WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI-2008-101-000045

BETWEEN	**ALISON MARGARET HEARN, MURRAY DEANS AND HARTHAM TRUSTEES LIMITED AS TRUSTEES OF THE A HEARN FAMILY TRUST** Claimant
AND	**PARKLANE INVESTMENTS LIMITED (NOW BOULCOTT INVESTMENTS GROUP LIMITED)** First Respondent
AND	**EMPA GROUP CONSULTANTS LIMITED** Second Respondent
AND	**WELLINGTON CITY COUNCIL** Third Respondent
AND	**RAJU MORAR, NEESHA MORAR AND ISHWERAL MORAR AS TRUSTEES OF THE I & R MORAR FAMILY TRUST** Fourth Respondents
AND	**MARK ANDREW DEBNEY** Fifth Respondent
AND	**TONG LIU & WEN TENG** Sixth Respondent (NOW REMOVED)
AND	**BARRY MILLAGE** Seventh Respondent
AND	**BARRY MILLAGE ARCHITECTS LIMITED** Eighth Respondent
AND	**WADESTOWN DEVELOPMENTS LIMITED** Ninth Respondent
AND	**HAYIM NACHUM** Tenth Respondent

COSTS DETERMINATION
Dated 23 June 2009

Jurisdiction of the Tribunal as to Costs

1. A number of parties are seeking costs in relation to the part of this matter that has already been heard (Interim Determination dated 30 April 2009).

2. Costs in the Tribunal are governed by s 91 of the Weathertight Homes Resolution Services Act 2006 (Act). That section is based on the presumption that there will be no award of costs. Parties claiming costs must therefore overcome that presumption.

3. Section 91 of the Act reads:-

> **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—
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> (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.

4. Based on the wording of section 91, the test for awarding costs is that the party claimed against must be shown to have caused those costs to have been incurred unnecessarily, and either:

- the costs were incurred by bad faith by that party ; or
- by allegations or objections by that party that are without substantial merit.

5. Given that provision, the third respondent, Wellington City Council (Council) submits that no costs orders should be made as the

determination dated 30 April 2009 is interim only and accordingly the Tribunal has no jurisdiction to award costs at this stage.

6. As indicated above, the Tribunal accepts that it has restricted ability to award costs. However, in interpreting the statutory language of s 91, such restrictions only pertain to the grounds to be considered by the Tribunal in determining whether or not costs ought to be awarded against a party. Section 91 does not preclude the Tribunal from awarding costs only after a final determination has been issued. It is envisaged that if this were the purpose of s 91, Parliament would have expressly stated it.

7. The interim determination is only in relation to the liability of the first to ninth respondents (with the exception of the sixth respondents who were removed earlier in the proceedings). The only outstanding matters that were not resolved in that determination include the issue of whether the tenth respondent (Mr Nachum) is responsible for any of the claimants' loss, and the consequent allocation of responsibility amongst any liable respondents as to what each will have to pay to the claimant. Notwithstanding those outstanding matters however, the findings of liability made against the above respondents in that determination are final regardless of any conclusions the Tribunal will make as to the involvement of Mr Nachum.

8. I therefore reject the Council's argument that the Tribunal has no jurisdiction to make orders for costs at this stage. This determination will now proceed to consider the grounds upon which the relevant costs applications are made.

Unnecessary Costs – Section 91

9. In each of the circumstances referred to under s 91 of the Act, the claiming party must show that they incurred costs that they would not have otherwise incurred but for the actions of the party claimed against.

10. The test as to whether an activity is unnecessary has been well set out by Adjudicator Kilgour in *White v Rodney District Council (Costs Determination)* [23 April 2009] WHT, TRI 2007-100-000064, in which he states that the circumstances of the claim must be considered. He also points out that one cannot exercise hindsight when considering whether a party is advancing arguments that have no substantial foundation. This is because sometimes a party cannot discern the weakness of the case earlier than its complete exposure at the hearing. Therefore the alleged party must instead be found to have pursued litigation in defiance of reason or common sense.

11. A further consideration noted by Adjudicator Kilgour at para [29] is s 57(2) which requires that in managing proceedings under the Act, the Tribunal must comply with the rules of natural justice. The rules of natural justice mandate that the parties have a right and opportunity to put their case and to be heard.

Bad faith

12. This matter was discussed by Adjudicator Ruthe in *Brodav Ltd & Cook Family Trust v Waters & Ors* [31 March 2009] WHT, TRI 2008-101-000066. At para [18] of that decision, Adjudicator Ruthe stated that:

> 18. The phrase "bad faith" has received judicial consideration in a number of decisions including:
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> Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd [2007] 1 NZLR 721,[2006] NZSC 98 (SC) at [87]-[89]; R v Reid [2008] 1 NZLR 575 SC; R v Williams [2007] 3 NZLR 207(– ruling that police had acted in bad faith); NZLR; WEL Energy Trust v Waikato Electricity Authority, 31 August 1994, HC Hamilton Penlington J.; Cannock Chase District Council v Kelly [1978] 1 AII ER 152; Webster v Auckland Harbour Board

[1983] NZLR 646 (CA); Latimer Holdings Ltd v SEA Holdings NZ Ltd [2005] 2 NZLR 328;(CA); R v Strawbridge (Raymond) [2003] 1 NZLR 683; Transpac Express Ltd v Malaysian Airlines [2005] 3 NZLR 709, Smellie J at [61] (bad faith by in-house counsel).

19. Where the alleged bad faith involves public authorities or abuse of executive power the courts give a more restrictive meaning to "bad faith" by requiring an element of dishonesty be proven. As McMullin J stated in the Court of Appeal decision in Webster v Auckland Harbour Board (supra) there is generally difficulty in establishing bad faith against public authorities. (page 683) A broader interpretation is given in other situations, such as in this claim.

20. An overview of the case law indicates the meaning to be attached to the words 'bad faith' depends on the circumstances in which it is alleged to have occurred and the range of conduct warranting the label can range from the dishonest to a disregard of a legislative intent.

21. Context and statutory intent were held to be the key in the recent High Court of Australia decision in Parker v Comptroller-General of Customs [2009] HCA; (2009) 252 ALR 619. French CJ undertook a consideration of the statutory framework (in that case it was the Customs Act) before considering the contextual meaning of "impropriety" at [27] and [29]. The Court arrived at the statutory meaning of the words taking into account their meaning in ordinary usage by looking through the eyeglass of the overall statutory framework. This is the approach to be applied here in deciding what amounts to bad faith.

13. Adjudicator Kilgour agreed with this test in *White* (supra). I will apply the same test.

Claimants' Application for Costs against the Council

14. The claimant seeks costs against the Council upon the following grounds:

i) The Council's denial of a duty of care;

ii) The Council's dispute of the outcome of the experts' conference;

iii) The Council's rebuttal of unused evidence;

iv) The Council's unsuccessful technical points; and

v) The purpose of the Act.

The Council however rejected the claimants' allegations in stating that there have been no acts of bad faith on their part.

i) Denial of Duty of Care

15. The claimant alleges that Council's denial of a duty of care was unnecessary. However the issue of whether the Council owed the claimant a duty of care was a matter that was clearly in dispute, which could only be determined at an adjudication hearing. I therefore find that this particular ground alleged by the claimant does not meet the test of being unnecessary.

ii) Disputing Outcome of Experts' Conference

16. The claimant also submits that the Council's refusal to accept the outcomes of the experts' conference caused unnecessary expenditure of time and money.

17. During the proceedings, the Council opted not to supply their experts' briefs prior to the experts' conference and indeed chose to provide evidence from their experts only by way of evidential briefs. As noted at the hearing, the wording of these briefs was in many cases identical.

18. Although the experts appointed by the Council signed the report from the experts' conference, the Council still chose to contest those findings at the hearing.[1]

[1] The High Court rules give guidance as to the use of the outcome of an experts' meeting, particularly Rule 9.45 which states:-

9.45 Status of joint witness statement by expert witnesses

(1) A joint witness statement prepared by expert witnesses under rule 9.44—

(a) must be circulated by the parties to the proceeding by whom the expert witnesses have been engaged to every other party who has given an address for service; and
(b) may be produced in evidence by any expert witness who signed the statement; and
(c) may, if the parties to the proceeding agree, be produced in evidence without the need to call any of the expert witnesses who signed the statement.

19. The claimant therefore argues that the time spent in dealing with the Council's attempt to relitigate the experts' findings was unnecessary and in bad faith. Consequently the claimant argue that they were put to the expense of keeping their experts at the hearing to deal with settled issues from which the Council might also resile.

iii) Rebutting unused expert evidence

20. The Council provided briefs of evidence for Messrs Tait, Toner and Eades for a line of defence that was not proceeded with. However, because the decision not to proceed with this evidence came after the claimant had called expert evidence in rebuttal, the claimant says that it was put to unnecessary cost.

iv) Unsuccessful technical points

21. The claimant accepts that the Council may have been entitled to raise new arguments as the hearing progressed and after the hearing was completed. However the claimant notes that those arguments were generally unsuccessful and thereby caused them unnecessary costs in responding to them.

vi) *Statutory scheme*

22. The claimant also refers to s 3 of the Act, which states :-

3 Purpose of this Act

The purpose of this Act is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

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(2) Rules 9.4 to 9.11apply, with all necessary modifications, to a joint witness statement as if the statement were a written statement under rule 9.2 or 9.3.

(3) An expert witness is not precluded from giving evidence on any matter at the hearing simply because the expert witness has participated in the preparation of a joint witness statement under rule 9.44 or because the witness statement is evidence at the hearing under rule 9.6.

23. The claimant submits that the strategies and tactics of the Council cut across the purpose of the Act to the detriment of the claimant. The claimant looks for comparison to the High Court Rules, in particular Rule 14.6 (3), which replaced Rule 48C:

> **Increased costs and indemnity costs**
>
> (3) The court may order a party to pay increased costs if-
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> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> (i) failing to comply with these rules or with a direction of the court; or
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; …

24. The claimant states that items (i), (ii) and (iii) above cover the Council's behaviour in question.

25. The claimant also refers to item (v) and to the offer put to the claimant prior to the hearing as well as the claimants' response. The claimant state that it was reasonable not to accept the offer in the form provided as there was no way of ensuring that the parties would pay the amount agreed. The subsequent liquidation of the first respondent, which in fact occurred, would have reduced the value of the settlement.

26. It is clear that the hearing would have been shorter and the claimant's costs of having the experts present would have been reduced if the Council had dealt with the expert evidence in the usual way. The lack

of experts' briefs for the experts meeting, the lack of acceptance of the experts' conclusions, and a continual unsuccessful attack on the expert evidence generally extended the hearing.

27. I therefore allow one day of counsel's time and a contribution towards the experts' costs of remaining at the hearing unnecessarily. I also allow the costs of the evidence in rebuttal that was given before the Council withdrew that line of defence. I consider that the Council was entitled to raise every issue, though many were time consuming and unsuccessful. No allowance is made for those items.

28. The amounts are:-

• Expert witness, Mr Gilbert	$3,386.00
• Expert witness Mrs Johnson	$3,000.00
• Expert witness Mr Wutzler	$3,000.00
• Counsel for one day, Category 2 District Court	$1,280.00
Total	10,666.00

29. I accordingly award costs to the claimant against the Council for the above amounts.

Second Respondents' Application for Costs against the Claimant and the Council

30. Mr Matsis and Ms Kershaw for the second respondent, EMPA Group Consultants Limited (EMPA), claim costs against the claimant and the third respondent, the Wellington City Council.

31. EMPA has always maintained that it did not carry out, supervise, inspect or certify the work in issue and did not do anything that caused

water to penetrate the dwellinghouse. Mr Blades, sole director of EMPA, in his witness statement made the same point.

32. At the start of the hearing an application was made for the removal of EMPA. By that time Mr Matsis says that there was no evidence showing that EMPA had any involvement with the relevant work on this building. The claimant and Council operated on the incorrect assumption that as EMPA was involved with this building at the start, it must have still been involved at the end. Mr Matsis says that they knew, or should have known, that there was no evidence at 11 December 2008 at the latest.

33. The claimant resisted the application for removal at the start of the hearing on the basis that there was evidence that would implicate EMPA.

34. The Council vigorously pursued a cross-claim against EMPA. The Council cross-examined at length and spent much time trying to show that Mr Blades had issued a final producer statement.

35. Mr Matsis referred to *Trustees Executors Ltd v Wellington City Council & Ors (Costs Determination)*[2] where on appeal[3] the High Court found that the claimant's failure to establish what it had earlier promised it would be able to establish, was a factor in favour of a costs award against them.

36. As a result of this resistance to removal, EMPA submits that it faced substantial costs in defending the claim and dealing with other legal and jurisdictional matters which arose during the hearing.

37. The claimant argues that EMPA has failed to show bad faith or that the claim was without substantial merit. I take it from this submission that

[2] [30 May 2008] WHT, TRI-2007-101-000029 per Adjudicator Pitchforth.

the claimant accept that the costs were unnecessary. The claimant asserts that there was a *prima facie* case against EMPA and that the lack of liability was only shown after evidence and cross-examination.

38. Both the claimant and the Council operated on the basis that EMPA was more involved in the building of the house than turned out to be the case. The technical evidence produced was based on the same misapprehension.

39. Both the claimant and the Council say that accordingly no bad faith was exhibited.

40. I find that at the start of the hearing on 11 December 2008 there was no evidence and no likelihood of evidence being produced showing that EMPA was liable. To continue past this time against EMPA was therefore to pursue a claim without substantial merit. The application therefore meets the statutory test.

41. I therefore award costs for the three days of hearing and the preparation for that hearing on a Category 2 of the District Court Rules Schedule 2 basis. The costs awarded are therefore $7,680.00 payable as to two-thirds by the claimant and one third by the third respondent - i.e. $5,120.00 by the claimant and $2,560.00 by the Council.

Application for Costs against the Council by the Seventh and Eighth Respondents

42. The seventh respondent, Mr Millage and eighth respondent, Barry Millage Architects Limited have applied for costs against the Council.

43. Mr Langford for the two parties argues that the claim, pursued by the Council against these parties, that they had ongoing involvement in, or

[3] [16 December 2008] HC, Wellington, CIV-2008-485-00739 per S France J.

responsibility for, the work in issue was without substantial merit. The claim was dismissed at the hearing.

44. Mr Langford submitted that the costs of defending the claim by the Council were incurred unnecessarily and that allegations made against them were without substantial merit. This was because they were unable to provide evidence to support their claims.

45. In response the Council submits that as Mr Millage and his company were not removed there was not an untenable claim against them, the findings of the Tribunal are only interim, and that it is premature to deal with costs (I have already dealt with the final two submissions above).

46. The failure to be granted removal in the face of opposition is no indication that the claim will have merit when the evidence is considered at a hearing.

47. I find that this application meets the test in s 91 and the Council should pay costs to Mr Millage and his company. He referred to Rule 48C(4)(a), which has been replaced by Rule 14.6 (3) (supra) in support of an application for indemnity costs. He also referred to *Trustees Executors Limited v Wellington City Council* (supra). Actual costs are $6,250.00.

48. Following the above principles I award $6,250.00 as costs against the Council.

Summary

49. Based on the findings made above, I order the following:

- The claimant, the A Hearn Family Trust is to pay the second respondent, EMPA Group Consultants Limited the amount of $5,120.00

- The third respondent, the Wellington City Council is to pay:

❑ The claimant	$10,666.00
❑ The second respondent, EMPA Consultants Limited	$ 2,560.00
❑ The seventh and eighth respondents, Mr Barry Millage and Barry Millage Architects Limited (jointly)	$6,250.00

DATED the 23rd day of June 2009.

Roger Pitchforth

Tribunal Member