IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-101-000013
[2010] NZWHT AUCKLAND 13

BETWEEN	PETER DEVON LEE and ESTELLE MARY LEE Claimants
AND	NAPIER CITY COUNCIL First Respondent
AND	WARREN RICHARD THOMPSON, MARGARET JEAN THOMPSON and MEGAN CLARE MACDONALD as trustees of the ARKLOW TRUST Second Respondents
AND	ANGUS CHARLES BEATTIE Third Respondent
AND	JULIE MARIE BEATTIE Fourth Respondent
AND	ANGUS CHARLES BEATTIE, JULIE MARIE BEATTIE, STEPHEN ALEXANDER GREER and STEPHEN ROBERT SHEPHERD as trustees for the ANGUS and JULIE BEATTIE FAMILY TRUST Fifth Respondent
AND	ROSS ANDREW (Removed) Sixth Respondent
AND	HASTINGS ALUMINIUM CO. LIMITED (Removed on 29 August 2008) Seventh Respondent
AND	GEOFFREY CLARK (Removed) Eighth Respondent

COSTS DECISION
Adjudicator: P A McConnell

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[1] Stephen Alexander Greer and Stephen Robert Shepherd, two of the fifth respondents, have applied for costs against the claimants. Mr Greer and Mr Shepherd were the trustees of the Beattie Trust (the Trust) and owned the Auckland Road property at the time construction commenced. They submit the claim against them was lacking in substantial merit as was 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 claimants.

Respondents' Case

[2] Mr Gray, on behalf of Greer and Shepherd submits that the claimants caused costs to be incurred by them unnecessarily by making allegations that were without substantial merit. Mr Gray submits that the claim that Greer and Shepherd were developers was based on a possibility founded on an assumption only and in order for the claim to have substantial merit more than this was required. He notes that at the hearing the claimants did not challenge Greer's evidence that he had no involvement in the development and construction. He further submits that even if it was reasonable for the claimants to assume, when starting the proceedings, that the Trust was a developer, it ceased being reasonable to do so from the time of Greer and Shepher's removal application supported by Greer's affidavit dated 14 July 2006.

[3] Mr Gray submits that his file record and the claimants' pleading both make it clear that the claimants did not know if the Trust was a developer of the property as distinct from Angus and Julie Beattie and Flood and Beattie Limited. He submits that a scattergun approach was adopted in this claim and suggests that Greer and Shepherd were kept in as parties because they were the only parties likely to be covered by insurance.

Claimants' Case

[4] The claimants oppose the application for costs. They acknowledge the difficulty they had in naming parties in these proceedings as they were subsequent purchasers with no knowledge of the events surrounding the construction of the home. They however note that it was known from publicly available records that the registered owners of the land up until 23 May 2001, which was partly through the construction process, were Greer and Shepherd. They further note that the building consent was applied for in the name of the Trust and was issued in the name of the Trust. A mortgage over the property was given by the Trust securing a sum of $315,000.00 at or around the time of construction. They also note that work on the construction of the house including the erection of the framing and most of the walls had been completed prior to the change of trustees from Greer and Shepherd to Angus and Julie Beattie.

[5] The claimants further submit that the matter was further confused by the involvement of the firm of Sainsbury Logan and Williams with a significant number of parties in this claim. Mr Greer is a partner in Sainsbury Logan and Williams as is his counsel, Mr Gray.

[6] The claimants further note that at no time since the proceedings were withdrawn from the 2002 Act adjudication and filed with the Tribunal have Greer and Shepherd made an application to be removed as parties. In any event they submit there was substantial merit in the claim as accepted by the 2002 Act adjudicator and therefore the application for costs should be dismissed.

The Issue

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

Discussion

[8] 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**
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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—
>
> (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.

[9] 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.

[10] The onus is however on Greer and Shepherd 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 a discretion to award costs.

[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] 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 parties to cases based on allegations which they should reasonably know they cannot establish.

[12] I accept Greer and Shepherd's submissions that there was no evidence that they personally made specific decisions or had any involvement in the development and construction. However as pointed out at the hearing, the critical issue that needed to be determined was more whether the Trust was the developer, not whether Greer and Shepherd were directly involved in any aspect of the development. If the Trust was a developer then the claim was appropriately brought against the trustees as the entity through which the Trust could be sued. If the Trust was a developer, Greer and Shepherd as the only trustees would owe a non-delegable duty of care to the claimants. It was accepted that at the time the property was purchased, when the building consent was issued and when a significant amount of the construction work took place, Greer and Shepherd were the only trustees of the Trust and as such were the owners of the property.

[13] The decision on whether or not the Trust was a developer was one of the most finely balanced decisions made in the determination issued. Both Mr Beattie and Mr Greer's evidence was that the Trust was in the business of investing in property and at the time it purchased the Auckland Road section it owned several other properties.

[14] Mr Gray in his submissions points to Mr Beattie's letter filed under the 2002 Act adjudication which states that Shepherd and Greer had no involvement in the construction process. Whilst I accept this information was filed, Mr Gray failed to note that Mr Beattie has throughout this adjudication consistently submitted that he personally was not the developer or builder but that at all times it was either the Beattie Trust or

Flood and Beattie Limited that were respectively the developers and builders of the dwelling. Mr Beattie's case also was that the Trust had entered into an agreement with his company for the construction of the property.

[15] It only became clear in the course of the hearing all decisions made were those of Mr Beattie and that he had no authority from the Trust to make these on its behalf. Mr Greer gave evidence at the hearing that Mr Beattie was not authorised to enter into contracts or make decisions on behalf of the Trust without the consent of the trustees.

[16] It was for this reason I concluded that it was Mr Beattie who was the developer and not the Trust as there was insufficient evidence to support his allegation that he was acting on behalf of the Trust or with the authority of the Trust when making these decisions. Much of this information however was not available to the claimants until the hearing as Mr Beattie had not been participating in the adjudication process for some time, had filed no response and had not filed a witness statement.

[17] I do not consider the claim against Greer and Shepherd was without substantial merit even though it was ultimately unsuccessful. There was tenable evidence supporting the claimants' view that the Trust was the developer. The Trust was in the business of acquiring property for investment, it purchased a section and shortly after purchase construction on that section started. In addition the property was placed on the market even before construction was completed.

[18] Even if I did however conclude the threshold of no substantial merit had been met, retain a discretion whether to allow costs. France J in *Trustees Executors Ltd v Wellington City Council*[2] said:

> "[51] The second question is that, given the threshold is met, should an award of costs be made notwithstanding the scheme of the Act is that generally costs should lie where they fall... Obviously meeting a threshold test of no substantial

[2] HC Auckland CIV-2008-485-739, 16 December 2008, S France J.

> merit must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still a discretion to be exercised."

[19] France J also concluded that one issue to consider when deciding whether the Tribunal should exercise this discretion is whether the claimant should have known about the weakness of the case and whether they pursued litigation in defiance of common sense. I do not believe this is such a case for the reasons already outlined. In addition I accept the submissions made on behalf of the claimants that the conflicted roles that both Mr Greer and Mr Gray have had at various stages were an obstacle to the claimants being able to obtain a clear picture of the appropriate parties and their roles in the construction.

[20] Firstly Greer and Shepherd were the owners of the Auckland Road property in their capacity as the two trustees of the Beattie Trust through until April 2001. Mr Greer then acted for the purchasers of the property from Beattie Trust, the second respondents in this claim, in November 2001. Mr Greer's firm continued to act for the Trust and for Angus and Julie Beattie in relation to the sale to the second respondents. I would note that agreement for sale and purchase was conditional upon the CCC being issued. Settlement however proceeded without the CCC being issued and it was not in fact issued until approximately 15 months after settlement. A key issue in dispute in this claim relates to what construction work was done after the settlement of the sale between the Trust and the second respondents.

[21] When the proceedings were commenced Mr Gray, a partner in the same firm as Mr Greer, acted not only for Mr Greer but also for the second respondents. For some months Mr Gray continued to insist there was no conflict of interest between these roles and nor did he consider there was any conflict in the his firm previously acting for Angus Beattie and for both the second and fifth respondents in relation to the sale and purchase agreement. It is understandable in these circumstances why the claimants concluded that the transfer from the fifth respondents to the second

respondents may not have been an arms-length deal and why confusion reigned as to the appropriate respondents.

[22] This is not a claim where the claimants could have known that there was significant weakness in their case or one where they had pursued litigation in defiance of common sense or good legal advice. I do not accept Greer and Shepherd's submission that documentary evidence was available from July 2006 that established the Beattie Trust was not the developer. The documentary evidence to the contrary pointed to the Beattie Trust being both the owner of the property and the developer. If the Beattie Trust was the developer the trustees at the time the development took place were the appropriate parties to name as a respondent in their capacity as trustees to the Beattie Trust. The application for costs by Greer and Shepherd accordingly fails.

Application by Claimants against Angus Beattie

[23] The claimants seek costs of the proceedings against the third respondent, Angus Charles Beattie, as they submit both limbs of section 91(1) apply in that there was bad faith on the part of Mr Beattie and objections were made by him that were without substantial merit.

[24] I accept the claimants' submissions that the objections made by Mr Beattie were without substantial merit and that his evidence was discredited. The difficulty with the claimants' application for costs however is that there is little, if anything, Mr Beattie did in the course of these proceedings that added to the costs the claimants faced in progressing their claim. Mr Beattie did not apply to be removed, took very little part in the proceedings and in fact only attended the proceedings to give evidence. He did not make any unnecessary interlocutory applications nor did he extend the length of the hearing by unnecessarily contesting parts of the claimants' evidence or by making unfounded submissions.

[25] As the claimants elected not to participate in mediation, the costs they incurred in preparing for and attending the hearing would have been

incurred in pursuing the claims against the other parties even if Mr Beattie had fully acknowledged responsibility for his role from the beginning.

[26] I accept there were allegations and objections made by Mr Beattie that were without merit and further accept that his behaviour could be construed as amounting to bad faith. However, this has not resulted in the claimants incurring costs and expenses unreasonably as those costs would have needed to have been incurred in any event. The application for costs accordingly fails.

DATED this 13th day of May 2010

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P A McConnell
Tribunal Chair