IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000074
[2010] NZWHT AUCKLAND 37

BETWEEN	**JA & JA BRADLEY FAMILY TRUST** **Claimant**
AND	**AUCKLAND CITY COUNCIL (REMOVED)** **First Respondent**
AND	**KEITH TRASK** **Second Respondent**
AND	**SKY TELEVISION NETWORK LIMITED (Removed)** **Third Respondent**
AND	**MATT FILIPEUKO** **Fourth Respondent**
AND	**ROBERT NEIL BOLER** **Fifth Respondent**
AND	**THE ATTORNEY GENERAL (for and on behalf of the Assets and Liabilities of the Building Industry Authority) (REMOVED)** **Sixth Respondent**

DECISION ON COSTS
Adjudicator: S Pezaro
18 November 2010

APPLICATION FOR COSTS

[1] Sky Network Television Limited (Sky), the third respondent (now removed), seeks an award of costs against the claimants on the basis that the claim against Sky lacked substantial merit. In determining this application I have considered the submissions for Sky in the memorandum dated 12 October 2010 and the reply submissions dated 10 November 2010 and the memorandum in opposition dated 5 November 2010 filed for the claimants.

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. In this case there is no allegation that the claimant acted in bad faith therefore the issue to be decided is whether the third respondent incurred costs unnecessarily as a result of allegations or objections made by the claimants that were without substantial merit. The onus is on the party applying for costs to prove its claim.

BACKGROUND

[4] Sky was named as a respondent when the claim was filed in the Tribunal on 21 June 2010. The claimants alleged that Sky or its agent caused water ingress and weathertightness defects by failing to install a satellite dish to the roof of the claimants' dwelling with due care and skill. The claimants sought the full cost of the remedial work of $89,938 from Sky as well as consequential costs, interest and general damages of $50,000.

[5] On 27 July 2010 Sky filed an application for removal and the parties were directed to file any opposition to this application by 20 August 2010. I directed that the application for removal would be granted if not opposed by this date. When the claimants opposed the removal application I directed that any replies by the third respondent were to be filed by 3 September 2010. The application was determined on the papers and granted on 20 September 2010. In granting the application I concluded that the claim had no prospect of success as there was no evidence that any quantifiable loss was caused to the claimants as a result of any defect caused by Sky.

[6] On 28 September 2010 the claimant attempted to file in the Tribunal an appeal against the decision to remove the third respondent. On 30 September 2010 I directed that any appeal against the Tribunal's decision was to be filed in either in the District Court or the High Court according to the appropriate courts Rules and that the claimants were to confirm by 7 October 2010 whether they had filed an appeal in which case the proceedings in this Tribunal would be put on hold.

[7] On 1 October 2010 the claimants advised the Tribunal that they no longer intended to appeal the Tribunal's decision to remove Sky as a party.

SUBMISSIONS FOR SKY

[8] Counsel for Sky submits that the claimant had two opportunities to accept that its allegations against Sky lacked any sufficient evidential foundation, first Sky's application for removal which submitted that the claimant had failed to establish a causative link between the installation of the Sky dish and damage caused by water ingress and, second, the amended Procedural Order No 2 issued on 27 July 2010 which directed that if no opposition was filed to the removal application it would be granted. Sky submits that costs were incurred unnecessarily because the claimant opposed the removal application but failed to establish that any action taken by Sky or its agent had caused the alleged damage.

OPPOSITION BY THE CLAIMANTS

[9] The claimants submit that they did produce expert evidence and they dispute the Tribunal's finding that the assessor's report was the only expert evidence before the Tribunal. While it is not appropriate in the context of determining a costs application to review the decision to remove Sky, it is relevant to consider whether the claimants produced tenable evidence in support of their allegations. The following points are therefore relevant:

i. The purpose of the WHRS assessor's report was to determine eligibility only. The report was not intended to provide comprehensive evidence of defects;
ii. The Realsure report describes the scope of that inspection as "*limited to a visual Pre-Purchase, or Pre-Sale inspection carried out in accordance with NZ4306: 2005. Maintenance*";
iii. The Hobbspeare report was based on two inspections. This report states that the first inspection was limited to the water ingress to the deck on the west side and that

the second visit was an assessment of the extent of damage to the external timber framing.

iv. The MDU House Report records moisture readings but does not identify defects and the author was not identified.

[10] The claimants refer in their opposition to costs to a letter dated 26 September 2010 from Mr Gill of Hobbespeare Building Consultants Limited as providing evidence of possible damage caused by the Sky dish installation. Mr Gill confirms that "*I was engaged by Mr Bradley to purely comment on the remediation of the timber framing to a targeted area of the property* ..." and "*I was not engaged to provide any form of expert witness work with regard to any claim that may be commenced at a later date*." Mr Gill then states that he observed an excessive area of decayed timber where he was informed that a Sky dish had been installed. This letter was not before the Tribunal when the removal decision was made however, even if such a letter from Mr Gill had been filed in support of the claimants' opposition to Sky's removal, this letter did not arguably establish a link between the Sky dish and any identifiable damage or loss suffered by the claimants.

CONCLUSION

[11] This case can be distinguished from that of *Holland & Ors as Trustees of the Harbourview Trust v Auckland City Council*[1] where the Tribunal declined to award costs against a claimant whose claim had failed at adjudication. In *Harbourview* the Tribunal was satisfied that that there was a clear dispute between the claimants' and the respondents' expert witnesses and the claimants proceeded to hearing with some evidential support. Although the Tribunal considered that the claim for costs was on the borderline of one that is without substantial merit, it concluded that the claimants had

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expert opinion supporting their view, even though they ignored some key decisions relevant to the issue of the respondent's liability. [2]

[12] In *Trustees Executors Ltd v Wellington City Council,*[3] 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 a discretion to be exercised".[4] 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.[5]

[13] In this case, the claimants have not adduced any evidence which was the result of an investigation intended to identify weathertightness defects and in particular they provided no evidence of any particular loss attributable to Sky. In addition, because the remedial work has been completed, the claimants never could produce any better evidence of defects or damage caused by Sky. For this reason I conclude that there was no reasonable basis for the claimants to oppose this removal application, although it appears that they were advised to do by Origins Group Limited, their representative at the time.

[14] I conclude that the claimants pursued allegations or objections to Sky's removal that were without substantial merit. As a result, costs have been incurred unnecessarily by Sky. I now address the question of the type of costs to which Sky is entitled.

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[2] See para [18] of *Harbourview*.
[3] HC Wellington, CIV-2008-485-000739, 16 December 2008, S France J.
[4] See para [51] of *Trustees Executors Ltd v Wellington City Council*.
[5] See para [52]of *Trustees Executors Ltd v Wellington City Council*.

MEASURE OF COSTS

[15] Sky seeks an award of indemnity costs or in the alternative increased costs with an uplift of 50% above the scale, or costs on the District Court scale on a 2B basis. The claimants submit that if an award of costs is granted the scale 2B costs are reasonable in the circumstances. The Tribunal is not bound by the District Court rules however the District Court scale of costs provides an appropriate guideline for setting an award of costs in this Tribunal.

[16] The costs claimed by Sky were incurred in relation to a removal application and not adjudication and therefore the steps required of Sky were limited. In these circumstances, and taking into account the presumption in the Act that costs lie where they fall, I am not satisfied that an award above the District Court scale on a 2B basis is justified.

[17] In relation to the steps for which costs are claimed, I am not satisfied that the costs claimed for responding to the purported notice of appeal are justified. It must have been clear to counsel for Sky, as it was to the Tribunal, that there was no jurisdiction for the Tribunal to consider an appeal from its own decision. However, on the day that the purported appeal was filed, and before any direction could be issued by the Tribunal, counsel for Sky filed a response. In my view this was unnecessary therefore I decline to award costs for this step.

[18] I conclude that Sky is entitled to costs based on the District Court scale on a 2B basis. Costs incurred are set out in Schedule C to the application and I award the sum of $3,800, the balance remaining after deduction of costs incurred in relation to the appeal.

ORDER

[19] The claimant is to pay Sky Network Television Limited the sum of $3,800 immediately.

DATED this 18th day of November 2010

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S Pezaro
Tribunal Member