept this submission as, while an initial timetable is set, the Tribunal can and will deal with applications for removal at any time up until the close of the hearing. It is not uncommon for applications for removal to be made once briefs are filed if those briefs do not provide sufficient evidential support for the claims being made against a party. Occasionally applications for removal have successfully been made during the course of a hearing. Counsel for SSR are experienced litigators and very familiar with the Tribunal's jurisdiction.

[13] The question is whether the one remaining issue relating to the vents that proceeded to hearing lacked substantial merit. Claims that have substantial merit, even if ultimately rejected, will not attract an order for costs.[2]

[14] There were a number of matters in dispute in relation to the vents. Mr Wilson, the claimants' expert, was of the opinion that the vents were to ventilate the roof space to prevent a build up of moisture. He accordingly concluded that the failure to install vents contributed to excessive moisture build up in the ceiling cavity that caused damage. His opinion was that SSR should have ensured the vents were installed before they installed the membrane roofing. However, Mr Cowperthwaite, SSR's expert, was of the opinion that the vents were not to ventilate the ceiling cavity but to ensure any moisture in the ply substrate would not be trapped under the membrane. I preferred Mr Cowperthwaite's explanation and for this reason the claim against SSR failed. However the fact that Mr Wilson's opinion on this issue was rejected does not of itself mean that the claimants' case lacked substantial merit.

[15] SSR however say that even if Mr Wilson's evidence had been preferred on this issue, the claim against it was still not tenable as even if had been established that there was damage caused by build up of condensation due to the failure to install ventilation outlets that would not be a weathertightness issue that was within the jurisdiction of the Tribunal. Counsel for SSR rightly point out that I raised that very issue with Mr Wilson in the course of the hearing. There is considerable merit in this submission, however, I consider that it has only been made with the benefit of hindsight. Up until the time I raised the issue on the second day of the hearing it was not an issue considered, by any of the parties to this claim.

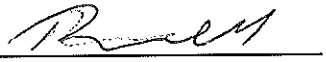
[2] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.

[16] The claimants proceeded with the claim against SSR based on the opinion of their expert who is an experienced and credible weathertightness expert. His opinion was that the vents needed to be installed to allow moisture to escape. As a result of the failure to install inadequate vents moisture accumulated in the ceiling cavity which caused damage. I do not accept SSR's submission that the claimants produced no evidence of damage to the plywood substrate as Mr Wilson's opinion is evidence. While it was unnecessary for me to reach a conclusion on this issue in the course of the determination I accept that it is more likely than not that there has been some damage to the plywood substrate in the roof area above the living areas of the house.

[17] While the claim against SSR ultimately failed it does not follow that the claimants' case did not have substantial merit. Mr and Mrs Strickland relied on Mr Wilson, a well regarded expert, in whom they were entitled to place their confidence. In other words there was tenable evidence to support their claim. The fact that I preferred other evidence is not determinative of the substantial merit question. The conclusion that the claim against SSR lacked substantial merit could only be reached with the benefit of hindsight.

[18] The application for costs is accordingly dismissed.

DATED this 12th day of December 2011



P A McConnell
Tribunal Chair