IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-101-000012
[2011] NZWHT AUCKLAND 17

BETWEEN	DAVID LINDSAY CAMERON, BRENDA MURIEL CAMERON and GEOFFREY HEWIT MYLES as Trustees of the NORMAC TRUST Claimants
AND	DAVID LAWRENCE STEVENSON First Respondent
AND	CHRISTOPHER JOHN CHOTE Second Respondent
AND	BMW PLUMBING LIMITED Third Respondent
AND	CARTER HOLT HARVEY LIMITED (Removed) Fourth Respondent
AND	BRIAN MUSSON (Removed) Fifth Respondent

Decision: 25 March 2011

COSTS DETERMINATION
Adjudicator: P A McConnell

APPLICATION FOR COST BY BMW PLUMBING LIMITED

[1] BMW Plumbing Limited (BMW) has applied for costs against the claimants. It submits the claim originally made against it was for the full costs of the remedial work and consequential and general damages. At that time there were ten alleged deficiencies in BMW's work. An amended claim was filed in June 2010, with one specific allegation against BMW which related to the relief pipe for the hot water cylinder. It however referenced Mr Linwood's affidavit in Schedule A which listed a large number of defects. In addition allegations in relation to other aspects of plumbing work carried out by BMW were still live issues.

[2] In the claimants opening submissions there were four specific items alleged against BMW but in the course of the hearing they withdrew three of these items and confirmed the claim against BMW was limited to the relief pipe from the hot water cylinder. BMW submits that none of the other allegations against it were supported by evidence at the hearing and no witness was called by the claimant to prove that BMW supplied or installed roof fittings. In addition other claims in relation to plumbing work were withdrawn when it became clear there was no evidence that they were weathertightness related. Mr Linwood, the claimants' expert, confirmed at hearing he was not an expert in the installation of relief pipes and could not give expert evidence on how it should have been installed. BMW accordingly submits the claimants brought no reliable evidence to the Tribunal to support the claims against it and therefore costs should be awarded.

[3] BMW's solicitor advises that the costs incurred since the High Court appeal amounted to $17,915.88. Using 2B of the District Court scale he submits BMW is entitled to costs of $12,972.00.

[4] The claimants oppose the application as they consider BMW should bear its own costs. They say that the second amended statement of claim on 23 June 2010 made it clear that the allegation

against BMW was clearly limited to a single item. They say BMW misinterpreted the amended statement of claim which was limited to the one single defect concerning the relief pipe. In relation to this defect the claimants say they were entitled to rely on their own expert's assessment that the relief pipe was not adequately supported. They therefore claim that there is no issue of bad faith or costs incurred unnecessarily by allegations that are without substantial merit. In any event they submit that if BMW is entitled to costs they have miscalculated the amounts claimable under the District Court Rules and that the amount will be $9,364.00.

[5] 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—
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> (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.

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. Bad faith is not being alleged in this case.

[6] 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.

[7] The onus is however on the party applying for costs to demonstrate that costs were incurred unnecessarily by allegations or objections by the claimants that were without substantial merit. Once that onus is met I then have a discretion as to whether to award costs.

[8] Underlying section 91 is the principle that a party should not be allowed to cause unnecessary costs to others through 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. There needs to be the ability to award costs against claimants and respondents who join other parties to cases based on allegations which they should reasonably know they cannot establish.

[9] Where allegations are made against a party which have little evidential support, costs can and in many cases will be awarded. However, I accept that costs in pursuing or defending aspects of claims should not be considered as being incurred unnecessarily where there are genuinely disputed issues of fact and law if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

[1] *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.

[10] When considering section 91 of the Act the Court in *Max Grant Architects Limited v Holland & Ors*[2] concluded that where a claimant fails to offer evidence that was necessary at a substantive hearing to establish a claim against a party then this could come under the "substantial merit" rubric.

[11] I accept BMW's submission that there was no reliable evidence presented on which I could conclude that BMW was negligent in relation to the installation of the hot water cylinder relief valve. The assessor's report put this down to a maintenance issue. Mr Linwood put it down to defective installation but when I questioned him as to what should have been done he advised he was he was not an expert on this matter and did not know how it should have been fixed other than it should have been fixed differently. His evidence that the stay was no.8 wire was also incorrect. Given Mr Linwood's lack of expertise on this key issue the progression to hearing against BMW based purely on his evidence was at best risky.

[12] I further note that this issue resulted in only minimal damage with remedial costs of under $5,000. In addition the claimants' opening submissions make it clear that they were at that stage still proceeding with claims in relation to the supply of the roof flashings, for which they produced no evidence, and other issues which they should reasonably have known were not weathertightness issues. BMW were therefore put to the expense of preparing for and attending a hearing for a claim which by the end of the hearing was only for a few thousand dollars.

[13] I accordingly conclude that BMW has incurred costs unnecessarily by the claimants proceeding with allegations against it that were without substantial merit.

[2] DC Auckland, CIV-2010-004-662, 15 February 2011, Joyce QC.

[14] Having concluded that costs were incurred unnecessarily I must now consider whether it is appropriate to exercise the discretion available to me to make a costs award. This is not the case where evidence needed to be tested or where there was a conflict in people's recollection. This is a case where the claimants have preceded to a hearing against one party where they had either no evidence or no reliable expert evidence against BMW.

[15] The claimants' submission that the claim against BMW had been narrowed to one point prior to the commencement of the hearing is not supported by their counsel's opening submissions. Whilst the claim in relation to flashings was not pursed the claim in relation to the sewer pipe level was pursued until towards the end of the experts' evidence. It was also unclear even at the commencement of the hearing what quantum was sought against BMW. I questioned the claimants' counsel on this issue at the pre-hearing conference and the answers given were unclear. I also was left with some doubt as to whether the cost of rectifying isolated defects only was being sought or a much greater sum.

[16] It is likely that if the claimants had been clear in the quantum of the claim they were seeking from BMW the claim against it would have been settled by a without prejudice payment well in advance of the hearing. Any confusion that arose is not however solely the responsibility of the claimants. Counsel for BMW would have been in a position to seek further clarity in advance of the hearing or to alternatively apply to be removed once evidence had been filed.

[17] In the circumstances of this case I consider it is appropriate to exercise my discretion in favour of awarding costs. However I calculate the amount based on 50% of the 2B District Court scale allowed for preparation for the hearing and pre hearing events of $3172 and the full scale amount for the hearing plus disbursements of $3020. There was some confusion as to the extent of the work carried out by BMW even after the appeal hearing. In addition BMW

could have done more to clarify the confusion as to the quantum and extent of the claims being made against it. The claimants, David Lindsay Cameron, Brenda Muriel Cameron and Geoffrey Hewitt Miles are accordingly to pay BMW Plumbing Limited the sum of $6,192.00.

CLAIMANTS' APPLICATION FOR COSTS

[18] The claimants submit that they are entitled to costs against both Mr Chote and Mr Stevenson either because costs were incurred unnecessarily by bad faith or alternatively by objections that were without substantial merit. In particular the claimants submit that the withdrawal of Mr Stevenson and Mr Chote from mediation three working days before it was scheduled amounts to bad faith and furthermore that the first respondent's evidence was filed one and a half weeks late. While both events are regrettable I do not believe either amount to bad faith. In addition the likelihood of this claim settling at mediation, given the events that subsequently transpired, was remote. In these circumstances there is little evidence that any additional costs were incurred by either of the events the claimants allege amounted to bad faith.

[19] The claimants further submit that Mr Stevenson's defence of the claim and his attempts to absolve himself entirely of all liability also amounted to either bad faith or allegations that were lacking in merit. This submission has some merit. The difficulty for the claimants in relation to a costs application is that even if Mr Stevenson had accepted some liability it is likely that the claim would have needed to be heard because a determination would need to be made as to the extent of his liability and the proportionate responsibility of the Council given the concessions made by the claimant when dealing with the application to join the territorial authority. The hearing itself lasted for just over one day. I would assess that the additional time taken to deal with Mr Stevenson's

allegations that were without substantial merit would have been no more than half a day at the hearing.

[20] In relation to Mr Chote I do not consider the claimants have established any bad faith on his part. Nor do I consider that additional costs have been incurred unnecessarily by allegations or defences that he made that were without substantial merit. While he was ultimately unsuccessful his defence was not sufficiently lacking in merit to the extent required to meet the threshold for costs.

[21] Having accepted that there were costs incurred unnecessarily by allegations and defences made that were without substantial merit by Mr Stevenson I must now determine whether it is appropriate to exercise my discretion and award costs. Whilst Mr Stevenson was self-represented at the hearing he did have legal counsel at earlier stages. In any event he should have been aware of the weaknesses of his defence and that many of the allegations he was pursuing defied both standard legal precedent and common sense. In these circumstances costs should be awarded against Mr Stevenson.

[22] I have calculated the costs based on half a day of extra hearing time and one and a half day preparation for hearing on the 2B District Court scale which amounts to $3600.00 as a contribution towards costs. I do not award any experts fees as these were not increased to any great extent by meritless defences raised by Mr Stevenson.

[23] I accordingly make the following orders:

I. David Lindsay Cameron and Brenda Muriel Cameron and Geoffrey Hewitt Myles are to pay BMW Plumbing Limited the sum of $6,192.00.

II. David Lawrence Stevenson is to pay David Lindsay Cameron, Brenda Muriel Cameron and Geoffrey Hewitt Myles the sum of $3600.00.

DATED this 25th day of March 2011

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P A McConnell

Tribunal Chair