

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000012
[2010] NZWHT AUCKLAND 18**

BETWEEN

**WAJIRA KUMARA
DASSANAYAKE AND
KUMUDIKA PRIYANTHI
DASSANAYAKE**
Claimants

AND

MANUKAU CITY COUNCIL
First Respondent

AND

D MOORE
Second Respondent

AND

PETER YAU
Third Respondent

AND

STEVE O'LEARY
Fourth Respondent

Decision: 24 June 2010

COSTS DETERMINATION
Adjudicator: K D Kilgour

Application by First Respondent for Costs following Determination of Claim

Background

[1] The claimants owned an alleged leaky home at 10 Navan Place, Dannemora. The claimants filed with the Tribunal an application for adjudication on 10 February 2010 and this was accompanied by the claimants' statement of claim prepared by their legal advisors.

[2] On the same date, the claimants filed a memorandum requesting from the Tribunal a determination, as a preliminary matter in this proceeding as to whether the claim must be terminated pursuant to the operation of section 55 of the Weathertight Homes Resolution Services Act 2006 (the Act).

[3] Section 55 of the Act states that a change in the ownership of a property on or after 1 April 2007 terminates any claim made in respect of the dwelling house on that property by its former owner.

[4] Counsel for the first respondent, the Manukau City Council (the Council), filed a memorandum with this Tribunal on 16 March 2010 responding particularly to the claimants' memorandum concerning potential determination of the claim.

[5] On 18 March 2010, the claimants filed a further memorandum clarifying the issues and authorities relied upon in their submissions that the claim ought not to be terminated. On that same date the Tribunal held a case conference attended by the claimants' representative and counsel for the Council. Oral submissions were heard at the conference and the issue considered in detail.

[6] On 19 March 2010 the Tribunal issued its final determination terminating the claim.

[7] On 6 May 2010, the Council was served with District Court proceedings arising from exactly the same facts as the claim pursued through this Tribunal. The District Court proceeding was filed by the claimants on 26 June 2009. The claimants mentioned to the case conference on 18 March 2010 that proceedings had been filed with the District Court but no mention of such filing had been made earlier, particularly in the claimants' memorandum of 10 February 2010.

Application by First Respondent for Costs

[8] The first respondent filed with the Tribunal on 4 June last an application seeking an order for costs pursuant to section 91 of the Act, by reason of bad faith and/or allegations made without substantial merit in circumstances where the first respondent submits that the claimants filed for adjudication of a WHRS claim having already commenced proceedings in the District Court; the claimants not having served the District Court proceedings or given any notice of those proceedings to the first respondent prior to filing for adjudication or indeed prior to the first case conference held at the Tribunal (the claimants' representative at the preliminary case conference did near the conclusion make mention of having filed proceedings in the District Court).

[9] The Council submits that the claimants' actions constitutes bad faith and, or in the alternative, allegations were made without substantial merit.

[10] On 18 June last, counsel for the claimants filed a memorandum responding to the application from Council to an order for costs. Such response submit that the claimants have not acted in bad faith in respect of their conduct of proceedings filed at the Tribunal in relation to the concurrent filing of District Court

proceedings; and, that the claimants' allegations in its application for adjudication were not without substantial merit.

Procedural Impropriety

[11] Council submits that in filing an application for adjudication in this Tribunal after already having filed a statement of claim in the District Court the claimants were in breach of section 60(5) of the Act which provides that:

“An owner of a dwelling house may not, however, apply to have an eligible claim adjudicated, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of:

- a) ...
- b) Proceedings initiated by the claimant...by way of:
 - (i) Proceedings in a Court or Disputes Tribunal; or
 - (ii) ...”

[12] Council submits that it is clear from section 60(5) that the claimants were not permitted to file the claim for adjudication in this matter. Furthermore, the claimants failed to notify the Tribunal or the parties that District Court proceedings had already been commenced.

[13] Council further submits that having proceeded with an application for adjudication in this Tribunal in breach of section 60(5) of the Act, the claimants caused the Council to incur unnecessary costs.

[14] The claimants submit that neither adjudication nor an application for adjudication had taken place within the meaning of section 60 of the Act when the Tribunal terminated the claim in response to the claimants' memorandum raising a preliminary issue for determination. In the alternative the claimants submit that the commencement of proceedings at the District Court by filing of a statement of claim on 26 June 2009 was not in contravention of

section 60(5)(b) of the Act as the District Court proceedings had not been served on any of the defendants (including the first respondent) prior to termination of the claim by the Tribunal on 19 March 2010. The claimants submit that no steps were required of any of the defendants prior to service of the District Court papers and accordingly no District Court proceedings had been initiated against the first respondent at the material time.

[15] Court proceedings are initiated by the plaintiff with the filing of a statement of claim. On a plain and ordinary meaning of section 60(5) of the Act it does appear to the Tribunal that there has been procedural impropriety by the claimants; but, I determine that that alone is not bad faith for the reasons mentioned below. Furthermore, the claimants when filing their application for adjudication with this Tribunal gave contemporaneous notice that the preliminary issue for determination before adjudication should proceed further, was, clearly, the issue which the claimants raised in their memorandum filed with the adjudication application. The claimants were properly “upfront” concerning the issue of whether their claim was eligible for adjudication and that that matter needed determination by the Tribunal before adjudication could continue. All respondents were aware of this preliminary matter requiring early determination.

[16] I determine that no party was seriously prejudiced as a consequence of the claimants’ procedural impropriety.

Bad Faith

[17] Whilst the Tribunal has discretion to award costs it is in limited circumstances. And, in exercising its discretion, it must do so judiciously and not capriciously. The presumption which the Council must overcome to successfully secure an award of costs is set down in section 91(2) of the Act, namely, that the parties must meet their own costs and expenses.

[18] The presumption 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 have caused costs and expenses to have been incurred unnecessarily by, in this case, the Council.

[19] The phrase "bad faith" has received judicial consideration in a number of decisions including: *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721, [2006] NZSC 98 (SC) at [87]-[89]; *R v Reid* [2008] 1 NZLR 575 SC; *R v Williams* [2007] 3 NZLR 207 (– ruling that police had acted in bad faith); NZLR; *WEL Energy Trust v Waikato Electricity Authority*, 31 August 1994, HC Hamilton Penlington J.; *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA); *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328; (CA); *R v Strawbridge (Raymond)* [2003] 1 NZLR 683; *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709, Smellie J at [61] (bad faith by in-house counsel).

[20] Case law indicates that the proper meaning to be attached to the words "bad faith" depends on the circumstances in which bad faith has alleged to have occurred. The range of conduct warranting the label "bad faith" can range from the dishonest to a disregard of legislative intent. Context and statutory intent were held to be key criteria for a finding of "bad faith" in a recent High Court of Australia decision in *Parker v Controller – General of Customs* [2009] 8 CA; (2009) 252 ALR 619.

[21] The intended meaning of the words "bad faith" as used in section 91 of the Act requires that I take into account their meaning in ordinary usage and by considering the overall statutory framework. The statutory framework governing this jurisdiction provides owners of dwelling houses that are leaky with access to speedy, flexible and

cost-effective procedures for resolution of their claims. The legislation is designed and to encourage owners of allegedly leaky buildings a specialist jurisdiction for speedy resolution of their claims. But the claim must be eligible and the Tribunal must have jurisdiction to continue the adjudication. These were issues sought to be determined at the earliest possible opportunity by the claimants in this matter. The claimants have not taken any steps against proposed defendants in the District Court without first seeking determination of the preliminary issue in this Tribunal which they properly raised at the time of filing their application for adjudication.

[22] A party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegations. I am satisfied that there is no basis for a finding of bad faith on the part of the claimants in this matter. I do not find any impropriety by the claimants.

Lack of Merit

[23] Council submitted that the claimants were legally advised and therefore ought to have realised that their claim was very unlikely to be able to proceed in the Tribunal and that the fact of still attempting to pursue such a course of action in this jurisdiction amounts to allegations having been made against the Council that were without substantial merit. The Council referred me to a case of *Trustees Executors & Ors v Wellington City Council & Ors* HC Wellington CIV-2008-485-739, 16 December 2008, Frances J, where the High Court upheld an award for costs on the basis of the claimants' case of having no substantial merit.

[24] In this matter the claimants allege that Mrs Dassanayake's ownership of the property, when she was not on the title, was equitable due to her status as the wife of Mr Dassanayake and her contribution (financial and otherwise to the marriage relationship and

the property) are pursuant to the Relationship Property Act 1976. The claimants sought to distinguish the Tribunal decision on *24 Bath Street Limited v Hulena Architects Limited* (TRI-2007-100-000067, 26 May 2008, Adjudicator Pezaro) and argued that Tribunal decision had been superseded by the High Court decision in *Petrou v WHRS & Ors* HC Auckland CIV-2009-404-1533, 24 November 2009, Randerson J. In proceeding with such arguments, I find that the claimants were not wilfully advancing arguments that had no substantial foundation. Whilst the claimants' allegations are somewhat bold and imaginative, I cannot characterise them as being put improperly or lacking in substantial merit. The fact that both arguments were rejected by me in my final determination, for I determined that the clear view in the Act is that a change of ownership must mean that any change in the legal ownership of the subject dwelling for whatever reason, subject to the statutory exceptions in section 55(3)(a) and (b), does not render such arguments from the claimants as lacking in substantial merit.

[25] For the reasons set down above, I do not find bad faith on the part of the claimants or that their allegations were without substantial merit. The presumption set out in section 91(2) of the Act is not overturned. The scheme of the Act is that generally costs in this jurisdiction should lie where they fall.

Order

[26] The first respondents' application for a costs determination in terms of section 91 of the Act is **dismissed**.

DATED this 24th day of June 2010

K D Kilgour
Tribunal Member