IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-101-000025
[2012] NZWHT AUCKLAND 51

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

Decision: 3 December 2012

COSTS DETERMINATION
Adjudicator: R Pitchforth

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[1] The Tribunal issued a final determination on this claim on 27 August 2012. The claim was only successful as to $2,200.00 for repairs against Mr Hislop and his company Building Approvals and Solutions Ltd. Mr Hislop and his company had previously agreed to undertake these repairs. Building Approvals and Solutions Ltd, Mr Hislop, Mr Peters and Mr Brown now seek costs under s 91 Weathertight Homes Resolution Services Act 2006 (the Act). Costs are awarded to Mr Peters, Mr Hislop and the company for the reasons set out.

[2] Mr McDonald has filed an appeal in relation to the substantive determination. The respondents referred to s 96 of the Act which provides that "an appeal under s 93 does not operate as a stay of the Tribunal's determination unless a District Court Judge.... on application so determines." I accept that submission and proceed to deal with costs accordingly.

ISSUES

[3] The issues are:

i. Did Mr McDonald cause costs to be incurred unnecessarily by either bad faith or allegations without substantial merit?
ii. If so, should I exercise my discretion to award costs?
iii. If so, what costs should be awarded?

COSTS PRINCIPLES

[4] Costs lie where they fall under s 91 unless there was either bad faith or allegations made without substantial merit.

> **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.

[5] In *Trustees Executors Ltd v Wellington City Council* [1] Simon France J stated that there is no need for a gloss to the legislatively struck balance. He identified the competing considerations to be balanced in making costs decisions in this jurisdiction are the need to avoid establishing disincentives to use an important resolution service and the need to avoid allowing a party to cause unnecessary costs to others in pursuing unmeritorious arguments. This approach has been confirmed in *Riveroaks Farm Limited v Holland* [2] and *White v Rodney District Council.*[3]

[6] A party should not be allowed to cause unnecessary costs by pursuing arguments that lack substantial merit or making allegations which they know they cannot establish.[4] Such acts may amount to bad faith. Bad faith depends on the circumstances and the conduct which ranges from the dishonest to the disregard

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[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008 at [66] and [67].
[2] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011 at [4], [5], [9].
[3] *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 19 November 2009 at [83].
[4] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

of the legislative intent.[5] It includes causing unnecessary delays or repeated failure to provide documents in contravention of Tribunal orders.[6]

DID MR MCDONALD CAUSE COSTS TO BE INCURRED UNNECESSARILY EITHER BY BAD FAITH OR ALLEGATIONS WITHOUT SUBSTANTIAL MERIT?

[7] When seeking costs, the respondents established the following instances of bad faith or claims made that were without substantial merit:

- Much of the claim pursued by Mr McDonald was for damage that was covered by the prior settlement which included a no further claims agreement. That part of the claim was without substantial merit.

- In relation to a second settled dispute, Mr McDonald unnecessarily retained Mr Scott as a party until the start of the hearing. That claim was also without substantial merit.

- Mr McDonald manufactured evidence including creating a false invoice for work for the purposes of his claim. Such actions are an act of bad faith.

- Mr McDonald inflated the amount claimed. Firstly he got the assessor to increase the extent and cost of the proposed remedial work to include work which had been part of the settlement. Secondly he increased the claim from $112,149 estimated by the assessor to $151,548 on the basis of inflation in the intervening period. During the course of the hearing he reduced the amount sought to $60,192. Those were acts of bad faith and the corresponding claims were without substantial merit.

- Mr McDonald refused Messrs Peters and Hislop's offer to arrange remedial work intended to reduce any ongoing damage and limit the cost of remediation. That was an act of bad faith.

- Mr McDonald delayed proceeding with the claim. Mr McDonald first filed a claim in late 2003 and settled some issues in 2004. In November 2007 Mr McDonald applied for an addendum report and advised the respondents

[5] *Brichris Holdings Limited v Auckland City Council* [2012] NZWHT Auckland 7.

that he was proceeding with this claim. The addendum report was received in April 2008 and the application for adjudication was made in May 2009. When discussing settlement and refusing to consider offers he said that he knew about limitation issues and could decide to do nothing and wait eight years before proceeding further. That was an act of bad faith.

- Mr McDonald frustrated attempts to conduct inspections and prepare for mediation. Messrs Peters, Hislop and Brown briefly inspected the property and requested an opportunity to conduct testing. From 2004 to 2011 Mr McDonald declined to allow testing on the grounds that the tests and reports would only serve to minimise the respondents' liability. The respondents subsequently sought and received an order that testing take place. The terms of the order were by consent. However the claimant refused to allow the assembled experts and parties access to the property. This frustrated a scheduled mediation. That was an act of bad faith.

- Mr McDonald refused to accept reasonable settlement offers. In 2006 Messrs Peters, Hislop and Building Approvals offered (without prejudice and subject to costs) the sum of $30,000.00 and the provision of interim remedial repairs to mitigate any further damage in full and final settlement. Mr McDonald refused the offer on grounds which included that the sum offered was inadequate, that the respondents required an indemnity against further claims and that Mr Hislop's insurers were not involved. Mr McDonald declined to make a counter offer or discuss painting issues. Between 2006 and 2011 the same respondents made a series of offers from $50,000.00 to $68,000.00. All offers and counter offers were rejected. The 1 November 2011 offer of $68,000.00 exceeded the amount which was finally claimed.

- Mr McDonald feigned lack of building knowledge when dealing with the respondents. The evidence showed otherwise. That was an act of bad faith.

- Mr McDonald failed to carry out agreed work. The earlier settlement included work to be done by the claimant. If the work had been done the

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[6] *Clearwater Cove Apartments Body Corporate No 170989 v Auckland Council* [2012] NZWHT

sources of leaks noted by the assessor would have been fewer. The work was not done and the settlement terms were not disclosed to the assessor. That was an act of bad faith.

[8] Many of Mr McDonald's actions required the respondents to prepare for issues which were not properly in dispute, obtain extra evidence or to take unnecessary advice.

[9] Any one of the above actions may have been sufficient to justify awarding costs but the effects of the accumulated instances demonstrate an attitude on the part of Mr McDonald which amounts to bad faith. In particular I note that Mr McDonald refused to comply with an order of the Tribunal to allow inspection and testing although the terms of that order were agreed to by his counsel. In *Phon* [7] the Tribunal stated that refusal to comply with an order of the Tribunal without lawful excuse passes the threshold for finding bad faith.

[10] In addition the claimant proceeded with significant aspects of the claim which had no substantial merit. He recognised this himself during the course of the hearing by reducing the amount claimed by approximately 60%. I accordingly conclude that Mr McDonald made allegations that were without substantial merit and that aspects of the way he progressed the claim amount to bad faith.

Unnecessary expense

[11] Mr McDonald submitted that even if bad faith or allegations without substantial merit are established there is no evidence that unnecessary costs were incurred as a result. However it is clear from the various submissions and memoranda filed during the course of the proceedings and the procedural orders issued that the respondents were put to considerable time and expense in addressing the various issues outlined in paragraph [7].

[12] If the settlements had been adhered to and not made part of the claim the respondents would have been spared the expense of defending such claims. That cost was unnecessary.

Auckland 35.

[13] If the Tribunal's orders had been obeyed the respondents would have been saved the costs of fruitless attempts to inspect the property and conduct testing.

[14] If Mr Scott's removal had been consented to earlier the other parties would not have had to prepare unnecessarily for the issues related Mr Scott's involvement.

[15] If Mr McDonald had accepted the settlement offer made in November 2011 the costs involved in preparing for and attending the hearing would not have been required. If Mr Scott had not been retained as a party, if evidence had not been manufactured needing rebuttal evidence, if the quantum had not been inflated, if remedial work and inspections had been allowed, and the proceedings conducted more expeditiously the respondents would not have been put to unnecessary expense.

[16] The processes of the Tribunal were frustrated by the claimant's behaviour and this added to the legal and expert witness' cost incurred by the parties. I therefore conclude that claims made by Mr McDonald and the way he conducted the claim did incur unnecessary costs for the respondents

SHOULD I EXERCISE MY DISCRETION TO AWARD COSTS?

[17] Having found that some of the respondents have incurred costs unnecessarily, because of allegations made against them that were without substantial merit or though bad faith, I need to determine whether I should exercise my discretion to award costs. Simon France J, in *Trustees Executors Limited v Wellington City Council*[8] considered that meeting the threshold test of no substantial merit went a considerable distance to successfully obtaining costs. He considered an important issue was whether the person against whom costs were sought should have known about the weakness of their case and still pursued the allegations.

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[7] Above n 5.
[8] Above n 1.

[18] I consider this is a case where Mr McDonald should have known about the weaknesses of the case he was putting forward. He was fully aware of the terms and conditions of the early settlement and also knew he could not establish the quantum initially claimed. In addition it is appropriate to award costs given the nature and extent of Mr McDonald's bad faith in the way he progressed this claim.

WHAT COSTS SHOULD BE AWARDED?

[19] The respondents seek indemnity costs from Mr McDonald. The Act does not provide guidance for the Tribunal on calculating quantum when awarding costs but it has applied the District Court scale as a guide and this approach was upheld by the High Court.[9] In other cases the High Court scale has been applied and the High Court Rules used for guidance, particularly where indemnity costs are sought.

[20] Rule 14.6.4 provides that indemnity costs can be awarded if:

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party ; or
>
> .....
>
> (g) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[21] The threshold to be met for an order for indemnity costs is a high one – *Paper Reclaim Ltd v Aotearoa International Ltd*.[10] In *Bradbury v Westpac Banking Corporation*[11] the Court of Appeal endorsed *Hedley v Kiwi Co-Operative Dairies Limited* where Goddard J adopted Sheppard J's summary in *Colgate v Cussons*. Whilst recognising that the categories in respect of which the discretion may be exercised are not closed (see r 14.6(4)(f)), the Court listed the following circumstances in which indemnity costs have been ordered:

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[9] Above n 1 and n4.
[10] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188; (2006) 11 TCLR 544 (CA).

(a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
(b) particular misconduct that causes loss of time to the court and to other parties;
(c) commencing or continuing proceedings for some ulterior motive;
(d) doing so in wilful disregard of known facts or clearly established law;
(e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions.

[22] In *Bradbury* at [204], the court found that costs are reasonably incurred if a reasonable observer would expect those costs for such litigation. They are calculated, not from the costs rules, but from a "reasonable allocation of actual costs", based on the appropriate time taken, the significance and complexity of the category of work, and a median hourly rate reasonably applicable.

[23] In view of the conduct referred to above and the *Bradbury* tests I find that Mr McDonald has behaved badly and very unreasonably and conclude it is appropriate to award indemnity costs. Accordingly the actual costs are to be borne in mind when setting quantum.

Mr Peters

[24] Mr Peters incurred costs totalling $46,448.77 including:
(a) $4,665.28 from the August 2004 application to December 2008.
(b) $22,371.49 from May 2009 to 21 December 2009.
(c) $19,412.00 from April 2011 to the completion of the hearing.

[25] Mr McDonald says that the first claimed sum relates to legal advice before an application for adjudication was filed in May 2009. The respondents however say that the claim had been on foot since August 2004 when an application was made under the 2002 Act. Under that Act mediation was undertaken before filing for adjudication so the whole process was part of the proceedings. The filing for adjudication in 2009 was but yet another step.

[11] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.

[26] Adjudication is defined in s 8 as 'an adjudication initiated by a claimant under s 62....' In these circumstances my jurisdiction under s 91 is restricted to the time from which the application was filed with the Tribunal. Mr Peters conceded that if this is the case then his claim is reduced to $41,783.49. He noted that the scale of costs in the District Court, taking into account the starting date of the adjudication, would have been $32,250.00.

[27] Mr Peters would have had to bear his own costs if the claim had proceeded in the ordinary way. Until the claim was filed and the early preliminary procedural matters dealt with the cost was not extraordinary nor was the level of costs increased by bad faith or allegations made without substantial merit. In the early stages of the proceedings there were no apparent unnecessary or additional costs incurred through Mr McDonald's behaviour. This would justify a reduction from the actual expenses to recognise the work in this early phase. Looking at the invoices this is about $10,000.00.

[28] Accordingly I award Mr Peters the amount of $29,083.49 inclusive of GST being the sum of $39,083.49 less the assessed value of the work for the early part of the claim.

Mr Hislop and Building Approvals and Solutions Limited

[29] Mr Hislop and his company sought actual legal costs of $9,338.37. The District Court Scale is in excess of actual costs and would have amounted to $26,624.00.

[30] I accept that the arguments set out above apply to Mr Hislop and his company and that with the exception of the fees incurred before the adjudication commenced the others must be considered.

[31] Mr McDonald said that the invoice from Hunter Ralfe was dated before the commencement of proceedings in May 2009 and so I have no jurisdiction to award that amount. I accept that submission. The costs remaining in the claim are:

Paul Genet – lawyer	$7,500.00
Beagle Consultancy Ltd	$ 431.25

Mr Langham (expert witness)	$6,906.56
Total	**$14,087.81**

[32] The first part of Mr Genet's bill relates to the cost of dealing with the application and, as in Mr Peter's situation, would have been incurred in a normal claim. Accordingly it is reduced to $3750.00. The other claims are reasonable given the situation outlined above. Mr Hislop and Building Approvals and Solutions Limited are therefore awarded $11,087.81 inclusive of GST.

Mr Brown's claims

[33] Mr Neill Brown's claim for costs was for legal fees of $8,887.97.

[34] In connection with Mr Brown's claim Mr McDonald said that he had not alleged the grounds for claiming costs and therefore the Tribunal does not have jurisdiction to award costs in favour of Mr Brown. He further referred to the claim for costs made by the Nelson City Council which was declined in similar circumstances.

[35] Mr Brown is now unrepresented and given the processes of the Tribunal I am prepared to infer that if he had known that he had to make that allegation he would have done so.

[36] Mr McDonald also submitted that the details of the invoices show that Mr Brown's solicitor's costs were unremarkable for anyone who is presented with a weathertight claim. Accordingly, there was no extra cost which would be the result of bad faith.

[37] I accept that at the time he was taking legal advice Mr Brown would have had no knowledge of the bad faith issues discussed above. There were plastering issues outlined in the assessor's report. Although the claim was not successful there is nothing to show that Mr Brown was put to unnecessary expense. He was not represented in the later stages of the process. Mr Brown's claim for costs is declined.

CONCLUSION AND ORDERS

[38] Gregory John McDonald is ordered to pay costs forthwith as follows:

i. To Timothy Peters the sum of $ 29,083.49.

ii. To Building Approvals and Solutions Limited and Mike Hislop (jointly) the sum of $11,087.81 however any amount still owed to Mr McDonald under the final determination should be deducted from this sum.

DATED the 3rd day of December 2012.

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Roger Pitchforth
Tribunal Member