IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000104
[2011] NZWHT AUCKLAND 24

BETWEEN	KIM YOUG PHON and KAO YUN Claimants
AND	WAITAKERE CITY COUNCIL First Respondent (Removed)
AND	MODERN HOME DEVELOPMENTS LIMITED Second Respondent
AND	DESIGN & BUILD CO LIMITED Third Respondent (Removed)
AND	DOUG KAILL Fourth Respondent (Removed)
AND	BARRY WALSH Fifth Respondent
AND	BRETT MCWILLIAMS Sixth Respondent
AND	WEI WEI ZHANG Seventh Respondent
AND	JAMES MCLEAN Eighth Respondent

ORDER AS TO COSTS
Dated 26 April 2011

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[1] Auckland Council, as successor to the assets and liabilities of the Waitakere City Council, and Doug Kaill have applied for costs against the claimants. They submit they have incurred costs unnecessarily by the claimants pursuing a claim against them that was substantially lacking in merit or made in bad faith. This is evidenced, they submit, by the fact that the Tribunal not only removed them from the claim but the High Court upheld the Tribunal's removal decision. The applications for costs are opposed by the claimants. They say firstly there is no jurisdiction to award costs in favour of parties who have been removed. In addition, if there is, they submit this is not an appropriate case for costs to be awarded.

The Issues

[2] The issues I need to decide are:

- Does the tribunal have jurisdiction under s 91 to award costs in favour of a party that has been removed from the claim?
- Have Auckland Council or Doug Kaill incurred costs unnecessarily by the claimant pursuing allegations against them that were without substantial merit and/or made in bad faith? If so I then need to determine whether I should exercise my discretion to award costs.

Does the Tribunal have jurisdiction to award costs?

[3] 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.

[4] The claimants submit the Tribunal has no jurisdiction to award costs on an application for removal where the parties seeking costs have been removed and are no longer parties to the adjudication. They therefore cannot be the beneficiaries of an order under section 91. The claimants further submit that there is no express statutory power to award costs on a successful removal application and that this is not contemplated under section 91.

[5] While it might be argued that s 91 only allows costs to be awarded against a current party it is silent on the issue of whether the person to whom costs are awarded must still be a party. I do not consider that the fact that the parties have been removed should prevent them from being able to apply for costs. There have been occasions both under the 2002 Act adjudication process and in the Tribunal where costs have been awarded against parties who have unreasonably opposed removal applications.

[6] Mr Kaill and the Council were both parties to this adjudication until they were removed. The costs they are seeking relate to costs incurred while they were parties. Adjudication is defined in s 8 as "an adjudication initiated by a claimant under section 62." It includes not only the final adjudication hearing but also the process from the time of filing until the claim is terminated or resolved. Section 91 does not restrict a costs award to any particular stage or time in that process provided the threshold to award costs is met. I therefore conclude the

Trib7unal does have jurisdiction to award costs in favour of a party that has been removed.

Have costs been incurred unnecessarily through bad faith or by the claimants pursuing claims without substantial merit?

[7] There is a clear presumption in the Act that costs lie where they fall unless they are incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. The onus is on the party seeking costs to demonstrate that the threshold for granting costs has been met. It is only once that onus is met that the discretion to award costs arises.

[8] Underlying section 91 is the principle that a party should not be allowed to cause unnecessary costs to other parties by 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. The Tribunal therefore has the ability to award costs against parties making allegations, or opposing removal applications based on allegations, which they ought reasonably to know they cannot establish.

[9] Where allegations are made against a party which have no evidential support, costs can and in many cases will be awarded. However, I accept that costs incurred as a result of an opposition to a removal application should not be considered as being incurred unnecessarily where there are genuinely disputed issues of fact and law and if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

[10] A summary of the relevant events leading up to this point are:

- The Council's only involvement in this property was issuing the building consent. Mr Kaill prepared the plans

and specifications but had no involvement after the issuing of the building consent.

- The assessor did not identify any deficiencies in the consented plans as being causative of leaks.
- At the preliminary conference both the Council and Mr Kaill asked for particulars of the claims being made against them.
- Mr Rainey, counsel for the claimants, advised that the claimants were waiting for their expert's report. He advised he would provide this when completed and further advised that if the claim against the Council and Mr Kaill was not supported by the claimants' expert, the claim against them would most likely to withdrawn.
- The claimants filed a copy of their expert's report without indicating they had any further advice or report from their expert.
- A further case conference was convened and the Council noted that the claimants' expert report neither clarified the details of the claim being made against it nor in fact supported a claim against it. The claimants' counsel agreed to file a further report or brief from their expert. They were accordingly directed to do so.
- Mr Rainey then filed a memorandum submitting that there was adequate information in the report already filed and refused to provide the further information directed.
- In Procedural Order 5 I recorded that I rejected this submission and stated that unless further evidence was filed supporting the claim against the Council and Mr Kaill, they would most likely be removed. I then provided further time for the claimants to file further information from Maynard Marks as well as further particulars of their claim.

- The claimants did not file any further expert evidence but amended their claim to contain new particulars which were not supported by the expert evidence they had filed. Mr Rainey filed another memorandum in which he submitted the amended pleadings were sufficient and that any removal should be determined on the basis of the pleadings and there was no requirement to provide any evidence to support those pleadings.
- The Council and Mr Kaill filed their applications for removal.
- The claimants opposed the removals and their counsel filed a memorandum again stating that there was no need for them to produce evidence to support the allegations forming the basis of their opposition, as for the purposes of the removal application I should accept their amended pleadings as correct.
- In Procedural order 7 dated 20 August 2010 I granted the Council and Mr Kaill's applications for removal.
- The claimants filed an appeal against that order which was heard before Ellis J on 8 February 2011.
- By decision dated 15 February 2001 she dismissed the appeal having concluded there was no arguable cause of action against the removed parties. In reaching this conclusion she stated:[1]

> [70] "If there is to be any prospect of hearing and determining such claims in an expeditious and cost-effective way, the Tribunal must be able to perform an active gate-keeping role in terms of both the joinder and removal of parties. If early receipt and assessment of evidence assists it to sort the wheat from the chaff, then I am of the view that the Act not only contemplates but arguably requires that, subject to the requirement of fundamental fairness that is reflected in s112 (2)."

- The claim resumed in the Tribunal and the removed parties asked for a decision on their costs applications.

[11] The claimants submit that costs should not be awarded because they have not acted in bad faith and neither have costs been incurred unnecessarily as a result of pursuing allegations that were without substantial merit. They submit that there was no evidence of bad faith because the claimants have brought their claim on the basis of legal advice and the benefit of independent expert advice. Furthermore they say the claim did have substantial merit because the allegations made by them were based on a report prepared by their expert, Stuart Wilson of Maynard Marks. While one Maynard Marks report was filed with the Tribunal in May 2010 the claimants advise that they have an additional responsibility report that was not filed with the Tribunal or served on the respondent parties because it was prepared for the benefit of the claimants' legal advisors for the purposes of pursing this claim.

[12] It is clear from the summary set out above that the claimants have refused to comply with orders of the Tribunal to file the evidence supporting their claim against Mr Kaill and the Council. This is despite agreeing to provide it. When the weakness of the evidence they had provided was outlined by both the respondents concerned and the Tribunal, they opposes the removal of the Council and Mr Kaill by filing amended pleadings. They only now produce the evidence they say supports the claims being made. This is the same information that they earlier agreed to provide and then refused to provide it even after being ordered to do so.

[13] Refusing to comply with an order of the Tribunal without lawful excuse can amount to an offence under section 115 of the Act. Such behaviour therefore must pass the threshold for finding bad faith.

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[1] *Yun and Phon v Waitakere City Council* HC Auckland CIV-2010-404-5944, Ellis

[14] In reaching this conclusion I note that the claimants' counsel submitted that the claimants brought their claim based on the basis of legal advice and the benefit of the independent expert advice. This is therefore not a case where self represented claimants have pursued a case based on a lay person's understanding of the technical and legal basis of their claim. RaineyLaw has experience in leaky home claims regularly appearing in both the Tribunal and the High Court. They are well aware of the High Court and Court of Appeal decisions on what is required to establish designer liability and the liability of the Council at building consent stage. They are also aware of the need for causative link between the alleged deficiencies and leaks and damage.

[15] The Tribunal is not a pleadings based jurisdiction and rather than formal pleadings it requires claimants to provide the technical evidence supporting their claim. The Chair's directions make it clear that claimants are required to file the technical evidence supporting the claims being made and that this cannot be substituted by formal pleadings. The claimants therefore ought to have been advised by their counsel of the inherent risks in proceeding in the way they did.

[16] In any event I do not consider that the report the claimants have now disclosed does provide any significant substance to the claim against the Council and the designer, particularly when read in conjunction with the other report. Mr Wilson outlines a number of deficiencies in the plans but concludes that as the cladding system was substituted and other variations made from the drawings, the as-built situation is not comparable to the design. He implicitly acknowledges a causative link between the defects and the design could well be lacking. In addition, as in the other report, he confirms that details that were lacking from the plans (which formed the basis of the claim against the Council and Mr Kaill) were provided for in the Harditex technical information.

[17] I therefore conclude that not only do the claimants' actions amount to bad faith, but also their opposition to Mr Kaill and the Council's removal applications was without substantial merit. The weaknesses of the claims being made against the two removed parties were flagged both at the preliminary conference and also at the next conference convened. Despite this the claimants opposed the removals although neither their expert's report nor the assessor's report supported the claims being made. I conclude that as a result costs have been incurred unnecessarily by both the Council and Mr Kaill in progressing their respective applications for removal.

[18] Having concluded the Council and Mr Kaill have established grounds for awarding costs, I must now determine whether it is appropriate to exercise my discretion to award costs. The High Court has inferred that the claimants' actions could be described as "uncooperative and recalcitrant". I agree and accordingly conclude it is appropriate to award costs.

[19] The Act does not provide 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.[2] While I am not 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) I consider it is an appropriate scale to use in these proceedings.

[20] Ms Martin has provided calculations based on 2B of that scale and calculated costs up to the Council's removal in accordance with that scale are $6900.00. Given the nature of Tribunal proceedings I do not think the costs of attending the first conference of producing

[2] *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.

documents are costs that can be concluded to be costs incurred unnecessarily. I accordingly deduct $1570.00 from that amount which is calculated as follows:

- Attendance at one conference 450.00
- Production of documents 1125.00

$1575.00

[21] I do not however consider it appropriate to award additional costs to Mr Kaill for the further submissions filed to support the costs application. It was not necessary to reply to the further experts report filed.

[22] I accordingly make the following costs orders:

I. Kim Youg Phon and Kao Yun to pay Auckland Council the sum of $5325.00 forthwith

II. Kim Youg Phon and Kao Yun to pay Douglas Frank Kaill the sum of $5325.00 forthwith.

DATED this 26th day of April 2011

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P A McConnell
Tribunal Chair