IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2009-100-000008
[2010] NZWHT AUCKLAND 23

BETWEEN	**JAMES HOLLAND, ALAN IVORY and YVONNE VAN DONGEN as Trustees of the HARBOURVIEW TRUST** Claimant
AND	**AUCKLAND CITY COUNCIL** First Respondent
AND	**L REEVE CONSTRUCTION LIMITED (in Liquidation)** (Removed) Second Respondent
AND	**LLOYD FREDERICK REEVE** (Bankrupt therefore removed) Third Respondent
AND	**LAUREEN EDITH REEVE** Fourth Respondent
AND	**MAX GRANT ARCHITECTS LIMITED** Fifth Respondent
AND	**ALAN MAXWELL GRANT** Sixth Respondent
AND	**DAY CONSULTANTS LIMITED** (Removed) Seventh Respondent
AND	**TONY GRAHAM DAY** (Removed) Eighth Respondent
AND	**REGAN FROST** (Removed) Ninth Respondent
AND	**REGENCY PLUMBING LIMITED** (Removed) Tenth Respondent
AND	**CRAIG GORDON** (Removed) Eleventh Respondent
AND	**MARK PAINTON** Twelfth Respondent
AND	**ELDON ARCHER** (Removed) Thirteenth Respondent

DECISION ON COSTS - QUANTUM
Adjudicator: P A McConnell

---

[1] Judge Joyce allowed the appeal against the decision not to award costs. He concluded that Alan Maxwell Grant and Max Grant Architects Limited (Max Grant) have satisfied the requirements of s91(1)(b) of the Weathertight Homes Resolution Services Act 2006 and that there was no good reason to deny them an appropriate award of costs. Judge Joyce however concluded that the Tribunal was in the first instance better placed to fix quantum than was the District Court and accordingly referred the quantum of costs back to the Tribunal for determination. Judge Joyce further noted that when it dealt with the issue of quantum the Tribunal should also deal with any pursued apportionment inter se issues as between the first respondents (the claimants in the Tribunal) and the second respondent, the Auckland Council.

[2] Counsel for Max Grant advised the Tribunal that he did not wish to make any further submissions as he believed the information already before the Tribunal was sufficient for a decision to be made on the appropriate quantum. The claimant trust (Harbourview) and the Council have filed submissions as to whether or not it is appropriate for any costs to be apportioned between them.

[3] In concluding that costs had been incurred unnecessarily by arguments that lack substantial merit Judge Joyce noted that the claimants had been put on notice of what was required in the Procedural Order dismissing the application for removal. Judge Joyce's opinion was that the claimants had failed to come up with any evidence that might have met the needs identified by the Tribunal in paragraph 15 of Procedural Order No 5 issued on 15 June 2009.

[4] I do not consider the initial allegations made were unreasonable or incurred unnecessary costs. The early part of the Tribunal proceedings were largely an attempt to obtain further information about how the dwelling was built, the parties involved and

the nature of their engagement. Costs are however appropriately awarded from 15 June 2009 being the date the Tribunal dismissed the removal application. At that stage the claimants, and also the Council had been put on notice of what needed to be established in order to sheet any liability home to Max Grant. They however proceeded to hearing without any persuasive evidence that would help to meet the appropriate test.

[5] The Act provides little 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.[1] I am not however 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.

[6] Given the quantum of the claim and the complexity of the issues I consider category 2B of the High Court scale to be the more appropriate basis for calculating costs. The allocation of days is as follows:

	No. of Days
Appearances at case conferences (4 x .3)	1.20
Memorandums filed (2 x .4)	.80
Preparation of witness briefs	2.00
Preparation of authorities and documents etc	2.00
Preparation for hearing	6.00
Appearances at hearing	3.00
Application for costs and reply	1.00
Total number of days	**16 days**

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008, and *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 19 November 2009,

[7] 16 days at $1880.00 per day amounts to $30,080. Experts costs incurred should be added to this amount. The total of the experts' costs in relation to both Clint Smith and Marshall Cook appear to have been incurred after 15 June 2009. These costs total $22,735.58. Costs awarded therefore total $52,815.58.

SHOULD COSTS BE APPORTIONED BETWEEN HARBOURVIEW AND THE COUNCIL?

[8] Counsel for Harbourview submits that the Tribunal should order that any costs awarded against it should be divided equally between the trust and the Council. He submits the Council prosecuted the case against Max Grant throughout the proceedings. The Council vigorously opposed the application for removal and also produced its own evidence and submissions in an endeavour to prove the liability of Max Grant. They were active participants in the claim against Max Grant.

[9] The Council opposes any award of costs being made against it. It submits that the costs application by Max Grant was against the claimants only and not against the Council. It says that it did not make allegations that were without substantial merit by merely repeating the claimants' allegations.

[10] The Council further says that it was only defending its position which included reflecting the alleged deficiencies in the plans being made against it in terms of building consent onto the architect. It says it did not call substantive evidence of negligence by the architect. It further says that the claimants ran the positive case against the architect and that any role the Council took did not put the architect to any more expense in defending the claim and there is no evidence that the involvement of the Council increased these costs.

[11] I do not accept the Council's allegation that it was not pursuing the architect in any meaningful sense. The Council both actively opposed the removal applications and pursued the claim against Max Grant before and during the hearing. I accept that the Council did not call an architect to give expert evidence but Mr Rankine, the expert engaged by the Council, gave a significant amount of evidence on what he perceived to be deficiencies in the plans.

[12] There is more merit in the Council's argument that in pursuing the claim against the architects it did not significantly increase the costs incurred by them. However both the Trust and the Council actually pursued the claim against Max Grant. Max Grant must inevitably have incurred costs in defending the allegations made against them by Mr Rankine and also in replying to the submissions and questions of the Council's counsel.

[13] In the circumstances therefore I consider that the claimant should pay 80% of the costs awarded and the Council 20%.

[14] I accordingly make the following orders:

- James Holland, Alan Ivory, and Yvonne van Dongen are to pay Max Grant Architects Limited and Alan Maxwell Grant the sum of $42,252.46.
- Auckland Council is to pay Max Grant Architects Limited and Alan Maxwell Grant the sum of $10,563.12.

DATED this 26th day of April 2011

____

P A McConnell

Tribunal Chair