**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2010-101-000009**
**[2011] NZWHT WELLINGTON 18**

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| BETWEEN | GORDON AND KATHRYN BEATTIE<br>Claimants |
| AND | PORIRUA CITY COUNCIL<br>First Respondent |
| AND | HOMECREATORS LTD<br>Second Respondent |
| AND | STEPHEN MACKFALL – TRADING AS TEXTURITE COATINGS<br>Third Respondent |
| AND | TOM REID – TRADING AS ROOFING DIRECT LIMITED<br>(Removed)<br>Fourth Respondent |
| AND | NULOOK WINDOWS AND DOORS LIMITED<br>(Removed)<br>Fifth Respondent |
| AND | BARBARA DONALDSON<br>(Dismissed)<br>Sixth Respondent |
| AND | INSPECT IT 1ST LIMITED<br>Seventh Respondent |
| AND | DAVID SMITHSON<br>Eighth Respondent |
| AND | GRANT BENNETT<br>Ninth Respondent |

Decision: 25 March 2011

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**COST DETERMINATION**
**Adjudicator: P A McConnell**

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[1] Gordon and Kathryn Beattie have applied for the costs of their experts preparing for and attending the hearing against the Porirua City Council. They submit the claim could and should have settled at mediation on 14 September 2010 and that the Council withdrew from the mediation for reasons that were incorrect and that this amounts to bad faith. The Council denies that there was any bad faith involved and in any event submits that there is no guarantee the claim would have settled at mediation. It further submits that it is not appropriate to award costs for failure to attend a mediation.

[2] The issue to be determined therefore is whether the Council acted in bad faith when withdrawing from mediation on 14 September 2010. If so I will then need to determine whether any costs have been incurred unnecessarily by the claimants as a result of bad faith.

[3] 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
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> (b) Allegations or objections by that party that are without substantial merit.
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> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[4] 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 Mr Beattie, the party applying for costs, to demonstrate that costs were incurred unnecessarily by bad faith. It is only once that onus is met that the Tribunal has a discretion as to whether to award costs.

[5] All parties to this claim attended mediation on 3 August 2010. The mediation was adjourned to allow further consultation by the second and eighth respondents with legal representation and further testing to be carried out. The claimants submit that the mediator strongly believed a reconvened mediation would lead to a settlement and that this was accepted by the Tribunal Member. Other than the claimants' submissions I have seen little evidence that this is in fact the case although I do accept Mr Rainey would not have suggested a new mediation date be set unless he believed there was a realistic chance of the matter settling. The subsequent mediation was scheduled for Tuesday 14 September 2010. However the first Christchurch earthquake intervened and Mr Taane, the Council officer attending the mediation, was seconded to Christchurch. On 10 September 2010 Mr Robertson, counsel for Porirua City Council, advised the Tribunal and other parties by email of the situation and advised that the Council officer would be unavailable to attend mediation. There was further communication between Mr Robertson and Mr Beattie and Mr Robertson emailed Mr Beattie on Monday 13 September 2010 advising that the Council officer was still unavailable.

[6] Mr Beattie submits that Mr Robertson told the Tribunal that Mr Taane was in Christchurch on 13 September 2010 and this was incorrect because he has since discovered that Mr Taane returned from Christchurch on Sunday 12 September 2010. Mr Beattie submits that the Council acted in bad faith by stating that Mr Taane was still in Christchurch, when he was in fact in Wellington, and by failing to attend the mediation.

[7] I note however that Mr Robertson in his email of 13 September 2010 did not state that Mr Taane was in Christchurch. He stated that he was still unavailable. While Mr Beattie's inference may have been that Mr Robertson was saying Mr Taane was in Christchurch that is not what he in fact said. What he did say was that the Council officer was unavailable. Mr Robertson submits that at worst this is a result of poor communication between him and his client but falls well short of bad faith.

[8] Mr Beattie has failed to establish that the Council, or its counsel, have acted in bad faith by deliberately misleading Mr Beattie and the Tribunal

as to the whereabouts of Mr Taane and withdrawing from the rescheduled mediation. Even if Mr Taane had returned to Wellington by the time of mediation that did not necessarily mean he was available to attend the mediation. Mr Taane was the Council officer who was familiar with this claim and most likely was the only Council representative who had the authority to accept any potential settlement agreement on behalf of the Council. His attendance at mediation was, from the Council's point of view, essential.

[9] I would further note that even if I were to have found Mr Robertson's email to be misleading I am not convinced costs have been incurred unnecessarily because of the Council's withdrawal from mediation. While Mr Beattie submits this case would have settled at a resumed mediation that does not appear to have borne out by the fact that there were a significant number of issues still in dispute by the time of the hearing. The Council submits that it was unlikely that a second mediation would have resulted in settlement as there was, and still remains, a direct conflict in the evidence as to the responsibility of the various respondents. I am inclined to agree with Mr Robertson on this issue. There are still significant issues in dispute and this has resulted in three different parties filing appeals against the determination issued.

[10] In these circumstances I consider that it is unlikely this claim would have settled at a subsequent mediation. Accordingly the costs that the claimants are seeking against the Council could not be considered as having been incurred unnecessarily because in all likelihood the hearing would have proceeded even if the 14 September 2010 mediation had taken place.

[11] The application for costs accordingly fails.

**DATED** this 25th day of March 2011

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P A McConnell

Tribunal Chair