IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000109
[2012] NZWHT AUCKLAND 12

BETWEEN	JASON GLEN LANDON AND SHARON MARY PEACE Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	DMITRI AND ANNA LECHTCHINSKI Second Respondents
AND	GRAHAM MURRAY (Struck Out) Third Respondent
AND	ALAN MARK MATTHEWS Fourth Respondent
AND	KEITH BERNARD MIDDLETON Fifth Respondent
AND	IAG NEW ZEALAND LIMITED Sixth Respondent

COSTS DETERMINATION
Adjudicator: S Pezaro
Dated 1 March 2012

---

[1] This claim was determined on 22 December 2011 after a two day hearing. The claims against the second respondents, Dmitri and Anna Lechtchinski, and IAG New Zealand Limited, the sixth respondent, were dismissed. The Lechtchinskis now claim costs against the claimants, the Auckland Council and Keith Middleton. IAG, the claimants and the Council claim costs against Alan Matthews and Keith Middleton.

[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] The important issues were whether the appellants should have known about the weakness of their case and whether they pursued litigation

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[2] At [51].

in defiance of common sense.[3] His Honour noted the importance of maintaining the balance in the Act between reducing 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.
>
> 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]

[4] In *River Oaks Farm Ltd v Holland*[5] the High Court held that preferring other evidence does not lead to the conclusion that a claim lacks substantial merit. In *Phon v Waitakere City Council*[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.

[5] The Act does not provide any guidance as to how the Tribunal should calculate any costs awarded when exercising its discretion. An award of costs in accordance with the District Court scale has been upheld by the High Court.[7] While the Tribunal is not bound by that scale I consider it is appropriate in these proceedings.

---

[3] At [52].
[4] At [66] – [67].
[5] *River Oaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[6] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.
[7] *Trustees Executors Ltd v Wellington City Council*, above n 1.

Dmitri and Anna Lechtchinkski

[6] The Lechtchinskis made a pre-hearing offer to the Council to contribute $30,000 towards a settlement and now claim that the claimants, the Council and Mr Middleton made allegations and submissions without substantial merit when opposing their removal and pursuing the claim against them at hearing. This allegation is not correct as it was only the claimants who opposed their removal.

[7] The Lechtchinskis submit that the claim that they were developers or head contractors was never tenable and that neither the claimants nor the Council adduced any evidence in support of their allegations. Further they submit that their affidavit evidence adduced in support of their removal application remains unchallenged.

[8] The claimants, the Council and Mr Middleton oppose costs on the basis that there was a tenable claim against the Lectchinskis which was why the removal application was declined. The Council also submits that it had a cross-claim against the Lechtchinskis and could not settle without the agreement of the claimants.

[9] I am satisfied that at the date of hearing there was a tenable claim against the Lechtchinskis. Steven Allwood deposed that he observed Mr Lechtchinski carrying out work on site and I summoned Mr Allwood to give evidence at the hearing. After hearing from Mr Allwood I concluded that his oral evidence was inconsistent with his affidavit. This finding was material to my conclusion that the claim against the Lechtchinskis had no merit. It was not possible for any of the parties from whom the Lechtchinskis now seek costs to know prior to hearing that Mr Allwood's affidavit would not be supported by his oral evidence. Those parties were justified in pursuing their claims against the Lechtchinskis and therefore it was not unreasonable for the claimants to decline the Lechtchinskis' offer of settlement.

[10] For these reasons I conclude that the claim against the Lechtchinskis had merit and no unnecessary costs were incurred by the Lechtchinskis as a result of any action by the claimants, the Council or Mr Middleton. This application for costs is therefore dismissed.

IAG New Zealand Limited

[11] Mr Middleton applied to join IAG to the proceedings on 16 June 2011. The claim was made on the basis that IAG provided cover to Matthews and Middleton Limited (MML) under a public liability policy for any damage caused by work carried out by MML or its employees and cover for the costs of defending proceedings against them. The policy did not provide cover for faulty workmanship and only provided cover for any damage caused to work or products supplied by other contractors. Mr Matthews supported the application for joinder as did the Council with the evidence of Peter Gillingham on the date of damage. The only construction element that could have been covered by the policy with IAG was the texture coating. In order to determine whether IAG was liable to provide cover, it was necessary to determine whether damage occurred within the policy period; if so, whether any damage to the texture coating could be distinguished from the damage caused by defects in the substrate; and the extent of any damage that could be distinguished.

[12] IAG submits that the discretion to award costs should be exercised because:

a) Mr Matthews and Mr Middleton made generalised claims which were speculative, not supported by evidence, wholly without merit and pursued in an attempt to bolster IAG's contribution to a settlement.

b) Mr Matthews and Mr Middleton did not adduce any evidence to support their submission that damage to the texture coating could be distinguished from the damage to the substrate or the extent of any liability. The claim that further damage might have been revealed at hearing through the evidence of other parties' experts

had no merit and ignored the request by IAG for the claims to be particularised.

c) IAG conveyed Calderbank offers to Mr Matthews and Mr Middleton which were reasonable and pragmatic but were declined.
d) Mr Matthews and Mr Middleton focused their claim on defence costs which could only be awarded if the policy applied.
e) The defence costs Mr Matthews and Mr Middleton incurred were in excess of $75,000 each and were disproportionate to the level of IAG's potential liability which was estimated by the experts at less than $10,000 for the cost of recoating the entire house. IAG provided its expert's estimate of cost prior to hearing.

[13] Mr Bates submits that it was reasonable of Mr Middleton not to accept IAG's offer of settlement because of the prospect of indemnity for defence costs which at the time of closing submissions amounted to $75,917.60. Mr Bates also suggests that Mr Middleton could not accept the settlement offer made on 18 November 2011 by IAG because it required Mr Matthews' agreement which was not forthcoming. I do not accept this submission. Mr Matthews and Mr Middleton were acting separately in these proceedings as is evident from their separate representation and separate claims for defence costs. Had Mr Middleton reached a settlement with IAG, the hearing time and the costs incurred by the other parties would have been reduced.

[14] Ms Thorne also submitted that the evidence of the date of damage required testing and that it was reasonable for Mr Matthews and Mr Middleton to pursue their claim for defence costs.

[15] I have considered whether there was any merit to the claim against IAG. I accept that the date of damage could not be determined without hearing the evidence of the experts. However, the claims against IAG could not succeed unless MML caused damage which was covered by the policy.

Neither Mr Matthews nor Mr Middleton called any evidence on this issue and the onus was on them to do so.

[16] I conclude that it should have been apparent to Mr Matthews and Mr Middleton, particularly as they were legally represented, that by the time they filed their responses to the claim that their allegations against IAG lacked substantial merit. For these reasons, and because the defence costs sought far exceeded IAG's potential liability, the decision by Mr Matthews and Mr Middleton to proceed to hearing because of their perceived potential for an award of defence costs was unreasonable. Further, IAG's final Calderbank offer on 25 November 2011 was made on the basis that the claim for defence costs could be preserved.

[17] IAG has incurred total costs and disbursements of $52,879.82 and seeks an award of $34,900 being two thirds of its actual costs. IAG submits that as a minimum it is entitled to costs and disbursements of $25,797.77 from 11 November 2011, the date when Mr Middleton filed his response to the claim, which was echoed by Mr Matthews' response on 17 November 2011. It is submitted that it was apparent from the date on which these responses were filed that the claims lacked substantial merit.

[18] Indemnity or actual costs may be awarded where a party has behaved either badly or very unreasonably.[8] The initial offer by IAG was to contribute $35,000 to a global settlement; its final offer was to pay Mr Matthews and Mr Middleton the sum of $25,088.35. Clearly these offers were reasonable under the circumstances. District Court Rule 4.11.1 states that the effect of making such an offer on an award of costs is at the discretion of the court.

[19] In this case, despite reasonable and pragmatic offers from IAG, Mr Matthews and Mr Middleton maintained a position which was unreasonable particularly in the absence of any legal or evidential support. For these reasons, and taking into account the Calderbank letters, I consider that costs

[8] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 (CA).

should be awarded on the basis of actual costs incurred. I am not satisfied that costs were unnecessarily incurred by IAG from the outset of these proceedings because the application to join IAG was not opposed. I therefore award the costs and disbursements of $25,797.77 incurred by IAG since 11 November 2011.

The claimants and the Council

[20] On 18 October 2011 the claimants conveyed an offer to settle for $395,000 to Mr Matthews and Mr Middleton as part of the Council's offer of settlement. On 28 November 2011 counsel for the claimants sent a without prejudice email to counsel for Mr Matthews and Mr Middleton advising that he would recommend the claimants accept an offer of $380,000. The claimants were awarded $399,052.

[21] The claimants and the Council now claim that the decision by Mr Matthews and Mr Middleton to decline their offer of settlement was an objection without substantial merit which entitles them to an award of costs. The claimants also submit that Mr Matthews' assertion that he did not assume personal responsibility for the construction had no merit because at hearing Mr Matthews admitted that he carried out work that caused two of the primary defects, installing the Harditex and the windows. The claimants claim that Mr Middleton is liable for costs as his assertion that he was not involved in the construction was contrary to the evidence.

[22] The Council submits that its offer to Mr Matthews and Mr Middleton on 21 October 2011 was reasonable because Mr Matthews and Mr Middleton would have reduced their liability had they accepted the offer and the Council would not have pursued its cross-claim against them. Mr Matthews declined to settle because he said that he could not contribute to a settlement. The claimants and the Council submit that documents produced by the Council demonstrate that this is not correct as the shares of Allmar Properties Limited are not worthless as deposed by Mr Matthews. While Mr

Matthews' financial position is not directly relevant to the question of costs, it is likely that given the assets of Allmar, Mr Matthews could have raised sufficient funds to make a reasonable settlement offer. However I am not satisfied that the evidence in relation to the liquidity and assets of Allmar is sufficiently complete for me to determine whether Mr Matthews had the ability to make a reasonable settlement offer.

[23] I am not satisfied that in the circumstances of this claim the refusal by Mr Matthews and Mr Middleton to accept the settlement offer put by the claimants and the Council incurred costs which are appropriately awarded under s91(1)(b). In my view the most significant cause of unnecessary costs being incurred by the claimant and the Council was the pursuit by Mr Matthews and Mr Middleton of their claim against IAG. A significant amount of the hearing time was spent on this issue. Based on the log notes I estimate this time at half a day. This estimate includes the time spent questioning the expert witnesses on the date and extent of damage that could be relevant to the policy. For the reasons given in relation to IAG's claim for costs, I conclude that Mr Matthews and Mr Middleton are liable for those costs reasonably incurred by the claimants and the Council as a result of the time spent on the claim against IAG. I find Mr Matthews and Mr Middleton jointly and severally liable for the costs incurred by all parties to whom they are liable as the claim against IAG arose from the policy held by MML, both Mr Matthews and Mr Middleton contributed to the unnecessary costs, and the same costs would have been incurred had only one party pursued IAG.

[24] I have awarded the claimants the cost of their defects expert, Stuart Wilson, attending the hearing. There was no opposing expert evidence and had it not been for the question of the date of damage, Mr Wilson's evidence would not have been required. However the claimant's evidence of Daniel Johnson on quantum was disputed by the Council and had to be tested. I therefore decline to award the cost of Mr Johnson's appearance. I do not consider that the claim by the Council for expert fees is justified as Mr Gillingham appeared with the consent of the Council and Ross Wood's

evidence on quantum was called to challenge the amount claimed for the remedial work.

[25] I note that although the claimants rely on the failure to settle for their application for costs, they claim costs from the outset of the proceedings. There is no basis for such an award. The claimants had to file the claim with the supporting evidence before the respondents could appreciate the allegations against them and respond accordingly. Given the presumption in the Act that each party bears its own costs it is difficult to envisage any circumstances which would give rise to an award to claimants of costs incurred from the outset of the proceedings.

[26] I have given my reasons for declining to award costs in favour of the Lechtchinskis however, for the avoidance of doubt I do not consider that an award to the Lechtchinskis of costs on the above grounds is justified. While the offer of settlement by the Lechtchinskis was declined, the claim against them was dismissed and they are therefore in a better position, or at least no worse, by attending the hearing.

[27] Mr Matthews and Mr Middleton are therefore jointly and severally liable to pay the claimants and the Council the cost of counsel for a half day on the District Court scale 2B and the claimants four hours of Mr Wilson's time at his rate of $205 per hour.

Orders

[28] The claim for costs by Dmitri and Anna Lechtchinski is dismissed.

[29] Alan Matthews and Keith Middleton are jointly and severally liable to pay IAG New Zealand Limited the sum of $25,797.77 immediately.

[30] Alan Matthews and Keith Middleton are jointly and severally liable to pay Jason Glen Landon and Sharon Mary Peace the sum of $1,570.00 immediately.

[31] Alan Matthews and Keith Middleton are jointly and severally liable to pay the Auckland Council the sum of $750 immediately.

Dated this 1st day of March 2012

S. Pezaro
Tribunal Member