IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-101-000052
[2010] NZWHT WELLINGTON 17

BETWEEN	**RIVER OAKS FARM LIMITED & C & A M THURNELL & L HORNE AS TRUSTEES OF INGODWE TRUST** Claimant
AND	**TIMOTHY OLSSON, CHARLOTTE OLSSON & JOHN CRONIN AS TRUSTEES OF THE PICOLLO TRUST** First Respondent
AND	**TIMOTHY OLSSON** Second Respondent
AND	**DENTON PERRY** Third Respondent
AND	**KENT JARMAN** Fourth Respondent
AND	**WARWICK SWEETMAN** Fifth Respondent
AND	**MAXI HOLDINGS LIMITED** Sixth Respondent
AND	**W B HOLLAND & ORS TRADING IN PARTNERSHIP AS THE LEGAL FIRM HOLLAND BECKETT** Seventh Respondent
AND	**GIANNI MARCHESAN** Eighth Respondent
AND	**MALCOLM HUNT** Ninth Respondent
AND	**GAVIN COSFORD** Tenth Respondent
AND	**SIMON NOEL MORAN** Eleventh Respondent

Decision: 16 June 2010

COSTS DETERMINATION
Adjudicator: C Ruthe

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INTRODUCTION

[1] The factual findings in this case were fully traversed in the Determination and need not be traversed here.

APPLICATION BY SEVENTH RESPONDENTS FOR COSTS

[2] The seventh respondent, Holland Beckett, seeks an order for costs and disbursements pursuant to section 91(1)(b) of the Weathertight Homes Resolution Services Act 2006 (the "WHRS Act"). The firm asserts that the claim against it was substantially lacking in merit. Holland Beckett incurred costs of $81,084.38 including GST and seeks an award of costs of $46,400.00 based on category 2C of the District Court scale. The awarding of costs is discretionary[1].

The Law

[3] In *Trustees Executives Limited & Ors v Wellington City Council & Ors*[2] *(supra)*, Justice Simon France J said at paragraph [66]:

[1] S 91
[2] HC Wellington CIV-2008-485-739, 16 December 2008, Simon France J

> "I conclude by noting that it appears this case was the first where costs under this Act have been awarded. The other cases to which I was referred seemed very different in their individual merits, and I do not find them of assistance. The Act gives the power to award costs, but only if one or of two situations exists. In policy terms, whilst one must be wary of establishing disincentives to the use of important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes the balance between these completing concerns by limiting the capacity to order costs to situations where:
>
> a) Unnecessary expense; has been caused by
> b) A case without substantial merit.
>
> [67] 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 Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary costs to others through pursuing arguments that lacks substantial merit…

Did the claim have substantial merit?

[4] Holland Beckett submitted that the claimants were never in a position to prove that Holland Beckett (i) owed the Thurnells' a duty of care; (ii) caused the Thurnells' loss; (iii) caused the Thurnells' losses anywhere near their claim of $712,559.00.

[5] Holland Beckett further submitted that the claimants were never in a position to prove that it was within the scope of Holland Beckett's retainer to recommend that the Thurnells' make the agreement for sale and purchase conditional on a satisfactory building report. They referred to the fact Mr Thurnell dismissed the idea of pre-purchase inspection because first he relied on the vendor builder's reassurances and secondly, he had taken another builder through the property to carry out inspection.

[6] On the issue of causation, Holland Beckett submitted the claimants were never in a position to establish any negligence by them as solicitors had caused loss. Holland Beckett further submitted that all the independent evidence indicated it was highly unlikely a visual inspection of the building by an inspector would have vacated any defects enabling the contract to be cancelled in any event.

[7] The claimants first ground of objection to awarding of costs is that an application for removal was unsuccessful. The second argument was that legal representation is not required in this jurisdiction and therefore it is not intended that costs generally be awarded. The claimants argued such a regime would create a disincentive for claims to be brought and be used to intimidate claimants. In this case counsel was involved from the outset. The point may have had some merit if the claimants were self represented.

[8] The Claimants referred to the following decisions in addition to *Trustees Executors Ltd v Wellington City Council* (supra):

a) *Smith v Waitakere City Council* (no citation given);
b) *Auckland City Council v Irwin* (WHRS claim no. 1092 (3/2006) Adjudicator Carden), more correctly cited as *Auckland City Council(as Assignee) v Irwin* WHRS, DBH – 1092, 3 March 2006;
c) *Miller-Hard v Stewart* more correctly cited as WHRS,-DBH-. 765, 26 April 2004.

[9] These two decisions were prior to *Trustees Executors Ltd v Wellington City Council*. In *Miller-Hard v Stewart*, Adjudicator Dean held that the allegations made against the Council were made without substantial merit but no costs were ordered. The adjudicator considered he could only order costs if the claimant had acted unreasonably and without a reasonable cause. Justice France in *Trustees Executors Ltd v Wellington City Council* took a different view.

[10] The appropriate test was clarified in the *Trustees Executives Limited* decision whereas S. France J said that the important issues were whether the appellants should have known about the weakness of their case or whether they pursued litigation in defiance of common sense. He went on to reiterate that the Act is not a scheme that is designed to allow a party to cause unnecessary costs by pursuing arguments that lacked *substantial* merit.

[11] The claimants referred to the Tribunal declining the application for removal stating that the information before it established sufficient tenable evidence to justify the retention of the seventh respondent as a party to the claim (para [17] Procedural Order No 7).

[12] At the removal hearing the claimants submitted there was clear evidence of a breach of duty of care by the solicitors containing the evidence of Mr Eaves. In fact at the hearing, Mr Eaves' evidence did not establish there was any such breach of duty of care for the reasons given in the Determination. The second issue considered at the removal hearing was whether if a pre-purchase inspection report had been commissioned would it have disclosed the building defects which had given rise to the leaks. The claimants said it would have. This proved not to be the case.

[13] The outcome of the removal hearing, with the limitation on powers to remove, cannot be interpreted as the sole basis for declining an application for costs.

[14] The claimants placed reliance on the expert evidence of Mr Eaves. In fact Mr Eaves' own criteria were applied by the Tribunal in determining whether there had been any breach of duty of care on the facts of the case.

[15] All the following relevant matters were facts known to the claimants well before the hearing, and were not disputed. The certifier issued a Code Compliance Certificate certifying the house was code compliant only six months prior to Mr Still's inspection on behalf of the claimants. His inspection also found no defects. The applicants were aware of the extent of their considerable experience as purchasers of residential properties. These factors should have indicated to the claimant's the potential weaknesses in their case.

[16] Another major weakness was the assertion that any inspector doing a pre-purchase inspection would have detected the leaks that subsequently developed. If the claimants' seriously considered they had a

meritorious case one would have expected them to have produced some evidence as to the availability of pre-purchase inspectors in Tauranga and the scope of investigations undertaken by inspectors doing a visual inspection, as well as addressing the standard form disclaimers invariably contained in the retainer contract. No such evidence was adduced.

[17] The claimants would have also been aware of the first WHRS assessor's report showing no moisture metre readings outside the range of 10-18%. They would have known from the report that this was within acceptable parameters. This was a report done well after the purchase by an expert who found no major problems. Again this should have raised real questions as to the likelihood of the claimants being able to establish that a visual non invasive pre inspection report was likely to uncover leaks.

Conclusion

[18] The claimants had been aware and at least have become aware further to Procedural Order No 7 as to the legal issues concerning solicitors' duty of care as established in *Gilbert v Shanahan* [1998] 3 NZLR 528 at 537 (CA), *National Home Loans Corporation Plc v Giffen Couch & Archer* [1997] 3 All ER 808 at 813 at 813, *Clark Boyce v Mouat* [1993] 3 NZLR 641 at 648 (PC) and *Bristol and West Building Society v Mathew* [1996] 4 All ER 698 at 703 (CA).

[19] The claimants would have also been aware of the Privy Council decision in *Invercargill v Hamlin* [1996] 1 NZLR 513 where the Privy Council indicated that to impose a duty on conveyancing solicitors to advise all clients' purchase of residential property to make the agreement conditional on a satisfactory pre-purchase building report would in effect require conveyancing solicitors to second guess territorial authorities.

[20] Procedural Order No 7 flagged the possibility of costs when it referred to litigation risk.

[21] The claimants had to navigate the strictures of causation. They had to prove that a pre-purchase inspector would have or would of likely to have, found leaking. They had to prove the solicitor owed a duty of care to advise the necessity of obtaining a pre-purchase inspection. They had to establish that it was more likely than not that a pre-purchase inspector would detect damage on such a scale as to warrant cancellation of the contract.

[22] I am of the view that this claim lacked substantial merit and the weaknesses should have been known by the claimants. It is appropriate for costs to be awarded. I order costs in favour of the seventh respondent the sum being in accordance with the District Court Rules referred to in section 125(3) of the Weathertight Homes Resolution Services Act 2006.

Costs Claim and Award

[23] The seventh respondents have sought the following costs:

Solicitors' Costs
On the category 2C basis of $46,400.00 made up as follows:

Preparation of response	3 days
Interrogatories	4 days
Discovery	4 days
Inspection	16 days
Memorandum	.75 days
Appearance of judicial conferences	1.5 days
Preparation for hearing	4 days
Attendance at hearing by lead counsel	2 days
Attendance at hearing by second counsel	1 day
TOTAL	**36.25 days**

[24] The claim for the interrogatories was excessive. The Tribunal had earlier ruled they were too extensive and inappropriate. It is disallowed. The number of inspection days is considered excessive and are reduced

to seven days. Discovery is reduced to two days for the same reason. . The total allowed is 21.25 days at $1,280.00 per day being $27,200.00.

[25] The following disbursements were sought:

Expert fees	$7,054.88
Middleton valuation	$1,687.50
Solicitor's travel accommodation and subsistence expenses	$1,286.40

[26] The expert's expenses are allowed. The Tribunal accepts it was appropriate in this case to instruct out of town counsel as it involved a professional negligence claim an area of law involving specialist knowledge. Travel expenses of $80.00, accommodation (one night for two counsel) being $270.00 and $20.00 photocopying are allowed. The total costs awarded are $36,312.38. Accordingly I order that the claimants pay the costs of $36,312.38.

APPLICATION BY FIRST AND SECOND RESPONDENTS FOR COSTS

[27] The first and second respondents say whilst they conducted their defence to the claim in a reasonable manner the claimants embarked on the strategy of inflating their claim so it considerably exceeded the economic loss. The tribunal made a finding to this effect.

[28] In *Invercargill City Council v Hamlin*[3] the Privy Council stated "The measure of the loss will…be the cost of repairs, if it is reasonable to repair, or to depreciation and the market value if it is not." In *Axa v Cunningham* [4] Lord Pearson observed at p51 that a plaintiff can adopt an expensive approach to repairs but can only recover by way of damages the sum that that reasonably needs to be expended to make good the loss. Hardie Boys J in *Brown v Heathcote County (No 2)* [5] said

[3] See [1996] 1NZLR513.
[4] See [2007] EWHC 3032 (QB).
[5] See [1982] NZLR 584 at 615.

reasonableness as to mitigating damage is to be gauged with reference to the defendant's interests as well as the plaintiffs, following *Darbishire v Warran.*[6]

[29] Another aspect relates to settlement proposals. The first and second respondents say that prior to the hearing they offered to meet the entire cost of remedial work and they nominated a builder, Mr Walmsey, who has a good reputation in the industry and whose expertise in remediation work was confirmed by the Assessor. The first offer was contained in a fax of 18 December. It included a request the claimants contribute $50,000. In the fax of 2 February no contribution was sought. There was a cash offer of $300,000 given as an option. In the event the first and second respondents were held liable for $310,888.

[30] The claimants in reply say that they were right to turn down the suggested settlement offer as they did not want the respondent or their contractors working on the house again.

[31] It was quite clear from the evidence given at the hearing that the proposed remediation contractor had no relationship whatsoever with the first and second respondents. This was a fact which could have been easily ascertained by the claimants or their advisors but it was something that they failed to do. A further objection to settlement mentioned at the hearing was that the suggested new roof with eaves was aesthetic despite the fact that the proposal would have substantially reduced the risk profile of the house but the claimants had not attempted to enter into any discussion on this point with the first and second respondents.

[32] In *Trustees Executors Ltd & Ors v Wellington City Council & Ors* Court upheld the cost determination of Adjudicator Pitchforth. His Honour said at paragraph [67]:

> The fact that a very reasonable settlement offer not long before the hearing should also be in mind of any who might see the decision as having precedent value."

6 See [1963] 1 WLR 1067 at 1072 per Harman LJ (CA).

[33] The objective of the Weathertight Homes Resolution Services Act 2006 is to effect speedy resolution of claims and one would have thought that the offer of full remediation met by the first and second respondents went a long way to meeting that objective.

[34] A settlement with the first and second respondents still left open the claims against the remaining respondents.

Conclusion

[35] The claimants proceeded with a quantum claim well in excess of economic loss as prescribed in *Invercargill City Council v Hamlin* and therefore this aspect of their claim could not be considered to have substantial merit. There was also a failure to consider a realistic settlement offer thereby avoiding further costs of litigation. I conclude this is a case where costs should be awarded.

Costs claim and Award

[36] The first and second respondents sought costs of $24,639.99 made up as follows:

Legal costs at $1600 per day:

- Preparation of statements of evidence – 2 days
- Preparation of list of issues and authorities – 2 days
- Preparation for hearing - 4 days (total 8 days)

The experts' costs:

- Quantity surveyor - $6,955.31
- Building expert - $1,684.68.

[37] The question is the degree to which the first and second respondents have been put to extra expense. Much of the hearing time related to the weathertightness claim (as distinct from the claim against the solicitors) was spent on evidence relating to apportionment between the various respondents.

[38] Experts' costs are allowed in the sum of $1500 the balance is disallowed as a substantial proportion of them would have been incurred

in preparation prior to the offer. I consider the appropriate allowance for extra legal costs is three days including preparation and hearing time at $1,280.00 a day as per District Court Rules Category 2C being $3840.00. The total costs awarded are $5,340.00. Accordingly I order that the claimants pay the first and second respondents costs of $5,340.00.

DATED at Wellington this 16th day of June 2010

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C Ruthe

Tribunal Member