



SUMMARY

Case: River Oaks Farm Ltd & Ors as Trustees of Ingodwe Trust v Olsson & Ors as Trustees of the Picollo Trust – COSTS DECISION

File No: TRI 2008-101-000052/ DBH 05463

Citation: [2010] NZWHT Wellington 17

Court: WHT

Adjudicator: C Ruthe

Date of Decision: 16 June 2010

Background

This determination is based on applications filed by the first, second and seventh respondents for costs against the claimants pursuant to s91(1) of the 2006 Act.

Applications for Costs

By Seventh Respondent, Holland Beckett

Holland Beckett (HB) sought an order for costs and disbursements on the basis that the claim against it lacked substantial merit upon the following submissions:

- the claimants were never in a position to prove that HB owed them a duty of care
- the claimants were never in a position to prove that HB caused their loss or that it caused such loss anywhere near their claim of \$712,559
- the claimants were never in a position to prove that it was within the scope of HB's retainer to recommend that the agreement for sale and purchase be conditional on a satisfactory building report
- the claimants were never in a position to establish that any negligence by HB, as solicitors, had caused their loss
- all the independent evidence indicated that it was highly unlikely that a visual inspection of the building would have identified any defects enabling the contract to be cancelled

In opposition the claimants argued that legal representation is not required in the Tribunal and therefore it is not intended that costs generally be awarded. The claimants also argued that an application for removal was unsuccessful. At the removal hearing the claimants submitted there was clear evidence of a breach of duty of care by HB contained in the evidence of Mr Eaves. However at the hearing, Mr Eaves' evidence did not establish there was any such breach. Also at the removal hearing the claimants argued that if a pre-purchase inspection report had been commissioned it would have disclosed the defects giving rise to the leaks. However this did not prove to be the case.

By First and Second Respondents, Trustees of the Picollo Trust and Mr Olsson

The first and second respondents (Olssons) stated that while they conducted their defence in a reasonable manner the claimants embarked on the strategy of inflating their claim so it considerably exceeded the economic loss. The Olssons also pointed out that before the hearing they offered to meet the entire cost of remedial work and nominated a builder who has a good reputation in the industry and whose expertise in remediation work was confirmed by the Assessor. The first offer included a request

that the claimants contribute \$50,000 and in a later fax no contribution was sought. There was also a cash offer of \$300,000. In the substantive determination the Olssons were held liable for \$310,888.

In response the claimants stated that they were right to turn down the settlement offer as they did not want the respondent or their contractors working on the house again.

Decision

Application by Holland Beckett

The Tribunal ordered costs in favour of HB in finding that the claim lacked substantial merit and the weaknesses should have been known by the claimants. The Tribunal stated that although the outcome of the removal hearing cannot be interpreted as the sole basis for declining an application for costs, the following matters were facts known to the claimants well before the hearing and were not disputed:

- The Code Compliance Certificate was issued six months before Mr Still's inspection on behalf of the claimants, whereby he also found no defects
- The claimants had considerable experience as purchasers of residential properties
- Due to the failure to produce evidence on the matter, there was a major weakness in the claimants' assertion that any pre-purchase inspector would have detected the leaks that subsequently developed
- The first assessor's report showed no moisture readings outside the range of 10-18% and therefore within acceptable parameters
- Procedural Order No. 7 flagged the possibility of costs in relation to litigation risk – ie to impose a duty on conveyancing solicitors to advise all clients to make the agreement conditional on a satisfactory pre-purchase building report would require solicitors to second guess territorial authorities

Application by Olssons

In failing to consider a realistic settlement offer as well as the claim being well in excess of their economic loss thereby lacking substantial merit, the Tribunal held that costs should be awarded in favour of the Olssons. It was clear that the proposed remediation contractor had no relationship with the Olssons but the claimants failed to ascertain that fact even though they could have done so easily. Also the claimants had not attempted to enter into any discussion on their objection to the settlement offer on the basis that the suggested new roof with eaves was aesthetic despite the proposal that it would have substantially reduced the risk profile of the house. The objective of the 2006 Act is to effect speedy resolution of claims and an offer of full remediation met by the Olssons went a long way to meeting that objective.

Costs Awards

Seventh Respondent, Holland Beckett

The claimants were ordered to pay \$36,312.38 in costs based on the following:

(a) Solicitors' Costs

The Tribunal allowed the amount of \$27,200 for solicitors' costs being \$1,280 per day for 21.25 days but disallowed the amount for interrogatories in finding that the amount was excessive and that they were too extensive and inappropriate. The number of days for inspection and discovery were also held to be excessive and therefore those amounts were also reduced

(b) Disbursements

The Tribunal allowed the experts' expenses and accepted that it was appropriate to instruct out-of-town counsel to deal with the issue of professional negligence claim – an area of law involving specialist knowledge. Travel expenses of \$80, accommodation of \$270 and \$20 photocopying were also allowed

First and Second Respondents, Trustees of the Picollo Trust and Mr Olsson

The claimants were ordered to pay \$5,340 in costs to the Olssons. The Tribunal allowed the sum of \$1,500 in experts' costs but disallowed the balance of that claim as a substantial proportion of that cost would have been incurred in preparation prior to the offer. The Tribunal also considered that the appropriate allowance for extra legal costs is 3 days including preparation and hearing time at \$1,280 a day being \$3,840.

Result

According to the Category 2C of the District Court Rules, the claimants were ordered to pay costs in the following amounts:

Holland Beckett	\$36,312.38
Olssons	<u>\$ 5,340.00</u>
	<u>\$41,652.38</u>