WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-101-000003
[2011] NZWHT WELLINGTON 26

BETWEEN	ROSS THEO EGGERS AND MARGARET RUTH EGGERS Claimants
AND	WELLINGTON CITY COUNCIL First Respondent
AND	CITY STRUCTURAL DESIGN LIMITED (Removed) Second Respondent
AND	WIN-DEY CONSTRUCTION LIMITED (In Liquidation) (Removed) Third Respondent
AND	PAUL EDWARD DEBRECENY Fourth Respondent
AND	KAPITI COATINGS LIMITED Fifth Respondent
AND	BOYD ALUMINIUM LIMITED (In Liquidation) (Removed) Sixth Respondent
AND	BROOKER AND HALL LIMITED Seventh Respondent
AND	ANDREW SEXTON Eighth Respondent
AND	ANDREW SEXTON ARCHITECTURE LIMITED Ninth Respondent

Decision: 10 May 2011

COSTS DETERMINATION
ADJUDICATOR: R PITCHFORTH

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SUMMARY

[1] On 4 April 2011 I ordered the removal of the seventh respondent, Brooker & Hall Ltd (Brooker) from these proceedings. Brooker has applied for costs.

LIABILITY FOR COSTS

[2] The jurisdiction for costs is set out in s 91 of the Weathertight Homes Resolution Services Act 2006.

> **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.
>
> Compare: 2002 No 47

[3] The presumption in s 91 is that costs cannot be awarded unless either of the preconditions is met. Brooker accepts that this is the position.

[4] The basis of this application is that the allegations were made without substantial merit.

THE CLAIM

[5] In the particulars of claim filed with the application in this matter the claimant alleged that Brooker owed a duty of care to supply building materials that were fit for purpose and that they had failed to do so on the grounds that the assessor's report showed that the assessor failed to identify the presence of timber preservatives and that the use of untreated timber in the structure of the property resulted in an increased rate of decay once water was allowed to enter the property. As a result the claimants said that they had suffered loss.

[6] The assessor's report at 5.2.1 i) iii) noted that there was considerable decay damage to the framing. At 5.2.5 the assessor reported on the consultant's observations and reports in relation to the testing of the timber.

BACKGROUND

[7] On 7 February Brooker wrote to the claimant outlining its defence, said that the claim lacked substantial merit and asked the claimants to withdraw their claim before 14 February. The letter also said that the claimants were put on notice that if the claim was maintained that costs would be claimed.

[8] The claimants' position was that they had an assessor's report indicating decay and an invoice showing that Brooker supplied the timber. Brooker said that this was insufficient as there was a novel claim that the supplied timber would meet an unstated purpose, namely not to decay once water was allowed to enter the property and that even if such a duty existed the use of untreated timber was allowed for in NZS 3602:1955. Further, the assessor said that even treated timber would have rotted.

[9] The claimants consulted their expert and sought instructions but did not receive them until after the Brooker imposed deadline. On 21 February they advised Brooker that they were seeking further instructions.

[10] Brooker sought further clarification on 24 February and 7 March 2011. The parties communicated by telephone on 8 March when it was agreed that a response would be provided by 5 pm. That afternoon Brooker was advised that the claimant consented to the removal. After further correspondence the claimant withdrew the claim.

[11] Brooker says that between the 14 February 2011 and the date of removal they had been put to the extra expense of preparing for the first telephone conference, perusing the Council's documents, the expert report and extra correspondence. They had also commenced filing a response and a formal application for removal as well as reviewing all other material filed in the claim.

[12] Brooker said that the delay has been the cause of $3,000 of the $4,770.95 costs that they incurred.

[13] The claimants withdrew the claim against Brooker and the other parties did not oppose the removal application which was granted. The claimant argued that the time for their response was not excessive. The correspondence from Brooker contained material that had to be considered by the claimants and their expert. The imposed timetable was unrealistic.

DISCUSSION

[14] The Tribunal's processes are designed to investigate clams and to ascertain the proper parties. It is usual and inevitable that claimants will identify possible parties based on the information that they have, just as they sometimes cannot identify proper parties without the assistance of the respondents. To that end sections 111 and 112 provide for joinder and removal of parties, if the applications meet the criteria. The Tribunal typically

holds a preliminary conference to discuss processes and sets a timetable to deal with joinders and removals. Until applications are considered in accordance with the timetable it is not usual for parties to be removed.

[15] The procedural orders in this matter made it clear that Brooker could not be removed before the second preliminary conference when it was so removed.

[16] From the material available to the claimants and without the information supplied by Brooker, it was reasonable to name Brooker as a party. When further information was supplied it took the claimants a month to obtain expert advice and conclude that the claim could not succeed.

[17] In this case Brooker knew on 10 March that it did not need to attend the removal conference as the claimant had by then withdrawn the application and the other parties had consented to the removal. Brooker knew, a month before the scheduled hearing date, that they would be removed if there was no opposition from any party.

[18] S France J in *Trustees Executors Ltd v Wellington City Council* [1] at paragraphs [44] ff discussed s 91. 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.

[19] In contrast with the *Trustees Executors* case, these claimants did not pursue their case once it was clear that there was no chance of success. At most, they could be considered a little slow, but the time taken was well within the usual processes of the Tribunal.

[20] Although it is now known that the allegations were not likely to succeed and therefore could be said to have been shown by Brooker not to

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

have merit, the period during which Brooker was at risk was short and was ended a month before the timetabled date for removals.

[21] I find that accepting the claim was not likely to succeed within a month of being supplied with the information was not unreasonable and I therefore decline to exercise my discretion in favour of Brooker.

[22] The application for costs is declined.

DATED this 11th day of May 2011.

Roger Pitchforth
Tribunal Member