IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000005
[2010] NZWHT AUCKLAND 27

BETWEEN	LYALL and LINDA BROWN and ALLIOTT THOMPSON FRANCIS TRUSTEE CO. LIMITED Claimants
AND	JOHN DELLER First Respondent
AND	AUCKLAND CITY COUNCIL Second Respondent
AND	MIKE RUSSELL Third Respondent
AND	JOE KAUKAS Fourth Respondent
AND	DAVID JOHN EDWARD Fifth Respondent
AND	JOHN PILCHER (Removed) Sixth Respondent

Decision: 29 September 2010

COST DETERMINATION
Adjudicator: K D Kilgour

COSTS APPLICATION

[1] Counsel for the sixth respondent, Mr John Pilcher, has applied to this Tribunal seeking an award of costs against the third respondent, Mr Mike Russell.

BACKGROUND

[2] The proceedings were issued by the claimants in 22 January 2010 and the sixth respondent was not then named in these proceedings. On 13 May 2010, counsel for the third respondent applied to join, amongst other parties, Mr Pilcher.

[3] Procedural Order No 3 issued on 19 May 2010 ordered the joinder to the proceeding of Mr Pilcher. Mr Pilcher was a director of Pilchers Waterproofing Limited which was the company involved with the remedial works undertaken at the concerned dwelling in 2004.

[4] On 3 June 2010 Mr Pilcher swore an affidavit explaining his lack of a role as regards the concerned dwelling and this affidavit was in support of Mr Pilcher's application for removal. On 17 June 2010 the third respondent consented to the removal of Mr Pilcher. On 12 July 2010 this Tribunal ordered the removal of Mr Pilcher on the grounds that there was no claim against Mr Pilcher, as his removal was unopposed and that indeed all parties consented to his removal.

THE SIXTH RESPONDENT'S COSTS APPLICATION

[5] Counsel for Mr Pilcher accepts that the jurisdiction of this Tribunal to award costs is very limited (see submissions and application for costs from the sixth respondent dated 6 August 2010). Counsel for Mr Pilcher submits that the Tribunal must nevertheless take into consideration all relevant case law surrounding cost applications. Counsel for Mr Pilcher referred me to the decision of

Simon France J in *Trustees Executives Limited & Ors v Wellington City Council*[1] and the decision of this Tribunal *River Oaks Farm Limited v Olsson & Ors,*[2] which applied the above mentioned High Court decision.

[6] Mr Pilcher's costs application submits that there was no substantial merit supporting the application for joinder for there was absolutely no evidence linking Mr Pilcher in carrying out any work or advisory work in respect of the concerned dwelling and that the best evidence that the third respondent adduced appeared to be a company search simply revealing that Mr Pilcher was once a director of Pilcher Waterproofing Limited.

[7] Counsel for Mr Pilcher submits that the joinder procedure in this Tribunal is not to be used as a process whereby "parties can be joined with the hope that something turns up, that pins them to a role in construction causing water ingress."

[8] The third respondent, Mr Russell, through his counsel filed with this Tribunal on 3 September last submissions opposing the costs application.

[9] The third respondent submits that the joinder of Mr Pilcher arose out of targeted remedial works undertaken at the concerned dwelling in 2004 by Pilchers Waterproofing Limited. The application for joinder submitted that the third respondent had no idea what works were undertaken or who undertook them until the claim was issued and that the claimants did not seek to join the sixth respondent despite the clear issues that arose from Pilchers Waterproofing Limited's works at the concerned dwelling in 2004.

[10] This Tribunal acknowledged in Procedural Order No 3 that counsel for the third respondent "properly states that the respondents

[1] HC Wellington, CIV-2008-485-739, 16 December 2008.

have not been involved with the 2004 remedial works and most of the information involving Mr Edwards and Mr Pilcher was in the possession and control of the claimants. The joinder application therefore has been brought by the third respondent based on information that has been progressively supplied to the respondents by the claimants..."

[11] The third respondent submits that the claimants disclosed documents as part of their claim from which it was apparent that Pilchers Waterproofing Limited had undertaken works on the concerned dwelling, but, such documents were not determinative as to which directors carried out which tasks.

[12] The fifth and sixth respondents filed evidence confirming Pilcher Waterproofing Limited's involvement with the concerned dwelling and discounting the involvement of Mr Pilcher. The third respondent's counsel recites that even the sixth respondent's own counsel accepted that it was only by the provision of the affidavit from Mr Pilcher that established that Mr Pilcher had no personal involvement in the 2004 remedial works. So that it was only once Mr Pilcher's sworn evidence was available it was appropriate for the removal of Mr Pilcher. Counsel for the third respondent submits that the third respondent consented promptly to the removal of Mr Pilcher.

[13] Counsel for Mr Pilcher makes the argument that there was never any basis for liability against Mr Pilcher. Counsel for the third respondent submits however that such a submission misconceives the legal position concerning section 111 of the Act. I agree with that submission. Even if the issue of potential liability is unclear, a director of an entity which undertook negligent construction works may have information of which the Tribunal should be aware (section 111(1)(c)) of the Act being the relevant provision. Counsel for the third respondent submits that in this proceeding, it was desirable that

[2] TRI-2008-101-0052, 16 June 2010, C Ruthe.

the sixth respondent be joined so at least his role, and that of the fifth respondent, could be clarified. I accept that submission.

[14] Counsel for the third respondent submitted that Mr Russell fairly and properly put the issues before this Tribunal in relation to Pilcher's Waterproofing Limited and its directors with the joinder application and the Tribunal agreed joinder was appropriate in terms of section 111 of the Act.

[15] Counsel for the third respondent concludes that joinder of the sixth respondent has not caused costs and expenses to be incurred unnecessarily in terms of section 91 of the Act.

Statutory Provision

[16] Section 91 of the Act is as follows:

> **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.

COSTS AWARD PRINCIPLES

[17] The Tribunal has discretion to award costs in limited circumstances, and it follows that in exercising its discretion, it should do so judiciously and not capriciously.

[18] The presumption which the sixth respondent must overcome to successfully secure an award of costs is set down in section 91(2)

of the Act, namely, that the parties must meet their own costs and expenses before this Tribunal. The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which has caused costs and expenses to have been incurred unnecessarily by, in this case, Mr Pilcher.

[19] The phrase "bad faith" has received judicial consideration in a number of decisions and these were addressed by me in my costs determination of 23 April 2009.[3]

[20] Bad faith is not a limb of Mr Pilcher's application in this proceeding and I am satisfied that there is no basis for a finding of bad faith on the part of the third respondent.

DECISION ON APPLICATION FOR COSTS

[21] Mr Pilcher's counsel's submissions on their face do not make out an arguable case for a costs award. In the circumstances of the claim and after considering all the submissions, I cannot characterise any of the third respondent's arguments supporting a joinder application as improper or lacking in substantial merit at the time they were made.

[22] This Tribunal's decision in *Royal Oaks Farm Limited* (supra) is distinguishable on its facts. That proceeding concluded with an adjudication hearing whereby no liability was found in respect of the seventh respondent, a firm of lawyers who sought an order for costs. The Tribunal found that there was no causation and no tenable evidence supporting the claimants' allegations.

[23] The High Court in *Trustees Executives Ltd* (supra) stated that "... one must also be wary of establishing disincentives to the

[3] *Paul White and Wilna White v Rodney District Council & Ors* WHT TRI-2007-100-64.

use of important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself states the balance between these competing concerns by limiting capacity to order costs to situations where:

a) Unnecessary expense; has been caused by,
b) A case without substantial merit."

[24] Section 57(2) of the Act requires that in managing adjudication proceedings under the Act, the Tribunal must comply with the rules of natural justice (section 57(2)). The rules of natural justice mandate that parties have a right and opportunity to put their case, and to be heard.

[25] I accept that the third respondent's submissions in support of the joinder application were proper and genuine and I do not find that costs were unnecessarily imposed on the sixth respondent.

[26] The Tribunal is entitled to make a joinder order if conditions contained in section 111 of the Act are fulfilled. From the evidence presented by the third respondent in support of his joinder application, Mr Pilcher's interests were affected by this proceeding and furthermore it was desirable that Mr Pilcher be joined to this proceeding to provide further information to clarify the nature and scope of his, and others, involvement in the impugned construction works. That ultimately is exactly what has occurred.

[27] The evidence suggests that the third respondent promptly, upon becoming satisfied that Mr Pilcher had no involvement with the alleged impugned works consented to his removal. As submitted by Mr Russell's counsel, even counsel for Mr Pilcher accepts that it was only by the provision of Mr Pilcher's affidavit that unequivocally established that the sixth respondent had no personal involvement

with the concerned dwelling and that he should not be a party to this proceeding.

[28] I have carefully considered the written submissions of both parties and I reiterate the onus is on the applicant for costs to demonstrate that the case comes within one or both of the provisions of section 91(1) of the Act, and, if that onus is met, then there is a discretion for the Tribunal to award costs.

[29] As mentioned earlier I am satisfied that there is no basis for a finding of bad faith and furthermore that the third respondent's joinder application was not made on the basis of absolutely no evidence linking Mr Pilcher to the impugned construction works. In other words the third respondent's allegations were not made without substantial merit. For these reasons I do not find the costs incurred by Mr Pilcher were unnecessarily imposed.

[30] The presumption set out in section 91(2) of the Act is not overturned.

ORDER

[31] The sixth respondent's application for a costs determination in terms of section 91 of the Act is dismissed.

DATED this 29th day of September 2010

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K D Kilgour
Tribunal Member