IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI-2007-101-000029

BETWEEN	**TRUSTEES EXECUTORS LTD as TRUSTEE FOR THE SIMPSON FAMILY TRUST** **Claimant**
AND	**WELLINGTON CITY COUNCIL** First Respondent
AND	**HEYHOE BUILDERS LTD** Second Respondent
AND	**JEANETTE O'CALLAGHAN** Third Respondent
AND	**G R W CONSULTANTS LTD. T/A FIRST WINDOWS AND DOORS** Fifth Respondent
AND	**CHRISTOPHER HEYHOE** Seventh Respondent
AND	**PAUL SIMPSON** Eighth Respondent
AND	**MIRANDA PATRICK** Ninth Respondent
AND	**BRIAN ANDREOLI** Tenth Respondent

COSTS DETERMINATION
Adjudicator: R J Pitchforth
30 May 2008

COSTS DECISION

[1] The decision on the merits of this claim was issued on 7 March 2008.

[2] The respondents made submissions at the hearing that the test in s 91 of the Weathertight Homes Resolution Services Act 2006 (the Act) had been satisfied.

[3] I accepted that there were apparent grounds for exercising my discretion and asked the parties to make submissions.

[4] Section 91 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.
> Compare: 2002 No 47 s 43

[5] The presumption which must be overcome by the respondents is set out in s 91(2), namely that the parties must meet their own costs and expenses.

[6] The presumption is overturned if I find either bad faith on the part of a party, in this case the claimant and ninth respondent, or allegations that are without substantial merit which have caused costs and expenses to have been incurred unnecessarily.

[7] The claimant and the first, second, fifth and seventh respondents made submissions.

SUBSTANTIAL MERIT

Limitation

[8] The claimant was put on notice that there would be a defence based on limitation in November 2005 when an application was made to Adjudicator Green to strike out the claim filed under the 2002 Act. The application was declined after submissions that a full factual assessment required a hearing. No new material was provided at this hearing.

[9] Limitation was part of the pleadings and the respondents dealt with the matter in opening submissions.

[10] Little attempt was made to respond to these submissions and the evidence in support.

[11] The claimant only submitted that as the leaks had not leaked between the date of the issuing of the Code Compliance Certificate and 2002 when the claim was registered the claim was in time. It was submitted that the limitation is not a bar to proceedings but an affirmative defence.

[12] Even if that were so, the claimant knew the details of the defence well before the hearing.

[13] I accept the submission of counsel for the second and seventh respondents and counsel for the fifth respondent that there was little that the claimant had to offer in response to this defence.

[14] I have been provided with a copy of a letter from Heaney & Co dated 24 January 2008 (Heaney letter) which was sent to the claimant's

solicitor '*without prejudice save as to costs'*. It was sent on behalf of all parties.

[15] The letter outlined the respondents' proposed defence based on limitation issues.

[16] The claimant's counsel replied to the Heaney letter, also without prejudice save as to costs, on 14 February 2008, (claimant's letter). The limitation issue was not addressed in that letter.

[17] It would appear that the claimant did not address the limitation issue before the hearing. The limitation defence was ultimately successful.

[18] In *Willis Trust v Laywood and Rees and others* CIV-2006-404-809, a case decided under the Construction Contracts Act 2002 which has wording similar to that found in s 56, the adjudicator had awarded costs having been satisfied that the allegations or objections were without substantial merit. Harrison J agreed with the adjudicator's assessment of the situation.

[19] The basis of this claim lacked substantial merit.

[20] I therefore find that I am empowered to consider costs.

Cost of claims made

[21] The claimant raised a number of claims that I did not have to decide. However, the respondents were obliged to prepare for those claims, present evidence and make submissions.

[22] When the hearing commenced on 20 February 2008 the claim was for $1,122,927.79.

[23] At 2.30 p.m. on the first day of hearing the claimant amended part of its claim from $595,954 for a total reclad to targeted repairs to an unspecified amount. The respondents assumed that the claim was reduced to the level referred to by the assessor, namely the Ortus costing.

[24] At the end of the morning the following day, 21 February, the claimant's expert produced a new costing for targeted repairs of $172,000. As the claimant's evidence proceeded the amount and the reasons for the amount were varied. The final amount was reduced to $168,333 by the late afternoon of 21 February.

[25] Respondents prepared their claim based on the highest amount claimed.

[26] On 21 February at 2.50 p.m. the ninth respondent withdrew her claim for general damages. The respondents had to prepare for this claim abandoned a day and a half after the hearing commenced.

Claim for total reclad

[27] The evidence presented by the assessor, the respondents and the respondent's experts was consistent. All agreed that a total reclad was not necessary.

[28] At the experts' conference held on 12 February 2008 it was clear to those present that a claim for a total reclad was not sustainable.

[29] The respondents put this situation to the claimant's solicitor. The claim for a total reclad was pursued at the hearing.

[30] All respondents dealt with the claim for a total reclad. The time and preparation in doing so was an unnecessary expense.

Abandonment of house and removal of stachybotrys

[31] The claimant made claims based on allegations relating to the spores being discharged by stachybotrys. The claims were for removal of the stachybotrys and the value of the time during which the house was abandoned.

[32] The evidence generally showed that this claim could not be made out, the scientific evidence being to the contrary.

[33] The time spent on defending this issue was an unnecessary expense.

CONSUMER GUARANTEES ACT

[34] There was no evidence of a supply of goods and services to the trust. This claim could not have been successfully prosecuted. The time spent defending this issue was an unnecessary expense.

Claims for repairs

[35] The claims for repairs were disclosed in cross-examination to be related to the proposal to reclad the dwelling. A claim for recladding was

unlikely to succeed. These costs were not likely to have been recovered. Defending this claim was unnecessary.

Claims against the fifth respondent

[36] The claimant sought about $350,000 from the fifth respondent that had, accordingly, a substantial litigation risk which counsel was obliged to prepare for. He prepared expert witness statements and evidence as well as submissions.

[37] The claimant did not produce tenable evidence of the failure of the windows or arcade. Indeed, the fifth respondent produced considerable evidence that they did not fail.

[38] It appeared that the claimant had not referred the expert evidence to its own experts. The claimant's expert wrote to the fifth respondent's expert on 13 February 2008 seeking an expert opinion, well after the opinion was available to the claimant.

[39] From March 2007 the fifth respondent repeatedly invited the claimant to withdraw its claim. A further offer was made at the beginning of the hearing as well as a final renewal of the Calderbank offer.

[40] The defence of this claim was unnecessary.

Duty of care

[41] The first respondent was faced with three causes of action. None of them were successful as I found that the Council did not breach the duty of care owed to the claimant.

[42] The breaches of duty of care alleged were different to the causes of water ingress identified by the experts. The evidence and submissions in defence of the allegations were not contested by the claimant.

[43] The first respondent was put to the cost of preparing this defence.

[44] The first respondent also prepared a second defence based on the leaks alleged. The prudence of such a course became evident when the claimant accepted the assessor's view and changed the thrust of the claim to payment for remediation for repairs.

[45] The first respondent relies on *Lester v White* 2 [1992] NZLR 483 for the proposition that the claimant is entitled to no more than the cost of the cheapest remedy. By claiming over one million dollars the claimant acted in bad faith and pursued a claim without merit.

Refusal to settle

[46] On 24 January 2008 the respondents (in the Heaney letter) jointly offered to settle this claim for a sum in excess of the amount that was provided in evidence as the value of the repairs needed to make the property weatherproof.

[47] The offer was rejected in the claimant's letter.

Costs against the ninth respondent

[48] The ninth respondent made a claim for general damages.

[49] On 8th February the second respondent advised the ninth respondent's solicitor that there was no jurisdiction for the Weathertight

Homes Tribunal to deal with such a claim. The ninth respondent was invited to withdraw the claim.

[50] The ninth respondent continued with the claim until part way through the hearing. The parties were put to the expense of defending this claim without merit.

[51] I find that the ninth respondent's actions meet the criteria set in s 91(1)(b).

[52] The costs of the respondents in preparing to defend this claim were unnecessarily incurred.

Principles to be applied

[53] The respondents propose that I seek guidance from Rule 48C of the High Court Rules and particularly (3)(b) which provides :-

> (b) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by
>
> (i) Failing to comply with these rules or a direction of the Court; or
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> (ii) Taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) Failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
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> (iv) Failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, notice for interrogatories, or other similar requirement under these rules; or
>
> (v) Failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 48G or some other offer to settle or dispose of the proceeding; or

[54] This is a helpful guide which I adopt. (The rule in 48G relates to offers made without prejudice save as to costs).

[55] In assessing the reasonableness of the offer I note that it was made despite the respondents' confidence in the strength of their arguments. It exceeded the amount which might reasonably have been recovered if the limitation issues were dealt with favourably to the claimant and it preceded a substantial amount of work in each case.

[56] In this case the claimant pursued arguments which lacked merit, failed without reasonable justification to accept legal argument, and failed without reasonable justification to accept an offer of settlement without prejudice save as to costs.

Approaches to costs

[57] The respondents made various submissions relating to the way in which costs in this matter should be approached. Those approaches included:-

a. Actual costs;
b. A proportion of actual costs relying on the authority of *Willis Trust* for a 70% contribution.
c. Actual costs from the date of the 'without prejudice save as to costs' offer following the principles in Rule 48 G, High Court Rules;

[58] The respondents made submissions in support of indemnity costs. They submitted that truly exceptional circumstances exist as was the case in *Hedley v Kiwi Co-op Dairies Ltd* (2002) 16 PRNZ 694. The submissions included:-

d. The claim lacked any merit from the outset;
e. The claimant was a trust company, so this is not the case of an unrepresented home owner battling corporate respondents;

f. The claimant obdurately and unreasonably refused to discontinue or settle the claim;
g. The claimant's evidence was late;
h. The claimant's evidence did not support the claim;
i. The parties had to prepare for a claim in excess of one million dollars as opposed to a claim for targeted repairs as recommended by the assessor. Such a large claim justified extensive instruction of experts.
j. The claimant behaved irresponsibly at the hearing;
k. The claimant's experts were unprepared, had not read the expert evidence and were unaware of the reports;
l. The claimant's experts substantially revised the quantum downwards during the course of the hearing, a step which could have been taken earlier;
m. The ninth respondent made a late claim for general damages which was only abandoned during the second day of hearing. As the ninth respondent was not the owner of the property jurisdiction to make the claim was not established;
n. The claim has been hanging over the fifth respondent for two and a half years, publicity has been damaging to its business.
o. The fifth respondent is considerably out of pocket defending a claim which lacked merit.
p. Indemnity costs would reflect the justice of the matter and the exceptional circumstances of the case.

LEGAL COSTS

[59] The claimant was in possession of an assessor's report which was the basis for a claim. It cannot be expected of an assessor that they

will consider limitation and jurisdictional issues outside of the provisions of the Act.

[60] It was reasonable for the claimant to bring a claim to make the repairs outlined by the assessor.

[61] In 2005 the claimant was aware of the limitation difficulties. The matter was allowed to continue under the previous legislation.

[62] My jurisdiction extends only to matters under the 2006 Act. Therefore I cannot award costs prior to the commencement of the claim in this tribunal on 6 August 2007. Many of the submissions of the claimant refer to costs incurred by the respondents before that time.

[63] Following the usual Calderbank procedure the respondents are entitled to costs incurred after making such an offer, which is not accepted. The Heaney letter of 24 January sent on behalf of all the respondents should have been accepted based on the known evidence and the outline of the defences provided.

[64] The factors set out in submissions relating to the claimant's behaviour confirm my view that it is proper that it bears the costs from this time.

[65] The appropriate level of costs for this tribunal is set out in the Schedules to the District Courts rules 1992. Due to the respondents' difficulty in ascertaining the basis of the claims the appropriate allocation of time should be category C. Similarly, the fluidity of the claims make the appropriate daily recovery rate a Category 3 procedure.

[66] It is not appropriate to make an allowance for second counsel who appears before the tribunal.

[67] Accordingly the proper rate for each of the three respondents who were represented from the date of the Calderbank letter is:

Appearance at Pre hearing meeting	(Days)	0.3	Category 3
Preparation for hearing		6	
Hearing		3	
Respondent's preparation of written & oral statements		3	
Respondent's preparation of authorities etc		3	
Submissions on costs		1	
Total	(Days)	16.3	$30,970.00

DISBURSEMENTS

[68] The first respondent incurred travel and accommodation costs for counsel and an expert witness. I allow travel and accommodation for one counsel and one witness at $1,619.00.

Experts' costs

[69] Each of the parties that made submissions employed experts who were obliged to attend the hearing until such time as the claimant abandoned the claims which they were present to provide evidence about.

[70] Section 57(1)(b) required the tribunal to use, and allow the use of, experts and expert evidence only where necessary.

[71] In all cases these experts would not have been required if the claimant had been content to rely on the assessor's report. They were, however, necessary for the defence of a claim in excess of one million dollars.

[72] Experts who were called to give evidence for the first respondent and their charges were:-

q. Pat Lawrence	$3,415
r. E F Gordon & Co	$3,780
s. Russell Cooney Building Building Consultant Ltd	$8,755.29

[73] The second and seventh respondents expert and its charges were:-

t. Peter Lalas of Connell Wagner	$8,000

[74] The fifth respondents experts and their charges for this hearing were:-

u. Laurie Baker	$3,514.10
v. Helfen Ltd	$37,512.11

Costs against the ninth respondent

[75] The ninth respondent made an abandoned a claim for general damages. Each of the parties was put to the expense of responding to this claim. The claim was never likely to succeed.

[76] In submissions for the ninth respondent it was argued that she would have been entitled to substantial damages if here had been jurisdiction for her claim. A technical defence and nothing more is not grounds for awarding costs.

[77] I disagree. The ninth respondent should bear some of the cost of defending the unsustainable claim. I allocate 5% of the cost to Miranda Patrick.

SUMMARY

[78] I award costs as follows:

First respondent

w.	Solicitors' costs:	$32,589.00
x.	Experts' costs	
	Pat Lawrence	$3,415.00
	EF Gordon & Co	$3,780.00
	Russell Cooney Building Consultants Ltd	$8,755.29
	Sub total	$48,539.29

Second and seventh respondents

y.	Solicitor's costs	$30,970.00
z.	Expert's costs	$8,000.00
	Sub total	$38,970.00

Fifth respondent

aa.	Solicitor's costs	$30,970.00
bb.	Experts' costs	
	Laurie Baker	$3,514.10
	Helfen Ltd	$37,512.11
	Sub total	$71,996.21

[79] The total solicitors costs are therefore $94,529.00.

[80] Mrs Patrick's share of the costs at 5% is $4,726.45.

[81] The claimants share of solicitors' costs is $89,802.55.

[82] Witness expenses total $64,976.50.

[83] Total costs payable by the claimant are therefore $154,778.94.

[84] The above amounts are inclusive of GST.

[85] Accordingly I order that the claimant and the ninth respondent pay the costs as set out.

DATED the 30th day of May 2008

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Roger Pitchforth

Tribunal Member.