IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000113
[2012] NZWHT AUCKLAND 44

BETWEEN	**BODY CORPORATE 206697 AND UNIT OWNERS OF EDEN 2** Claimants
AND	**QBE INSURANCE (INTERNATIONAL) LIMITED & OTHERS** Respondents

Decision: 2 October 2012

ORDER AS TO COSTS
Adjudicator: P A McConnell

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Application for costs by Richard Hiles-Smith

[1] Richard Hiles-Smith, the fifth respondent was removed from this claim by Order dated 9 August 2012. He now seeks costs from Metalcraft Industries Limited, the only party who opposed his removal. He says that Metalcraft's opposition to his removal, and the particulars of claim they alleged against him, were made in bad faith or without substantial merit and as a result have caused him unnecessary costs. Metalcraft opposes the application for costs as it submits the threshold for costs has not been established. It says there is no foundation for any allegation of bad faith as its arguments did have merit and were worthy of serious consideration by the Tribunal.

[2] The issues I therefore need to decide are:

- Has Metalcraft caused costs to be incurred unnecessarily by either bad faith or allegations and objections that are without substantial merit?
- If so, should I exercise my discretion to award costs?
- If so, what costs should be awarded?

Relevant principles

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

> **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.

[4] 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.

[5] 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.
>
> 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.

[6] 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 *River Oaks Farm Limited v Holland* [3] the court concluded that

[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.

preferring other evidence does not 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.

[7] 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.

Have costs been incurred unnecessarily due to bad faith or allegations that lack substantial merit?

[8] In considering this issue, it is relevant to consider the background to this claim. Mr Hiles-Smith was originally named as a party by the claimants when they filed with the Tribunal. Mr Hiles-Smith did not immediately apply for removal but co-operated with the directions made to provide documents. He engaged in the investigative processes in the Tribunal and endeavoured to provide a picture of his role and correct what he considered to be a misunderstanding that had arisen either due to an incomplete record

[4] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 16 December 2008 at [81].
[5] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

or an incomplete understanding of the relevant events in his role. He invited the claimants to review the material that he provided and, as a consequence, they withdrew their claim against him.

[9] Mr Hiles-Smith then applied for removal and the only party opposing his removal was Metalcraft. In Procedural Order 6, I set a timetable for dealing with that application and noted that any party opposing Mr Hiles-Smith's removal would need to articulate a claim against him and provide supporting documentation to show that there was potentially tenable evidence that demonstrated a link between alleged acts or omissions on his part and the defects and/or the claimants' loss or a viable cross-claim. In other words they would need to satisfy the test for joinder in s 111 of the Act.

[10] In opposing Mr Hiles-Smith's removal, Metalcraft was not alleging that it had a cross-claim against him in the strict sense. They however alleged he was a joint tortfeasor and therefore liable to contribute to an award of damages. The claim against him was that he owed the claimants a duty of care, not Metalcraft, in issuing practical completion certificates and that the owners relied on those certificates in settling their purchases.

[11] The allegations and submissions made on behalf of Metalcraft in opposing the removal application, and to a lesser extent the approach taken to the opposition to the costs award, could be described as a one plus one equals three approach. Each submission or allegation may well have been correct but the conclusions reached were not a necessary consequence of a sum of the allegations and submissions. It is unnecessary to consider every issue raised in the various memorandums filed but I will deal with some key issues by way of example.

[12] Metalcraft's claim against Mr Hiles-Smith was based on the assumption that the practical completion certificates issued by the engineer to the company were relied on by the claimants. As pointed out in my Procedural Order, such an assumption could not reasonably be made in circumstances where the claimants had, after knowledge of the full facts, withdrawn their claim against Mr Hiles-Smith. In doing so they accepted that they did not have an arguable claim against him.

[13] A further example is Metalcraft's submission that Mr Hiles-Smith's situation was on all fours with *Sunset Terraces*[6] and this decision had overruled the High Court decision in *Byron Avenue.*[7] As noted in Procedural Order 9, the situation of Mr Walden in *Byron Avenue* was very similar to that of Mr Hiles-Smith and was different to the situation of Mr Coughlan in *Sunset Terraces*. Mr Coughlan was the designer not an engineer under the contract and the practical completion certificate Mr Coughlan signed was a practical completion certificate for the sale and purchase. The confusion between practical completion certificates as issued by an engineer under the contract in a more administrative role and practical completion certificates under the terms of the agreement for sale and purchase is significant in Metalcraft's submissions.

[14] This is not a case, as suggested by Council for Metalcraft where the court has preferred certain evidence which in *River Oaks* was held not to be a legitimate basis for finding that a claim lacked substantial merit. If there had been a dispute of facts, I would not have been in a position to remove Mr Hiles-Smith in the context of an application for removal. In other words, the fact that I removed Mr Hiles-Smith goes some way in establishing that a claim against him

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[6] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486.

[7] *Body Corporate 189855 v North Shore City Council (Byron Avenue)* HC Auckland, CIV-2005-404-5561, 25 July 2008.

was without substantial merit. I consider this should have been known to Metalcraft if they had reviewed all the documentation including the information provided by Mr Hiles-Smith, and the relevant legal principles and precedents.

[15] This is not sufficient to establish bad faith but I conclude that the claims made by Metalcraft were without substantial merit. Mr Cash, on behalf of Mr Hiles-Smith has provided information of the work he needed to do to contest the allegations made by Metalcraft and the costs he had incurred in doing so. I accept that these costs were a consequence of Metalcraft's opposition to his removal and its articulation of the claim against him. In addition, Mr Hiles-Smith has had to face the costs of being involved in this claim from May through to August 2012, which were not insignificant. I therefore conclude that Mr Hiles-Smith has incurred costs unnecessarily through allegations that were without substantial merit.

Should the Tribunal exercise its discretion to award costs?

[16] Having found that Mr Hiles-Smith has incurred costs unnecessarily, because of allegations made against him that were without substantial merit, I need to determine whether I should exercise my discretion to award costs. Simon France J, in *Trustees Executors Limited v Wellington City Council*[8] considered that meeting the threshold test of no substantial merit went to a considerable distance to successfully obtaining costs. He considered an important issue was whether the person against whom costs were sought should have known about the weakness of their case and still pursued the allegations. I consider this is a case where Metalcraft should have known about the weakness of the case they were putting forward. They were legally represented by experienced

[8] Above n 1.

counsel who is familiar with Tribunal proceedings. In the circumstances, I consider it is appropriate to award costs.

What level of costs is appropriate?

[17] Mr Hiles-Smith is either seeking the actual cost or a contribution towards the actual cost. The Act does not provide guidance for the Tribunal on calculating quantum when awarding costs. In some cases, the Tribunal has applied the District Court or High Court scale as a guide and this approach has been upheld by the High Court. [9] However, the Tribunal is not bound by those scales when calculating quantum.

[18] While either the High Court or District Court scale is often appropriate when costs are being awarded following a substantive hearing, they are not always appropriate when it comes to interlocutory applications. The reason for this is that the removal application in the circumstances of this case, and the additional cost incurred by Mr Hiles-Smith, cannot easily be equated to the various steps in the scale set out by the High Court. This is apparent from the very different calculations that have been made by counsel for Mr Hiles-Smith and counsel for Metalcraft when suggesting what the appropriate cost would be under the High Court scale.

[19] In the circumstances of this case, therefore, I consider that a contribution towards the actual costs should be awarded. I do not however consider that there are grounds for ordering indemnity costs. The Court of Appeal in *Bradbury v Westpac Banking Corporation*[10] recognised the categories in respect of which the discretion may be exercised was not closed, but note the following circumstances in which indemnity costs have been ordered:

[9] Above n 1.
[10] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 (CA).

- The making of allegations of fraud known to be false.
- Particular misconduct that causes loss of time to the court and other parties.
- Commencing or continuing proceedings for ulterior motives.
- Doing so in wilful disregard for known facts or clearly established law.
- Making allegations which never ought to have been made or unduly prolonging a case by groundless contention.

[20] The High Court Rules also provide that a court may order indemnity costs if the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a claim or if it has ignored or disobeyed an order or direction. I do not consider that any of these categories have been established in this case.

[21] In the circumstances of this case I consider a 60 per cent contribution to the actual costs that have been incurred by Mr Hiles-Smith from the date the opposition to his removal was filed on 11 June 2012 until the Tribunal's decision 9 August 2012 is appropriate.

[22] If the parties cannot reach agreement on what these costs are they can seek further direction from the Tribunal.

DATED this 2nd day of October 2012

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P A McConnell

Tribunal Chair