IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000106
[2011] NZWHT AUCKLAND 1

BETWEEN	CHONG HUNG MOK and SHUI HA HO Claimants
AND	BLAKE BOYD First Respondent (Nicola Boyd removed)
AND	CRAIG TIBBITS Second Respondent
AND	ALAN BOLDERSON Third Respondent
AND	MICHAEL GREGORY MAY Fourth Respondent

DECISION ON COSTS
Adjudicator: S Pezaro
18 January 2011

APPLICATIONS FOR COSTS

[1] Craig Tibbits, the second respondent, seeks an award of costs against Blake Boyd, the first respondent. Alan Bolderson, the third respondent, and Michael May, the fourth respondent, apply for an order of costs against the claimants. These costs applications follow the determination of the claim by Chong Hung Mok and Shui Ha Ho, issued 8 October 2010, dismissing the claims against Craig Tibbits, Alan Bolderson and Michael May.

Jurisdiction

[2] 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**
>
> (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.

[3] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. The onus is on the party applying for costs to prove its claim.

[4] In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J observed that meeting a threshold test of no substantial merit "must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still discretion to be exercised".[2] His Honour considered that the important issues were whether the appellants should have known about the weakness of their case and whether they pursued litigation in defiance of common sense.[3]

Craig Tibbits

[5] Craig Tibbits claims an award of costs against Blake Boyd, the first respondent, who was found liable to the claimants as the project manager and/or developer of the property. It is submitted that Mr Tibbits is entitled to costs under both grounds of s 91(1) because Mr Boyd's allegations and objections to Mr Tibbits' removal were clearly without merit and the Tribunal's findings establish that Mr Boyd gave false evidence in his affidavit of 14 May 2010 and at hearing. Mr Tibbits has not claimed costs against the claimants as he accepts that they had no personal knowledge of who was responsible for the construction defects on the property and were dependant on Mr Boyd's identification of the relevant parties.

[6] It is relevant to Mr Tibbits' costs application that he applied for removal on 26 January 2010, before the first conference was convened on this claim and before he incurred legal costs. In his removal application Mr Tibbits set out the details of his involvement in the construction and he produced relevant documents and a supporting statement by one of his witnesses, Paul Davies.

[7] After Mr Boyd opposed Mr Tibbits' removal application on 24 March 2010, Mr Tibbits engaged counsel and a further timetable was

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008.
[2] At [51] per France Simon J.
[3] At [52] per France Simon J.

set for submissions on this removal application. Mr Boyd then filed his affidavit of 14 May 2010 deposing that Mr Tibbits was the builder responsible for virtually all the defects. On the basis of this affidavit I concluded that there was a material factual dispute on the extent of Mr Tibbits' involvement in the construction and declined Mr Tibbits' removal application.

[8] However, at adjudication Mr Boyd neither cross-examined Mr Tibbits' witnesses who gave evidence of the work that Mr Tibbits carried out nor challenged Mr Tibbits' expert witness, Andrew Gray, who gave evidence on the potential for any work carried out by Mr Tibbits to cause weathertightness defects.[4]

[9] Mr Boyd accepted that Mr Tibbits was a labour-only builder but alleged that Mr Tibbits installed the joinery which caused weathertightness defects and at adjudication Mr Boyd extended this allegation to include the installation of the battens.[5] However, Mr Boyd failed to produce any evidence to support these allegations. Although Mr Boyd produced invoices and delivery dockets for various materials to support his submissions on the dates on which Mr Tibbits was on site, Mr Boyd did not produce the invoices for the joinery. Mr Boyd therefore had no documentary evidence to counter the evidence of Mr Tibbits and his witnesses that the joinery was installed during the Christmas break when Mr Tibbits was not on site.

Mr Boyd's Opposition

[10] Mr Boyd submits that he has acted in good faith throughout the process by providing the information that he was bound to discover and by meeting the claimants and offering them a settlement. Mr Boyd states that he has maintained in his evidence and his affidavit that Mr Tibbits was employed as a labour-only builder and not a head-contractor.

[4] *Mok and Ho v Boyd & Ors* [2010] NZWHT AUCKLAND 29 at [56].
[5] *Mok and Ho v Boyd & Ors* [2010] NZWHT AUCKLAND 29 at [68].

[11] In his submissions in opposition to this costs application, Mr Boyd stated that he was not in a fit state to cross-examine Mr Tibbits' witnesses during the adjudication due to a heavy medication that he was on following shoulder surgery. Mr Boyd did not raise this as an issue during proceedings and has not provided any medical evidence in support. When Mr Boyd gave evidence at adjudication he had his arm in a sling or plaster and I arranged for the registrar to assist him to find documents in the common bundle. Mr Boyd gave his oral evidence without any apparent difficulty and did not indicate that his ability to do so was compromised in any way. Even if it had been, Mr Boyd was required to produce all his evidence in advance of the hearing and had seen all the evidence for Mr Tibbits. I conclude that Mr Boyd should have been aware once he had seen the evidence in support of Mr Tibbits' removal application that he had no counter to that evidence.

[12] However in his opposition to Mr Tibbits' removal dated 24 March 2010 it was submitted for Mr Boyd that Mr Tibbits was engaged to build the house without supervision albeit on a labour-only basis and in accordance with the Building Code. It was also submitted that it was Mr Tibbits who engaged the assistant builder.

Conclusion

[13] Mr Tibbits has remained in these proceedings since 14 May 2010 due to Mr Boyd's objections to his removal and I am satisfied that those objections and allegations were without merit. I reach this conclusion as a result of Mr Boyd's failure to provide any evidential basis for his challenge to Mr Tibbits' evidence, most of which had been adduced in support of Mr Tibbits' removal application.

[14] I conclude that Mr Boyd is liable for an award of costs as he pursued his allegations against Mr Tibbits when they lacked substantial merit. It is not necessary for the Tribunal to find that both

grounds of section 91(1) have been made out in order to grant Mr Tibbits' application for costs. However I am satisfied that the threshold of bad faith is met in this case because Mr Boyd, knowing that his evidence was relied on by the claimants, maintained his opposition to Mr Tibbits' removal when he must have known that he could not produce evidence to establish his allegations. In doing so, Mr Boyd must have been aware that Mr Tibbits would incur significant costs in defending the claim. Mr Tibbits' costs include his expert's report in July 2010 and the expert's appearance at adjudication which was justified in these circumstances.

[15] Mr Boyd has not questioned the amount of costs claimed by Mr Tibbits. The Act provides little guidance on setting an award of costs however I have applied the High Court scale as a guideline and, as the costs claimed are less, I conclude that they are reasonable. I therefore order Blake William Boyd to pay Craig Tibbits the sum of $19,297.74 being the total of the invoices rendered by Mr Kohler, his instructing solicitor and Origin Building Consultants Limited.

Alan Richard Bolderson

[16] Mr Bolderson applies for costs on two grounds. The first ground is that the claimants' allegations against him substantially lacked merit and that the claimants were never in a position to prove that Mr Bolderson's report failed to meet the required standard because the claimants' expert, Nick Dibley, was not qualified as an expert in this area. The second ground is that Mr Bolderson made an offer of settlement which it would have been reasonable for the claimants to accept. As the offer of settlement was not made in writing and was made on a without prejudice basis it did not have the status of a Calderbank letter. For these reasons I do not consider that the offer made by Mr Bolderson justifies an award of costs and this ground fails. The remaining issue is whether the claim was without substantial merit.

Claimants' Opposition

[17] The claimants oppose this costs application on the basis that "the threshold of without substantial merit" is not necessarily met when a claim is unsuccessful and that, if a claim is supported by tenable evidence, costs should not be awarded simply because the claim failed at hearing. It is submitted that although the evidence of Mr Bolderson's expert was preferred to that of Mr Dibley, it does not necessarily follow that the claim against Mr Bolderson was without substantial merit.

Conclusion

[18] The relevant question for this costs application is whether it was reasonable for the claimants to rely on Mr Dibley's evidence for their claim against Mr Bolderson. Mr Dibley has no experience in conducting pre-purchase inspections and was not in New Zealand at the relevant time. In his brief Mr Dibley expressed his opinion of the standard of inspection which could be expected at the time as an 'assumption' which he based on press cuttings from BRANZ and the NZ Herald. It should have been apparent to the claimants that they needed to support their claim against Mr Bolderson by adducing evidence from a suitably qualified expert. By failing to do so they had no reliable evidence to support their claim against Mr Bolderson. I conclude that as they proceeded with their claim without reliable evidence, they pursued a claim that lacked substantial merit.

[19] I find therefore that an award of costs against the claimants in favour of Alan Bolderson on a s91(1)(b) basis is justified. The claimants have not challenged the basis on which Mr Bolderson's costs and disbursements are calculated and I am satisfied that Mr Bolderson's decision to engage an expert was justified in the context of this claim and that his legal costs are reasonable as they are lower than the High Court scale. I therefore order the claimants to pay Alan Bolderson the sum of $53,342.51.

Michael Gregory May

[20] Michael May applies for costs under s 91(1)(b) of the Act on the basis that the claimants caused him to incur legal costs and expenses unnecessarily by pursuing allegations that were without substantial merit. At hearing counsel for the claimants did not cross examine Mr May to challenge his evidence and, after the hearing had ended and closing submissions were delivered, counsel for the claimants advised the Tribunal that they withdrew their claim against Mr May.

[21] The claimants named Michael Gregory May as the fourth respondent when they filed their claim in the Tribunal. In July 2010, prior to instructing counsel, Mr May advised the claimants and their legal advisors and the other parties that the plastering work was undertaken by May Plastering Limited (in liquidation) and that Mr May had no personal involvement in the work which had been sub contracted to another plastering company by May Plastering Limited. On 2 August 2010 Mr May filed a Statement of Defence and a Brief of Evidence confirming these details.

Claimants' Opposition

[22] The claimants submit that they had expert evidence that the plastering work was negligently performed and that an email from Nicola Boyd dated 4 April 2007 constituted credible evidence that Mr May was involved in the plastering work. The claimants should have realised, particularly as they were legally represented, that it was not reasonable to rely on this email once Mr May filed his affidavit in July 2010 unless they could adduce credible evidence to support their allegations. Not only did the claimants fail to produce such evidence but they pursued their claim to adjudication, only withdrawing it after the substantive proceedings had concluded. This belated acceptance that their claim lacked merit was of no benefit to Mr May

who had justifiably incurred the costs of legal representation by this stage.

[23] While the claimants dispute liability for the full costs claimed by Mr May, I am satisfied on the basis of the memorandum dated 26 November 2010 from Mr Stewart, counsel for Mr May, that the costs claimed are reasonable. I therefore order the claimants to pay Michael Gregory May the sum of $9,908.63 immediately.

ORDERS

[24] Blake Boyd is to pay Craig Tibbits the sum of $19,297.74 immediately.

[25] Chong Hung Mok and Shui Ha Ho are to pay Alan Bolderson the sum of $53,342.51 immediately.

[26] Chong Hung Mok and Shui Ha Ho are to pay Michael May the sum of $9,908.63 immediately.

DATED this 18th day of January 2011

S. Pezaro
Tribunal Member