IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-101-000031
[2011] NZWHT AUCKLAND 25

BETWEEN	BRETT JORDAN ASHLEY AND LEEANNA TE KURA ASHLEY Claimants
AND	CATHERINE ANNE BULL (Removed) AND MAURICE CHARLES BULL First Respondents
AND	JIM NICHOLSON (Removed) Second Respondent
AND	IAN MURRAY SPROUSEN (Removed) Third Respondent
AND	BRUCE JAMES HUNTER (Removed) Fourth Respondent
AND	CHRIS JOHN LUSBY Fifth Respondent

DECISION AS TO COSTS
Adjudicator : P J Andrew

INTRODUCTION

[1] Following their removal from the proceedings, the second and third respondents have applied for an award of costs against the claimants pursuant to section 91 of the Act. It is contended by the second and third respondents that they have incurred unnecessary costs caused by the claimants acting in bad faith and maintaining objections to their removal applications that were without substantial merit.

[2] The application for costs is opposed by the claimants, who contend that neither threshold in section 91, namely bad faith and/or a lack of substantial merit, has been made out.

[3] The second and third respondents sought and obtained removal orders principally on the basis that the claims against them were limitation barred, having been brought outside of the ten year long stop limitation period in section 393(2) of the Building Act 2004. The claimants ultimately did not oppose the removal applications. However, they took active steps to defer the determination of the removal applications, including seeking and obtaining a witness summons hearing with a view to obtaining evidence relevant to the issue of limitation and other defences. The witness who gave evidence at the witness summons hearing was not able to provide any relevant evidence. Following that witness summons hearing the claimants withdrew any active opposition to the removal applications.

RELEVANT PRINCIPLES

[4] Section 91 of the Act reads:

> **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.

[5] There is a clear presumption in the statute that costs should lie where they fall unless incurred unnecessarily in the terms identified in section 91.[1]

[6] The onus is on the applicant for costs to demonstrate that the case comes within one or both of the provisions of section 91(1), and that if the onus is met, there is a discretion for the Tribunal to award costs.[2]

[7] The task in determining costs under section 91 is therefore to be approached in two stages. The first enquiry is as to whether the claim in question lacks substantial merit or is brought in bad faith. If the answer is in the affirmative, the Tribunal must then consider whether, in the exercise of its discretion, it is appropriate to make an award of costs.[3]

THE BASIS OF THE COSTS APPLICATION

[8] The second and third respondents argue that at a very early stage they signalled to the other parties, including the claimants, that they would seek removal on limitation and other grounds. In November 2010 they both filed and served substantive applications, supporting evidence and submissions. The evidence contained detail as to the extent and timing of the works that the second and third respondents were involved with.

[1] *Max Grant Architects Limited v James Holland & Ors* DC Auckland, CIV-2010-004-00662, 15 February 2011.
[2] *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 12 March 2010.
[3] *Riveroaks Farms Limited v W Holland & Ors* HC Tauranga, CIV-2010-470-584, 16 February 2011.

[9] It is contended that it was apparent to the claimants in November 2010 that there was no tenable basis for them to oppose the removal applications. However, despite that knowledge, the claimants, it is alleged, persisted in their opposition to the earlier resolution of the removal applications. It is also argued that the witness summons procedure was a speculative "fishing expedition" and that there was no reasonable basis for the claimants to believe that the proposed witnesses (originally three), could offer any information with respect to the relevant issues. It is said that there was never any prospect that Mr Lyttle, the witness who was summonsed and did give evidence, could assist in the matter.

[10] The second and third respondents further maintain that there were delays in the claimants' filing of documents, identifying the witnesses they intended to summons, and providing discovery and issuing the witness summons. The second and third respondents are also critical of the failure by the claimants to have taken "a very simple and basic step of contacting the proposed witness [Mr Lyttle] to explore what evidence, if any, he had to give." It is submitted that had this been done, as the first common sense step, the summons process would not have been necessary.

OPPOSITION BY THE CLAIMANTS

[11] In opposing the application, the claimants note that the applications relates only to steps taken after the respondents had filed their applications for removal. The second and third respondents do not argue that costs should be awarded for the filing of proceedings against them per se.

[12] The claimants contend that the steps taken by the second and third respondents said to have given rise to unnecessary costs, are in fact quite limited.

[13] The claimants further argue that, unlike the respondents, they had no first-hand knowledge of the construction of their home. Upon receipt of the removal applications they became aware, for the first time, of further parties involved in the construction of the house. This then led to the witness summons procedure. The claimants say that they were not required to accept at face value what the second and third respondents stated in their removal applications – and that they were entitled to invoke the witness summons procedure to seek to obtain further relevant evidence. They, the claimants, were not to know in advance of the witness summons hearing that the witness would not provide any relevant information.

[14] Viewed overall the costs and expenses claimed by the second and third respondents did not, so the claimants argue, arise out of bad faith or the maintaining of objections that were without substantial merit.

DECISION

[15] It is important that this application be considered in its context. The application relates not to costs incurred at a substantive hearing but in relation to interlocutory removal applications based in large part on limitation defences. The affidavit evidence filed by the second and third respondents, while clearly supporting the limitation and other defences, also suggested that those two parties did have some involvement with aspects of construction during a period of time that was not very far outside the ten year limitation period. The claimants, who were subsequent purchasers with no first-hand knowledge of what happened during construction were understandably concerned to seek some independent verification or scrutiny of the contentions made by the second and third respondents.

[16] The claimants' original claim was of course found to be eligible i.e. it was accepted by the WHRS that the house was built

within a period of ten years before the day on which the claim was brought (i.e. section 14). In addition, the WHRS assessor's report named both the builder and the roofer as parties to the claim.

[17] The application for a witness summons hearing was granted by the Tribunal in Procedural Order No 3. In rejecting the challenge by the second and third respondents to the Tribunal's jurisdiction to issue a witness summons in circumstances other than a substantive adjudication hearing, I noted that the witness summons process can be a useful tool at an initial stage of the process to identify and join the correct parties to a proceeding.

[18] The claimants did receive notification from the witness, Mr Lyttle, on 17 February 2011 that he had no relevant documents in his possession and no memory of the property. However, this was within a week of the then scheduled witness summons hearing.

[19] Having regard to this important contextual background, I am of the view that the second and third respondents have failed to establish that they have incurred unnecessary costs because of either bad faith or the pursuit of objections without substantial merit. Neither of the thresholds in section 91 has been made out. While the claimants may have been aware in November 2010 there were difficulties and likely weaknesses with their case against both the second and third respondents, the steps subsequently taken and in particular the witness summons hearing, do not in my view constitute bad faith or the pursuit of objections/allegations without substantial merit.

[20] I reject the submission of the second and third respondents that after November 2010 the claimants' pursuit of litigation against them was in defiance of common sense. In my view, the claimants, having received in November 2001 additional information and increased understanding of what occurred during construction, were

entitled to take steps, including the witness summons hearing, to seek further relevant evidence. The witness summons hearing was of course the result of an application granted by the Tribunal following argument by the parties on its merits.

[21] An allegation of bad faith is a very serious allegation which requires a commensurate degree of probative evidence to support it. In my view it was not bad faith for the claimants to involve the second and third respondents in the witness summons process by not first ascertaining what the evidence would be through discussions with Mr Lyttle. While it may often be prudent practice to make contact with the witness prior to a witness summons hearing and to enquire about what relevant information and evidence might be given, there will be cases where parties decide that this might not be constructive. While the claimants did receive an email from Mr Lyttle on 17 February 2011 this was close to the scheduled hearing. In any event, the claimants were entitled to conclude that a witness summons hearing with questions directed at jogging the witnesses' memory was worthwhile pursuing. The high threshold of bad faith has not been made out.

[22] As Allan J held in *Riveroaks Farm Limited*[4] "substantial merit" in section 91 denotes claims which require serious consideration by the Tribunal. The allegations and objections of the claimants in this case were deserving of serious consideration by the Tribunal. Removal from a proceeding is of course a final step bringing a claim against a particular party to an end. The claimants, clearly disadvantaged by their lack of knowledge (which was no fault of theirs), were entitled to take steps to verify and check the position of the second and third respondents.

[23] The High Court in *Trustees Executives Limited*[5] held that the power to award costs in section 91 seeks to balance two competing

[4] *Riveroaks Farms Limited v W Holland & Ors*, above n 3.
[5] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008.

policy factors, namely avoiding the creation of disincentives to the use of “an important Resolution Service”, and not exposing other participants to unnecessary costs. As the claimants submit, the costs said here to have been incurred unnecessarily relate to somewhat limited steps/events, all of which occurred during an interlocutory and early stage of the process. I have of course already noted that the witness summons process can be a very useful vehicle for identifying parties and clarifying issues. In my view the Tribunal needs to be wary of creating disincentives to resorting to this useful mechanism.

[24] The criticisms that the second and third respondents make about delay by the claimants in filing documents, providing discovery and issuing the witness summons, all have some merit. Likewise, the claimants’ decision to adopt the position of abiding the Tribunal’s decision, rather than ultimately consenting to or withdrawing opposition to the removal applications, can also fairly be criticised. However, once it became clear that the claims against the second and third respondents were hopeless, the claimants promptly advised the Tribunal of their position. In any event, the criticisms levelled against the claimants do not give rise to bad faith or mean that the claims advanced were pursued without substantial merit.

[25] For all these reasons, the application for costs is dismissed.

DATED this 5th day of May 2011

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P J Andrew

Tribunal Member