IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000011
[2012] NZWHT AUCKLAND 23

BETWEEN	FRASER HALL AND DUNCAN BINNIE Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	ULSTER PROPERTIES LIMITED Second Respondent
AND	MARK ALLAN BLACK Third Respondent
AND	BRUCE BEAZLEY Fourth Respondent
AND	KEVIN WILLIAM ANDERSEN (Bankrupt and Removed) Fifth Respondent

Decision: 5 April 2012

COSTS DETERMINATION
Adjudicator: S Pezaro

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[1] This claim was determined on 16 February 2012 and the claim against Bruce Beazley, the fourth respondent, was dismissed. Mr Beazley seeks an award of costs against the Auckland Council, the first respondent, and Mark Black, the third respondent.

[2] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) to make an award of costs. The relevant provision is 91(1)(b):

> **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.

[3] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily and the onus is on the party applying for costs to prove its claim. In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J observed 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] His Honour considered that the important issues were whether the appellants

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008.
[2] At [51] per France Simon J.

should have known about the weakness of their case and whether they pursued litigation in defiance of common sense.[3]

[4] Simon France J noted the importance of maintaining the balance in the Act between exposure to unnecessary costs and creating disincentives to use the Tribunal:

> The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
>
> a) Unnecessary expense; has been caused by
>
> b) a case without substantial merit.
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> I see no reason to apply any gloss to the legislatively struck balance. The outcome in this case should not be seen as sending any message other than that the Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary cost to others through pursuing arguments that lack substantial merit.[4]

[5] In *River Oaks*[5] the High Court held that preferring other evidence does not lead to the conclusion that a claim lacks substantial merit. In *Phon & Yun*[6] the Tribunal concluded that the bar for establishing that a claim was without substantial merit should not be set too high and that the Tribunal should have the ability to award costs against parties making allegations, or opposing removal applications on the basis of allegations which a party ought reasonably to have known they could not establish.

[6] In *Max Grant Architects Limited v Holland*[7] the Tribunal declined a removal application by the architect but recorded that the claimant, the party opposing removal, needed to establish causation.

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[3] At [52] per France Simon J.
[4] *Trustees Executors Limited v Wellington City Council* (HC Wellington, unreported, CIV-2008-485-739, 16 December 2008, France J).
[5] *River Oaks Farm Limtied v Holland* HC Tauranga, unreported, CIV-2010-470-584, 16 February 2011, Allan J.
[6] *Phon v Waitakere City Council* [2011] WHT TRI-2009-100-000104, 26 April 2011.
[7] *Holland & Ors as Trustees of the Harbourview Trust v Auckland City Council* WHT TRI-2009-100-00008, 17 December 2009.

At adjudication the claim against the architect failed but the Tribunal declined his application for costs. On appeal the District Court held that the Tribunal was wrong to conclude that the threshold for an award of costs under s91(1)(b) had not been met because the claimant failed to offer the necessary evidence of causation at hearing.[8]

Grounds

[7] Mr Beazley applies for cost on the basis that the first and third respondents made allegations or objections, in particular their objection to the proposed settlement, that were without substantial merit. It is therefore submitted that there are grounds for an award of costs pursuant to section 91(1)(b).

[8] Mr Beazley initially made an offer to the claimants to settle for $20,000, conditional on the other respondents not objecting to his removal. After negotiations Mr Beazley increased this amount to $27,500 and settlement was confirmed between Mr Beazley and the claimants, subject to the consent of the first and third respondents to Mr Beazley's removal. The Council agreed to the settlement subject to the Tribunal still determining Mr Beazley's probability. A conditional settlement was not acceptable to Mr Beazley and the proposed settlement came to an end.

[9] Mr Beazley seeks costs in accordance with the High Court scale for five days costs including preparation, the three day hearing and closing submissions. Costs sought amount to $9,400.

Opposition

[10] The Council and Mr Black opposed the application on similar grounds. They submit that there was a conflict of evidence between

[8] *Max Grant Architects v Holland* at [81].

Mr Beazley and Mr Black as to Mr Beazley's role as project manager and that this conflict could not be resolved before hearing the evidence. It is submitted that the fact that the evidence of Mr Beazley was preferred to that of Mr Black does not mean that the claim against Mr Beazley lacked substantial merit.

[11] The strongest submission by these respondents is that if Mr Beazley's proposed settlement had been confirmed, he would have paid $27,500 to the claimants, more than the costs incurred in proceeding to hearing. On this basis it is submitted that Mr Beazley has not incurred costs or expenses unnecessarily, even if there was no merit in the claim against him.

CONCLUSION

[12] I am not satisfied that the claim against Mr Beazley lacks substantial merit. It was necessary to hear and weigh the evidence against him before deciding that the claim against him would be dismissed. Further, Mr Beazley is in a better position as a result of attending the hearing than he would have been if he had paid the amount of $27,500 which he ultimately offered as a settlement. I therefore conclude that Mr Beazley has not incurred any unnecessary costs and dismiss his application for an award of costs.

DATED this 5th day of April 2012

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S Pezaro

Tribunal Member