IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2021-100-002

BETWEEN	**HELEN BERNADETTE O'SULLIVAN, FIONA CHERIE WHITE & ANDREW RODGER WILTON as trustees of the WILTON FAMILY TRUST** Claimants
AND	**DEANE FLUIT BUILDER LTD** First Respondent
AND	**TAB DESIGN LTD (Removed)** Second Respondent
AND	**TILING SOLUTIONS WANAKA LTD** Third Respondent
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL** Fourth Respondent
AND	**HEMPEL (WATTYL) NEW ZEALAND LTD formally called VALSPAR PAINT (NZ) LTD** Fifth Respondent
AND	**WILTON JOUBERT LTD** Sixth Respondent

PROCEDURAL ORDER 26
(Sixth respondent's costs application)
26 March 2024

Introduction

[1] The sixth respondent has made an application seeking costs from the fourth respondent under s 91 of the Weathertight Homes Resolution Services Act 2006 (the Act). The fourth respondent opposes the application.

Background

[2] This proceeding relates to the claimants' residential property situated at 65 Forest Heights, Wanaka. One of the claimants, Mr Wilton, is an experienced structural engineer and a director of the sixth respondent. Mr Wilton, through the sixth respondent, drafted the structural engineering drawings and specific engineering design for parts of the property including the concrete blockwork. The drawings and design work were completed by late November 2009, but Mr Wilton continued to be involved with the construction of the property over 2010 and beyond.

[3] On 10 September 2021, the Tribunal granted an application by the fourth respondent to join the sixth respondent to the proceeding.[1] An application by the sixth respondent to be removed from the proceeding was later declined by the Tribunal.[2]

[4] The claims against the sixth respondent were that:

(a) through Mr Wilton, the sixth respondent was effectively acting as project manager throughout 2010 and made decisions that were causative of damage to the property; and

(b) the sixth respondent was negligent in producing designs that omitted control joints and waterproofing sealant in the concrete blockwork.

[1] *O'Sullivan v Deane Fluit Builder Ltd* WHT TRI-2021-100-002, 10 September 2021 (Procedural Order 2).
[2] *O'Sullivan v Deane Fluit Builder Ltd* WHT TRI-2021-100-002, 15 March 2022 (Procedural Order 8).

[5] On 26 October 2023, the Tribunal issued a final determination of the proceeding.[3] It determined the claims against the sixth respondent were not made out on the basis that:

(a) the sixth respondent's work concluded in late November 2009 and Mr Wilton's continued involvement with the property was determined to be in his personal capacity as a homeowner, rather than as an officer of the sixth respondent;[4] and

(b) having considered the evidence of Mr Wilton and Dr Jacobs (an expert engaged by the sixth respondent), the sixth respondent's structural design work was neither negligent nor causative of the damage to the property.[5]

Submissions of the sixth respondent supporting its costs application

[6] The sixth respondent seeks costs from the fourth respondent on the basis that the allegations raised by the fourth respondent were without substantial merit.

[7] The sixth respondent submits that the fourth respondent had the onus of proving its claim against the sixth respondent and ought to have discontinued the claim by early March 2023 when it was due to file and serve its evidence. The sixth respondent says that from 14 October 2022, the fourth respondent had sufficient information to determine the merits of its claim against the sixth respondent. In particular, the sixth respondent says the fourth respondent had received the sixth respondent's response to the claim along with a 'will say' statement from Dr Jacobs. On 6 March 2023, the sixth respondent's counsel invited the fourth respondent to withdraw its claim. However, on 7 March 2023, the fourth respondent's counsel declined to withdraw the claim.

[8] The sixth respondent points out how the fourth respondent did not adduce any expert evidence regarding its structural engineering work. In relation to whether the sixth respondent was acting as project manager, the

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[3] *O'Sullivan v Deane Fluit Builder Ltd* WHT TRI-2021-100-02, 26 October 2023 (Final Determination).
[4] At [274]–[276].
[5] At [40], [283] and [286].

sixth respondent submits that the fourth respondent's evidence was speculative as to what capacity Mr Wilton was acting in when he continued to be involved with the construction of the property. On that basis, the sixth respondent submits the fourth respondent ought to have known it was going to be unsuccessful in its claim.

[9] The sixth respondent submits that the fourth respondent's decision to continue with its claim without establishing an evidentiary foundation was in defiance of common sense. It says the fourth respondent's claim lacked substantial merit.

[10] The sixth respondent accepts that there were grounds for its joinder to the proceeding. However, it contends that the fourth respondent should have withdrawn its claim in March 2023. As a result of the fourth respondent continuing to pursue the claim, it is submitted that the sixth respondent has incurred significant costs in preparing for and attending the hearing.

[11] The sixth respondent claims against the fourth respondent costs incurred in preparing for and attending the hearing in the sum of $44,968.93 (including GST and disbursements).

The fourth respondent's response to the application

[12] The fourth respondent submits that it considered there to be tenable evidence supporting its claim against the sixth respondent. It submits that there were significant issues that needed to be tested at the hearing, including issues relating to whether control joints should have been included in the structural design and the extent of the sixth respondent's involvement with the installation of the cladding. The fourth respondent claims that none of the opportunities it had to withdraw its claim arose in a situation where these issues were satisfactorily answered.

[13] The fourth respondent contends that the Tribunal's procedural orders joining the sixth respondent to the proceeding and later declining to remove the sixth respondent provide clear statements that the fourth respondent's claim had a factual foundation and substantial merit worthy of being heard at a

hearing. The fourth respondent highlights the Tribunal's finding that there were genuine factual disputes that needed to be determined at trial.[6]

[14] In response to the sixth respondent's submission that the fourth respondent should have discontinued its claim when it received the evidence of Mr Wilton and Dr Jacobs, the fourth respondent submits that it was entitled to rely on the evidence of its own experts – Mr Hadley, Mr Saul and Mr Wood – which raised issues in relation to project management and a causal connection between a lack of control joints in the concrete blockwork and a lack of control joints in the cladding. Furthermore, the fourth respondent says the evidence of its experts were supported by the claimants' leaks list and the evidence of Mr Hardaker (the cladding installer) and Mr Downie (the assessor).

[15] The fourth respondent further submits that even if the Tribunal finds the fourth respondent should have withdrawn its claim in relation to the sixth respondent's structural design work, its claim in relation to project management still had substantial merit as it was ultimately successful against Mr Wilton. Although the Tribunal found that Mr Wilton was acting in his personal capacity rather than as an officer of the sixth respondent, the fourth respondent emphasises that the differentiation was not clear cut. The fourth respondent maintains that it was precisely because of this difficulty that it argued in the alternative that either the sixth respondent or Mr Wilton in his personal capacity was project managing the construction of the property.

[16] It is submitted that the fourth respondent acted reasonably when resisting the removal of the sixth respondent in circumstances where it was clear that Mr Wilton played an integral role in the construction. According to the fourth respondent, if its claim was withdrawn but the Tribunal found Mr Wilton was acting in a professional capacity, the fourth respondent would have been left with no recourse.

The sixth respondent's reply to the fourth respondent's response

[17] The sixth respondent submits that it was not for it to satisfactorily answer the disputed issues, but for the fourth respondent to prove those issues and assess, as the proceeding progresses, whether it will maintain its claim.

[6] *O'Sullivan v Deane Fluit Builder Ltd* (Procedural Order 8), above n 2, at [47] and [67].

[18] The sixth respondent submits that although the Tribunal determined in its procedural orders that there were issues to be tested at a hearing, subsequent evidence was provided to the fourth respondent which showed that it was not going to succeed with its claims at a hearing.

[19] In particular, the sixth respondent points out how Dr Jacobs' evidence that control joints were not required in the concrete blockwork was never challenged, yet the fourth respondent maintained this part of its claim.

[20] In response to the fourth respondent's contention that it was reasonable to pursue its claim based on evidence that there was a link between the absence of control joints in the blockwork and the absence of control joints in the cladding, the sixth respondent submits that there was no evidence that the former was causative of any loss.

[21] In terms of the fourth respondent's successful project management claim against Mr Wilton, the sixth respondent again points out that the fourth respondent's own expert evidence was that it was unclear what "hat" Mr Wilton was wearing in that regard. According to the sixth respondent, the fact that the Tribunal found against Mr Wilton in this regard does not justify the fourth respondent's claim against the sixth respondent. The sixth respondent also says it was apparent prior to the hearing that there was no evidence that project management was causative of any loss.

[22] The sixth respondent concludes that the fourth respondent ought to have considered the claim more carefully and critically. It recognises that not all costs incurred are reasonably claimable as the Tribunal considered there were grounds for its joinder to the proceeding. The sum it seeks represents only the costs for preparing for and attending the hearing.

Statutory provision

[23] Section 91 of the Act allows the Tribunal to award costs if a party has caused those costs and expenses to be unnecessarily incurred by one of the criteria set down in s 91.

[24] Section 91 of the Act reads as follows:

> **91 Costs of adjudication proceedings**
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> (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.
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> (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

[25] The starting point is that parties to proceedings before the Tribunal must meet their own costs.[7] This is consistent with the statutory purpose and procedural provisions of the Act.

[26] The Tribunal has jurisdiction to only award costs if a party has caused costs and expenses to be incurred unnecessarily by either acting in bad faith or making allegations or objections that are without substantial merit. There is no presumption that costs reflect success in the litigation.

[27] Despite having different starting points, the costs jurisdiction of both Tribunals and courts has the same general objective, being the provision of access to justice by the discouragement of bad behaviour and the promotion of compromise.

Without substantial merit

[28] In *Riveroaks Farm Ltd v Holland*, the High Court set down a two-stage approach to determining costs under s 91(1)(b) of the Act:[8]

(a) firstly, the Tribunal must assess whether the claim in question lacked substantial merit; and

[7] Weathertight Homes Resolution Services Act 2006, s 91(2).
[8] *Riveroaks Farm Ltd v Holland* HC Tauranga CIV-2010-470-584, 16 February 2011 at [5].

(b) if the claim has lacked substantial merit, the Tribunal must consider whether it is appropriate to exercise its discretion to make an award of costs.

[29] A number of High Court authorities provide the following guidelines when determining whether a claim lacked substantial merit:

(a) "substantial merit" refers to claims that require serious consideration by the Tribunal;[9]

(b) the proper enquiry when considering whether a claim or a defence has substantial merit is to determine what the party and their advisers properly considered the strength of the case to be;[10]

(c) that enquiry must be conducted without the benefit of hindsight associated with the Tribunal's findings in its final determination;[11] and

(d) the bar for establishing substantial merit should not be set too high as the Tribunal should have the ability to award costs against those making allegations which a party ought reasonably to have known they could not establish.[12]

[30] Moreover, costs decisions by the Canterbury Earthquakes Insurance Tribunal (the CEIT) will be relevant as its jurisdiction to award costs are identical to that of this Tribunal. In *B v Earthquake Commission*, the CEIT observed that "without substantial merit" involves establishing that the defects in the allegations or objections made are such that there is no prospect that the allegations or objections will advance the point they are made to support, either because they are unsupported by evidence or they are logically flawed.[13]

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[9] At [9].
[10] At [45].
[11] At [4] and [44]–[45]. See also *White v Rodney District Council* HC Auckland CIV-2009-404-1880, 19 November 2009 at [83].
[12] *Clearwater Cove Apartments Body Corporate 170989 v Auckland Council* [2013] NZHC 2824 at [27].
[13] *B v Earthquake Commission* CEIT-0021-2020, 12 October 2020 at [24].

[31] The CEIT also considered that although there is a subjective element in considering "bad faith", the test for "without substantial merit" is objective.[14] In *Dewes v IAG New Zealand*, the CEIT determined the question to be "what ought the party and its advisors have known about the prospects of the argument in question being successful?"[15] On appeal, the High Court accepted the CEIT's approach to the issue.[16]

[32] In *Trustees Executors Ltd v Wellington City Council*, Simon France J found that the defendants had advanced a case without substantial merit.[17] In considering whether it was then appropriate to exercise the discretion to award costs, the Judge considered the important issues to be whether the party making the claim "should have known about the weakness of their case", and whether they "pursued their claim in defiance of common sense".[18]

[33] In determining whether the Tribunal should exercise its discretion to award costs, the following principles can also be drawn from the relevant authorities:

(a) the mere fact that an allegation or argument is not accepted by the Tribunal will not of itself expose the party concerned to liability for costs.[19] In other words, claims which have substantial merit, even if rejected, will not attract an order for costs;[20]

(b) the Tribunal must consider the interests of those that have been exposed to unnecessary costs by parties determined to advance an unmeritorious case, but care must also be taken to ensure that parties are not dissuaded from pursuing their claims by an unduly rigorous approach to the requirement to establish that a case has substantial merit for costs purposes;[21] and

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[14] At [24].
[15] *Dewes v IAG New Zealand Ltd* CEIT-0037-2019, May 2021 at [38].
[16] *IAG New Zealand v Dewes* [2022] NZHC 3335 at [176]–[182].
[17] *Trustees Executors Ltd v Wellington City Council* HC Wellington CIV 2008-485-739, 16 December 2008 at [44]–[50].
[18] At [52].
[19] *Riveroaks Farm Ltd*, above n 8, at [9].
[20] At [10].
[21] At [51].

(c) only the costs "incurred unnecessarily" as a consequence of a party advancing arguments that lacked substantial merit are to be recovered.[22]

Was the fourth respondent's claim against the sixth respondent without substantial merit?

[34] Both limbs of the fourth respondent's claim against the sixth respondent – the lack of control joints in the masonry blockwork and assuming the role of project manager – ultimately failed. However, as said by the High Court in *Riveroaks Farm Ltd*, that failure does not necessarily mean the claim lacked substantial merit.

[35] In relation to the first limb of the claim – that the sixth respondent acted as project manager over the construction of the property – the Tribunal found the fourth respondent's claim to be successful against Mr Wilton in his personal capacity as a homeowner. The claim therefore failed against the sixth respondent. However, the issue was not so clear cut such that it would have been obvious to the fourth respondent that it would not succeed against the sixth respondent. There was a serious issue to be considered as to whether Mr Wilton, when making decisions such as omitting drip edges and control joints in the cladding, was acting as an officer of the sixth respondent or in his personal capacity as a homeowner.

[36] Prior to the hearing, the fourth respondent's experts provided evidence on this issue, particularly Mr Wood and Mr Saul. Mr Wood in his brief stated that it was difficult to "differentiate the steps taken by Mr Wilton personally or Mr Wilton in his capacity of a director of Wilton Joubert".[23] He went on to conclude that "Mr Wilton/Wilton Joubert" was at times acting in some capacity as a project manager. Similarly, Mr Saul stated that the roles of structural engineer and project manager were often conflated, and that it was not clear whether Mr Wilton or the sixth respondent was undertaking each role at any given time.[24]

[37] The sixth respondent submits that the uncertainty of the experts as to whether it was Mr Wilton (in his personal capacity) or the sixth respondent

[22] *Clearwater Cove Apartments*, above n 12, at [68].
[23] Brief of Evidence of Jeffrey George Wood (3 March 2023) at [9.4].
[24] Brief of Evidence of Eddy Saul (31 March 2023) at [12.26].

acting as project manager makes the evidence speculative at best. I find that the uncertainty rather indicates the difficulty of the issue and that there is merit to the claim. The experts did not completely rule out that Mr Wilton was acting for the sixth respondent when he stepped into the bounds of project managing the construction of the property.

[38] I do not accept the sixth respondent's submission that there was no evidence that project management was causative of the damage to the property. Mr Hardaker in his brief stated that Mr Wilton instructed Mr Hardaker to install the cladding without drip edges and control joints.[25] In general, the evidence indicated that issues with the cladding was a cause of the damage to the property.[26] There was therefore a very real possibility that Mr Wilton's decisions in relation to the cladding contributed to its issues and therefore was causative of damage to the property.

[39] Prior to the hearing, the Tribunal could not determine the fourth respondent's claim based only on the submissions and briefs of evidence it had before it. A hearing was required for the Tribunal to hear and properly assess the expert evidence on what capacity Mr Wilton was acting in when making significant decisions regarding the construction of the property, and whether this was causative of damage. It was the totality of the evidence, which could only have come out at a hearing, that would have enabled the Tribunal to determine the issue. In other words, the first limb of the fourth respondent's claim required serious consideration by the Tribunal.

[40] In relation to the second limb of the fourth respondent's claim – that the sixth respondent's structural design itself was negligent for omitting control joints – I do not accept that the evidence of Mr Wilton and Dr Jacobs was unchallenged by the fourth respondent. As the fourth respondent points out, it was entitled to rely on the evidence of its own experts in deciding to continue its claim, particularly in relation to a link between the lack of control joints in the masonry and the same for the cladding. One of its experts, Mr Hadley, had suggested that the lack of control joints in the masonry contributed to the lack of control joints in the cladding.[27] This was supported by similar statements

[25] Brief of Evidence of Paul Brian Hardaker (31 March 2023) at [11]–[12], [81], [93] and [108].
[26] See for example Assessor's Full Report (23 July 2020) at [9.2].
[27] Brief of Evidence of Mark Hadley (31 March 2023) at [7], [12.2]–[12.3] and [12.28]–[12.29].

made in Mr Hardaker's brief and Mr Downie's report.[28] Mr Ward also stated that the decision not to include control joints in the masonry was significant in the appearance of cracks in the cladding.[29]

[41] I note that Mr Saul, another expert engaged by the fourth respondent, did not entirely support its claim in relation to the lack of control joints in the masonry. Mr Saul in his brief said it is unusual to have no control joints in the masonry, but that it is possible with a specific design.[30] Contrary to the fourth respondent's allegation, Mr Saul said that although Mr Hardaker was right to query the lack of control joints in the masonry, it did not follow that control joints should also be omitted from the cladding.[31] This however is not necessarily fatal to the merits of the fourth respondent's claim, given there were other experts who gave evidence supporting the fourth respondent's claim.

[42] In the circumstances, I find that the fourth respondent's claim in relation to the lack of control joints did not lack substantial merit. The issue was contested by expert evidence from both parties. Further evidence from Mr Downie, Mr Hardaker and Mr Ward supported the fourth respondent's claim. Furthermore, the fourth respondent at that point in time was not necessarily obliged to assess the merits of its claim, especially in circumstances where neither Dr Jacobs nor any of the other relevant experts were examined and had their evidence tested at a hearing. The Tribunal could not properly determine the issue based only on the submissions and briefs of evidence it had before it prior to the hearing.

[43] It was therefore necessary for the claim to go to a hearing in order to hear and assess the expert evidence in regard to control joints in the masonry blockwork. Again, it was only the totality of the evidence, which could only come out at a hearing, that would have enabled the Tribunal to determine whether the sixth respondent's decision to omit control joints from the masonry was negligent. As it was for the first limb of the fourth respondent's claim, this issue also required serious consideration by the Tribunal.

[28] Brief of Evidence of Paul Brian Hardaker (31 March 2023) at [76] and [108]; and Assessor's Full Report (23 July 2020) at [9.2].
[29] See Brief of Evidence of Mark Ward (31 March 2023) at [37].
[30] Brief of Evidence of Eddy Saul (31 March 2023) at [8.13].
[31] At [8.20] and [12.15].

[44] It is also relevant to consider the Tribunal's procedural orders joining the sixth respondent to the proceeding and later declining to remove it. In those orders, the Tribunal has consistently found there to be at least a tenable claim against the sixth respondent.

[45] On 10 September 2021, the Tribunal issued a procedural order joining the sixth respondent to the proceeding as it determined there to be tenable evidence supporting a claim against it.[32] Mr Downie's report stated that the structural engineering design of the property was defective, but this raised an issue of whether the sixth respondent was responsible for the defects. The Tribunal reasoned that this was an issue that was likely to be contested and may require expert evidence.[33]

[46] Similarly, the Tribunal determined on 15 March 2022 that it was not fair or appropriate to remove the sixth respondent from the proceeding.[34] The Tribunal considered that the issue of whether the lack of control joints in the structural design bear any relation to the lack of control joints in the cladding was one that required expert evidence and testing at a full hearing.[35] Furthermore, there were emails from Mr Wilton which showed that he had some knowledge and possible involvement with the cladding, which was considered to be the primary defect.[36]

[47] These procedural orders were issued by a different member of the Tribunal, and I agree with their reasoning. There was enough evidence to support a claim against the sixth respondent, and there existed disputed issues that were sufficiently complex to warrant expert evidence and a hearing to be resolved. These two procedural decisions strongly support the notion that there was, at the relevant time, some merit to the fourth respondent's claim against the sixth respondent.

[48] The presumption which the sixth respondent must overcome to successfully secure an award of costs is set down in s 91(2) of the Act, that it must meet its own costs and expenses. The presumption is only overcome if

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[32] *O'Sullivan v Deane Fluit Builder Ltd* (Procedural Order 2), above n 1, at [31].
[33] At [28].
[34] *O'Sullivan v Deane Fluit Builder Ltd* (Procedural Order 8), above n 2, at [67].
[35] At [43].
[36] At [44]–[46].

the Tribunal finds that in this case, the fourth respondent advanced a claim that lacked substantial merit.

[49] Applying the relevant authorities in determining "substantial merit", I find that the fourth respondent's claim against the sixth respondent did require serious consideration by the Tribunal. In the circumstances, the fourth respondent's allegations were not such that they were unsupported by evidence or logically flawed. The fourth respondent had available evidence from various experts that supported its claim. There was some prospect that its claim would succeed after a hearing.

[50] For the reasons outlined above, I find that the sixth respondent has not established that the fourth respondent's claim lacked substantial merit for the purposes of s 91.

Should the Tribunal exercise its discretion to award costs?

[51] As I have determined that the fourth respondent's claim did not lack substantial merit, I do not need to determine this issue.

Conclusion

[52] The sixth respondent's application for costs is declined.

DATED this 26th day of March 2024

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K D Kilgour
Tribunal Member