IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000023
[2011] NZWHT AUCKLAND 35

BETWEEN	OVERVIEW TRUSTEE LIMITED AS TRUSTEE OF THE CARRIGAFOYLE TRUST Claimant
AND	GILBERT EDMOND ANTON COOK AND MARK SIMON HORNABROOK AS TRUSTEES OF THE C C TRUST (Removed) First Respondent
AND	GILBERT EDMOND ANTON COOK (Removed) Second Respondent
AND	AUCKLAND COUNCIL Third Respondent
AND	FEARON HAY ARCHITECTS LIMITED Fourth Respondent
AND	ARCHITECTURAL WINDOW SOLUTIONS LIMITED Fifth Respondent
AND	SHAY O'BRIEN Sixth Respondent
AND	AXEL INSTALLATIONS LIMITED (IN LIQUIDATION) (Removed) Seventh Respondent
AND	CHRISTOPHER GIL COOK Eighth Respondent

Appearances: Mr T Rainey for the claimant
Mr P Robertson for the third respondent
Ms Couldwell for the fourth respondent

Cont...

Mr Wood for the fifth respondent
Mr Herbert for the sixth respondent

Decision: 20 July 2011

COSTS DETERMINATION
Adjudicator: R Pitchforth

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BACKGROUND

[1] This decision relates to applications for costs following the determination on the claim issued on 25 March 2011. In that claim for $268,522.38 the claimant was successful only against the eighth respondent who took no part in the proceedings and who has not applied for costs.

[2] Claims for costs were made by the third respondent, Auckland City Council, fourth respondent, Fearon Hay Architects Limited, fifth respondent, Architectural Window Solutions Limited (Windows) and Seamus O'Brien, the sixth respondent.

[3] In the substantive decision the unsatisfactory conduct of the case was outlined.

[4] The Weathertight Homes Resolution Services Act 2006 provides for costs in limited circumstances:

> 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] S France J in *Trustees Executors Ltd v Wellington City Council* [1] at paragraphs [44] ff discussed this section. He found that there should be two steps. First, that one or other of the grounds must be made out and second, that the Tribunal should exercise discretion. Showing that there was evidence of one of the grounds was not synonymous with exercising the discretion. Later he said:

[1] CIV-2008-485-0739, HC Wellington, 16 December 2008, S France J.

[66] I conclude by noting that it appears this case was the first where costs under this Act have been awarded. The other cases to which I was referred seem very different in their individual merits, and I did not find them of assistance. The Act gives the power to award costs, but only if one of two situations exists. In policy terms, whilst one must be by wary of establishing disincentives to the use of an important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes the balance between these competing concerns by limiting the capacity to order costs to situations where:

a) unnecessary expense has been caused by

b) a case without substantial merit.

[67] 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 costs to others through pursuing arguments that lack substantial merit. The fact of a very reasonable settlement offer not long before the hearing should also be borne in mind by any who might see the decision as having precedent value.

Bad faith

[6] Some respondents submitted that the claim was spurious, which implies both bad faith and lack of substantial merit.

[7] Bad faith includes abusing the Tribunal's processes by pleadings unsupported by evidence to the disadvantage of other parties. Using expert evidence to oppose a removal application and not producing or ignoring that evidence at the hearing similarly indicates bad faith.

[8] I also note s 57 which says:

> Adjudications to be managed to achieve purpose of Act
>
> (1) The Tribunal must manage adjudication proceedings in a manner that tends best to ensure that they are speedy, flexible, and cost-effective; and, in particular, must—

(a) encourage parties where possible to work together on matters that are agreed; and

(b) use, and allow the use of, experts and expert evidence only where necessary; and

(c) try to use conferences of experts to avoid duplication of evidence on matters that are or are likely to be agreed; and

(d) try to prevent unnecessary or irrelevant evidence or cross-examination.

(2) In managing adjudication proceedings, the Tribunal must comply with the principles of natural justice.

[9] It is difficult to achieve this purpose if allegations, based on evidence which the alleging party later considers unnecessary or irrelevant, are the basis for opposing an interlocutory application.

[10] There was also some reliance on the assessor's report as a justification in persisting with the claim. However, apart from receiving the report, the claimant relied during the prehearing period, on two of its own experts, who did not agree on major issues. Parties only learned that one expert was not being called shortly before the hearing commenced. Experts met only during the hearing period. If documentation had been prepared on time an experts' conference before the hearing may have been possible and would have informed the assessor of the differing views contrary to his. This would have especially applied once he was advised as to the application of Xypex coating in lieu of paint or plaster.

Calderbank letter

[11] In August 2008 all the respondents pointed out the inadequacy of the case. The claimant wished to continue. To encourage settlement the respondents made a Calderbank offer (being an offer *without prejudice* save as to costs) of $20,000.00 on 29 September 2008. It was not accepted by 3 October 2008 when the offer expired. As all respondents were parties to the offer it is discussed separately below.

AUCKLAND CITY COUNCIL

[12] The council submitted that this was always a hopeless case for an inflated amount. The Xypex coating was subsequently approved by the Council and there was no basis to show that it was inappropriate. The *claimant had unconditionally purchased the house before the council issued* the code compliance certificate. The roof was not leaking. Water entry through the pivot door which was an obvious architectural feature visible upon purchase did not cause damage and the flashing issues were only discoverable by destructive testing beyond the ken of any inspector.

[13] The council have spent $61,650 in defending the claim after 29 September 2008 made up as follows:

Solicitor's costs		
30/10/08	$1,549.78	
31/3/09	$847.13	
24/2/10	$6,498.88	
30/6/10	$8,268.38	
30/9/10	$1,498.50	
18/10/10	$5,868.00	
29/10/10	$1,115.50	
22/12/10	$3,136.63	
30/11/10	$11,428.13	
Subtotal		**$40,210.93**
Experts costs		
Summers 31/12/08	$899.94	
Project economics 30/11/10	$1,725.00	
Alexander & Co (Mr Flay) 20/12/10	$4,405.71	
Summers 28/2/10	$2129.12	

Summers 30/6/10	$4893.48	
Summers 30/9/10	$312.69	
Summers 22/10/10	$399.13	
Summers 26/1010	$6685.92	
Subtotal	$21,439.99	
Total		**$61,650.92**

Claimant's response to Council

[14] The claimant's submission is that the claim against the Council did not lack substantial merit. It referred to the evidence of its expert and the assessor who considered that the Xypex coating had or would fail. The claimant believed that it had an arguable claim supported by expert evidence. Rejection of evidence on the balance of probabilities is not the same as having no substantial merit.

Discussion

[15] The information available as to the advice the claimant's experts provided is the evidence submitted to the Tribunal.

[16] The assessor in a table at 9.9 in his report described the finish as a flush skim coat of plaster with about 3 to 4 mm thickness. At Photo 4 in Appendix J he observes that the photo is taken for the eligibility report. Water penetrates the plaster surface at the north side. At photo 23 the Assessor refers to the appearance of the plaster and concludes that there is only one skim coat applied to achieve a bagged plaster finish. He noted that it was not solid plaster as required by the specifications.

[17] It was clear that the Assessor was not informed until the hearing that the coating had been changed to Xypex. His assessment was based on the assumption that the coating was plaster. There was nothing to indicate that the claimant, who was claiming on the basis of the inadequacy of Xypex, had referred this issue to the assessor. Accordingly relying on the assessor's

misunderstanding of the facts as a justification for a reasonable basis for continuing the claim is not sustainable.

[18] In opposition to Mr O'Brien's removal application in 2008 the claimant provided evidence from Mr Morrison and at the hearing evidence from Mr Medricky.

[19] In his evidence Mr Morrison described Xypex as a crystalline waterproofing system and concluded that the application of Xypex is an appropriate finish to concrete block walls if applied as per the technical data information. There was a procedure for rectifying any deficiency in the concrete block substrate if required. The claimant therefore knew at that time that Xypex was a waterproofing finish.

[20] Mr Medricky's evidence was that he found (par 10(d) October evidence) that the exterior paint system approved in the building consent had been changed to Xypex, about which he had doubts. (He did not seem to agree with Mr Morrison, the claimant's other expert).

[21] In a spreadsheet filed in June 2010 Mr Medricky indicated that the fault he was concerned with was the horizontal and vertical cracking in the blockwork. His further concern was not that the Xypex was not a generally suitable product, but that it may not seal the larger cracks over 2 mm.

[22] The negligence of the Council was said to be that it accepted the Xypex coating without an appropriate Producer Statement for weathertightness warranties as specified. The acceptance was at the time of issuing the Code Compliance Certificate, an event which occurred after the agreement for sale and purchase had become binding. The allegation was not totally reliant on Mr Medricky's brief.

[23] This response was pointed out in the Calderbank letter so from that time the claimant was on notice as to the defence which was ultimately successful.

[24] Genuine belief is not sufficient to overcome the evidence first that the claimant had provided evidence regarding Xypex in 2008 and second that the claimant knew that Xypex became acceptable to the Council as an appropriate form of weathertightness seal. Mr Medricky was concerned about the larger cracks which may not be properly treated with the Xypex coating. Further, the claim was not run on the basis of the assessor's report.

[25] It was not for Mr Medricky to decide whether there was an arguable claim against the Council. Further, as indicated in the Calderbank letter, if the coating was considered inadequate for the cracks, the claimant did not paint the house with an alternative weathertight seal. In relation to the coating the claimants did not have the grounds to sustain a claim against the council.

[26] The claimant does not deal in submissions with the other claims, the roof membrane, defective parapet cappings, kitchen window joinery and pivot doors in relation to its claim against the council other than to say that it was supported by Mr Medricky's evidence.

[27] In relation to the roof membrane Mr Medricky does not say that it leaks, but rather that there was no Producer Statement to show that the Vulkem 171 primer had been applied and that the warranty was inadequate. He thought that the membrane roof did not, therefore, meet the requirements of the building consent.

[28] Mr Medricky observed that the parapet cap flashings had solder cracks and two portions were fixed through the top into the wall below. Water could penetrate the lap joints. This evidence does not show that the parapets did not appear adequate when inspected by the council. There seems to have been no attempt to find out who had done what appeared to the other experts to be subsequent work on the parapets.

[29] The reference to joinery in Mr Medricky's evidence is that he saw significant issues with the weathertightness of the current aluminium joinery which related to design choices and were under review with the joinery supplier. This again does not seem to be the basis for a valid claim against the council.

[30] I do not accept that the claimant could properly believe that it had a claim against the council based on its expert's evidence. Further, having had the defences brought to its attention, there is no indication that these matters were further investigated. The claimant proceeded to trial on the basis of the claim filed and was not successful.

[31] I find that the claim against the council had no substantial merit.

FEARON HAY ARCHITECTS LIMITED

[32] Fearon Hay Architects Limited (Fearon) claim costs on the grounds that the allegations made against it for $191,733.11 lacked substantial merit.

[33] The allegations against Fearon were that it breached its duty of care in relation to the preparation and supervision of the plans and works, recommended and failed to consider a change in the waterproofing system and issue amended plans as a result and designed the dwelling to include pivot doors which allowed moisture ingress.

[34] Fearon says that the claimant had no evidence for these allegations.

[35] The defence included a denial that Fearon had been engaged to do more than prepare the plans or that it had an ongoing supervisory role. It said the pivot doors were adequate. The claimant in closing accepted that the plans were code compliant. The Tribunal denied the pivot door and coating claims. The claim was therefore without substantial merit.

[36] The Calderbank letter was not acted upon. Fearon was forced to incur significant costs to defend the claims.

[37] The costs incurred by Fearon were:

Solicitor's costs		
Date	**Amount**	**Subtotal**
31/7/08	$9,962.25	
31/8/08	$8,573.13	
31/10/08	$3,246.25	
31/3/09	$938.00	
20/11/09	$2,145.00	
20/1/10	$1,997.5	
20/2/10	$3,190.00	
20/4/10	$1,367.5	
20/6/10	$2,458.75	
20/7/10	$1,255.00	
20/8/10	$1,333.75	
20/10/10	$2,857.5	
22/12/10	$20,184.75	
		$59,508.88
Clarke consultant architects		
30/8/08	$14,834.42	
23/11/09	$4,795.88	
3/3/10	$4122.56	
20/11/10	$21,457.09	
		$45,299.95
Total		**$104,808.83**

Claimant's response to Fearon

[38] The claimant argued allegations were made about the Xypex coating and the pivot doors the on the basis of evidence from the assessor and the

claimant's expert. It submitted that a rejection of a claim does not equate to lack of substantial merit.

Discussion

[39] The claim as presented included a number of grounds. It was claimed that Fearon had breached its duty of care in preparing the building consent plans in eighteen detailed ways. By the time of the hearing at least twelve of these negligent deficiencies were acknowledged as not being a defect and by the end of the hearing it was acknowledged that the plans were code compliant.

[40] Mr Medricky, who did not claim to have architectural expertise, pointed to some specifications which may not have complied with E1/AS1 and E2/AS1 but did not relate those matters to leaks. In relation to the pipes it was lack of sealing rather than inadequate diameter which was the problem. Any inadequate fall in the roof had not produced leaks.

[41] Mr Medricky's evidence of cracks in the blockwork could not be the basis for a claim for inadequate plans. He had not provided evidence that Fearon had supervised the construction or taken any other steps which had caused leaks. Similarly, the report on the pivot doors was insufficient in itself to be taken as containing all the elements of a potentially successful claim.

[42] The claimant inferred that Fearon had approved the change in the waterproofing system and failed to supply further plans and specifications to take the change into account. It alleged that Fearon had designed the dwelling to include pivot doors that both allowed moisture ingress and failed to have the proper tolerances. (The second part of the door claim was not related to weathertightness.) These inferences were not made on the basis of Mr Medricky's evidence. He provided no evidence that Fearon supervised the construction. There was no other substantive evidence despite the plans being available for some years for the claimant to take advice on the architectural aspects of the dwelling.

[43] In closing, the claimant accepted that the plans were code compliant. The Xypex issue has been discussed above. The material provided does not support the claimant's submission that it relied on its expert in rejecting attempts to settle. I find that there has been bad faith and a lack of substantial merit in the claim.

[44] The claimant noted that the documents provided show that Fearon made no payment of its costs, they were all paid by QBE Insurance (International) Limited. (See par 32 Fearon's submissions). Accordingly, the claimant says there is no power to award costs to the insurance company under s 91.

[45] QBE was Fearon's professional indemnity insurer. As part of the contractual arrangements, as is usual in these situations, the insurer took over the conduct of the defence of the claim. Fearon has paid the $10,000.00 excess. This in no way makes the insurer the respondent. The claimant cannot claim the benefit of Fearon's insurance.

Windows

[46] Windows claim costs because the claim against them was progressed in bad faith and was dismissed. An example of bad faith was that the claim against Windows was for $20,000 to $30,000 in relation to a reputedly $4 million house which was left largely untenanted since early 2007.

[47] Windows say that their defence was known since the first filing of a response in 2007. The claim against it lacked substance both in fact and in law. The claimant refused to enter substantive discussions to resolve the perceived grievance.

[48] There were unnecessary delays in the process and the need to revisit aspects already dealt with due to the claimant's consistent failure to

deliver documents which compromised the preparation of the defence. The bundle of documents finally provided was in a substandard form requiring extra effort to wade through it.

[49] The amount of costs claimed (with an adjustment for a payment where GST was not paid) was:

Payee	**Invoice ref**	**Date**	**Type**	**Amount (excl GST**
MIS Philips	1660	23/11/2010	Barrister	$7,868.56
David Thwaite	AWSL 01/01	2/12/10	Legal advice	$1,020.33
AMR Dean	29/11/10	29/11/10	Expert advice	$4,850.40
AMR Dean	31/8/08	31/8/08	Expert advice	$2,103.69
Simpson Grierson	417815	29/4/09	Legal advice	$855.00
Malcolm Wood	189 hours @$100 (details provided)			$18,900.00
Total				$35,597.98
GST				$5,339.70
Window Consultants	28/11/10	Wc364	Expert Report (GST did not apply)	$480.00
Total inc GST				**$41,417.68**

Claimant's view

[50] The allegations were made against Windows based on evidence from several experts. Evidence which is not accepted by the Tribunal which preferred other evidence is not the basis for saying that the claim was without substantial merit.

[51] The claimants claim in relation to the windows was :

> (n) the window joinery is non compliant with the requirements of the Building Code both as to its design and installation and leaks allowing water penetration into the interior of the dwelling.

[52] The claim went on to seek :

> (g) Remove several of the windows and door joinery units, modification of a number of those units, and reinstallation to form a weathertight barrier.

[53] The amount of the claim was $23,628.76 for the north facing doors.

Discussion

[54] As well as the claim further allegations were made against Windows about the joinery for which no amount was claimed.

[55] The claimant only produced evidence from one expert, Mr Medricky. In that evidence he said no more than that there were significant issues with the weathertightness of the current aluminium joinery which included design issues. He said that the repairs necessary were under review with the joinery supplier to provide appropriate long term solutions and the cost of implementing those works was approximately $25,000.00 including GST. He made no mention of the details in the claim in evidence in chief, though he did express views at the hearing.

[56] At the hearing the matter was not progressed due to 'without *prejudice'* matters. Whatever they were, they did not form part of the evidence.

[57] The evidence supplied did not indicate a claim with substantial merit.

ENTITLEMENT OF COSTS TO UNREPRESENTED PARTIES

[58] The claimant submitted that Windows was never represented by counsel and the accounts for costs do not show that they were costs in the claim. There is no evidence that Windows incurred an hourly cost from Mr Wood's time. As these are not costs which would be compensated by a court there is no reason why the Tribunal should award them.

[59] The established rule in New Zealand is that a lay litigant is not entitled, except in exceptional cases, to recover costs. This is because the costs allowed are legal costs. No party is entitled to 'time and bother' costs.[2]

[60] However, in *Official Assignee v Cavell Leitch Pringle & Boyle* [3] it was held that sums paid to a lawyer for help in preparing documents and preparing to appear and argue the case in person are recoverable.

[61] Windows spent $ 9743.89 exclusive of GST on legal advice in defending this claim.

[62] *In re Collier* (supra) it was also held that a lay litigant is entitled to reasonable disbursements. This is on the same basis as the disbursements sought by represented parties. Windows spent $7434.09 exclusive of GST in reasonable disbursements.

[63] Accordingly I find that only Windows costs of $17,177.98 plus GST $2,576.70, total $19,754.68 are able to be considered in this decision.

SEAMUS O'BRIEN

[64] Seamus O'Brien applied for costs on the basis that the claim was made in bad faith or without substantial merit.

[65] The basis of the application was that the both the allegations that Mr O'Brien was the plasterer and that the application was carried out negligently were unsuccessful.

[2] *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (1996) 10 PRNZ 145 CA30/96 Richardson P, McKay J, Temm J.
[3] HC Christchurch CP131/88; B28/91, 18 August 1995.

[66] Mr O'Brien conceded that the evidence that he was not the plasterer was given late in the piece though the issue had been raised at the preliminary conference in 2008.

[67] There has never been any evidence that the Xypex system has been negligently applied. The lack of negligence was known or should have been known by the claimant form the instigation of the claim against Mr O'Brien.

[68] Mr O'Brien was within his rights to defend the claim which, he submitted, was spurious.

[69] The costs claimed were:

Entity	**Role**	**Cost**
Peter Wright	Counsel	$12,842.92
Hoskins Thorn	Counsel	$9,400.14
Tim Herbert	Counsel	$10,925.00
Prendos (Philip O'Sullivan)	Expert	$23,287.81
Total		**$56,455.87**

[70] Mr O'Brien seeks all actual costs due to the tortuous nature of the steps to hearing as outlined in the decision.

Claimant's view

[71] The claimant submitted that there as an evidential basis for the allegations made in relation to the Xypex system and that failure to prove it does not amount to bad faith or lack of substantive merit. It also says the claim was based on warranties implied into the contract by virtue of ss 397-399 of the Building Act 2004.

[72] Further, the claimant says that the last minute allegation that a company was contracted to apply the Xypex and Mr O'Brien was therefore

not responsible avoids the issue of warranties under the Building Act 2004 which Mr O'Brien had contracted for before incorporation of the company was a sufficient ground on which to base a claim.

Discussion

[73] The question of who was the right party in relation to the application of the Xypex was immaterial if there was no negligence in the application of the Xypex. (The claimant accepted in final submissions that the claim in negligence against Mr O'Brien must fail).

[74] There was no evidence that the Xypex was applied negligently. All the allegations were directed towards the suitability of Xypex and the evidence from Mr Medricky was always that he did not think it would fix the larger cracks in the blockwork.

[75] It is also relevant to note that Mr O'Brien's evidence was made available in an application for removal in 2008. With that application he filed an expert's report from Mr O'Sullivan at Prendos. In the application Mr O'Brien said that not only was the Xypex coating not defective, it was not applied by him.

[76] The claimant opposed the application and, as reported in Procedural Order 3, 3 July 2008, provided evidence from Mr Morrison who was not called at the main hearing. In his evidence Mr Morrison described Xypex as a crystalline waterproofing system and concluded that the laying of Xypex an appropriate finish to concrete block walls if applied as per the technical data information and there was a procedure for rectifying any deficiency in the concrete block substrate if required.

[77] The relevant evidence was clearly in the claimant's possession when it opposed the removal of Mr O'Brien. The evidence at the hearing was not a surprise to the claimant; it had already had it checked over two years before.

Once it had decided not to call Mr Morrison at the hearing it should have been aware that it was in difficulty over these allegations.

[78] I find that there was bad faith and no substantial merit to the claim.

ACTS IN BAD FAITH

[79] Apart from the matters discussed in relation to individual respondents above the record showed that the adjudicator dealing with the preliminary procedures for the claim made considerable efforts to encourage parties to work together. The claimant failed to cooperate. The constant delays at the behest of the claimant were also an impediment to the speedy, flexible and cost effective process as well as impeding the application of the principles of natural justice.

[80] As the individual claims for costs reveal, each delay and tactic by the claimant triggered further legal and expert witness consultations which were unnecessary costs.

[81] I consider that the behaviour of the claimant showed bad faith.

GROUNDS FOR COSTS

[82] As each of the respondents have shown that the claimant has caused them to incur costs unnecessarily by either or both bad faith or allegations that were without substantial merit I consider that the respondents are entitled to costs.

THE COSTS

[83] The parties have each claimed the full costs of the proceedings from the time of the Calderbank letter.

[84] France J in his judgment said in relation to a Calderbank Offer:-

> [63] In my view the adjudicator was entitled to take account of the letter. Its exact nature and terms are less significant that its general effect, which is to confirm the offer and to identify both the defendants' position on matters and its concerns over whether the claimants' case is ready. In my view the letter is an accurate encapsulation of what was to happen. The offer of $90,000 was very reasonable and, for the reasons already discussed, I have not seen any evidence that would have made it reasonable for the claimants to reject it.

[85] The letter sent by the respondents to the claimant first pointed out that the majority of allegations at that time related to non-weathertight issues. In relation to the Xypex coating it was pointed out that this could only be a complaint made against the builder, that the system was appropriate and that the claimant had failed to paint the house with any weathertight seal.

[86] The Council disclosed that its expert evidence was that the house could be made weathertight for $8,700 plus preliminaries, margins, contingency and GST.

[87] The respondents said that the claim would fail or at worst could only succeed to the limited extent suggested by the council expert. Despite this the respondents offered $20,000.00 in full and final settlement. The usual note concerning costs then followed.

[88] The offer seems to me to have been a realistic offer in the light of the material available at the time.

[89] The offer was not accepted and at a Procedural Conference on 16 October 2008. The parties again complained about the difficulty in obtaining documents from the claimant which prejudiced their cases.

[90] There then followed two years during which the claimant avoided pursuing the claim in any meaningful way or providing sufficient material for the respondents to come to grips with the claim. Fixtures were vacated. When it was finally presented to the Tribunal the evidence was disorganised

and in need of sorting and editing. There was little change from the position outlined in the Calderbank letter.

[91] During those two years the parties had incurred legal and expert costs which were unnecessary in that the issues had not changed and there were no new facts revealed by the claimant. There was no obvious reason why the claimant had delayed the hearing.

[92] The outcome at the hearing was in line with the predictions set out in the Calderbank Letter.

[93] I find that the costs that are claimed were incurred unnecessarily.

QUANTUM OF COSTS

[94] The claimant accepted that as a general rule the actual experts' costs reasonably incurred are recoverable as disbursements if costs are awarded.

[95] The experts costs claimed are therefore awarded to the parties claiming them.

[96] The claimant submitted that the successful parties ought to be entitled to reasonable contributions to their costs and no more. However, it is conceded that more may be awarded if a reasonable contribution will not achieve the purpose of an award of costs.[4]

[97] It argued that scale applies by default when no cause is shown to depart from it, increased costs may be awarded where there is a failure by the paying party to act reasonably or scale costs are significantly inadequate and indemnity costs may be awarded where that party has behaved badly or very unreasonably.[5]

[4] *Morton v Douglas homes Ltd (No2)* [1984] 2 NZLR 620 and *Cheyne Developments Ltd v Sandstad* (1998) 1 PRNZ 409
[5] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.

[98] The claimant also argued that the starting point must be the District Court scale on a 2B basis as there was nothing exceptional or unusual about the case.

[99] The claimant also acknowledged that the Calderbank offer was relevant and could be taken into account by way of uplift from the scale costs rather than by reference to the actual costs.[6] Uplifts have been recorded at 25%, (*Holdfast)* and 50% (*Todd*).[7] The claimant concedes that if uplift were applicable the amount should be 25%.

[100] I have considered the accounts produced in support and compared them with the claimant's submitted schedule:

Item	Time allocation
Response to claim	1
Producing Documents	.75
Inspection	1
Conferences (6 @ .3 days	1.8
Preparation for hearing	6
Hearing	3
Total	13.55

[101] This will produce an amount of $20,325.00 at a daily recovery rate of $1,500.00.

[102] I accept that there was no more than usual difficulty in the case. The problem was rather the difficulty in ascertaining the case and maintaining the files for the eventual hearing. I consider that difficulty sufficient to allow a loading of 25% as submitted by the claimant.

[103] Accordingly each of the parties is entitled to up to $25,406.25 for the legal component of their costs.

[6] *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897
[7] *Todd v Hillary (Costs)* CIV-2005-412-294, HC, Auckland, 20 August 2007, Venning J.

ORDER FOR COSTS AGAINST CLAIMANT

[104] The claimant is therefore ordered to pay the following costs.

Auckland City Council	
Costs	$25,406.25
Experts' costs	$61,650.92
Total	$87,057.17
Fearon Hay Architects Limited	
Costs	$25,406.25
Experts' costs	$45,299.95
Total	$70,706.20
Architectural Window Solutions Limited	
Costs	$ 9,743.89
Experts' costs	$ 7,434.09
Total	$17,177.98
Seamus O'Brien	
Costs	$25,406.25
Experts' costs	$23,287.81
Total	$87,057.17

[105] It is noted that the claimant on record is the trustee of the Carrigafoyle Trust. As indicated in the application to the Department of Building and housing on 16 January 2008, it was made clear to the Department when starting the adjudication process that Overview Trustee Limited was the trustee and agent for the owner, the Carrigafoyle Trust. Similarly, the assessor's reports were made for the Carrigafoyle Trust. As the person who applied for the Assessors report Carrigafoyle Trust falls within the definition of 'party' in s 8. The Carrigafoyle Trust is therefore also liable for the costs.

Cost recovery from non parties

[106] The respondents were concerned that the proceedings were being funded by Patrick O'Connor and the Bank of New Zealand. The fourth and sixth respondents sought costs from Mr O'Connor and the BNZ with the support of the third respondent.

[107] The claimant's counsel was not instructed to act for BNZ or Mr O'Connor.

PATRICK O'CONNOR

[108] At the hearing Mr O'Connor gave evidence that indicated that the purchase was one of a series of transactions made on his behalf and that he was orchestrating it though companies and trusts managed by him and in which he had a major interest.

[109] The Council submitted that Mr O'Connor was a party for the purposes of s 91 in that a *party* is defined to include *the claimant*. The *claimant* is defined as the *person* who applies to the chief executive to have an assessor's report prepared and Mr O'Connor was the *person* who applied for the assessor's report. The other parties supported the application.

BNZ

[110] On the 18 November 2010, the week before the hearing, BNZ wrote to all the respondents and advised that it was the mortgagee for the dwelling and as part of the mortgage agreement the claimant had assigned to BNZ "all monies which become payable by way of ... compensation or otherwise in respect of any part of the mortgaged property". They provided a copy of the certificate of title to show that there were no prior encumbrances, liens or interests what would affect the BNZ's right to be paid these moneys. The parties were then put on notice by BNZ that any amounts owing, including costs, were to be paid into a nominated account.

[111] BNZ also advised that it held the power of attorney pursuant to the mortgage and as assignee and attorney the instructions were to pay any amounts due to the BNZ. It added that BNZ would treat any obligation on the respondent to pay compensation to the mortgagor as undischarged if it failed to make payment to BNZ in accordance with its rights or directions.

[112] On 10 March 2011 BNZ wrote to say that the release of the decision was imminent and reminded the respondents of their obligation to pay any amounts due to BNZ.

[113] These letters were the basis of an inference that BNZ was promoting or funding the claim in the hope of benefitting from the claim. As funder BNZ should therefore share any costs awards against the claimant.

[114] Fearon submitted that the Tribunal had the ability to award costs against non-parties pursuant to s 90(1) or s 125(3) which allows the Tribunal to make any order a court of competent jurisdiction could make and/or to invoke the rules of the District Court where necessary.

[115] I was also referred to a number of cases discussed below.

[116] The sixth respondent Seamus O'Brien also supported the application. The same letters led to the inference that as the BNZ had funded the proceedings and was the beneficiary of any proceedings.

[117] Mr O'Connor made no submissions. The BNZ made submissions.

[118] BNZ argued that the Tribunal does not have jurisdiction to award non-party costs, that if it does, costs should not be awarded because:

- Costs against a non-party are only awarded in exceptional circumstances

- A key consideration when awarding non-party costs is the exercise of control and control is not made out against BNZ
- Policy grounds point against a discretion to award non-party costs as the WHRS scheme is to provide relief and assistance to the victims of leaky buildings preventing banks from enabling claimants to bring proceedings would create a precedent at odds with public policy and the purposes of the scheme. It would deprive many victims of the leaky building crisis from relief.

[119] BNZ say that from November 2009 BNZ advanced funds to the claimant to meet legal and expert costs. The strategy, decision making and instructions regarding the claim were between the claimant and its advisers.

[120] The mortgage terms predate the claim and were standard in the industry. The respondents are trying to read more into the notices of assignment pursuant to the mortgage than can be justified.

[121] BNZ is not a party to the proceedings so cannot come within the definition of 'claimant'. Section 91 refers only to the claimant and parties and is the only costs provision in the Act.

[122] BNZ argues that s 90 deals with the substance of the claims and not costs. Section 119 refers to transfers of claims to the court and is irrelevant. Section 125 (3) does not mean the District Court Rules apply to the claim.

[123] Even if the Tribunal does have the power to award such costs, the criteria for such an award have not been met.

Discussion

[124] The award of costs against non parties raises jurisdictional issues that need to be dealt with before and if a decision to award costs is made.

[125] I accept BNZ arguments that s 119 is not relevant as the claim is not being transferred to the court. Similarly I accept the argument that s 125 deals with the procedure of the District Court and has no relevance to the Tribunal.

[126] Section 90 deals with the Tribunal's powers in relation to substance. It is followed by s 91 which deals with costs. Section 90 reads, in part:

> **90 Tribunal's determination: substance**
>
> (1) The Tribunal may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.
>
> (1A) An order under subsection (1) may require the payment of general damages (for example, for relevant mental distress).
>
> (1B) Subsection (1A) does not limit subsection (1).

[127] BNZ argue that s 90 does not apply to costs as they are outside the ambit of the decided claim. The section cannot be read as if it was giving the Tribunal all the powers of the District and/or the High Court. To be able to order costs in any situation that the District and High Courts could would be at odds with s 91 and the decision in *Trustees Executors* supra.

[128] Section 5 of the Interpretation Act 1999 says :

> 5 Ascertaining meaning of legislation
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[129] Section 90 clearly says that the Tribunal may make any order that a court might make. Section 91 however, modifies that power by providing that costs decision must also take into account the elements discussed above.

Accordingly, the Tribunal can make any orders that could be made by a court in relation to costs if, and only if, those preconditions are met. It provides a further restriction that the order provides for the costs and expenses to be met by any of the parties.

[130] I have already determined, above, that the threshold has been met as between the claimant and respondents. In order for the regime to extend to non parties, I would have to identify them as parties.

[131] As discussed above, there is little difficulty in treating Mr O'Connor as a party. He has managed the claim on behalf of the trust and the trust company. As beneficiary he would benefit from any decision of the Tribunal in relation to the property. He has clearly given instructions and been in control of the process.

[132] BNZ, in an affidavit from the manager, Strategic Services, said that it does not dispute that the funds were advanced to the claimant form November 2009 in order to enable the claimant to pay its lawyers and experts' fees in the proceeding. BNZ denied control or conduct and denied giving any instructions as to the strategy of the proceeding.

[133] But for the BNZ involvement this claim would not have proceeded to trial as the litigation could not be funded. Is this sufficient to make BNZ liable for the respondents' costs?

Legal principles

[134] Tompkins J in *Carborundum Abrasives Ltd v BNZ (No 2)* [1992] 3 NZLR 757, 763 found that the court had power to order a person who was not a party to proceedings to make payments towards the costs incurred by a party.

[135] Fisher J in *Arklow Investments Limited v McLean* CP 49/97, HC, Auckland, 19 May 2000, outlined the then reasonably well settled principles

based on the discretion of a court to make orders against persons who are not parties to the litigation itself. The guiding principle is that costs orders against third parties are exceptional but they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued. [19]. At [21] he said:

> The authorities show that it is the substance of the arrangement between the plaintiff and the third party which matters. There is no limitation to direct payments passing from the third party funder to the plaintiff. It is sufficient if the third party funder knows that the payment which is being made will by one means or another support the litigation involved. There must also be some form of associated benefit or expectation or hope of benefit to the third party funder but again it is the substance of the arrangement that matters rather than its form. For example, as the cases involving receivers, mortgagees and shareholders show, the benefit need not take the form of a direct contractual entitlement to a share of the expected damages or anything of that nature. It is sufficient if as a matter of economic substance, the hoped for outcome of the litigation will be that the third party funder will ultimately derive a material advantage. All of that follows not simply from the examples shown in the individual cases but, even more importantly, the overall rationale that it is wrong to allow someone to fund litigation in the hope of getting a benefit without a corresponding risk that that person will share in the costs of proceedings if they ultimately fail.

[136] The steps were fully laid out in the Judicial Committee in *Dymocks Franchise Systems v Todd* [2005] 1 NZLR 145, where Lord Brown of Eaton-Under-Heywood dealt with the situation where funding for litigation was advanced with an agreement as to the distribution of money recovered. *Carborundum Abrasives v BNZ* [1992] 3 NZLR 757 was affirmed.

[137] In *Dymocks* the first issue was jurisdiction. The Judicial Committee found that an order for costs against a non party is in the strictest sense supplemental to the judgment and in no way varies it. The parties claiming costs would not be entitled to recover more than their awarded costs.

[138] The second issue was causation. The Judicial Committee adopted the ‘but for’ test. It noted that the solicitors had not provided any suggestion that they would have conducted the cases without funding.[22]

[139] In discussing discretion the court explained that ‘exceptional’ means no more than outside the ordinary run of cases when parties meet their own expenses. The court must consider whether it is just to make the order. [25](1).

[140] Pure funders are outside the discretion. To be a pure funder there has to be no personal interest in the litigation, they do not stand to benefit from it, it must not be funding as a matter of business and it should in no way seek to control its course.

[141] If a non-party funds the proceedings and either controls or stands to benefit from it justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non party in these cases is not so much facilitating access to justice by the party as gaining access to justice for his own purpose and is himself the real party to the litigation. [25](3)

[142] In relation to the funding of financially insecure companies the court approved *Carborundum* where it was said that the funder should not be able to do so without risk. If it is for the purposes benefiting from the litigation or of preserving assets an order for costs may be appropriate.

[143] *Arklow* was also approved confirming that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that the costs will be shared if the proceedings fail.

[144] The ratio was that when a non party promotes and funds proceedings by an insolvent company solely or substantially for its own benefit it should be liable for the costs if the claim or defence or appeal fails.[29]

[145] It appears in this matter that the claimant did not have the funding to pursue the case even after the Calderbank offer.

[146] This present case clearly falls into the category of a major shareholder/ trustee and a mortgagee funding litigation with the expectation, as indicated in the BNZ letter, that a material advantage would be derived.

[147] In *Dymocks* it was said that the funder was a real party to the litigation. Mr O'Connor was in this situation.

[148] Baragwanath J said in *O'Hagan v Body Corporate* 189855 [2010] NZCA:

> [52] The fruit must accompany the rind. Just as a trustee is presumptively liable on contracts, because there is no difference in legal status between the individual as trustee and in his or her own right, so also for the purpose of the law of tort that status does not alter when the person transfers an asset to him or herself as trustee.

[149] As noted above, Mr O'Connor was intimately involved in all aspects of the building from the date of purchase through to the claim that followed. He was the authorised agent for his company and his legal status is intertwined with that of his company as trustee in such a way that his actions in regard to these proceedings were for the benefit of the trust's beneficiaries, including himself. There had been a period when it was to be his personal residence. But for his involvement the case would not have proceeded after the Calderbank letter. His involvement was such that he was a party.

[150] The BNZ is in a different position. Section 91 does not make mention of an award of costs against non- parties and, if it did, there would have to be shown that there was bad faith. (The BNZ made no allegations.) This has not been done.

[151] Accordingly the claim against BNZ is rejected.

[152] BNZ sought costs but ,as they have successfully argued they are not a party, they have not shown that s 91 applies.

SUMMARY

[153] The claimant (being the Carrigafoyle Trust and Overview Trustee Limited) shall pay the respondents forthwith:

Auckland Council	$87,057.17
Fearon Hay Architects Limited	$70,706.20
Architectural Window Solutions Limited	$17,177.98
Seamus O'Brien	$87,057.17
TOTAL	**$261,998.52**

[154] In the event of any default by the claimant Patrick O'Connor shall also be liable for the costs.

DATED this 20th day of July 2011

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Roger Pitchforth
Tribunal Member