IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000038
[2012] NZWHT AUCKLAND 35

BETWEEN	CLEARWATER COVE APARTMENTS BODY CORPORATE NO: 170989 Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	THE FLETCHER CONSTRUCTION COMPANY LTD Second Respondent
AND	NICHOLAS VAN DIJK AND NORMAN PALMER AS Trustees of the LIVI TRUST Third Respondent
AND	BRIAN AITKEN Fourth Respondent

Decision: 22 August 2012

COSTS DETERMINATION
Adjudicator: K D Kilgour and S Pezaro

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APPLICATIONS FOR COSTS BY AUCKLAND COUNCIL AND THE FLETCHER CONSTRUCTION COMPANY LTD

[1] Body Corporate 170989 (the claimant) filed an application for adjudication on 18 April 2008. The claim initially related to 14 of 16 residential units in a mixed use complex at Clearwater Cove. A separate claim from Unit 2B was consolidated with this claim and a claim relating to Unit 16R was struck out. This left 15 units in the proceedings.

[2] The claim was against the Waitakere City Council (now Auckland Council), the first respondent, and The Fletcher Construction Company Limited (Fletcher), the second respondent. The Tribunal joined Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust (the Trust) as the third respondent because the Trust was the developer. Brian Aitken, the certifying architect, was joined on the application of the Council. The Council maintained its claim against Mr Aitken although at hearing the claimant withdrew its claim.

[3] Fletcher applied for removal at the outset of the proceedings on the grounds that any claim against it was time-barred and that it had reached a full and final settlement with the Trust at the end of the construction period. The claimant, the Council and the Livi Trust opposed Fletcher's removal and we declined the application. Fletcher, the Council, and Mr Aitken then applied to strike out the claims for all but two units. The claimant did not oppose the applications to strike out the claims for units 4D, 9K, 10L. The applications to strike out the claims in respect of the other 12 units were dismissed.

[4] At the date of hearing three of these 12 units were owned by Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust. Seven units were owned by West Harbour Holdings Limited (WHH), a company of which the Trust is the sole shareholder. One unit was owned by Norman Palmer and Marilyn Palmer as trustees of the Palmer Family Property Trust. The remaining unit was owned by Petil Holdings Limited.

[5] The quantum sought at hearing was $1,533,245. After an eight day hearing we found the Council liable only for the sum of $2,909.50 for damage caused by the lack of ground clearance around the garage of Unit 2B, the unit owned by Petil Holdings Ltd. We dismissed the claim against Fletcher because no relevant act or omission by Fletcher occurred within the limitation period. The claimant and the Livi Trust have appealed our decision to the High Court.

[6] The Council and Fletcher now seek costs pursuant to ss 91(1) (a) and (b) of the Weathertight Homes Resolution Services Act 2006 (the Act). The claimant opposes these applications.

Related proceedings

[7] The High Court recently issued two decisions which are relevant to this decision on costs. On 30 July 2012 Ellis J determined an application by Fletcher for an order that the claimant pay increased security for costs in its appeal against our decision.[1] In that decision Her Honour drew conclusions relevant to the question of costs and referred to the judgment of Woodhouse J in another matter involving West Harbour Holdings Limited and Brent Ivil, the settlor of the Livi Trust, *West Harbour Holdings Limited v Waipareira Investments Limited*.[2]

[8] *Waipareira* is an action brought by West Harbour Holdings Limited (WHH) to enforce a joint venture agreement between WHH and Waipareira Investments Limited (WIL) for the redevelopment of the apartments that are subject to the Tribunal proceedings and to prevent WIL from putting properties up for mortgagee sale, including two units that are subject of these proceedings. On 11 July 2012 Woodhouse J declined an application by WHH for discharge of the mortgage or an interim injunction preventing sale. His judgment and the court records obtained by Fletcher from those proceedings are also relevant to these cost applications.

[1] *Clearwater Cove Apartments v Auckland Council* [2012] NZHC 1870.
[2] *West Harbour Holdings Limited v Waipareira Investments Limited* [2012] NZHC 1645.

Relevant principles

[9] Section 91(1) of the Act provides that:

> **91 Costs of adjudication proceedings**
>
> (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—
>
> (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.

[10] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily. This presumption is only overcome if either bad faith or allegations that lacked substantial merit have caused unnecessary costs and expenses to a party.

The approach to awarding costs against a body corporate

[11] The Council and Fletcher claim costs against the individual owners of the units that were subject of these proceedings as well as the Body Corporate. Mr Smyth, counsel for the claimant, submits that costs cannot be awarded against individual owners, other than the Trust which is also the third respondent, as they are not parties to the claim.

[12] In accordance with s 22(3) of the Act a representative claim in respect of a dwelling-house in a multi-unit complex can only be brought by a properly authorised body corporate:

Section 22

How authority to bring representative claims in respect of dwelling-houses in multi-unit complexes to be obtained

…

(3) In the case of a unit title complex, a claim cannot be brought under section 19 or 20 unless a resolution has been passed in accordance with the Unit Titles Act 2010 authorising the body corporate to take the actions stated in subsection (4).

[13] The Body Corporate is therefore the claimant. If any costs are awarded against it, the Body Corporate must determine how liability is apportioned to the individual unit owners in the same manner that any award in favour of a body corporate is apportioned. A decision of a court or tribunal may provide a guideline as to how an award should be apportioned but it does not bind the body corporate.

[14] The next question is what criteria determine whether costs should be awarded against a body corporate. Is it appropriate that the threshold for an award of costs is assessed according to the steps that a body corporate takes in respect of individual units? If this approach is adopted, costs may be awarded against a body corporate if the conduct of a claim in relation to one unit only meets the threshold in s91. The alternative approach is to evaluate the manner in which the Body Corporate has conducted the proceedings as a whole.

[15] We are not aware of any other case where a court has had to consider the actions of individual unit owners in a claim brought by a body corporate for the purpose of awarding legal costs and expenses against it. However, Duffy J. observed in *St. Johns College Trust Board v Body Corporate 197230* that while it may seem unfair that the benefits and liabilities are shared to some extent, this principle is a fundamental element of ownership of property in such a scheme. Her Honour observed that liability can be avoided by not purchasing this type of property.[3] Although *St. Johns College Trust Board* concerned the liability of owners for common

[3] *St. Johns College Trust Board v Body Corporate 197230* [2012] NZHC 827.

property maintenance, the same principle must apply to a body corporate's liability for other costs, including the cost of proceedings.

[16] The decision to file these proceedings was made by the members of this Body Corporate which had an obligation, to the same extent as any individual claimant, to act in good faith and not to pursue a claim that lacks substantial merit.

[17] We therefore consider that the preferable approach to determining these applications for costs is to consider whether any limb of the claims meets the threshold for costs and, if so, to assess whether, taking into account the proceedings as a whole, the respondents were put to unnecessary costs or expenses. We will now consider whether the Council and/or Fletcher have rebutted the presumption against costs and, if so, the level of costs that is appropriate.

The applications for costs

Auckland Council

[18] The Council claims that the respondents were put to unnecessary cost and expense as a result of claims that lacked merit and were not supported by evidence. The Council submits that:

a) It is settled law that a council does not owe a developer a duty of care, therefore the claims for units 7I and 8J which are owned by the Livi Trust had no prospect of success.
b) The claims related to units 3C, 6H, 11M, 12N, 13O, 14P and 15Q lacked substantial merit and/or were brought in bad faith because West Harbour Holdings Limited knew of the defects before buying them.
c) The Calderbank offer of $100,000 made to the claimant on 11 February 2011 exceeded any award that was likely to be made against the Council and it was unreasonable of the claimant not to accept this offer.

The Fletcher Construction Company Limited

[19] Fletcher seeks indemnity costs on the grounds that the claim lacked merit because:

a) Fletcher's removal application put the claimant on notice of the defences based on limitation and the post construction settlement between Fletcher and the Trust.
b) The applications for strike out put the claimant on notice of the defence of knowledge. At the latest the claimant was on notice of the strength of this defence when the Council filed its valuation evidence in August 2010.

[20] Fletcher submits that the claimant acted in bad faith by*:*

a) Bringing the claim in circumstances where it was found that Mr Ivil, and therefore WHH, had knowledge of weathertightness issues and WHH suffered no loss because it paid reduced prices.
b) Causing unnecessary delays throughout the course of the proceedings, including repeated failure to provide documents in contravention of Tribunal orders.
c) The conduct of the claim in relation to the Livi Trust.
d) Threatening to subpoena Fletcher's counsel and subpoenaing Fletcher employees when no information could be obtained from them that were not in the documents.
e) Giving inconsistent evidence at hearing.

The threshold for an award of costs

[21] In *Trustees Executors Ltd v Wellington City Council,*[4] Simon France J observed that:

> In policy terms, whilst one must be wary of establishing disincentives to the use of an important Resolution Service, one must also be wary of exposing other participants to

[4] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.

> unnecessary costs. The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
>
> a) unnecessary expense; has been caused by;
>
> b) a case without substantial merit.
>
> I see no reason to apply any gloss to the legislatively struck balance. The outcome in this case should not be seen as sending any message other than that the Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary cost to others through pursuing arguments that lack substantial merit.

[22] His Honour considered that meeting a threshold test of no substantial merit "must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still discretion to be exercised".[5] The important issue is whether the claimant should have known about the weakness of the case and whether litigation was pursued in defiance of common sense.[6]

[23] Preferring other evidence does not lead to the conclusion that a claim lacks substantial merit[7] but the District Court held that a failure to provide evidence of causation at hearing justified an award of costs in *Max Grant Architects Limited v Holland.*[8] In *Phon v Waitakere City Council* [9] the Tribunal held that the bar for establishing 'without substantial merit' should not be set too high and the Tribunal should have the ability to award costs against parties making allegations, or opposing removal applications, based on allegations which a party ought reasonably to have known they could not establish.

[5] Above n 4 at [51].
[6] Above n 4 at [52].
[7] *River Oaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[8] *Max Grant Architects v Holland* DC Auckland, CIV-2010-004-662, 16 December 2008 at [81].
[9] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

The claim for the units owned by the Trust

[24] Throughout the hearing the claimant maintained its claim that the Council owed a duty of care in respect of the units owned by the Trust, even though this allegation was inconsistent with its claim against the Trust as developer which ultimately failed. The Council submits that there was never any legal basis for this claim however the claimant does not accept this submission.

[25] Mr Smyth says that the Livi Trust only conceded that it was the developer at the commencement of the hearing due to the appointment of new counsel. He says that the Trust relied on its earlier legal advice that, due to the nature of the contract between the Trust and Fletcher, it was possible that the Trust was not the developer.

[26] Although Mr Smyth now acts for the claimant, he acted for the Trust from the time it was joined until he withdrew, due to conflict, prior to the hearing. Whether or not it was Mr Smyth who gave the earlier legal advice to the claimant, the relevant issue now for determining costs is the conduct of the claimant/Body Corporate.

[27] The Trust is a member of the Body Corporate however they are not synonymous. The claimant pursued the claim on behalf of the Trust unit owners without providing any legal basis for this claim. This limb of the claim therefore lacked any merit from the outset. We are satisfied therefore that the claimant put the Council to unnecessary costs in defending the claim in respect of the units owned by the Livi Trust.

The claim for the units owned by West Harbour Holdings Limited

[28] The Council filed expert evidence on valuation in August 2010 to support its defence that the units owned by WHH were purchased with knowledge of likely weathertightness defects. At hearing the claimant did not call any expert evidence in rebuttal but now submits that the question of whether Mr Ivil, and therefore WHH, knew of the weathertightness defects before buying was contested and could only be determined at hearing.

[29] At hearing the claimant's witnesses on this issue gave inconsistent factual evidence on the circumstances surrounding the purchases. It should have been apparent to the claimant, from the time the Council's valuation evidence was filed, that in the absence of a plausible explanation for the purchase price of the units owned by WHH it could not prove loss. We conclude that the claimant should reasonably have been aware that the claim in respect of these units was unlikely to succeed.

[30] Mr Smyth submits that although the claimant did not oppose three of the strike out applications, no unnecessary costs were incurred because the claimant accepted early in the proceedings that it should not claim for these three units. We do not accept this submission. The claim was filed with the Tribunal on 18 April 2008 and the claimant did not accept that the claims for these three units should not be brought until the end of 2009, after the interlocutory process was complete. By this time the Council and Fletcher had incurred costs in filing interrogatories and applications for strike out in relation to these three units.

[31] Even if the claimant was justified in going to hearing on the issue of knowledge, the claimant did not adduce any evidence of causation to support its claims against the Council or Fletcher in relation to the units owned by WHH. We conclude that the claims arising from the seven units owned by WHH lacked substantial merit and were pursued in defiance of common sense. As a result, the Council and Fletcher incurred unnecessary costs and expenses.

The claimant's expert evidence

[32] The conflict caused by the manner in which the claimant and the Trust conducted the proceedings was evident not only in the claim that the Trust was the developer but also in the evidence of the cause of weathertightness defects and the extent of damage. In closing the claimant relied on the Trust's submissions on defects and quantum, despite the fact

that during the hearing the Trust relied on the claimant's evidence on defects and did not call its own evidence.

[33] A crucial question for determination was which Harditex manual was operative at the time of construction as this determined whether the window installation was found to be defective. The claimant and the Trust maintained opposing views on which Harditex manual applied, the claimant adopting the opinion of its expert, Mr Earley, whose evidence was contradicted by the experts for the Council and Fletcher and the WHRS assessor who all gave evidence on which manual applied. The cost to the Council and Fletcher of producing this evidence could have been avoided if the claimant had resolved the conflict in its own evidence prior to hearing and adopted its ultimate position on defects and quantum at an earlier stage.

[34] The claimant's evidence on whether any damage was caused by the window installation was also inconsistent. Mr Earley gave evidence that his tests indicated damage however the claimant's other expert on defects, Dr Powell, said that the testing regime carried out on the windows was insufficient to draw such a conclusion. Dr Powell did not give this evidence until the hearing. We therefore accept that, up to this point, it was not unreasonable for the claimant to rely on Mr Earley's evidence that damage was caused by the window installation.

[35] However, the claimant also called contradictory evidence on whether the cladding installation was defective. In Mr Earley's brief he concluded that the cladding installation caused water ingress however his evidence was contradicted by Dr Powell who said that water ingress was caused by the different expansion rates of the framing timber and the cladding. In evidence Mr Earley agreed with Dr Powell that the difference in the expansion rates was the most significant cause of cracking in the cladding.

[36] It should have been apparent to the claimant when it filed its expert evidence that its experts did not agree on the cause of the damage to the cladding. Further, the claimant had no evidence of any causative link

between the alleged cladding defects and any of the respondents. For these reasons the claimant ought to have known that its allegation that the respondents were liable for damage to the cladding lacked substantial merit.

[37] We conclude that the claimant pursued its claim that the installation of the cladding was a major cause of damage and loss without a sound evidential base. This limb of the claim clearly lacked merit and should not have been brought.

Are the Council or Fletcher entitled to costs?

[38] The claims in relation to the majority of units lacked substantial merit and should not have been pursued. As a result the Council and Fletcher have incurred costs and expenses unnecessarily. The presumption in the Act that the parties meet their own costs and expenses is therefore overcome.

What level of costs is appropriate?

[39] The Council originally claimed costs calculated on Schedule 2B of the District Court scale with an uplift of 50 per cent. However it submitted in reply that if Fletcher was awarded indemnity costs, the Council was entitled to costs on the same basis. We directed the Council to file a schedule of its actual costs which are $447,539.82 being legal costs of $341,650.13 and experts' fees of $105,889.69. Fletcher seeks indemnity costs of $433,022.46 being legal costs and expert costs of $153,183.77, a total of $586,206.23.

[40] The claimant opposes costs but submits that any award made should be based on District Court Scale 2B from the date of the Calderbank letters. The Tribunal has applied the District Court scale as a guide and this approach was upheld by the High Court.[10] However the Tribunal is not

[10] *Trustees Executors Limited v Wellington City Council* HC Wellington, above n 4; and *White v Rodney District Council* (2009) 11NZCPR 1 (HC).

bound by that scale in calculating quantum.[11] In this case we consider that the High Court scale is more appropriate given the quantum and complexity of the original proceedings.

[41] In *Bradbury v Westpac Banking Corporation*[12] the Court of Appeal identified three approaches to costs:

> a) The standard scale applies by default where cause is not shown to depart from it;
> b) Increased costs may be ordered where there is a failure by the paying party to act reasonably; and
> c) Indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

The effect of the Calderbank offers

[42] On 11 October 2010 Fletcher and Mr Aitken jointly made a Calderbank offer of $500,000 to the claimant. The Council made an offer to settle with the claimant for $100,000 on 11 February 2011, two weeks before the hearing.

[43] High Court Rule 14.11.1 states that the effect of making an offer under rule 14.10 (written offers without prejudice as to costs) is at the discretion of the court. Imprudent refusal of an offer of compromise does not fall under the indemnity costs rule but may justify increased costs under Rule 14.6(3)(b)(v).[13]

[44] The claimant submits that most of the costs had been incurred by the time the Council's Calderbank offer was made. However, in *Trustees Executors* an offer of settlement was made approximately one month before

[11] s125 (3) of the Act only applies to the District Court when dealing with proceedings under the Act and not to the Tribunal.
[12] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234; [2009] 3 NZLR 400.
[13] Bradbury above n 12 at [30] referring to *Colgate Palmolive Company v Cussons Pty Ltd* (1993) 46 FCB 225.

the date of hearing and Simon France J considered the reasonable offer a factor in favour of costs.[14]

[45] We do not accept that the majority of costs were incurred prior to the Calderbank offers. The hearing took eight days and incurred significant legal and expert costs for the parties. Had the offers been accepted, the costs incurred by the Council and Fletcher would have been significantly reduced.

[46] We conclude that the claimant unreasonably refused to accept the Calderbank offers which it should have appreciated were significantly higher than any award likely to be made to it.

Did the claimant actions amount to bad faith?

[47] Bad faith has received judicial consideration in a number of decisions.[15] An overview of the case law indicates that the meaning of "bad faith" depends on the circumstances in which it is alleged to have occurred. The range of conduct constituting bad faith can range from dishonesty to a disregard of legislative intent.

[48] The claimant submits that the matters referred to by the Council and Fletcher's do not amount to bad faith and that all parties bore some responsibility for the delays that occurred.

[49] Mr Smyth refers to *Harbourview Trust v Auckland City Council* [16] where Chair McConnell discussed the underlying principles of section 91:

> Where allegations are made against a party which have little evidential support, costs can and in many cases will be awarded. However, I accept the costs in pursuing or defending aspects of claims should not be considered as being incurred unnecessarily where there are genuinely

[14] *Trustees Executors Ltd v Wellington City Council* above n 4 at [67].
[15] *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA).
[16] *Harbourview Trust v Auckland City Council,* [2010] NZWHT Auckland 7 at [11].

> disputed issues of fact and law if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

[50] The difficulty for the claimant in these proceedings is that, for the reasons given, it had no reasonable basis for its claim.

Related proceedings and discovery

[51] On 16 May 2012 we directed the Council and Fletcher to file a schedule of costs, calculated according to High Court Scale 2B, from the date of issue of their Calderbank offers. When Fletcher filed its schedule it made further submissions based on documents produced by Mr Ivil in *Waipareira*. We then directed the Council to file a schedule of actual costs incurred and set a timetable for the claimant to respond.

[52] The claimant objected to the filing of the further submissions and sought an order that Fletcher apply for leave to adduce further evidence. For the reasons given[17] we declined to grant the orders sought by the claimant.

Change of ownership

[53] Mr Christie, for Fletcher, submits that the evidence filed in *Waipareira* demonstrates that the claim in the Tribunal lacked substantial merit and the claimant acted in bad faith. Mr Christie also submits that it is evident from the documents in *Waipareira* that, either at the outset of the Tribunal proceedings or at least prior to determination, the apartments subject of the Tribunal proceedings were sold to Marina Resort Limited, the joint venture entity, at full market value with no reduction for weathertightness issues. Fletcher argues that this change of ownership terminates the claim pursuant to s 55 of the Act.

[17] Procedural Order 39, 28 May 2012.

[54] Fletcher submits that, based on the evidence adduced in *Waipareira*, the claimant, or all members of the Body Corporate except Petil Holdings Limited, pursued their claims in the Tribunal knowing that they did not own the apartments, in breach of s 55 of the Act. Fletcher submits that the claim therefore lacked any merit and was pursued in bad faith. In determining these applications for costs it is not necessary to determine the question of whether ownership of the claimant units was transferred by the joint venture agreement. It is our view that as the substantive claim has been determined, we do not have jurisdiction to consider whether the claim is terminated pursuant to s 55 of the Act.

Evidence of valuation and plans for development

[55] On 9 September 2008 counsel for the claimant filed a list of discoverable documents, produced in response to Procedural Order 6 issued 20 August 2008. Counsel confirmed that discovery was complete, despite West Harbour Holdings Limited and Mr Ivil having entered into the joint venture agreement in May 2008 which was prepared by the claimant's solicitor, Corban Revell.

[56] Discovery issues were ongoing and on 13 October 2010 we ordered Mr Ivil to file a supplementary affidavit by Friday 29 October 2010 disclosing:

> All documents including any proposed remediation works, scope of works, concept plans, designs, quotations, reports, correspondence relating to the repair or remediation or redevelopment of the property.

[57] Other than producing two concept drawings, Mr Ivil failed to comply with the order, but subsequently disclosed plans for redevelopment and sale in *Waipareira.* Fletcher submits that the order required Mr Ivil to disclose all the documents attached to the affidavit he filed in *Waipareira*, including the joint venture agreement.

[58] At hearing Mr Ivil was cross examined about plans to redevelop the units and his involvement with Waipareira Investments Limited (WIL). Ms

Thodey asked Mr Ivil what interest WIL was holding in the units. He responded that WIL assisted with refinancing and had taken mortgages by way of security.[18]

[59] The Trust as respondent did not file any evidence however Norman Palmer and Nicholas Van Dijk gave evidence as trustees of the Livi Trust for the claimant and Mr Palmer was cross-examined by counsel for the Trust. Mr Palmer did not disclose the joint venture agreement despite the fact that he must have been aware of it because he signed the heads of agreement.[19]

[60] The Brief of Evidence of Brent Ivil sworn 19 September 2011 and filed in *Waipareira* demonstrates that WHH commissioned valuations of the units in late 2007 and early 2008. These were not disclosed to this Tribunal nor were further valuations obtained prior to the Tribunal hearing and subsequently produced and referred to by Mr Ivil in *Waipareira* and in the appeal proceedings.[20] These valuations were clearly relevant given the defence of knowledge raised by the Council and Fletcher which relied on the Council's valuation expert. In addition, the joint venture agreement is evidence of the intention to redevelop the apartments which clearly fell within the ambit of the order issued on 13 October 2010.

[61] There can be no doubt that the claimant was aware of the undisclosed documents. WHH owns seven out of the 12 units in the Tribunal proceeding and the Livi Trust owns four units. The sole shareholders of WHH are Nicholas Van Dijk and Norman Dennis Palmer as trustees of the Livi Trust therefore WHH and the Trust had the controlling interest in the conduct of these proceedings. Further, one of Corban Revell's solicitors witnessed Mr Ivil's signature on the joint venture agreement. The fact that WHH is seeking to enforce the joint venture agreement in the High Court is inconsistent with the claimant's denial in these proceedings of any intention to develop the property.

[18] Transcript of Evidence p 185 (questioning of Mr Ivil by Ms Thodey), lines 24-42, and p 186, lines 1-25.
[19] Transcript of Evidence p 128.
[20] Affidavit of Brent Ivil dated 8 June 2012.

[62] We conclude that the claimant acted in bad faith by failing to produce all relevant documents and failing to comply with specific orders by the Tribunal for discovery.

The findings of the High Court

[63] In *Waipareira* Woodhouse J recorded that the parties agreed to defer settlement until the Tribunal determination was issued; WHH was aware of plans for redevelopment;[21] WHH estimated the cost of remedial work at $836,500 compared with the claim in the Tribunal of over $1,500,000;[22] there were major conflicts of evidence as to the current value of the units with one valuation put in evidence of $2.86 million.

[64] In *Clearwater Cove Apartments v Auckland Council* Ellis J concluded that: [23]

> For all practical intents and purposes, the Trust/WHHL controls the Body Corporate. The Trust's affairs appear inextricably entwined with those of WHHL.

Her Honour recorded that:

a) Mr Ivil deposed, in an affidavit filed on behalf of the appellants, that the sum of $7.81 million agreed for the transfer of the units to the joint venture entity was not a full market price.[24]
b) Mr Ivil admitted that the settlement date agreed for the units was designed to avoid any difficulties that the transfer of title would cause for the WHH claim.[25]
c) It was her tentative view that the price agreed was a full market price.[26]

[65] Ellis J also concluded that:[27]

[21] Above n 2 at [16(f)].
[22] Above n 2 at [38].
[23] Above n 1 at [3].
[24] Above n 1 at [20(c)].
[25] Above n 1 at [36].
[26] Above n 1 at [40].

> Even putting to one side the issue about whether the sale to MRL was at full market value, the steps taken deliberately to avoid the operation of s 55 necessarily creates a question mark over whether the appellants have pursued the WHT proceedings in good faith. Any doubts in that respect are reinforced by the fact that WHHL failed to disclose the existence of the joint venture agreement in the WHT proceedings, notwithstanding that an order was made by the WHT requiring Mr Ivil to disclose all documents relating (inter alia) to the proposed redevelopment of the property.

[66] We are satisfied that the claimant withheld relevant information from the Tribunal and the respondents and that the claimant acted in bad faith in doing so. The decision of Ellis J further supports our finding that the claimant's conduct was improper and we conclude that the threshold for a finding of bad faith is met. We now consider what level of costs is appropriate.

Are indemnity costs justified?

[67] Rule 14.6.4 provides that indemnity costs can be awarded if:

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party ; or
>
> .....
>
> (g) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[27] Above n 1 at [41].

[68] The threshold to be met for an order for indemnity costs is a high one – *Paper Reclaim Ltd v Aotearoa International Ltd*.[28] In *Bradbury* the Court of Appeal endorsed *Hedley v Kiwi Co-Operative Dairies Limited* where Goddard J adopted Sheppard J's summary in *Colgate v Cussons*. Whilst recognising that the categories in respect of which the discretion may be exercised are not closed (see r 14.6(4)(f)), the Court listed the following circumstances in which indemnity costs have been ordered:

a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
b) particular misconduct that causes loss of time to the court and to other parties;
c) commencing or continuing proceedings for some ulterior motive;
d) doing so in wilful disregard of known facts or clearly established law;
e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions.[29]

[69] We have no hesitation in concluding that in these proceedings Body Corporate 170989 engaged in misconduct causing loss of time to the Tribunal and other parties; wilfully disregarded known facts and clearly established law; and made allegations which ought never to have been made. We have not reached this conclusion lightly however we are not aware of another case where the conduct approaches the level of bad faith exhibited by this claimant. The fact that the claimant was legally represented from the outset of the proceedings reinforces our conclusion that the level of bad faith warrants an award of indemnity costs.

Conclusion on Costs

The claimant brought allegations without substantial merit causing unnecessary costs and expenses to the Council and Fletcher. The

[28] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA).
[29] *Bradbury v Westpac Banking Corporation* above n 12 at [29].

weakness of the case should have been apparent to the claimant from the outset and therefore we conclude that the Council and Fletcher are entitled to an award of costs calculated from the commencement of the proceedings. The claimant also acted in bad faith. We are satisfied that the costs claimed are reasonable and for the reasons given award actual costs.

ORDERS

[70] We order Body Corporate 170989 to pay:

1) Auckland Council the sum of $447,539.82 immediately being actual legal costs of $341,650.13 and experts fees of $105,889.69; and

2) The Fletcher Construction Company Limited the sum of $586,206.23 immediately being actual legal costs of $433,022.46 and experts fees of $153,183.77.

DATED this 22nd day of August 2012

_____	_____
K D Kilgour	S Pezaro
Tribunal Member	Tribunal Member