IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000018
[2012] NZWHT AUCKLAND 48

BETWEEN	**SLAVE TOMOV, LILJANA TOMOVO AND DAVENPORTS WEST TRUSTEE COMPANY (NO 1) LIMITED** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**MODERN HOMES DEVELOPMENT LIMITED** Second Respondent
AND	**ANDREW THOMAS** Third Respondent
AND	**PBS DISTRIBUTORS LIMITED** Fourth Respondent
AND	**GEORGE MAREVICH** Fifth Respondent
AND	**ROOF IMPROVEMENTS LIMITED (Removed)** Sixth Respondent
AND	**BARRY WALSH** Seventh Respondent
AND	**JAMES MCLEAN** Eighth Respondent

DETERMINATION ON COSTS
(Application for Costs following Final Determination)
Dated 16 November 2012

Introduction

[1] Following the final determination of 13 August 2012, the claimants have sought costs against Auckland Council, the first respondent. In the final determination, the Tribunal ordered that the Council should pay damages to the claimants of $507,051.10.

[2] The claimants contend that they were forced to incur unnecessary costs directly as a result of the Council taking a position on its liability that lacked substantial merit. They note that in closing submissions the Council acknowledged that it had contested liability for the ancillary purpose of advancing cross-claims against the other respondent parties.

[3] The Council opposes the application for costs and argues that the threshold of a lack of substantial merit has not been made out. The Council's cross-claims were successful; it submits that there is no third party procedure in the Tribunal and that in order for it to prosecute the cross-claims, it was necessary for the claimants to be involved.

Relevant principles

[4] 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.

[5] 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.

[6] In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J observed that:

> In policy terms, whilst one must be wary of establishing disincentives to the use of an important Resolution Service, one must also be wary of exposing other participants to unnecessary costs. The Act itself strikes a balance between these competing concerns by limiting the capacity to order costs for situations where:
>
> a) unnecessary expense; has been caused by
> b) a case without substantial merit.
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> I see no reason to apply any gloss to the legislatively struck balance. The outcome in this case should not be seen as sending any message other than that the Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary cost to others through pursuing arguments that lack substantial merit.

[7] His Honour considered that an important issue was whether the claimant should have known about the weakness of the case and whether litigation was pursued in defiance of common sense.[2] In *Riveroaks Farm Limited v Holland* [3] the court concluded that preferring other evidence does not

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[2] Above n 1 at [52].
[3] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.

generally lead to the conclusion that a claim lacks substantial merit. It considered the appropriate test for substantial merit was whether it required serious consideration by the Tribunal. However in *Max Grant Architects Limited v Holland*[4] the District Court held that a failure to provide evidence of causation at hearing justified an award of costs. In that case the claimants provided some expert evidence in support of their claim against Max Grant Architects Limited but that evidence did not address the key issues that needed to be established that were identified by the Tribunal when dismissing Max Grant's application for removal at an earlier stage.

[8] In *Phon v Waitakere City Council*[5] the Tribunal held that the bar for establishing "without substantial merit" should not be set too high and that the Tribunal should have the ability to award costs against parties making allegations, or opposing removal applications, based on allegations which a party ought reasonably to have known they could not establish.

The Application

[9] The claimants contend that irrespective of the position between the respondents and whether or not the cross-claims were successful, the Council caused them to incur costs unnecessarily by:

(a) Making allegations, particularly the allegations of contributory negligence and failure by the claimants to mitigate their loss, that were unsupported by any evidence and completely lacking in any substantial merit; and

[4] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81].
[5] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

(b) By making objections regarding its individual liability that was contrary to the evidence and lacked any substantial merit.

[10] The claimants seek an order that the Council pay their legal costs and expert witnesses' costs from after the experts' conference on 20 April 2012 until the conclusion of the adjudication hearing. This includes the full costs of Mr Barry Gill, expert witness for the claimants, whose evidence sought to refute that of Mr Flay, expert witness for the Council, on the issue of its liability (i.e. what a reasonable council inspector could and should observe during an inspection).

[11] The claimants say that the Council, which called no evidence to refute liability for its failure to observe Defects 5 and 7 [6] (and which gave rise to the need for a full reclad) knew or ought to have known that there was no merit or substantial merit to its denial of liability. In particular, the claimants submit:

(a) The Council continued to allege contributory negligence by the claimants when it did not call any evidence to prove those allegations.
(b) The Council continued to deny liability to the claimants when it plainly had advice from its own experts, including Mr Flay (not included in the Council's briefs) that the Council had been negligent and then continued to maintain that position even after the experts' conference on 20 April 2012.

[6] At the experts' conference on 20 April 2012, the experts signed an agreed Defect List containing seven defects. See para [25] of the Final Determination dated 13 August 2012.

(c) The Council continued to rely on the evidence of Mr Peter Gillingham that very limited repairs were required to fix the claimants' dwellinghouse given the nature and extent of the building defects on the experts' leaks list which the WHRS assessor, the Council and the claimants' experts had agreed at the experts' conference.

[12] The claimants submit that the concession made by the Council during closing submissions that it did not seriously contest its liability to the claimants (i.e. on the basis of Defect 5) was a surprising one. This is because right up until that point counsel for the claimants believed that the Council was denying any liability to the claimants. The Council did not make the concession in its statement of response and the evidence of Mr Flay (which was silent on Defect 5) negated any suggestion of Council liability. It is said that Mr Flay's evidence cannot be reconciled with the concession made about Defect 5 and that the omission of reference to Defect 5 was deliberately misleading. The claimants contend that had the concession been made (as it should have been, given the Chair's Directions[7]) they would not have needed to brief Mr Gill at all.

[13] The claimants further argue that the defence run by the Council that it may have placed reliance on a producer statement for the cladding installation, when there was no producer statement on the Council file, was always without substantial merit and again put the claimants to unnecessary expense.

[7] Chair's Directions- Expert Witnesses-Code of Conduct.

Council's opposition to costs

[14] The Council contends that the threshold in s 91 has not been met and that the Tribunal cannot therefore award costs. It submits:

(a) At no time did the Council plead that the claimants had failed to mitigate their loss.
(b) The contention that there was contributory negligence by the claimants was never pursued by the Council. It was Mr McLean, the eighth respondent, who ran arguments about contributory negligence and failure to mitigate loss. The claimants had to respond to Mr McLean's contentions in any event, and any additional costs incurred as a result of these affirmative defences were not caused by the Council.

[15] The Council says that its defence at adjudication was based on expert evidence that:

(a) There was a defence to some of the defects because of the timing of Council inspections and what was visible at those inspections.
(b) The scope of repairs was greater than necessary. This was supported by opinion evidence of Mr Peter Gillingham, an independent expert.
(c) The Council's expert attended the experts' conference but did not reach agreement on the remedial scope.

[16] The Council further argues that:

(a) The claimants' experts were required to prove the claimants' claims against the other respondents and

the additional time required in relation to the Council's defence of the claim was no more than one day.

(b) The Council did not defend the allegation that it breached the duty of care it owed by failing to observe Defects 5 and 7. However, it was entitled to defend itself in relation to the other defects.

(c) It transpired that the arguments raised by the Council in respect of the timing of inspections were fatally damaged by the evidence of the plasterer, Mr Andrew Thomas, the third respondent. However, the plasterer's evidence was not available to the Council prior to the adjudication because he did not file any evidence. Mr Thomas was self represented.

(d) It is impossible to apply hindsight to the question of substantial merit and if the plasterer had provided a brief of evidence prior to the adjudication, it is likely that the running of the Council's case would have been different.

(e) There is no third party procedure in the Tribunal and for the Council to prosecute its cross-claims, the claimants needed to be involved. In any event, the claimants needed to prove their claims against the other respondents.

(f) The claimants have not established that costs and expenses were unnecessarily incurred by them. The Council's case forms only part of the time allocated by the Tribunal for the hearing of the adjudication. At least a day was required by the Tribunal to hear from the other respondents (not the Council) and deal with proving the claimants' claims against them.

Analysis

[17] In my view there is no real merit to the contentions by the claimants that the Council's allegations of contributory negligence and failure to mitigate loss were without substantial merit and caused them unnecessary costs.

[18] The Council did not raise the defence of failure to mitigate and took no steps, apart from a bare assertion in the original statement of response, to advance the defence of contributory negligence. These two affirmative defences were raised and argued by Mr McLean, the eighth respondent, and the claimants had to deal with them in any event. It was Mr McLean who may have caused the claimants to incur additional costs in defending these contentions, not the Council.

[19] The real issue raised by the claimants' application for costs is whether there was no substantial merit to the Council's ongoing denial of liability (when it allegedly knew it had no defence to Defects 5 and 7) and this resulted in unnecessary costs and expenses incurred by the claimants.

[20] In addressing that key issue, I conclude that the claimants have failed to establish the threshold of a lack of substantial merit.

[21] In my view there was some merit and rationale to the position of the Council in defending itself in relation to all defects (including Defects 5 and 7) until such time as all of the evidence had been fully tested, particularly that of the other non-represented respondents. The Council did not know until the testing of the evidence of Mr Thomas, first given at the hearing, that the factual premise of Mr Flay's evidence (and thus the basis for denying liability) was flawed and could no

longer be sustained. Once the evidence of Mr Thomas had been tested and the evidence on the issue of the producer statement, the Council accepted that it had no defence to Defects 5 and 7. Viewed in context, its denial of liability up until that time was not pursued in defiance of common sense. The Council was legitimately concerned about its cross-claims. The concept "without substantial merit" needs to be applied in that wider context.

[22] The nature and extent of the Council's liability was directly relevant to the cross-claims advanced against the other respondents and the issue of contribution. The Council naturally had a significant and legitimate interest in the Tribunal's determination of contribution. In the Tribunal, where liability and contribution are usually dealt with in the same final determination, it was inevitable that the claimants, who had to establish their claims against the other respondents, would to some extent be involved in the cross-claims.

[23] With the benefit of hindsight it would have been of assistance to the Tribunal and the claimants had the Council's position on liability (i.e. that it had no defence to Defects 5 and 7) been made clear at an earlier stage in the proceedings, namely prior to the hearing. However, the Council was under no obligation to settle with the claimants and to subrogate their claims and it is not generally for the Tribunal to second guess Council litigation strategy particularly when the Tribunal does not have all the relevant information. This is not a case where the Council's position had no rationale or legitimate basis.

[24] There can be no doubt that in this case decisions by the Council on litigation strategy were rendered more difficult by the large number of respondents who were not represented

by counsel and did not file evidence in advance of the hearing. In addition, two principal respondents did not give any evidence at all or appear at the hearing. The only other respondent party who was legally represented, namely the second respondent, played a very limited role in the adjudication.

[25] I also reject the submissions of the claimants that the further defence advanced by the Council, namely that it may have placed reliance on a producer statement when it always knew that a copy of that statement was not in its file, lacked substantial merit. In my final determination, I held that the issue of the producer statement was relevant to the Council's cross-claims against the fourth and fifth respondents.

[26] The defence the Council advanced was that the Council likely received the producer statement but had later misplaced it. There was some evidence to support those contentions although ultimately I concluded that the evidence was equivocal and the Council had not discharged the burden of proof (i.e. that it had received and relied on the producer statements). There was a legitimate basis for the Council to run the arguments it did and have the evidence tested. The issue was one deserving of serious consideration by the Tribunal.

[27] I likewise conclude that the claimants' submissions that the Council's continued reliance on the evidence of Mr Peter Gillingham has given rise to a lack of substantial merit, should be rejected. There was a genuine dispute about the scope of repairs and although I ultimately rejected Mr Gillingham's views and preferred the evidence of the other experts, this was also an issue deserving of careful consideration by the Tribunal.

[28] As I noted in para [2] of the final determination, the claimants' house was somewhat unusual in that it was built with a ventilated cavity, not at all common in 2003. One of the principal issues in the case was whether a less extensive scope of repairs was required, given that the original construction included a cavity. Mr Peter Gillingham's evidence was directly relevant to that issue. In opening submissions, Ms Divich for the Council described the proceedings as somewhat of a test case in relation to the question of the scope of repairs. The threshold in s 91 has not been made out.

[29] For all these reasons, the claimants' application for costs against the Council is dismissed.

DATED this 16th day of November 2012

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P J Andrew

Tribunal Member