IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000112
[2012] NZWHT AUCKLAND 47

BETWEEN	**ROGER JERZY AND SAMANTHA KAY ZAGORSKI** Claimants
AND	**WILKINSON BUILDING AND CONSTRUCTION LIMITED** First Respondent
AND	**ALLIED HOUSE INSPECTIONS LIMITED** Second Respondent
AND	**AUCKLAND COUNCIL** Third Respondent
AND	**RICHARD ANDREW JOHN WILKINSON** Fourth Respondent
AND	**CATHERINE WILKINSON** Fifth Respondent
AND	**TIMOTHY JOHN BURCHER** Sixth Respondent
AND	**HITEX BUILDING SYSTEMS LIMITED** Seventh Respondent
AND	**IAN CONRAD HOLYOAKE** Eighth Respondent

ORDER AS TO COSTS
Dated 15 November 2012

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[1] The Tribunal has issued three determinations on this claim. On 3 February 2012, a final determination dealing with liability was issued following a four day hearing in November 2011. On 24 August 2012, a determination dealing with remedial scope was issued following a hearing on 31 July 2012, and on 21 September 2012, a determination dealing with quantum was issued.

[2] Three applications for costs have been made against Hitex Building Systems Limited and Ian Holyoake.

[3] The Zagorskis seek costs in respect of various interlocutory applications that were made and in respect of an aspect of Mr Holyoake/Hitex's conduct at the hearing.

[4] Wilkinson Building and Construction Limited (Wilkinson) seeks costs arising from the actions of Mr Light, Mr Holyoake/Hitex's expert, which Wilkinson claims unnecessarily increased the attendances required by Wilkinson's expert, Mr Bayley.

[5] The Council seeks costs relating to the remedial scope hearing on the basis that Mr Holyoake/Hitex made allegations or raised objections that were without substantial merit. It is claimed that this resulted in all the costs associated with the remedial scope hearing essentially being "wasted."

[6] Mr Holyoake and Hitex have opposed the three applications for costs. In respect of each application, the issues we need to decide are:

- Did Mr Holyoake/Hitex cause costs to be incurred unnecessarily by either bad faith or allegations and objections that are without substantial merit?
- If so, should we exercise our discretion to award costs?
- If so, what costs should be awarded?

Relevant principles

[7] Section 91 of the Weathertight Homes Resolution Services Act 2006 provides that:

> **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.

[8] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily. This presumption is only overcome if either bad faith or allegations that lacked substantial merit have caused unnecessary costs and expenses to a party.

[9] In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J identified the competing considerations to be balanced in making costs decisions in this jurisdiction. These

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.

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. The words without "substantial merit" employed in s 91 do not set a high bar and costs can be awarded in respect of allegations which a party ought reasonably to have known they could not establish.[2]

[10] The three costs applications before us raise different issues and accordingly, we will deal with each in turn.

Claimants' application for costs

[11] The Zagorskis seek costs in respect of six interlocutory steps or aspects of Mr Holyoake and Hitex's conduct of the case. These are:

i. Delay in filing briefs of evidence.
ii. Unauthorised site inspection by the expert/new evidence at the hearing.
iii. Application to undertake further moisture tests.
iv. Application to strike out Mr Angell's report.
v. Submission of further voluminous and irrelevant evidence.
vi. Submission of a without prejudice transcript.

Delay in filing briefs of evidence

[12] Mr Holyoake and Hitex failed to comply with the timetable which required their briefs to be filed by 28 September 2011. An alternative date was directed by the Tribunal in Procedural Order 12, dated 4 October 2011. Following the

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[2] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

grant of a further extension, the briefs were finally filed on 6 and 7 October 2011.

[13] The Zagorskis claim that this delay caused additional cost to them arising from the need to review and respond to the evidence more quickly than what would otherwise have been necessary.

[14] Counsel for the Zagorskis has submitted that the delay and associated lack of communication is contrary to the purposes of the Act and constitutes bad faith or conduct without substantial merit. We agree. Lack of compliance with the Tribunal's timetables is a systemic problem and compromises the ability of the Tribunal to provide homeowners of leaky dwellings with speedy and cost-effective procedures for the resolution of their claims.

[15] However, for the purposes of s 91, it is insufficient to solely establish bad faith or conduct without substantial merit. It must also be established that costs have been unnecessarily incurred. The Zagorskis have not established this in respect of the delay in filing. It is not established that the need to review and respond to the evidence more quickly would have resulted in additional costs of any significance.

Unauthorised site inspection by experts/new evidence at the hearing

[16] The expert for Hitex/Mr Holyoake, Mr Light, revealed while giving evidence at the hearing that he had returned to the Zagorskis' property and undertaken an unauthorised inspection. This was contrary to the Tribunal's direction that any such site visit required consent. Mr Light attempted to

give evidence about his findings during the unauthorised visit.

[17] The costs application claims that the Zagorskis and other parties were deprived of the opportunity to consider Mr Light's new evidence at the appropriate time and to reply to it. It is submitted that Mr Light's actions on behalf of Hitex and Mr Holyoake amounted to bad faith.

[18] We decline to award costs under this heading. The remedy applied to Mr Light's unauthorised inspection was that his evidence arising from this inspection was excluded. It therefore did not prejudice the Zagorskis or other parties. Further, it is noted that this matter was dealt with swiftly at the hearing and did not result in additional costs of any significance.

Application to undertake further moisture tests

[19] In July 2011, Hitex/Mr Holyoake applied for an order entitling their expert to install further moisture probes at the house. The Zagorskis filed a memorandum opposing the application and on 14 July 2011, the application was denied in Procedural Order 9. The Tribunal directed that following testing prescribed in the order,[3] no further testing could be done without the consent of the Zagorskis.

[20] On 3 April 2012, Hitex/Mr Holyoake applied by email for an order to take further moisture readings at the house, having been denied permission to do so by the Zagorskis.

[21] The Zagorskis responded to the application with a memorandum.

[3] Procedural Order 9, 14 July 2011, at [6].

[22] We do not consider that the application to take further moisture readings was lacking substantial merit or made in bad faith. The application was made in the context of an upcoming experts' conference on remedial scope. Although extensive testing and moisture readings had been carried out already, the request to take updated readings falls short of the standard set by s 91.

Application to strike out Mr Angell's report

[23] Some three months after the final determination on liability was issued, Hitex/Mr Holyoake made an application seeking to strike out the report of the WHRS assessor, Mr Angell and the evidence he gave at the hearing. The basis of the application was an allegation of bias against Mr Angell.

[24] The Zagorskis responded to this application with a memorandum of submissions. In dismissing the application, the Tribunal found that there was little or no substance to the allegation of bias and that the evidence of Mr Angell, which was tested at the hearing and considered by the Tribunal in making its findings in a final determination, could not be revisited.

[25] The application to strike out Mr Angell's report and evidence lacked substantial merit. We accept that responding to it caused the Zagorskis to incur costs unnecessarily.

Submission of further voluminous and irrelevant evidence

[26] A hearing was convened on 31 July 2012 to deal with the issue of remedial scope. This was required because of the uncertainty as to whether a full reclad was required or

whether the established defects and damage could adequately be repaired by a partial reclad or more targeted repairs.

[27] On 26 July 2012, Hitex/ Mr Holyoake filed a further brief of evidence from Mr Light and briefs from three new experts who had not been involved in the hearing, Mr Hazlehurst, Mr Probett and Dr Spiers. These extensive briefs focused largely on issues that had been finally determined in the February 2012 decision.

[28] In response, the Zagorskis filed a memorandum seeking an order striking out or excluding the additional evidence.

[29] On 30 July 2012, we issued Procedural Order 16 in which we excluded the briefs from Mr Probett, Dr Spiers and Mr Hazlehurst and those parts of Mr Light's supplementary brief of evidence that attempted to challenge or provide further evidence on issues already determined in the substantive decision of February 2012. We noted that Mr Holyoake had previously been personally advised that the Tribunal would not permit additional witnesses to be called in relation to the remedial scope.

[30] In his memorandum opposing the filing of this evidence, counsel for the Zagorskis acknowledged that he had not attempted to read all the material which ran to 123 pages. This concession was noted by Mr Holyoake in his notice of opposition to the costs application. However, it does not follow that costs were not incurred in opposing the filing or acceptance of this additional evidence. Plainly they were.

[31] Mr Holyoake filed extensive briefs after being advised by the Tribunal that briefs from further witnesses would not be

accepted. Furthermore the briefs attempted to re-litigate findings that had been made in a final determination. Even after receiving the direction from the Tribunal he continued to re-litigate this issue both at the beginning of the scope hearing and in written submissions. We consider that Mr Holyoake's behaviour in this regard constituted bad faith and crossed the threshold established by s 91. It is also accepted that filing the additional briefs caused the Zagorskis to incur unnecessary costs.

The submission of a without prejudice transcript

[32] On 7 September 2012, Hitex/Mr Holyoake filed submissions regarding quantum. Attached to these was a transcript recording a "without prejudice" meeting that had taken place between the Zagorskis and Mr Holyoake, in an attempt to settle the claim. It was submitted that this transcript provided evidence that the claim had been settled and the terms of the settlement.

[33] In response, the Zagorskis made an application for an order from the Tribunal excluding the transcript and any reference to its contents from the record.

[34] Rather than making the order sought, we dealt with the matter in our decision on quantum. We found that Mr Holyoake was attempting to introduce new evidence and to raise a new defence. We noted that he had not provided the transcript before or at the hearing and that there had been no opportunity to question witnesses about the alleged settlement. Further, it was noted that the transcript showed that, contrary to Mr Holyoake's submission, no agreement had been reached at the without prejudice meeting. Accordingly, we disallowed the production of the transcript.

[35] The production of the without prejudice transcript after the hearing had concluded constituted bad faith while the submissions concerning its content amounted to allegations without substantial merit. The filing of the transcript and related submissions resulted in the Zagorskis incurring unnecessary legal costs.

Should the Tribunal's discretion be exercised to award costs to the Zagorskis?

[36] We have found that the s 91 criteria for costs have been established in respect of the following steps taken by Mr Holyoake/Hitex:

- The application to strike out Mr Angell's report.
- The submission of further voluminous and irrelevant evidence.
- The submission of the without prejudice transcript.

[37] It is next necessary to determine whether to exercise our discretion to award costs. Meeting the statutory threshold goes a considerable distance to successfully obtaining costs. However, there is still discretion to be exercised. Important factors in favour of exercising this discretion are whether the party against whom costs are sought should have known about the weakness of their case, and whether they pursued litigation in defiance of common sense.[4] We consider that these factors are established in this case.

[38] Mr Holyoake was legally represented at the substantive hearing, but represented himself after that. He is familiar with the Tribunal's procedures and jurisdiction, having appeared as a witness on a number of occasions and also

[4] Above n 1.

having represented parties at the Tribunal. He was well placed to understand the weakness of the various positions he took and can also be fairly described as having acted in the absence of common sense.

[39] It is relevant that two of the instances in respect of which costs are sought relate to interlocutory steps taken by Mr Holyoake contrary to advice or directions from the Tribunal.

[40] In considering all of the above, we determine that it is appropriate to exercise our discretion to award costs against Mr Holyoake/ Hitex.

What level of costs is appropriate?

[41] Mr Robertson has "roughly" estimated that the behaviour of Hitex/Mr Holyoake in respect of which the Zagorskis seeks costs resulted in 20 per cent more time being expended on the claim than would otherwise have been necessary. Following a formula he sets out in his submissions to calculate the quantum this 20 per cent represents, he claims that costs of $35,040.84 should be awarded.

[42] There are various difficulties with this. The figure claimed represents a proportion of the Zagorski's combined legal and expert costs. However, no details of any expert involvement have been provided in respect of the steps for which we have determined that costs are appropriate. Even if legal costs had been itemised separately, the assertion that 20 per cent of these costs arose from the steps complained of is unsupported by any reasoning or evidence. Furthermore, costs are only being granted for three of the six matters complained of, further reducing the validity of the claimed 20 per cent.

[43] While it is accepted that the estimate is “rough” it is simply too inaccurate to be reliable. We determine it is more appropriate to use the High Court scale as a guide. We consider each of the three steps is roughly equivalent to preparing and filing opposition to an interlocutory application. Costs calculated on the 2B scale in respect of the three steps for which we have agreed that costs should be allowed totals $3,582.00. In addition the Zagorskis are entitled to any additional experts fees incurred in relation these issues. They are to file details of any such costs by 23 November 2012.

First respondent’s application for costs

[44] The first respondent, Wilkinson Building, claims costs related to attendances by its expert, Mr Bayley, which it claims were caused by the actions of Mr Holyoake and his expert, Mr Light. The matters for which costs are sought are as follows:

- Waiting time while Mr Light argued with Mr Maiden, the Zagorskis’ expert at the beginning of an inspection regarding the installation of new moisture probes.

- As Mr Light was accompanied by Dr Walls, the time required to examine each inspection panel was increased.

- The briefs of Mr Light and Mr Holyoake were overly long, resulting in increased attendances by Mr Bayley who reviewed the briefs.

- Mr Light was argumentative at the first experts’ conference resulting in the conference being extended.

- The behaviour of Mr Holyoake and the argumentativeness of Mr Light unnecessarily extended the second experts' conference convened on 19 April 2012.

- Review of the supplementary briefs filed prior to the quantum hearing (which were excluded as noted above) necessitated Mr Bayley spending 5.75 hours at a cost of $1,581.25.

[45] Mr Holyoake was entitled to vigorously defend the claim against him. Although there may have been difficulties arising from the manner in which Mr Holyoake and Mr Light conducted the defence to the claim, we do not consider that the matters complained of constitute either bad faith or allegations without substantial merit. Neither are we persuaded that the behaviour of Mr Light and Mr Holyoake significantly increased the attendances required by Mr Bayley.

[46] The exception to this is the time, (5.75 hours) spent by Mr Bayley reviewing the additional evidence that had been filed by Mr Holyoake contrary to an order of the Tribunal. We have already accepted that the threshold for awarding costs has been met in relation to this issue. We accept that the amount of costs that should be awarded is $1,581.25.

Council's application for costs arising from remedial scope evidence

[47] For reasons explained in the February 2012 liability decision, it was uncertain whether a full reclad was required or whether the established defects and damage could adequately be repaired by a partial reclad or more targeted repairs. The parties agreed to convene an experts'

conference to consider the scope of repairs and, in the absence of agreement, that a short hearing should be held to hear evidence from the experts in relation to the appropriate remedial scope.

[48] An important determinant of this issue was whether Auckland Council would give building consent for targeted repairs or a partial reclad.

[49] After hearing from the experts, we reached the view that the defects were primarily localised and were essentially discrete failures in specific locations in the cladding system. We concluded that something short of a full reclad would be appropriate if the Council would issue a consent for the work. Based on the evidence presented, we considered that the Council would be more likely to issue consent if Hitex were willing to provide a warranty or producer statement for the repairs.

[50] Mr Holyoake was then asked to give evidence as to whether he would be willing to provide such a warranty on behalf of Hitex. He said he would not and explained he would not give a warranty unless he was able to carry out further investigations and would only give a warranty for work he considered was necessary. He said he would not give a warranty for what the experts or the Tribunal determined was necessary, if he considered that it was more than what was required to remedy the defects that he accepted.

[51] As a consequence of Mr Holyoake's stance, we concluded that it was unlikely that the Zagorskis would be able to obtain a building consent for targeted repairs or a partial reclad. We concluded therefore that the only reasonable way for the Zagorskis to remedy the defects with their dwelling was for the property to be reclad.

[52] The Council has submitted that because of the position taken by Mr Holyoake, the hearing which was convened to determine whether reclad or targeted repairs should be carried out was “wasted”. It is submitted that Mr Holyoake raised objections that were without substantial merit causing costs and expenses to be incurred unnecessarily.

[53] While we are sympathetic to the Council’s view, we are not convinced that even if Mr Holyoake’s position had been sought and communicated in advance, the parties would have agreed that a full reclad was warranted and that matters would have been resolved without a hearing. Furthermore, the stance taken by Mr Holyoake was factored into the contribution apportioned to him and Hitex in our quantum determination. The Hitex/Holyoake contribution was increased because of his refusal to warrant targeted repairs. This represents a sanction of sorts.

[54] While the refusal of Mr Holyoake to warrant targeted repairs if he considered them too extensive may constitute either bad faith or an objection without substantial merit, we are not satisfied that this refusal caused costs to be incurred unnecessarily or that it is appropriate to exercise our discretion in favour of an award of costs.

[55] The application by the Council for costs is declined.

Orders

[56] Ian Holyoake and Hitex Building Systems Limited are to pay Roger Jerzy and Samantha Kay Zagorski the sum of $3,582.00 together with any expert’s fees incurred in relation to the three steps for which costs have been awarded. The

Zagorskis are to file a schedule of any such costs by 23 November 2012 and an amended order can then be made.

[57] We order Ian Holyoake and Hitex Building Systems Limited to pay Wilkinson Building and Construction Limited the sum of $1,581.25 being the expert's fees incurred in respect of the filing of additional briefs of evidence contrary to the Tribunal's direction.

[58] The application by Auckland Council for costs is dismissed.

DATED this 15th day of November 2012

M A Roche	P A McConnell
Tribunal Member	Tribunal Chair