IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000024
[2012] NZWHT AUCKLAND 5

BETWEEN	JOHN ANTHONY AND HELEN OSBORNE Claimants
AND	AUCKLAND COUNCIL (Removed) First Respondent
AND	CHRISTOPHER JOHN ERNEST DIXON Second Respondent
AND	DESMOND NOEL BARNES Third Respondent
AND	MASTER BUILD SERVICES LIMITED (Removed) Fourth Respondent
AND	PLASTER SYSTEMS LIMITED Fifth Respondent

Decision: 16 February 2012

COST DETERMINATION
Adjudicator: K D Kilgour

COSTS APPLICATION BY AUCKLAND COUNCIL

[1] The Council was removed from this proceeding on 10 September 2010 in Procedural Order No 7.

[2] The claimants appealed that determination and also judicially reviewed the Eligibility Decisions of the Department of Building and Housing and of the Chair of this Tribunal to the High Court.

[3] The appeal and judicial review was heard before Woolford J whose judgment was handed down on 9 September 2011.[1] The appeal and the judicial review were dismissed by Woolford J.

[4] The claimants then sought leave from the High Court to appeal Woolford J's decision dismissing their appeal and the application for leave was dismissed.[2]

[5] The Council has now applied to the Tribunal (see applications dated 20 September 2010 and 23 September 2011) seeking an award of costs against the claimants.

[6] The Weathertight Homes Resolution Services Act 2006 (the Act) carries a presumption in section 91(2) that the parties bare their own costs. However in the circumstances of this matter the Council now seeks an order from the Tribunal that the claimants pay the Council's costs for the joinder of the Council and the opposition to the removal.

[7] The application is made in reliance on section 91 of the Act.

Statutory Provision

[8] Section 91 of the Act is as follows:

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[1] *Osborne v Auckland* Council, HC Auckland, CIV-2010-404-6582 and CIV-2010-404-06583, 9 September 2011.
[2] *Osborne v Auckland Council*, HC Auckland, CIV-2010-404-6582, 30 November 2011.

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.

COUNCIL'S GROUNDS FOR AN AWARD OF COSTS

[9] The Council seeks costs from the claimants upon the basis that the claimants proceeded with their claim "…when they clearly knew or ought to have known, that the claim against the Council was without substantial merit…".

[10] The Council submits in paragraph 6 of its application of 23 September 2011 that the following facts are relevant to its claim for costs:

i. The claim for the building of the original dwelling was ineligible, and, it was deemed so more than once, after the claimants had exercised appeal rights to the decision maker that it was not an eligible claim in the Tribunal.

ii. The allegations that the claimants make against the Council were in respect of the building of the original dwelling and in respect of that original building work and the issue of the Code Compliance Certificate for the original home build.

iii. It was clear that all allegations made against the Council in relation to the original building work and its

inspections of that work were time barred by the ten year long stop provision in the Building Act.

iv. The Council's issue of the Code Compliance Certificate for the original build did not cause any of the losses allegedly suffered by the claimants.

v. The Council and its counsel on more than one occasion invited the claimants to discontinue with no issue as to costs, and, continued such an invitation throughout the proceedings.

vi. Notwithstanding, the claimants opposed the Council's application for removal without ever attempting to address the issue of causation or limitation in respect of the Building Act.

[11] The Council submits that this is a situation where the Tribunal ought to award costs because the claim against the Council was demonstrably without merit and it sets out its reasons in support of such submission in paragraphs [21] to [30] of its application dated 23 September 2011.

LEGAL PRINCIPLES

[12] The Tribunal has discretion to award costs in limited circumstances. In exercising its discretion, it follows that it should do so judiciously and not capriciously. The Council has outlined the presumption which the applicants must overcome to successfully secure an award of costs. This is set down in section 91(2) of the Act. The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which has caused costs and expenses to have been incurred unnecessarily by, in this case, the claimants.

[13] I accept the legal principles and the case law submitted and cited by counsel for the Council in paragraphs 7-16 of its application of 23 September 2011.

THE THRESHOLD FOR ASSESSING SUBSTANTIAL MERIT

[14] Council's cost application proceeds materially on the basis of the second limb of section 91, namely section 91(1)(b) of the Act. In *Trustees Executors Limited v Wellington City Council*[3] Justice France held that:

> In policy terms, whilst one must be wary of establishing disincentives to the use of the important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
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> a) Unnecessary expense; has been caused by
>
> b) a case without substantial merit.
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> 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.

[15] In *River Oaks Farm Limited v Holland*[4] 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*[5] the Tribunal held that the bar for establishing '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 based on allegations which a party ought reasonably to have known they could not establish.

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[3] *Trustees Executors Limited v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[4] *River Oaks Farm Limtied v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[5] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

[16] In *Max Grant Architects Limited v Holland*[6] the Tribunal declined a removal application by the architect but recorded that the claimant, the party opposing removal, needed to establish causation. At adjudication the claim against the architect failed but the Tribunal declined his application for costs. On appeal the District Court held that the Tribunal was wrong to conclude that the threshold for an award for costs under s91(1)(b) had not been met because the claimant failed to offer the necessary evidence of causation at hearing.[7]

CONCLUSION

[17] Section 57(2) of the Act requires that in managing adjudication proceedings the Tribunal must comply with the rules of natural justice. The rules of natural justice mandate that parties have a right and opportunity to put their case and to be heard.

[18] Woolford J's dismissal of the claimants' application for judicial review of the Tribunal's eligibility decision is proceeding on appeal to the Court of Appeal. Claimants' counsel has submitted that my Costs Determination should await that appeal. Instead I determine that the proper, speedy and cost effective process which the claimants should have adopted was to judicially review the Eligibility Decisions of the Department of Building and Housing and the Chair of this Tribunal at the time those decisions were issued.

[19] Instead, without any proper or timely consideration of the Council's invitations to discontinue with no issue as to costs, the claimants proceeded against the Council. The claimants proceeded with their claim against the Council and opposed the Council's application for removal without demonstrating any substantial merit

[6] *Holland & Ors as Trustees of the Harbourview Trust v Auckland City Council* WHT TRI-2009-100-00008, 17 December 2009.
[7] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81].

and otherwise in an obfuscate fashion. All of this has put the Council to unnecessary expense which will be unaffected by the appeal.

[20] The claimants and their counsel knew that the claim in respect of the original dwelling's construction had been found ineligible; that the Council had no involvement in the subsequent alterations or remediation building works. The issue of the Code Compliance Certificate was in performance of the Council's functions relating to the original building. The Council's final inspection for the issue of that Certificate had been undertaken and passed outside the ten year limitation period and had no causative link to the claimants' loss. The eligible claim and the claimants' loss was caused by the unconsented and allegedly failed remedial alteration works carried out in 1999. The Council played no part in such remedial works. Therefore they could not be found liable in respect of those building works. The claimants have continued their claim notwithstanding invitations from the Council to discontinue. This has caused the Council to prepare a response, to take interlocutory steps to protect the Council's possession and then to proceed with a removal application and reply to the claimants' opposition. The Council's position has always been clear and addressed the lack of causation and limitation issues in its removal application and reply to the claimants' opposition to removal.

[21] I accept that the Council has unnecessarily been put by the claimants to a number of interlocutory steps to be successfully removed from this claim. As a result it has incurred unnecessary costs. It should reasonably have been apparent to the claimants that their continued claim against the Council had no substantial merit.

[22] The claimants have not challenged the Council's application for costs.

[23] I am satisfied that costs as claimed are reasonable and that the appropriate scale has been applied.[8]

ORDER

[24] John Anthony Osborne and Helen Osborne are ordered to pay the Auckland Council the sum of $4,059.00 immediately.

DATED this 16th day of February 2012

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K D Kilgour
Tribunal Member

[8] *Trustees Executors Limited v Wellington City Council*, HC Wellington, CIV-2008-485-739, 16 December 2008.