

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000098
[2014] NZWHT AUCKLAND 03**

BETWEEN ANTHONY WONG-KAM
Applicant for Costs
Respondent 16 in original claim

AND GILLIAN ANNE BARRON
Second Respondent in original
claim

Decision: 21 March 2014

COSTS DETERMINATION
Adjudicator: P A McConnell

INTRODUCTION

[1] Anthony Wong-Kam, the sixteenth respondent, in the original claim, seeks a costs award against Gillian Barron, the second respondent. Mr Wong-Kam submits that the two alternative grounds for awarding costs set out in s 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) have been met because the claims against him by Ms Barron were made in bad faith and were without substantial merit.

[2] Ms Barron opposes Mr Wong-Kam's application for costs. She denies any bad faith and further denies making any allegations or objections that were without substantial merit. Even if she did she says that they have not caused Mr Wong-Kam to incur any unnecessary or additional costs. She notes that Mr Wong-Kam had also filed a claim for costs and damages in the District Court and submits that it is inappropriate for Mr Wong-Kam to pursue broadly similar claims in two different jurisdictions. I agree. I therefore directed that the District Court claim needed to be discontinued or the Tribunal would dismiss the costs application. Mr Wong-Kam has discontinued his District Court claim. There are no res judicata issues as the District Court claim was discontinued before hearing.

[3] The key issue I therefore need to decide is whether Mr Wong-Kam has incurred costs unnecessarily either as a result of bad faith on the part of Ms Barron or as a result of her making allegations that were without substantial merit.

Relevant Principles

[4] The application for costs is made under s 91(1) of the Act. Section 91 provides:

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.

[5] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily. This presumption is only overcome if the Tribunal is satisfied that either bad faith or allegations that lack substantial merit have caused unnecessary costs or expenses to a party.

[6] In *Trustees Executors Ltd v Wellington City Council*¹ Simon France J observed that:

[66] In policy terms, whilst one must be 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 a balance between these competing concerns by limiting the capacity to order costs...

[7] His Honour considered that meeting a threshold test of no substantial merit “must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still discretion to be exercised.”² The important issue is whether the weakness of the case was apparent and whether litigation was pursued in defiance of common sense.³

[8] Allan J stated in *River Oaks Farm Limited v Holland*:⁴

The mere fact that an allegation or argument is not accepted or upheld by the Tribunal will not of itself expose the party concerned to liability for costs. In many cases a party will advance a claim or argument that requires careful consideration by the Tribunal, but which is ultimately rejected.

¹ *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.

² Above n 1 at [51].

³ Above n 1 at [52].

⁴ *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011 at [25].

He considered that the appropriate test for substantial merit was whether it required serious consideration by the Tribunal.

[9] The meaning of 'bad faith' depends on the circumstances in which it is alleged to have occurred. Conduct constituting bad faith can range from dishonesty to a disregard of legislative intent. It is well established that a party alleging bad faith must discharge a heavy evidential burden, commensurate with the gravity of the allegations made.⁵

[10] All previous cases however agree that in order for the Tribunal to exercise its discretion to award costs two things need to be established. They are:

- unnecessary expense;
- caused by a claim without substantial merit or bad faith by the party against whom costs are sought.

Procedural History

[11] In order to decide whether Mr Wong-Kam has incurred any unnecessary costs due to either bad faith or meritless allegations made by Ms Barron it is useful to look at the procedural history of Mr Wong-Kam's involvement in this claim. Mr Wong-Kam was joined to the claim after Ms Barron and the Auckland Council both applied to join him. The only information provided by Ms Barron at the time was:

There was considerable concern during the pouring of the ground floor concrete. At the time of the pouring the lower level of the ground floor there was extra water added to the mix and I understand this is the cause of the major crack in the concrete.

A further issue was the pouring of the upstairs concrete floor and the difficulty around ensuring the two inches of floor separation between the living room and the balcony. Because of these two issues I would like Concrete Services joined to the claim as a possible contributor to the defects and damages listed in the Assessor's Report.

⁵ *Clearwater Cove Apartments Body Corporate 170989 v Auckland Council* [2013] NZHC 2824 at [48].

[12] Initially Mr Wong-Kam was incorrectly named as Tony Chan. This was subsequently corrected. This appears to have been a genuine mistake rather than any indication of bad faith. In any event the fact that a mistake was made in naming Mr Wong-Kam has not resulted in him incurring any additional or unnecessary expense.

[13] Once Mr Wong-Kam was correctly named and joined to the claim the only steps Ms Barron took prior to the mediation was filing a detailed response as directed by the Tribunal. Mr Wong-Kam did not attend the mediation. Ms Barron attended the mediation, together with the other respondents that attended reached a settlement with the claimants. The claimants then elected to proceed to hearing against the non-settling respondents including Mr Wong-Kam. While Mr Wong-Kam sought legal and expert advice at times during the course of the claim he was not represented by counsel at the hearing.

[14] On 28 June 2011 Mr Wong-Kam filed 53 pages of information which included a request for access to the dwelling and other information, copies of letters and information including diary notes, technical information on concrete, information which appears to be a detailed response to the claims against him, and a request that he be removed as a party.

[15] Only the claimants opposed Mr Wong-Kam's application for removal. When dismissing the removal application Mr Carter noted that Mr Wong-Kam did not deny that he carried out the concrete works but that he blamed the defects on other building work or other parties. Mr Carter concluded that these matters could not be resolved in the context of a removal application and for that reason it was inappropriate for Mr Wong-Kam to be removed from the claim.

[16] The claim against Mr Wong-Kam proceeded to hearing and Ms Barron was called by the claimants to give evidence. At the end of that hearing Mr Carter made an oral ruling dismissing the claim against Mr Wong-Kam. This was confirmed in a written determination dated 2 February 2012. Mr Carter accepted that Mr Wong-Kam poured the concrete that was alleged to be defective. However he concluded that Mr

Wong-Kam was not liable because either his work was in accordance with the standards at the time, or the responsibility for the alleged defect was not that of Mr Wong-Kam.

THE APPLICATION FOR COSTS

[17] In the application for costs Mr Wong-Kam says that Ms Barron has acted in bad faith because she has made false allegations against him and as a result he was joined to the claim. He further says that she lied when she said he was the only person who did concreting work as there were others who carried out some of the concreting work.

[18] I have already set out in full the statement made by Ms Barron in support of the application to join Mr Wong-Kam. I note that Mr Wong-Kam does not deny that he either poured the concrete ground floor or the upstairs concrete floor. Mr Wong-Kam also does not dispute that there was an inadequate step down or floor separation between the living room and the balcony. Therefore, with the possible exception about the statement regarding water being added to the mix, there is nothing inaccurate in the information provided by Ms Barron. It is unlikely that Ms Barron's statement regarding water being added to the mix was a significant factor in Mr Wong-Kam being joined to the claim as the cracked floor was not a weathertightness issue. I further note that in her statement Ms Barron did not say Mr Wong-Kam was responsible for the other substandard concreting work that compromised the ground clearances. Ms Barron also attached copies of the invoices provided by Mr Wong-Kam which confirmed the extent of the work he carried out.

[19] I do not accept that the fact that Ms Barron did not detail the concreting work carried out by people other than Mr Wong-Kam constitutes a lie. Therefore I do not consider that Ms Barron lied in providing this information nor do I consider that she made false allegations. The list was a list of people she considered should be joined to the claim. It was not intended to be an exhaustive list of who did what on site.

[20] Mr Wong-Kam does not deny that he poured the concrete driveway, the ground floor and the upstairs concrete floor. There were

alleged defects associated with this work or the transition or junctions between this work and other elements of the construction. Even if Ms Barron had been fulsome in her explanation as to the others who had carried out concreting work on site the Council would still most likely have successfully applied to join Mr Wong-Kam. There is no evidence to support a finding that this has caused Mr Wong-Kam any unnecessary costs. Once Mr Wong-Kam had been identified as the concreter responsible for laying the concrete floors and driveway it was almost inevitable that he would be joined to the claim.

[21] The only other issue I need to decide is whether there are any other unnecessary costs that Mr Wong-Kam has incurred caused by any subsequent bad faith on the part of Ms Barron or allegations without substantial merit.

[22] Mr Wong-Kam is critical of some of the statements Ms Barron made in her response. He has not however detailed how these in themselves added to his costs in defending the claim against him. Mr Wong-Kam has also provided a detailed analysis of some of the evidence Ms Barron gave at the hearing and alleges that this establishes bad faith. However, again there appears to be no connection between these statements and any unnecessary costs incurred by Mr Wong-Kam. Mr Wong-Kam was not represented by counsel at the hearing.

[23] The allegations against Mr Wong-Kam were that the ground clearances and the fall in the driveway at the garage entrance were insufficient and that he did not provide a sufficient step down at the first floor balcony. The key evidential dispute at the hearing was in relation to the upper level concrete floor and whether it had been either boxed to provide a step down before the concrete was poured or whether Mr Wong-Kam had been given instructions or plans to show that a step down was to be installed. Ms Barron and Mr Wong-Kam gave very different evidence on this issue. The fact that two people have quite different recollections of the same event, particularly after such a length of time, does not establish that one of them is lying. I also note that the High Court has concluded that preferring other evidence should not generally lead to a conclusion that a

claim lacks substantial merit.⁶ Therefore the fact that Mr Wong-Kam's evidence was preferred to that of Ms Barron on this point does not establish that Ms Barron acted in bad faith or that her claim lacked substantial merit.

[24] I accept that Mr Wong-Kam has suffered considerable stress and anxiety and has spent a considerable amount of his own time defending the claims against him. However general damages cannot be awarded for stress related suffering or the personal costs incurred by a party in defending a claim against them in proceedings under the Act. This is regardless of whether the claim for costs and general damages is filed with the Court or the Tribunal. The District Court, like the Tribunal, is confined by the provisions of s 91 of the Act when it is considering costs applications relating to proceedings under the Act. Mr Wong-Kam's application to the District Court for ongoing costs and stress related suffering was therefore doomed to fail.

[25] In relation to the claim for costs filed with the Tribunal I conclude that Mr Wong-Kam has not established that he incurred costs unnecessarily as a result of bad faith or allegations or objections by Ms Barron that were without substantial merit. Mr Wong-Kam has failed to establish that Ms Barron acted in bad faith. Any costs that have been incurred by Mr Wong-Kam have not been a result of allegations made by Ms Barron that were without substantial merit. Mr Wong-Kam was the concrete layer that poured the ground floor and upstairs concrete floors and the driveway. On being identified as the concrete layer it was almost inevitable that he would be joined to the claim given the alleged defects that related to that work. The subsequent statements made by Ms Barron in her response and in the evidence she gave at hearing have not caused Mr Wong-Kam to incur any unnecessary or additional costs to those he would inevitably have faced on being joined to this claim.

[26] In particular I note that Mr Wong-Kam has provided no details as to the matters on which he consulted Mr Boggiano, the lawyer he consulted when first served with the proceedings, or how his legal costs were increased by Ms Barron's actions or inaction. The first account from Mr Boggiano is dated 21 January 2011 which is shortly after Mr Wong-Kam

⁶ Above n 5.

was joined to the claim but then named as Tony Chan. The only other account from Mr Boggiato relates to advice on the costs application filed in the District Court and this application with the Tribunal. These costs cannot form part of the claim for costs in relation to the original proceedings. Mr Wong-Kam therefore has not incurred legal costs as a result of any statements made by Ms Barron either in her response or in the evidence she gave at the hearing.

[27] The ability to award costs under s 91 is in general restricted to legal and expert costs. The only other cost incurred by Mr Wong-Kam that may fit within these categories is the account from Mr MacDonald. Mr Wong-Kam says that Mr MacDonald was engaged as an expert but he gives no details of his expertise or the expert evidence he provided. He does not appear to have been called as a witness at the hearing. It also appears that Mr MacDonald's involvement went well beyond what is the usual role of an expert. He appears to have also filled the roles of a support person and lay advocate.

[28] Mr MacDonald's account is dated 14 January 2014 and provides no details of the time periods in which work was done. I further note there is no GST reference and the document does not have the appearance of a formal invoice. The Tribunal is aware that Mr MacDonald has been assisting Mr Wong-Kam with his costs applications and it is likely this work is included in his account. As noted above work and attendances relating to preparing and filing the various costs applications are not expenses that can be considered when determining whether Mr Wong-Kam is entitled to costs under s 91 of the Act for the original proceedings.

[29] In conclusion I note that even if Mr Wong-Kam had established that that he had incurred costs unnecessarily as a result of either bad faith or allegations made that were without substantial merit I would still have a discretion as to whether to award costs. In the circumstances of this case it is unlikely that I would exercise such a discretion. In particular I note that the application for costs was not made until more than two years after the Tribunal had issued its final determination and almost two and a half years since Ms Barron was removed as a party.

[30] The application for costs is accordingly dismissed.

DATED this 21st day of March 2014

P A McConnell
Tribunal Chair