IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2009-100-000008
[2010] NZWHT AUCKLAND 7

BETWEEN	**JAMES HOLLAND, ALAN IVORY and YVONNE VAN DONGEN as Trustees of the HARBOURVIEW TRUST** Claimant
AND	**AUCKLAND CITY COUNCIL** First Respondent
AND	**L REEVE CONSTRUCTION LIMITED (in Liquidation)** (Removed) Second Respondent
AND	**LLOYD FREDERICK REEVE** (Bankrupt therefore removed) Third Respondent
AND	**LAUREEN EDITH REEVE** Fourth Respondent
AND	**MAX GRANT ARCHITECTS LIMITED** Fifth Respondent
AND	**MAX GRANT** Sixth Respondent
AND	**DAY CONSULTANTS LIMITED** (Removed) Seventh Respondent
AND	**TONY GRAHAM DAY** (Removed) Eighth Respondent
AND	**REGAN FROST** (Removed) Ninth Respondent
AND	**REGENCY PLUMBING LIMITED** (Removed) Tenth Respondent
AND	**CRAIG GORDON** (Removed) Eleventh Respondent
AND	**MARK PAINTON** Twelfth Respondent
AND	**ELDON ARCHER** (Removed) Thirteenth Respondent

DECISION ON COSTS
Adjudicator: P A McConnell

[1] Max Grant Architects Limited and Alan Maxwell Grant (the respondents) have applied for costs against the claimants. They submit the claim against them was lacking in substantial merit as is evidenced by the fact that the Tribunal dismissed all claims against them. They accordingly submit they are entitled to costs. The application for costs is opposed by the claimant.

Respondents' Case

[2] Mr St John, on behalf of the respondents, submits that the claimant's case was without substantial merit because it was putting forward a proposition in law that was untenable having being rejected repeatedly by the Tribunal and by the High Court. In addition the claimants not only did not attempt to distinguish those decisions but ignored them. Furthermore he submits that the claimants failed to grasp that the standard of care must be founded upon evidence of the standard expected of an architect at the relevant time and they did not produce any such evidence. It is also submitted the claimants ignored specific directions of the Tribunal including directions to consider causation principles when it came to elements of the design where the builder had ignored or changed that design.

[3] The respondents further submit that the bar for establishing "without substantial merit" should not be set too high. They submit that the respondents do not need to show that the claim was hopeless or speculative nor do they need to show that the claim had no merit at all.

Claimants' Case

[4] The claimants, in opposition to the application for costs, submit that a high threshold must be met to justify a finding that allegations or objections raised were without substantial merit. They say this test has not been met because there was good evidence that

supported their claim against the respondents. In particular the claimants refer to the assessor's evidence that the designer's reliance on generic details of construction was risky. The assessor's opinion was that the designer should have provided site specific details in the context of the design of this dwelling which had some complexities. The claimants further submit that the reply briefs from the respondents' experts were only filed shortly before the adjudication hearing and there was also key evidence given at the hearing which they submit was significant in terms of the decision reached.

[5] The claimants also submit that they acted sensibly and realistically throughout and suggest that the respondents' refusal to attend mediation meant that early settlement could not be achieved. They submit that the way the respondents conducted their case made it difficult for the claimants to fully appreciate that the designer's case except by exposure at the hearing.

The Issue

[6] The fifth and sixth respondents are not alleging bad faith. The issue I therefore need to decide is whether the fifth and sixth respondents have incurred costs unnecessarily by allegations or objections made by the claimants that were without substantial merit.

Discussion

[7] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) to make an award of costs:

> **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.

There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. Bad faith is not being alleged in this case.

[8] The Act provides little guidance as to how the Tribunal should calculate the quantum of costs to be awarded in exercising its discretion. In some costs awards the Tribunal has been guided by the District Court scale and such an approach has been upheld by the High Court.[1] I am not however bound by that scale in calculating quantum as section 125(3) of the Act only applies to the District Court when dealing with proceedings under the Act and not to the Tribunal.

[9] The onus is however on the respondents to demonstrate that costs were incurred unnecessarily by allegations or objections by the claimants that were without substantial merit. It is only once that onus is met that I have the discretion to award costs.

[10] Underlying section 91 is the principle that a party should not be allowed to cause unnecessary costs to others through pursuing arguments that lack substantial merit or are made in bad faith. For this reason the bar for establishing "without substantial merit" should not be set too high. There needs to be the ability to award costs against claimants and respondents who join other parties to cases based on allegations which they should reasonably know they cannot establish.

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008, S France J; and *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 19 November 2009, Woodhouse J.

[11] Where allegations are made against a party which have little evidential support, costs can and in many cases will be awarded. However, I accept that costs in pursuing or defending aspects of claims should not be considered as being incurred unnecessarily where there are genuinely disputed issues of fact and law if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

[12] I accept the respondents' submission that the claimants failed to put forward legal submissions which were against their case. I further accept that this is both inappropriate and contrary to counsel's professional obligations to the Tribunal. It may in part be explained by the fact that I had already referred, by implication, to those authorities in dealing with the removal application. It does not however in itself establish that the claim was without substantial merit.

[13] The respondents further allege that the claimants continued with allegations against the respondents that were untenable and had been rejected repeatedly by the Tribunal and the High Court. They further submit that the claimants ignored specific directions of the Tribunal in particularly in relation to the issue of causation. I accept that in both Procedural Orders 3 and 5, I clearly set out the tests that would need to be met for liability to be established and raised the problems of causation the claimants faced. In paragraph 15 of Procedural Order No 5 dated 15 June 2009, I stated:

> I would however note that in order to be successful in any claim against Max Grant or Max Grant Architects Limited, the claimants will not only need to establish that the designer was negligent in failing to provide detailed construction details for high risk areas that were not covered in the general technical literature, they will also need to establish that the loss suffered has been caused by this lack of detail. This latter aspect may be difficult given the reasonably wide spread departure by those responsible for construction from the plans and specifications that were provided.

[14] Despite these directions and similar comments made at the commencement of the hearing some alleged design deficiencies were pursued where there was no tenable evidence of either a causative link between the design (or lack of design detail) and defects that caused water ingress or that the design defects fell short of the standards of the day. I do not however consider this lengthened the hearing to any significant extent. In addition it did not result in further costs being unnecessarily incurred by the respondents as the respondents' counsel acted appropriately in not being distracted by meritless arguments.

[15] The fact that the claims against the respondents ultimately failed also does not necessarily mean that the claim against the respondents was without substantial merit. This is not a case where allegations were made for which there was no evidential support. There was a clear dispute between the claimants' and the respondents' expert witnesses both as to the appropriate standard of care and whether the respondents had breached their duty of care. The claimants relied not only on the assessor's opinion in relation to alleged deficiencies in the design work but also that of their own architectural expert, Norman Williams.

[16] While the assessor may not qualify as a design expert, Mr Williams clearly does. His opinion was that the design incorporated several features considered to be weathertight risk items. It was also his view that there were 18 specified items where there were shortcomings in the design work. Whilst not specifically dealt with in either of his briefs, Mr Williams' evidence was that he believed, given the complexity of the design, there were design deficiencies even when judged in accordance with the standards at the time. I accept neither the assessor or the claimants' expert addressed the relevant dicta and tests as set out in such decisions as *Gray, Sunset, Tabram* or *Byron* being the cases referred to by the respondents. However, those issues go more to liability and the application of legal tests is

not necessarily within the expertise of an expert. The claimants did however proceed to a hearing with some evidential support for their claim against the respondents.

[17] There is little merit in the claimant's submission that the respondents' filing evidence at the last minute, meant they had difficulty in appreciating the respondents' defence. The claimants were well aware from the time the respondents applied to be removed what the basis of the respondents' defence and arguments would be. The initial briefs were filed in accordance with the timetable set by the Tribunal and supplementary briefs were only filed in response to the Council's submissions and evidence. I also accept Mr St John's submission that the proposition that a successful party should be denied costs because it insisted there was no valid claim against it is not reasonable. In these circumstances the respondents' refusal to attend mediation does not amount to bad faith. Mediation under the Act is a voluntary process. It may be possible to establish bad faith where a party deliberately subverts mediation or after agreeing to participate in mediation refuses to participate without good reason. I do not accept that a party who genuinely believes they have no responsibility and is ultimately successful in their defence, can be criticised for failing to accept liability or to attend mediation.

[18] I consider this claim is on the borderline of one that is without substantial merit. The claimants however did not proceed without any tenable evidence as they had expert opinion supporting their view. For that reason, even though they may have overlooked or ignored some key decisions on the issue of designer liability, I conclude that there was a genuine case to argue and therefore the costs have not been incurred unnecessarily by allegations or objections that are without substantial merit.

[19] In conclusion I would note that the only thing that has saved the claimants from having a significant award of costs made against

them is the fact that they proceeded on the basis of tenable expert evidence. If it were not for the evidence of Mr Williams, I would have concluded that the respondents had established that allegations or objections had been made by the claimants were without substantial merit and awarded the majority if not all of the costs claimed.

DATED this 19th day of March 2010

_____

P A McConnell

Tribunal Chair