IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2016-100-0006
[2017] NZWHT AUCKLAND 2

BETWEEN	**MARCO EDWARDES AND CHARLOTTE RONA EDWARDES** Claimant
AND	**ARCHITECTURAL EDGE LIMITED** First Respondent **(Removed)**
AND	**SALLY BROWN SMITH** Second Respondent **(Removed)**
AND	**MICHAEL HUTCHENS** Third Respondent
AND	**REMEDIAL SOLUTIONS LIMITED (IN LIQUIDATION)** Fourth Respondent
AND	**POMME LIMITED** Fifth Respondent
AND	**MICHAEL JOHN HOLT** Sixth Respondent
AND	**TIM DAVID SIMES** Seventh Respondent **(Removed)**

Procedural Order 15
COSTS DETERMINATION
Dated 27 June 2017
Adjudicator: K D Kilgour

Background

[1] This claim relates to a Geodesic Dome dwelling-house situated at 308D Seaview Road, Ostend, Waiheke Island. The home allegedly has water ingress issues causing significant damage. The claimants filed an application for an assessor's report under the Weathertight Homes Resolution Services Act 2006 (the Act) with the Ministry of Business Innovation and Employment on 27 November 2012.

[2] The claimants applied for adjudication before this Tribunal on 14 March 2016.

[3] The claimants' second amended statement of claim dated 7 February 2017 alleges, amongst other claims, two claims against the sixth respondent Michael John Holt; being misrepresentation and misleading and/or deceptive conduct. The quantum of their claim against Mr Holt, not yet completely finalised, is in excess of $300,000.

[4] The claimants entered into an agreement to buy the home in November 2010 from the fifth respondent Pomme Limited (company number 1830768). The sole director of Pomme Limited is Mr Holt.

[5] Pomme Limited and Mr Holt have from inception of proceedings through to Tuesday 16 May 2017, been represented by counsel. On 16 May 2017 Mr Holt's counsel informed the Tribunal that he no longer acts for the fifth and sixth respondents. However, until that advice, Mr Holt was represented at various procedural conferences by counsel, and attended a number of those conferences with counsel. At the first procedural conference Mr Holt phoned in from Italy. During the time of his counsel representation, Mr Holt filed an application for joinder of the seventh respondent, an application for his removal, including a comprehensive statement in support of his removal application and an interim response to the claims against him. In other words, he participated fully in proceedings.

[6] Through his counsel the Tribunal learnt that Mr Holt was willing to attend mediation.

[7] The Tribunal first set down this proceeding for mediation on 29 March 2017.[1] The day before that mediation Mr Holt, through his counsel, emailed the Tribunal and the parties advising that Mr Holt was unable to attend due to being detained in France because of a relative's death in that country. That same email explained Mr Holt nevertheless remained willing to attend mediation and that he would be available after mid-April 2017 for he would have returned to New Zealand by that time.

[8] Accordingly mediation was rescheduled for 24 May 2017 to accommodate Mr Holt's availability. Mr Holt's counsel at the time informed the Tribunal that Mr Holt would attend the mediation.[2]

[9] During the evening of Tuesday 23 May 2017, after the closure of the Tribunal's registry and the offices of the lawyers for the claimants and the third respondent, Mr Holt, without explanation, advised by email the Tribunal solely that he was unable to attend mediation the next day.

[10] Mr Holt's failure to participate in that scheduled mediation caused the other parties to call for its cancellation. All parties were significantly inconvenienced by the late cancellation.

[11] The Tribunal received notice from the claimants that they now required the proceeding to go straight to a hearing and a timetabling teleconference was scheduled for Wednesday 14 June 2017. An email notice was sent to Mr Holt by the Tribunal on Wednesday 31 May 2017. That notice directed him to attend the teleconference and informed Mr Holt that the Tribunal has power to proceed to adjudicate the proceeding notwithstanding any party's failure to attend and furthermore can determine claims where a party fails to participate.[3]

[12] Counsel for the third respondent, Michael Hutchens, sent to the Tribunal on 9 June 2017 a memorandum in preparation for the timetabling conference on 14 June 2017. This included an application for costs against Mr Holt alleging, amongst other matters, that Mr Holt's late

[1] See Procedural Order 11.
[2] See email to all parties and the Tribunal of Wednesday 26 April 2017 from Andrew Hough, Mr Holt's then counsel.
[3] Weathertight Homes Tribunal Resolution Services Act 2006, ss 73–75.

notice of refusing to participate in the mediation without explanation had jeopardised the settlement process and thereby has caused additional and unnecessary costs to various parties who were prepared for the mediation.

[13] Mr Holt failed to attend the procedural teleconference on 14 June 2017. Again he gave no explanation for his non-attendance, notwithstanding that the Tribunal reminded Mr Holt by email on Wednesday 31 May 2017 that it is an offence under the Act to fail to adhere to a Tribunal direction and that such notice had directed Mr Holt to attend the teleconference.

[14] The teleconference set down a timetable for the proceeding to move to a hearing.[4] The timetable included a process to determine Mr Hutchen's costs application and invited the claimants, who had also given notice of their intent to make a costs application, to file their application by Friday 16 June 2017. Their application for costs was duly filed on that date and e-mailed to Mr Holt. The costs determination timetable invited Mr Holt to file by email his response to the applications by 4 pm on Thursday 22 June 2017. On Thursday 15 June 2017 at 2.56 pm, Mr Holt emailed the Tribunal's registry informing it of a change of his physical address for service. I am satisfied that Mr Holt has by email communication received the Tribunal's direction of Wednesday 31 May 2017, Procedural Order 14 dated 15 June 2017, Mr Hutchen's counsel's memorandum of 9 June 2017 which included Mr Hutchen's application for costs, and the claimants' application for costs of Friday 16 June 2017.

[15] The claimants and the third respondent's application for costs has been made pursuant to s 91 of the Act. Mr Holt has not responded to these applications.

Statutory provision

[16] Section 91 of the Act is as follows:

91 Costs of adjudication proceedings

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[4] See Procedural Order 14 (15 June 2017).

(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.

Costs award principles

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

[18] The presumption which the claimants and the third respondent 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.

[19] 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 claimants and the third respondent.

[20] The phrase bad faith has received judicial consideration in a number of decisions including: *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2006] NZSC 98; [2007] 1 NZLR 721 (SC) at [87]-[89]; *R v Reid* [2008] 1 NZLR 575 (SC); *R v Williams* [2007] 3 NZLR 207(CA) ruling that police had acted in bad faith); *WEL Energy Trust v Waikato Electricity Authority* HC Hamilton, CP69/93, 31 August 1994; *Cannock Chase District Council v Kelly* [1978] 1 AII 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, at [61] (bad faith by in-house counsel).

[21] 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.

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

[23] In that case French CJ undertook a consideration of the statutory framework (that case concerned 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.

[24] In terms of public policy, "bad faith" as used in s 91 of the Act could apply to parties who are obfuscate or take few or no steps and refuse to participate in the process or settlement negotiations (often in the hope of escaping any liability), and who in so doing jeopardise the settlement process.

Application for costs

[25] Mr Hutchens' counsel submits that the third respondent incurred unnecessary costs concerning the mediation set down for 24 May 2017 in the amount of $1,957.69 (including GST and disbursements). His application submits that these costs pertain to wasted time and attendance throughout April and May 2017. Because of Mr Holt's belated withdrawal from the mediation, Mr Hutchens' counsel submits that the costs incurred in respect of it have been incurred unnecessarily in terms of s 91 of the Act and that Mr Holt's conduct, "particularly when viewed in the context of what happened in respect of the first mediation, demonstrates bad faith on his part".[5]

[5] application for costs (9 June 2017) at [16].

[26] Mr Hutchens' application states that Mr Holt's conduct has wasted two months of the proceeding that could have otherwise been applied to the resolution of the claim. Mr Hutchens' counsel mentions that timely notice of Mr Holt's unwillingness, or inability, to attend mediation could have spared all parties, including the Tribunal the costs that they have now unnecessarily incurred.

[27] Mr Hutchens' application concludes that Mr Holt's conduct amounts to bad faith and that an award of costs is appropriate. The application further refers the Tribunal to s 125(3) of the Act and suggests that the costs application submitted meets the requirement of r 14.6 of the District Court Rules 2014 having established bad faith for the purposes of s 91 of the Act.[6]

[28] Mr Hutchens' counsel further submits that r 14.6(b) of the District Court Rules 2014 are also relevant because Mr Holt disobeyed a direction of the Tribunal by failing to attend the mediation. The submission recites that the Tribunal directed the parties and their experts to attend.[7] It is moot as to whether the Tribunal has power to direct parties to attend mediation so I will not further consider that aspect of his submissions.

[29] The claimants' application supports the factual background set down in Mr Hutchens' application and agrees with the authorities relied on by Mr Hutchens. The claimants submit that Mr Holt's late withdrawal from the mediation with no reason or explanation provided was an act of bad faith on his part; even more so that Mr Holt agreed to attend mediation and yet twice withdrew. In the second occasion the late withdrawal was after the claimants and other parties had already taken steps and incurred costs in preparation for that mediation. Such costs were unnecessarily incurred. The claimants seek indemnity costs of $2,195 plus GST.

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[6] Woodhouse J indicated as much in *White v Rodney District Council* (2009) 11 NZCPR 1, (HC).
[7] Procedural Order 13 at [2].

[30] The claimants' application concedes that bad faith does depend on the circumstances in which it is alleged to have occurred but submits that repeated failures to comply with Tribunal orders and a refusal to participate in settlement negotiations, particularly when the object of the Act encourages speedy negotiated resolution, does amount to bad faith in terms of s 91 of the Act.[8]

Discussion and determination on costs applications

[31] The meaning of "bad faith" depends on the circumstances in which it is alleged to have occurred and a range of conduct constituting bad faith can extend from dishonesty to a disregard of legislative intent. The claimants and the third respondent are alleging bad faith and it is well established that they have a heavy evidential burden to discharge.[9]

[32] As set down above, the applications in this proceeding submit that "bad faith" as used in s 91 of the Act could apply to Mr Holt who after indicating a willingness to participate in a mediated settlement process withdrew and took no steps at the last moment to participate. The claimants and the third respondent are essentially submitting that Mr Holt by refusing to participate in the mediation (settlement process) was by his inaction acting in bad faith, and he made it inevitable that no overall mediated settlement could be reached.

[33] The context in this proceeding is the purpose of the Act which is to have speedy, flexible and cost effective procedures towards resolution of the claim. Currently, a large percentage of claims before the Tribunal are being settled during the stages prior to adjudication at a hearing, and this is consistent with Parliament's intent.

[34] The objectives of speedy resolution and cost effectiveness are significantly advanced by settlement. This movement towards settlements prior to a hearing are actively encouraged by the Tribunal. In this proceeding, the claimants and the third respondent indicated a willingness to participate and were ready to participate in this exercise

[8] *Brodav v Waters WHT TRI 2008-101-00059 &66 Determination 31 March 2009*.
[9] *Clear Water Cove Apartments Body Corporate 170989 v Auckland Council* [2013] NZHC 2824, at [48].

and were expecting the sixth respondent to participate also for he had indicated his willingness. But at the very last moment Mr Holt declined to participate.

[35] I accept that Mr Holt's non-participation had a negative effect on the proceedings to advance settlement by mediation.

[36] I am satisfied, having considered the case law and the circumstances of this proceeding that it can be considered "bad faith" by a party where an earlier resolution to participate is aborted by a deliberate refusal to participate in the processes which enable speedy and cost effective resolution of a claim.

[37] Mr Holt, since discharging his counsel, has consistently failed to cooperate and this failure to participate is an impediment to the speedy, flexible and cost effective process towards resolution of this proceeding. As the claimants and the third respondent have submitted, Mr Holt's conduct has wasted two months of the proceeding that could have otherwise been applied to the resolution of the claim. As the respective claims for costs reveal, each delay by Mr Holt has triggered further legal and expert witness consultations by the claimants and the third respondent which were unnecessary costs.

[38] In terms of public policy, too narrow an interpretation placed on the phrase "bad faith" as used in s 91 of the Act would effectively condone parties who take no steps and refuse to participate in settlement negotiations such as a mediation (often in the hope of escaping any liability although in this case that is purely speculative), and who in so doing jeopardise the settlement process.

[39] I conclude that the behaviour of Mr Holt showed bad faith.

[40] Both claimants for costs are seeking the actual costs. The Act does not provide guidance for the Tribunal in calculating quantum when awarding costs. In some cases, a Tribunal has applied the District Court or High Court scales as a guide and this approach has been upheld by

the High Court.[10] The Tribunal is not bound by those scales when calculating quantum.

[41] While either the High Court or District Court scale is often appropriate when costs are being awarded following a substantive hearing, they are not always appropriate when it comes to interlocutory applications such as this. The reason for this is that the unnecessary costs incurred by the claimants and the third respondent in the circumstances of this case cannot easily be equated to the various steps in the scale set out by the Courts.

[42] In the circumstances of this case, therefore, I consider that a contribution towards the actual costs should be awarded, but I do not consider that there are grounds for ordering indemnity costs. The Court of Appeal in *Bradbury v Westpac Banking Corporation*[11] recognised the categories in respect of which the discretion may be exercised is not closed but noted the following circumstances in which indemnity costs have been ordered:

- The making of allegations of fraud known to be false.
- Particular misconduct that causes loss of time to the Court and other parties.
- Commencing or continuing proceedings for ulterior motives.
- Doing so in wilful disregard for known facts or clearly established law.
- Making allegations which never ought to have been made or unduly prolonging a case by groundless contention.

[43] The High Court Rules also provide that a Court may order indemnity costs if the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a claim or if it

[10] *Trustees Executors Ltd v Wellington City Council* HC Wellington CIV-2008-485-739, 16 December 2008.
[11] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, (2009) 3 NZLR 300 (CA).

has ignored or disobeyed an order or direction. I do not consider that any of these categories have been established in this case. Mr Holt has disobeyed my direction that he attend the procedural teleconference on 14 June 2017 but that is not relevant to this costs determination.

[44] In the circumstances of this case, I consider a 60 per cent contribution to the actual costs that have been incurred, which were incurred unnecessarily by the claimants and the third respondent, is an appropriate award in this instance.

Orders

[45] Michael John Holt is ordered to pay Marco Edwardes and Charlotte Rona Edwardes the sum of $1,317 plus GST immediately.

[46] Michael John Holt is ordered to pay Michael Hutchens the sum of $1,174 (including GST and disbursements) immediately.

DATED this 27th day of June 2017

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K D Kilgour
Tribunal Member