

**IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-100-000013**

BETWEEN	MOHAMMED REZA-REZAEI ABYANEH and KEVIN WAYNE HARBOURNE as trustees of the REZAEI ABYANEH FAMILY TRUST Claimant
AND	AUCKLAND CITY COUNCIL First Respondent
AND	ASAD ALI Second Respondent
AND	SAID HAROUN ALI Third Respondent
AND	MOHAMMED FAROOK Fourth Respondent
AND	H C SENIOR AUCKLAND LTD (in Liquidation) Fifth Respondent

**DECISION FOR COSTS
Dated 28 October 2008**

Introduction

1. A substantive determination regarding the subject dwelling was delivered on 22 July 2008 whereby the claimants were awarded the sum of \$43,629.13 against the first, second, third and the fourth respondents.
2. This decision therefore deals with applications filed by the second respondent (Mr Asad Ali), first respondent (Auckland City Council), and the third respondent (Mr Said Haroun Ali) in that sequence, for an award of costs against the claimants.

Legislation

3. Section 91(1) of the Weathertight Homes Resolution Services Act 2006 provides as follows:

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.

4. Section 91 makes it clear that there is a presumption in proceedings in this Tribunal that the parties will bear their own costs unless the grounds in s91(1) are made out.

Applications for Costs

5. Each of the respondents seeking costs alleged that costs should be awarded because:

- (a) The respondents had proffered a joint settlement offer on a “without prejudice save as to costs” basis, for an amount which exceeds the amount awarded to the claimant; and/or
 - (b) The claimant’s allegations lacked merit.
6. To these claims a response was filed on behalf of the claimants.

Calderbank Offer

7. On 27 April 2008 all the respondents made a settlement offer of \$52,650.00 on a “without prejudice” basis (Calderbank Offer). As is clearly set out in the email exchange on 28 April 2008, that offer was made up as follows:

- Mr Asad Ali \$15,000.00
- Mr Said Haroun Ali \$ 9,650.00
- Mr Farook \$ 3,000.00
- Auckland City Council \$25,000.00

8. In comparing the amount of the Calderbank Offer (\$52,650.00) with the amount that was awarded by the Tribunal (\$43,629.13), it is claimed that the amount offered by the respondents to the claimants “far exceeded the award of liability” ordered by the Tribunal by \$9,650.00 (see Counsel for Second Respondent’s Memorandum for Costs, 27 August 2008, para 9).

9. It is that \$9,650.00 difference which the respondents focus on in their applications for costs. This is because the claimants did not accept the Calderbank Offer.

Simpson Family Trust Decision

10. Mr Asad Ali referred to the decision in *Trustees Executors Ltd (trustee for the Simpson Family Trust) v Wellington City Council & Ors*, WHT, TRI 2007-101-000029 (30 May 2008) in which the adjudicator ordered costs against both the claimant and the ninth respondent. In reaching that decision the adjudicator found that the claimant had wrongly rejected an offer prior to adjudication that exceeded the actual award.
11. However, a review of the facts of that decision has led to the finding that the decision in *Simpson Family Trust* must be distinguished from the present case. This is because there was a dispute between the parties as to whether the claimants actually owed money to Mr Said Haroun Ali.
12. In his submissions, Mr Said Haroun Ali claimed that the amount of \$9,650.00 he put forward in the Calderbank Offer was still owed to him by the claimants. Mr Said Haroun Ali claims that he was prepared to “write off” the claimants’ debt for the purpose of merely achieving a settlement.
13. Both the claimant trust and Mr Abyaneh denied, and continue to deny, that either owes Mr Said Haroun Ali that sum of \$9,650.00. This is because no demand for payment has ever been made. Nor has any invoice been tendered.
14. In an email circulated by Mr Said Haroun Ali to all the parties on 28 April, Mr Said Haroun Ali admitted that:

“The claimant is correct, he does not owe any money to Haroun Ali Architect. The sum in question is owed to Vista Architect Ltd.”

(Exhibit “A” of Mr Said Haroun Ali’s Submissions as to Costs dated 16 October 2008)

On that basis the claimants were correct in their contention that they did not owe money to Mr Said Haroun Ali.

15. Consequently the claimants assert that the award that they received of \$43,629.13 was in excess of the correct value of the Calderbank Offer which in effect was only \$43,000.00 being \$52,650.00 less the disputed claim of \$9,650.00. That means that the amount awarded by the Tribunal was greater than the Calderbank Offer by \$629.13.
16. It is also noted that none of the respondents apparently took the opportunity of tendering to the claimants an individual settlement prior to the adjudication commencing.
17. In the present case the allegation that the claimants failed to accept an offer of settlement which was reasonable, was not established as quite clearly there was a dispute between the parties as to whether the claimants actually owed money to Mr Said Haroun Ali.
18. Therefore the Tribunal is not prepared to accept that the claimants were at fault in failing to accept the Calderbank offer.

Merits of the Claim

19. The claim by the claimants was only successful to a very limited extent. That result, to a very large degree was due to the significant assessment made by the experts in apportioning a percentile responsibility in respect of specified areas of water damage, an assessment which only became available towards the conclusion of the adjudication hearing

20. As submitted on behalf of the claimants that while consideration has to be given to the decisions agreed on by all the experts, that knowledge was not readily available. Nor was it brought to the attention of the claimants prior to the adjudication.
21. Considered broadly, quite clearly many of the claims pleaded by the claimants were found not to be proven. But those findings do not necessarily mean that the claimants' claims were so unreasonable that they were made "without substantial merit".
22. Indeed the facts of this present case is not akin to those of *Simpson Family Trust* to warrant such a conclusion. At para [56] of that decision the adjudicator held:
- [56] In this case the claimant pursued arguments which lacked merit, failed without reasonable justification to accept legal argument, and failed without reasonable justification to accept an offer of settlement without reasonable justification to accept an offer of settlement without prejudice save as to costs.
23. Upon that view, the Tribunal is therefore satisfied that there is no evidence of "bad faith" on the part of the claimants and indeed none was alleged by the respondents. Nor is the Tribunal of the opinion that there were "allegations or objections" by the claimants which were "without substantial merit".

24. The claims for costs by the first, second and third respondents are therefore dismissed.

DATED this 28th day of October 2008

S G Lockhart QC
Tribunal Member