IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-101-000025
[2011] NZWHT AUCKLAND 38

BETWEEN	GREGORY MCDONALD Claimant
AND	TIMOTHY PETERS First Respondent
AND	BUILDING APPROVALS AND SOLUTIONS LIMITED Second Respondent
AND	MIKE HISLOP Third Respondent
AND	NEIL BROWN Fourth Respondent
AND	CARLTON RICHARDS Fifth Respondent
AND	NELSON CITY COUNCIL (Removed) Sixth Respondent
AND	GRAHAM SCOTT Seventh Respondent
AND	PHILIP HILLEARD Eighth Respondent

Hearing: On papers

Appearances: G Praat for the claimant
J H Morrison for the sixth respondent

Decision: 11 August 2011

COSTS DETERMINATION
Adjudicator: R Pitchforth

SUMMARY

[1] The sixth respondent, the Nelson City Council, applied for costs pursuant to s 91(1) of the Weathertight Homes Resolution Services Act 2006.

[2] That section provides:

> **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] The claim against the council was that it failed to oversee the building certifier or check the building during or after construction.

Prior applications

[4] The first application for removal was unsuccessful as reported in Procedural Order No. 3 dated 17 August 2009.

[5] After the council had filed its response to the claim on 3 September 2009 the council made a second application on 9 November 2009. The Council was removed (along with others). That decision was appealed and the appeal was granted on 12 April 2011 on the basis that the claimant had not been able to be properly heard on the removal.

[6] On 27 May 2011 the council again applied for removal. The Tribunal accepted the council's arguments and removed it from these proceedings on 9 June 2011.

[7] The council alleges that their costs and expenses were incurred unnecessarily due to bad faith on the part of the claimant and/or allegations by the claimant that were made without substantial merit.

[8] There was no factual dispute. At the removal the claimant argued that *Auckland City Council v McNamara* [2010] 3 NZLR 848 CA is only authority for the proposition that where the building owner has engaged an independent certifier for inspection and approval of building work the territorial authority no longer owes the owner a duty of care. The claimant argued that it is not authority for the proposition that the territorial authority is not responsible for certifying other work.

[9] The claimant referred a the wastewater inspection, which is not in dispute, which was not carried out by the council. The claimant alleged that a council officer would have seen the house defect when the wastewater was inspected and accordingly was responsible for the defects overlooked by the certifier.

[10] The council submitted that the claimant has been conducting the claim in a manner which is obstructive and in breach of natural justice. The claim has been pursued in defiance of common sense. The claimant said that it had reasonably pursued the claim as there may be evidence, which can now never to be obtained at a hearing, that the council officer inspecting the wastewater might have re-inspected the building work already signed off by the certifier.

[11] The council said that it had incurred substantial costs in excess of $40,000 due to the removal applications and the appeal.

LIABILITY FOR COSTS

[12] The presumption in the act as cited above is that costs lie where they fall unless they were incurred both unnecessarily and as a result of actions in bad faith or making allegations were without substantial merit.

[13] Although it could be argued that the claimant has made this claim more difficult than the usual run of leaky homes cases, he has been advised throughout and there is nothing to show that the allegations made against the council were prima facie in bad faith. The claim failed on legal grounds.

[14] Once the claim was clearly not tenable the council was removed. That is in line with the procedures set out in the Act.

[15] The council's removal twice for the same reasons was affected by the intervening appeal. The costs on appeal were dealt with by the appellant court.

[16] The only costs that could therefore be considered are the costs of the first and third applications.

[17] In the first application there was no response to the claim filed by the council though its position was clear. There were also allegations that the council had, or ought to have, inspected some of the work. At that stage the claimant was unremarkably given the benefit of the doubt and it was found that the council had not proved that there was no tenable case against it.

[18] The council had shown untenability by the second application but as that decision was reversed on appeal the tribunal is not in a position to award costs.

[19] In relation to the third application it has been dealt with as soon after the appeal as was practicable. Accordingly the situation does not attain the level where unnecessary costs have been incurred.

[20] The application for costs is declined.

DATED this 11th day of August 2011

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R Pitchforth
Tribunal Member