

**IN THE WEATHERTIGHT HOMES TRIBUNAL  
TRI 2007-101-000012**

**BETWEEN**

**JOHN WILLIAM BOSWELL  
BURNS, PETER GEOFFREY  
STUBBS and WILLIAM  
GRAHAM GEORGE CAMERON  
CLEARY as Trustees of the  
FUTURE HOLDINGS FAMILY  
TRUST**

Claimant

**AND**

**ARGON CONSTRUCTION  
LIMITED**

First Respondent

**AND**

**AUCKLAND CITY COUNCIL**

Second Respondent

**AND**

**BERNARD MOHAN**

Third Respondent

**AND**

**PAUL BAYER  
(Removed)**

Fourth Respondent

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**DECISION ON COSTS  
Adjudicator: S Pezaro**

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## **BACKGROUND**

[1] On 8 October 2008 I granted applications for strike out by the first respondent, Argon Construction Limited's ("Argon"), and the second respondent, Auckland City Council ("the Council"). Argon and the Council have applied for costs and I now determine these applications. The third respondent, Bernard Mohan, has taken no steps in these proceedings. Reference in this decision to the respondents means the first and second respondents.

## **JURISDICTION**

[2] Section 91 of the Weathertight Homes Resolution Services Act 2006 ("the Act") provides limited jurisdiction for the Tribunal to award costs of adjudication proceedings. There is a clear presumption that parties in this Tribunal bear their own costs. The Tribunal has no jurisdiction to award costs other than on the grounds set out in 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-
  - (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.

## **THE GROUNDS FOR THE APPLICATIONS**

[3] The grounds for the applications are made out in the application by Argon dated 24 October 2008 and the application by the Council dated 23 October 2008. Mr Booth, counsel for Argon,

submits that Argon is entitled to an award of costs under sections 91(1)(a) and (b). The first part of the application by Argon is for costs from 31 May 2006, the date on which Argon was served with the claim, to 22 May 2008 when I gave the claimants their final opportunity to provide evidence of the quantum. This application is made on the ground that the claimants repeatedly delayed complying with Tribunal orders. The second part of Argon's application is for the costs incurred in the strike out applications.

[4] Ms Macky for the second respondent, Auckland City Council ("Council"), has applied for costs in accordance with s91(1)(a) only, on the grounds of bad faith.

[5] These applications are opposed by the claimants on the grounds set out in the Notice of Opposition dated 19 November 2008.

#### **BAD FAITH**

[6] Mr Booth argues that the delay by the claimants which he records at paragraphs 4 to 19 of the application amounts to bad faith. As a result of these delays Mr Booth argues Argon has incurred substantial unnecessary costs and expenses.

[7] Ms Macky also recorded the occasions on which the claimants failed to comply with my orders and argues that the claimants' failure to comply with these orders resulted in unnecessary conferences being attended by counsel. Ms Macky submits that the claimants' persistent failure to comply with timetable directions and orders amounts to bad faith. She suggests that the costs incurred by the Council in this claim are nearly double those incurred by the Council compared with similar claims in this Tribunal.

[8] Mr Booth and Ms Macky identified difficulties in assessing the nature of the claim against the respondents due to the failure of

claimants to either finalise the claim or provide the evidence upon which they relied.

## **STRIKE OUT APPLICATION**

[9] Mr Booth submits at paragraph 27 that the claimants were aware throughout the proceedings that the limitation issue was significant because prior to the Preliminary Conference on 15 June 2007 the Council had filed a memorandum stating that the claim was time-barred.

[10] Mr Booth argues that the claimants persevered with their claims against Argon and the Council when it was clear, or should have been clear, that their claim was statute-barred. Mr Booth submits that the success of the strike out applications confirms that the claim lacked substantial merit therefore Argon is entitled to costs under s91(1)(b).

## **THE CLAIMANTS' OPPOSITION TO COSTS**

### *Timetabling compliance and delays by the claimants*

[11] Mr Carden, counsel for the claimants, submits that non-compliance with Tribunal orders can only justify an award of costs if such non-compliance amounts to bad faith. He argues that any delays by the claimants fall far short of this threshold and that this claim has involved a complex series of factual matters.

### *The merits of the claim*

[12] Mr Carden submits that the costs applications must be determined on the basis that limitation defences are a shield that operates independently of the merits of any claim and: -

“a claimant with merits to his, her or its claims can pursue them and is entitled to pursue them vigorously until a limitation opposition is raised....”

[13] Mr Carden argues that the claim has substantial merit but that my decision that the claim was time-barred meant that those merits were not explored. He further submits that by declining to allow any amendment to the claim, the merits of any claims in contract against the first respondent have not been tested.

## **PRECEDENT**

[14] Counsel for the respondents have not drawn my attention to any precedent for finding that delay in the manner of these claimants amounts to bad faith. The presumption in the Act that parties pay their own costs indicates a high threshold must be met to justify a finding of bad faith.

[15] The only decision issued by this Tribunal awarding costs is *Simpson Family Trust v Wellington City Council & Ors (Costs Determination)* TRI 2007-101-29, 30 May 2008 where the Tribunal awarded costs pursuant to s91(1)(b).

## **DELAY AND BAD FAITH**

[16] While it is clear from the orders that I issued and the recitation in the submissions for Argon and the Council that the claimants repeatedly failed to particularise and quantify the claim and to meet timetable deadlines, it is also clear that the respondents could have brought their strike out application earlier with the likely result that costs would have been reduced.

[17] I am not convinced that the delays caused by the claimants contribute significantly to the length of these proceedings when weighed against the early withdrawal by the respondents of a limitation defence.

## **LIMITATION AND THE MERITS OF THE CLAIM**

[18] While I accept Mr Carden's submission that the substantial merits of a claim are independent of any limitation defence, it must be the case that a claim can have no merit if it is clearly time-barred. The issue that I have to determine in terms of section 91(1)(b) is whether the fact that the claim was time-barred was so clear to the claimants that it should not have been pursued.

[19] As recorded, the Council raised the question of limitation prior to the preliminary conference. I scheduled a hearing on limitation on 28 August 2007. This hearing was adjourned as a result of the claimants delay in complying with timetable orders and a new hearing date was set for 10 October 2007.

[20] On 3 September 2007 the first and second respondents requested that the claim proceed to mediation before the Tribunal determined the question of limitation.

[21] Once Argon and the Council consented to proceed to mediation the claimants were justified in pursuing their claim. Even if, as Ms Macky suggests, the Council made a pragmatic decision to go to mediation rather than argue limitation the respondents had effectively abandoned their limitation defence and allowed the claimants to prosecute the claim.

[22] There is nothing in the submissions on strike out to suggest that there is any information or evidence that was withheld by the claimants but later disclosed which was required by the respondents for them to apply for strike out.

[23] For these reasons I am not satisfied that these claimants should have accepted that their claim was time barred prior to the limitation hearing. The applications for costs therefore fail on both available grounds.

**ORDER**

[24] The applications by Argon Construction Limited and the Auckland City Council for costs are dismissed.

**DATED** this 10<sup>th</sup> day of December 2008

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S Pezaro

**Tribunal Member**