IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000016
[2012] NZWHT AUCKLAND 7

BETWEEN	BRICHRIS HOLDINGS LIMITED Claimant
AND	AUCKLAND COUNCIL (Removed) First Respondent
AND	GASCOIGNE ASSOCIATES LIMITED (Removed) Second Respondent
AND	IRMAC BUILDERS LIMITED (IN LIQUIDATION) Third Respondent
AND	ALLAN FORSTER IRWIN Fourth Respondent
AND	DEAN CHANDLER Fifth Respondent
AND	WAYNE JOHN MCDONNELL Sixth Respondent
AND	BRENT MICHAEL BARRETT (Removed) Seventh Respondent
AND	BRETT RICHARD NEILSON (Removed) Eighth Respondent
AND	IGOR ARAKELIAN Ninth Respondent
AND	JAN PONICHTERA Tenth Respondent
AND	THE GLASS BLOCK COMPANY LIMITED (819765) (Removed) Eleventh Respondent

	AND	GARY RICHARD WALDEN (Removed) Twelfth Respondent
	AND	NORTH SHORE WROUGHT IRON PRODUCTS LIMITED (586314) (Removed) Thirteenth Respondent
	AND	DAVID MARK GILBERT (Removed) Fourteenth Respondent
	AND	BRIAN DRYDEN DAVIS (Removed) Fifteenth Respondent

Decision: 17 February 2012

COSTS DETERMINATION
Adjudicator: K D Kilgour

APPLICATION FOR COSTS BY BRETT RICHARD NEILSON

Background

[1] Mr Neilson was joined to these proceedings by directions contained in Procedural Order No 4 dated 17 June 2011 based upon an evidential foundation advanced by the then first respondent, Auckland Council.

[2] By application dated 29 August 2011, Mr Neilson applied for removal which was granted by directions contained in Procedural Order No 13.

[3] Mr Neilson now seeks costs pursuant to section 91 of the Weathertight Homes Resolution Services Act 2006 to reimburse him for the unnecessary cost and expense he has incurred.

[4] Mr Neilson seeks costs against Allan Forster Irwin, the fourth respondent.

[5] Mr Neilson states that he does not seek costs against Auckland Council or the claimants.

[6] Mr Neilson's cost application against Mr Irwin is advanced on two basis:

a) the allegations by Mr Irwin against Mr Neilson were made without substantial merit; and
b) the allegations were made in bad faith.

[7] Costs are sought on an indemnity basis.

Factual Background

[8] The factual background is concisely set down in Mr Neilson's counsel's memorandum of 21 December 2011 (see paragraphs 7 to 13).

[9] Construction of the concerned dwellings in this claim took place at 419 Beach Road, Mairangi Bay between March 2000 and March 2001.

[10] In answer to a request from counsel for Auckland Council, counsel for Mr Irwin responded by stating that labour-only contractors engaged by Mr Irwin and his former company on construction included Mr Neilson who was involved with general building and specifically cladding and joinery installation.

[11] Auckland Council followed this with a joinder application.

[12] Following joinder Mr Neilson disclosed relevant documents evidencing that he was engaged by Irmac Builders Limited from about July 1999 and that he had entered into an apprenticeship training agreement with Irmac Builders Limited on 24 June 1999. The apprenticeship training continued with Irmac Builders Limited until terminated on 13 June 2001, after completion of construction of the concerned dwellings.

[13] The relevant factual matrix was clearly set down by Mr Neilson in his affidavit filed in support of his removal application. That affidavit deposed that Mr Neilson was during the entire construction period only a trainee carpentry apprentice engaged by Irmac Builders Limited and that at all relevant times was under the supervision of Mr Irwin and that Mr Irwin was in control of Mr Neilson's training as a carpentry apprentice.

[14] Mr Irwin did not participate in Mr Neilson's application for removal.

[15] Mr Irwin filed no submissions at the time of Mr Neilson's joinder application or his removal advising the Tribunal that Mr Neilson was during the construction period only a trainee carpentry apprentice and under the control and supervision of Mr Irwin.

[16] Mr Irwin through his counsel has filed submissions in response to Mr Neilson's application for costs.

[17] In support of the response to the costs application Mr Irwin has filed an affidavit.

[18] Mr Irwin states that in May 2011 the first respondent's counsel requested via email his counsel to advise the identity of the fibre cement cladding installer. Mr Irwin stated that Irmac Builder's Limited (in liquidation) engaged a number of labour-only contractors to install the cladding on the dwellings. Mr Irwin through his counsel supplied the information used by Auckland Council in its application to join the eighth respondent; that is, identifying Mr Neilson as a labour-only contractor involved specifically with the cladding and joinery installation. The thrust of Mr Irwin's response is that Mr Neilson worked onsite during the construction period, that he was never an employee but always an independent contractor during his apprenticeship.

[19] The conclusion to Mr Irwin's response, as submitted by his counsel is that the threshold of one or both of the two limbs of section 91 of the Act have not been met and that the onus is on the applicant, Mr Neilson to prove the same.

Jurisdiction

[20] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) to make an award of costs. The relevant provision is s91(1):

> **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—
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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.

[21] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily and the onus is on the party applying for costs to prove its claim. In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J observed 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".[2] His Honour considered that the important issues were whether the appellants should have known about the weakness of their case and whether they pursued litigation in defiance of common sense.[3]

[22] Thus, the Tribunal has discretion to award costs in limited circumstances and it follows that in exercising its discretion, it should do so judiciously and not capriciously.

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[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[2] At [51].
[3] At [52].

[23] The presumption to be overcome, as set down in section 91(2) of the Act, is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which has caused costs and expenses to have been incurred unnecessarily by, in this case, Mr Neilson.

Submissions

[24] Mr Neilson states that from the material made available by Mr Irwin's counsel to Auckland Council it was reasonable and only proper that Auckland Council seek to join Mr Neilson.

[25] Mr Neilson states that Mr Irwin's omission to point out that he was Mr Irwin's apprentice "…could be nothing but a cynical attempt to spread liability to a party who otherwise should not have been joined…". Furthermore, Mr Neilson is critical of Mr Irwin not seeking to oppose Mr Neilson's joinder notwithstanding that the joinder was made solely on allegations against Mr Neilson from Mr Irwin.

[26] Mr Irwin's response is that he solely answered literally the enquiry of him as to the identity of the fibre cement cladding installers and clearly that Mr Neilson was never an employee of Irmac Builders Limited (in liquidation) but a labour-only contractor.

[27] Mr Neilson applied through his counsel to Mr Irwin's response on 9 February 2012 stating:

i. It is now acknowledged that Mr Neilson's status was that of a labour-only contractor.
ii. The real issue is whether Mr Neilson should have been identified as potential further party by Mr Irwin not whether he was a labour-only contractor.

iii. That at all relevant times Mr Irwin was fully aware that Mr Neilson was his apprentice under an apprentice training scheme and that Mr Irwin must have understood that any construction work Mr Neilson did was to be supervised by himself or by Mr Chandler, the fifth respondent.

iv. Despite this knowledge Mr Irwin advanced Mr Neilson's name as a potential further party without explaining Mr Neilson's status as an apprentice and that he was under supervision at all times during construction.

v. The statements by Mr Irwin regarding Mr Neilson's status as a labour-only contractor and his involvement in the construction as a cladding and joinery installer were at best "…a half truth…".

vi. Mr Irwin at no time has sought to correct the false impression he conveyed by his counsel's email to the Auckland Council's counsel.

Threshold for assessing bad faith

[28] The phrase "bad faith" has received judicial consideration in a number of decisions including: *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd*;[4] *Reid v R*;[5] *R v Williams*;[6] *WEL Energy Trust v Waikato Electricity Authority*;[7]*Cannock Chase District Council v Kelly*;[8] *Webster v Auckland Harbour Board*;[9] *Latimer Holdings Ltd v SEA Holdings NZ Ltd*;[10] *R v Strawbridge (Raymond)*;[11] and *Transpac Express Ltd v Malaysian Airlines*.[12]

[4] [2007] 1 NZLR 721,[2006] NZSC 98 (SC) at [87]-[89].
[5] [2008] 1 NZLR 575 SC.
[6] [2007] NZCA 52; [2007] 3 NZLR 207(– ruling that police had acted in bad faith).
[7] HC Hamilton, CP69/93, 31 August 1994.
[8] [1978] 1 AII ER 152.
[9] [1983] NZLR 646 (CA).
[10] [2005] 2 NZLR 328(CA).
[11] [2003] 1 NZLR 683 (CA).
[12] [2005] 3 NZLR 709 (HC) at [61] (bad faith by in-house counsel).

[29] An overview of the case law indicates that the meaning to be attached to the words “bad faith” depends on the circumstances in which it is alleged to have occurred, and the range of conduct warranting the label can range from the dishonest to a disregard of legislative intent.

[30] Context and statutory intent were held to be the keys in the recent High Court of Australia decision in *Parker v Comptroller-General of Customs* [2009] HCA; (2009) 252 ALR 619.

[31] In that case French CJ undertook a consideration of the statutory framework (in that case it was the Customs Act) before considering the contextual meaning of "impropriety" at paragraphs [27] and [29]. The Court arrived at the intended meaning of the words by taking into account their meaning in ordinary usage and by considering the overall statutory framework. This is the approach to be taken here in deciding what amounts to bad faith.

[32] A party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegations. In terms of public policy, “bad faith” as used in section 91 of the Act could apply to parties who are obfuscate, or who obscure the correct and proper understanding or who take few or no steps to put right allegations advanced wrongly.

[33] I accept Mr Neilson’s submission that Mr Irwin at all relevant times knew that Mr Neilson was an apprentice and despite this knowledge he put forward Mr Neilson’s name as a potential further party without explaining Mr Neilson’s status.

[34] I further accept that it was improper of Mr Irwin to allow his statement to go forward to Mr Neilson’s status as a labour-only contractor and that he was as such involved in the construction as a cladding and joinery installer. Mr Irwin never sought to correct the

false impression he conveyed nor did he ever explain that Mr Neilson's carpentry work during construction was always supervised as he was an apprentice trainee.

[35] For the reasons set out above, I conclude Mr Neilson has discharged the heavy evidential burden that Mr Irwin's actions or omissions meet the threshold for the allegation of bad faith.

The threshold for assessing substantial merit

[36] In *Trustees Executors*[13] Justice France held that:

> In policy terms, whilst one must be wary of establishing disincentives to the use of the important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
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> a) unnecessary expense; has been caused by
>
> b) a case without substantial merit.
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> 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.

[37] In *River Oaks Farm Limited v Holland*[14] the High Court held that preferring other evidence does not lead to the conclusion that a claim lacks substantial merit. In *Phon v Waitakere City Council*[15] the Tribunal held that the bar for establishing 'without substantial merit' should not be set too high and that the Tribunal should have the ability to award costs against parties making allegations, or opposing

[13] At [66] – [67].
[14] *River Oaks Farm Limtied v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011, Allan J.
[15] *Phon v Waitakere City Council* [2011] WHT TRI-2009-100-000104, 26 April 2011.

removal applications based on allegations which a party ought reasonably to have known they could not establish.

[38] In *Max Grant Architects Limited v Holland*[16] the Tribunal declined a removal application by the architect but recorded that the claimant, the party opposing removal, needed to establish causation. At adjudication the claim against the architect failed but the Tribunal declined his application for costs. On appeal the District Court held that the Tribunal was wrong to conclude that the threshold for an award of costs under s91(1)(b) had not been met because the claimant failed to offer the necessary evidence of causation at hearing.[17]

Conclusion on the threshold – substantial merit

[39] Mr Irwin was at all times privy to the knowledge and the proper status of Mr Neilson during the construction period, that is, as an apprentice builder trainee under the guidance and supervision of Irmac Builders Limited (in liquidation). Throughout the process of joinder and removal Mr Irwin was silent and omitted to point out Mr Neilson was his apprentice. At no time did Mr Irwin seek to correct the literally but false impression gained from the information he supplied, namely that Mr Neilson was a labour-only contractor involved in general building, cladding and joinery installation in the subject dwellings.

[40] It should have been reasonably apparent to Mr Irwin that the literal information he supplied was improperly used outside of the actual factual matrix and that he alone was privy to that information which was reasonably not available to Auckland Council or the claimants because of his silence. There is no substantial merit literally to the claim or allegation that Mr Neilson was a labour-only

[16] *Holland & Ors as Trustees of the Harbourview Trust v Auckland City Council* WHT TRI-2009-100-00008, 17 December 2009.
[17] *Max Grant Architects v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81].

contractor engaged in general building and specifically cladding and joinery installation on the concerned dwellings during the construction period. Mr Irwin at the critical times during this proceeding (enquiries, joinder and removal) was the sole party with knowledge of the correct status and involvement of Mr Neilson and by allowing his information to Auckland Council to go forward uncorrected he must stand accused of advancing critical information without substantial merit.

[41] For the reasons outlined above I am satisfied that Mr Neilson has properly established his claim in terms of section 91(1)(b) and has "scaled" the threshold for assessing substantial merit. The literal information advanced by Mr Irwin was clearly without substantial merit. It formed the basis of Mr Neilson's joinder and the revised claim from the claimant. All such documentation has been served on Mr Irwin and so available to him. The Tribunal therefore has ability to award costs against Mr Irwin. Mr Irwin was privy to information he ought properly and reasonably to have known to not be established as tenable allegations against Mr Neilson.

CONCLUSION

[42] The presumption which Mr Neilson needs to overcome, that the parties must meet their own costs and expenses, has in this matter been overcome for I find that there has been both bad faith and allegations made without substantial merit on the part of Mr Irwin, which has caused costs and expenses unnecessarily to Mr Neilson.

[43] Mr Irwin has not challenged the level of costs claimed by Mr Neilson.

[44] The legislation governing the Tribunal does not provide guidance as to how I should exercise my discretion in calculating the quantum of costs to be awarded. In a number of costs awards the

Tribunal has been guided by the District Court scale and such an approach has been upheld by the High Court.[18] However I am not bound by that scale in calculating quantum as section 125(3) of the Act only applies to the District Court when dealing with proceedings under the Act and not to the Tribunal. Mr Neilson is seeking actual costs incurred. I consider in this proceeding that the costs award should reflect the complexity and significance of the proceedings to which Mr Neilson has been put; that he has had to pursue otherwise unnecessary steps due to Mr Irwin without reasonable justification failing to admit salient facts. For these reasons it is appropriate that the costs are those actually incurred by Mr Neilson.

[45] For the reasons above mentioned I have determined that Mr Irwin failed without reasonable justification to admit facts and thereby caused Mr Neilson to pursue unnecessary steps and arguments that lacked merit. By his lack of response during joinder and removals, Mr Irwin has also caused Mr Neilson to incur unnecessary costs. Applying these factors I am satisfied that the actual costs as claimed are reasonable and appropriate.

ORDERS

[46] Allan Forster Irwin is ordered to pay Brett Richard Neilson the sum of $4,564.35 immediately.

DATED this 17th day of February 2012

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K D Kilgour
Tribunal Member

[18] *Trustee Executors Limited v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008 and *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 19 November 2009.