IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-101-000067
[2010] NZWHT WELLINGTON 4

BETWEEN	**CONCHITA TWEEDDALE** Claimant
AND	**MICHAEL PEARSON** First Respondent
AND	**KAREN TUCKER** Second Respondent
AND	**PALMERSTON NORTH CITY COUNCIL** Third Respondent
AND	**PAUL HUMPHRIES** Fourth Respondent
AND	**STEVEN HARLEY** Fifth Respondent
AND	**SARAH SMITH and BARRY NIX trading as BARRAKUDA DESIGNS** Sixth Respondent

Hearing: On the papers

Decision: 4 March 2010

COSTS DETERMINATION

Adjudicator: R Pitchforth

Contents

Costs

[1] A determination was made on 1 December 2009 dealing with the substantive issues between the parties.

[2] The fifth respondent has appealed against the decision.

[3] Applications for costs have been received from the third and sixth respondents.

[4] Generally the Tribunal awaits the outcome of any appeals before dealing with costs. However, in this matter, there is no appeal affecting the issues involved in the application for costs.

Functus Officio

[5] Some parties have claimed that the Tribunal is *functus officio* in that it had issued a final determination wherein it has determined costs. It is submitted that it is therefore not appropriate or open to the Tribunal to revisit the issue of costs as the determination was expressly noted to be a final determination and does not reserve costs. The Tribunal has no jurisdiction.

[6] As H Williams J said in *Boyd v McGregor* High Court Auckland, CIV-2009-404-5332, 17 February 2010 at [28], debating labels is an arid debate. An attempt to rely on the label of a decision was considered in *Nachum v WHT* High Court Wellington, CIV-2009-485-2070, 18 February 2010, Gendall J. The label attached to a decision was found not to affect the effect of the content. The decision dealt with matters before the Tribunal and did not exclude dealing with other matters on another occasion.

[7] Counsel for the sixth respondents referred to *Wilson v Selwyn District Council* (2004) 17 PRNZ 461 where Fogarty J at [13]-[14] rejected the suggestion that when a matter is determined there is no power to deal with supplemental matters. That follows well settled law.

[8] By their very nature, applications for costs cannot be dealt with in most cases until the outcome is known. It is often not proper, for instance in the matter of Calderbank letters, that the Tribunal be made aware of offers of settlement.

[9] It was also argued that s 92(2) of the Weathertight Homes Resolution Services Act 2006 provides:

> (2) After a copy of the determination is given to the parties to an adjudication under section 89(2), the tribunal may, on its own initiative, correct any errors in it that are –
>
> (a) errors in computation; or
>
> (b) clerical or typographical errors; or
>
> (c) errors of a similar nature.

The granting of costs however is not the correction of an error.

[10] I accept that argument. There was no error in the determination requiring the exercise of s92(2). Instead, the question of costs has not been dealt with and is still at large. I do not accept that the Tribunal does not have jurisdiction to deal with costs.

[11] This ground of opposition is therefore unsuccessful.

Claim by Palmerston North City Council

[12] The Palmerston North City Council has applied for costs against all respondents. There are two grounds for a claim.

[13] One is based on [251]–[260] of the determination. That was a consideration of a costs application against Mr Humphries for failing to attend the mediation.

[14] The second ground is a Calderbank letter sent by the Council ‘without prejudice save as to costs’ to all respondents offering an amount to settle the dispute.

[15] The fourth respondent opposes the Council's application on the grounds that the decision was final and that the Tribunal is *functus officio.* I have dealt with these submissions above. This ground of opposition is therefore unsuccessful.

[16] The next ground is based on the costs jurisdiction in the Act. The section provides:-

> **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.

[17] The fourth respondent argues that the claim is based on bad faith, the threshold for the test is high and that the Tribunal has a limited jurisdiction.

[18] The fourth respondent's failure to attend mediation is said not to have been an obstacle to settlement. The reasons given for this were that he had made an offer in good faith and his legal adviser was available to discuss settlement options throughout the day.

[19] However, the fourth respondent produced an email from the Council dated 20 July 2009 saying:-

> Given Mr Humphries' refusal to attend mediation and the obstacle to settlement this will pose, we have now been instructed not to attend mediation.

[20] The Council clearly withdrew from the mediation at short notice. The combination of behaviours does not entitle it to claim bad faith against another party exhibiting the same behaviour. This is not a ground for awarding costs.

[21] The Calderbank offer was a more certain ground. It relates to a lack of merit. The offer was for $20,000.00. None of the respondents was willing to either limit the Council's liability to $20,000 or join with it in providing an offer which could be made to the claimant with any prospect of success. The Council was found liable for $14,657.85 which is less than the amount of the offer. The other respondents would have been better to have agreed to limit the Council's contribution to $20,000 and agree to pay any balance among themselves. In normal circumstances in litigation this is grounds for an award of costs.

[22] Parties faced with an offer 'without prejudice save as to costs' are put on notice that if they fail to obtain an award of a higher figure they can be liable for the consequences. When receiving an offer it is for the other parties to evaluate the merits of their case, the likelihood of success on all points at issue and the cumulative effect of such assessment. A decision to proceed carries with it the potential for obtaining an award for less than was offered. The offeror's assumption is then that the other party's risk was not worth taking and that the party making the offer has been put to the unnecessary expense of a hearing.[1]

[23] The Council made an offer to all the other respondents. In the light of the evidence known to the parties and the consequent decision allegations that it was responsible for more of the claim lacked merit. None of the other respondents could show that the Council involvement exceeded the amount

[1] Trustees Executors Ltd as *Trustees for the Simpson Family Trust v Wellington City Council*, Costs Decision WHT TRI-2007-101-29, 30 May 2008, Adjudicator Pitchforth – upheld on appeal in *Trustees Executors v Wellington City Council*, HC Wellington, CIV-2008-485-739, 16 December 2008, S France J at [44]-[47]

of responsibility that they accepted. As a result the Council was needlessly involved in two days of hearing.

[24] The Court of Appeal has discussed the effect of a *Calderbank* offer. In *Moore v Mcnabb* (2005) 18 PRINZ 127 (CA175/04; CA206/04) 8 September; 22 September 2005, (Hammond, O'Regan, Robertson JJ) the Court of Appeal said:

> [55] This device is a statutory recognition of the procedure first recognised in *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333 (reaffirmed by the Court of Appeal in *Cutts v Head* [1984] Ch 290; [1984] 1 All ER 597, and the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; [1988] 3 All ER 737 (HL)).
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> [56] It is as well to articulate the reasons for this important procedure in our law. Litigation is today potentially a very costly exercise. Clients pay for legal services essentially on an hourly basis. The more complex and prolonged the litigation, the higher the final bill is going to be. And it is not only single party costs which are in issue: the underlying principle of New Zealand law in relation to costs is that the losing party pays a reasonable proportion of the winning party's costs calculated in accordance with the rules of Court (see *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606; (2004) 16 PRNZ 1047 (CA)). Even with the assistance of the new rules, calculating the amount of costs involved can still be a difficult burden. Costs can outstrip the value of the subject matter in dispute and for a losing party, the costs of losing a case can be ruinous. It follows that litigants should have some means of limiting their exposure to this risk. A claimant may avoid this risk by abstaining from taking legal proceedings; but a party who is sued has no such alternative. It follows that, in fairness, defendants must have the means of gaining some protection from costs by making offers to settle by in some way meeting the claim. Plaintiffs should also have protection where defendants decline reasonable settlement offers.
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> [57] Then there are the "public" aspects of litigation. If the parties resort to formal adjudication through state-supported litigation there is distinct public expenditure involved. It was therefore important, as Lord Woolf MR pointed out in *Access to Justice*, the Interim Report on the civil justice system in England and Wales, to have a policy "to develop measures which will ncourage reasonable and early settlement of proceedings". (Chapter 24, at para 1. See also *Final Report*, at chapter 11.)
>
> [58] In summary, it is a requirement of fairness that litigants — particularly

> defendants — have some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure that a procedure of this character operates as an effective encouragement to settle.
>
> [59] As the Rules recognise, this is not the end of the matter, because the Court is not duty bound to give the defendant who is "successful" (in the sense of making an offer which beats the sum awarded) a costs order. This is because, as *Court of* 136 *Appeal* 18 PRNZ 127 Lord Woolf MR explained in *Ford v GKR Construction Ltd* [2000] 1 WLR 1397; [2000] 1 All ER 802: [T]he normal cost consequence of failing to beat the sum paid in does not apply when it is unjust that it should do so. If a party has not enabled another party to properly assess whether or not to make an offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have been reached if there had been proper disclosure, that is a material matter for a court to take into account in considering what orders it should make [P 1403; P 810].
>
> [60] It follows that a "successful" defendant may still be deprived of costs if the Court concludes that he or she should share the responsibility for the failure to reach a compromise; if the defendant kept back information that had a bearing on the assessment of the offer; or if for some other reason it would be unjust to order the claimant to pay the defendant's costs.

[25] The riders outlined by the Court of Appeal do not apply in this case. The Council is therefore entitled to the costs of the hearing which could have been saved if the offer was accepted.

[26] The sixth respondents were successful. Accordingly these costs are to be shared by the other respondents.

[27] I award 2 days based on the District Court Scale, a total of $2560.00 against the first, second, fourth and fifth respondents equally. The amounts are GST inclusive.

[28] Accordingly:-

[28.1] The first and second respondents shall pay the Palmerston North City Council the sum of $1280.00.

[28.2] Paul Humphries shall pay the Palmerston North City Council the sum of $640.

[28.3] Steven Boyce Harley shall pay the Palmerston North City Council the sum of $640.

Claim by Sarah Smith and Barry Nix trading as Barrakuda Designs

[29] The sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs claim costs on the basis that the claim against them was in bad faith and lacked substantial merit.

[30] As far back as 9 September 2009 the sixth respondents said that there were no sufficiently particularised allegations that suggest a breach of contract or a breach of duty of care to any party in the proceedings. They said that at that stage there was no evidence from any party which suggests that the sixth respondents were negligent and there were no contested facts. The pleadings were limited to an allegation that the sixth respondents were designers. They challenged parties to show that there was a duty of care owed to any of them. It was, in effect, a challenge to provide an argument with merit or be on notice that costs would be claimed if the parties failed in their claim against the sixth respondents.

[31] Procedural Order No 3 dated 21 November 2008 recorded that counsel for the Council referred to *Sunset Terraces*[2] arguing that the architect needed to be included in the process before the extent of liability was established and that there was a dispute as to fact.

[32] Counsel for the claimant said that it was necessary to join the designers in order to see their records. They viewed the records.

[33] All parties were invited to consent to the removal of the sixth respondents. They did not accept that invitation.

[2] *Body Corporate 188529 v North Shore City Council (No. 3)* [2008] 3 NZLR 479 (HC), Heath J.

[34] The sixth respondents apply for costs on the basis that its position was sustained at the hearing and the claim against the sixth respondents was dismissed.

[35] This is not a pleadings-based jurisdiction. However, parties are expected to outline their claim against each party in a way which provides specific particulars as to what is alleged, at least on a factual basis, and the legal justification if they are represented by counsel.

[36] The first and second respondents did not set out particulars of the claim against the sixth respondents.

[37] The evidence of the first and second respondents indicated that they had relied on the sixth respondents as designers but did not deal with the scope of duties or any failures.

[38] The sixth respondents say that there was bad faith on behalf of the first and second respondents. Two affidavits were sworn in support of the sixth respondents being a party. The inference was that the designer was involved in supervision. At the hearing it was clear that they were not.

[39] The first and second respondents said in support of retaining the sixth respondents as a party that they had no control over the building when their later evidence showed that they had input through Mr Humphries. In fact it was clear at the hearing that they agreed that the sixth respondents had no involvement after the plans were completed.

[40] The sixth respondents say that if the involvement of the first and second respondents with Mr Humphries had been divulged at the removal hearing it is likely that they would have been removed at that time.

[41] The third and fourth respondents sought an indemnity without any specific basis for the claim.

[42] The third respondent filed no evidence at all.

[43] The fourth respondent made no mention of design in his evidence.

[44] The first and second respondents oppose the application on a number of grounds, the first being that no evidence has been filed in support of the application.

[45] The record was relied upon by the sixth respondents. There is no other evidence needed.

[46] The fourth respondent opposed the application on the basis that it only sought indemnity costs from the sixth respondents as a joint tortfeasor - not an unusual procedure in this jurisdiction.

[47] The fourth respondent had the opportunity to disassociate himself from the claims made against the sixth respondents and avoid costs. He did not. To maintain a claim knowing that it is not capable of being successful is bad faith – see Tabram v Slater – Costs Determination WHT, TRI-2007-100-41, 27 May 2009, Adjudicator S Pezaro, at [12].

[48] The fifth respondent opposed the application on the basis that he did not join the sixth respondents to the proceedings. The fifth respondent also attended the mediation. I accept both of those contentions. However, he did not disassociate himself from the support for retention of the sixth respondents when challenged in September 2009.

[49] The diminished responsibility for the fourth and fifth respondents is recognised in the claim for costs and the decision below.

[50] The Tribunal does award costs in these situations - see *Kelly & Ors as Trustees of the Kelly Family Trust– Procedural Order No. 5* WHT, TRI-

2009-101-47, 2 November 2009, Adjudicator R Pitchforth approved on appeal in *Scott v Stewart* DC Porirua, CIV-2009-091-650, Judge Walker.

Amount of costs

[51] The sixth respondents say that if the evidence as known to the other parties had been properly disclosed and the affidavits in support of retaining them not been sworn, they would have been removed on 21 November 2008. That they were not was due to the bad faith of the first and second respondents.

[52] I accept that submission.

[53] All respondents objected to the removal of the sixth respondents despite lack of evidence to suggest liability. The sixth respondents submit that this also lacked merit and is the basis for costs.

[54] Again I agree.

[55] The sixth respondents argue that costs from 20 November 2008 to 9 September 2009 should be borne by the first and second respondents.

[56] All respondents should share the costs from the 9 September 2009.

[57] The sixth respondents elected not to attend the mediation. There will be no costs in relation to that matter.

[58] In *Simpson Family Trust v Wellington City Council* (supra) it was established that the District Court Scale can be an appropriate rate for costs in the Tribunal.

[59] The sixth respondents also claimed against the first and second respondent for their expert witness' fee. Again, this witness would not have been required if the allegations had not been made.

[60] The claim based on a 2B calculation submitted is :-

Ref District Court Schedule	Item	Dated / or set down for	Days	1280 x days
9.9	Appearance at judicial conference	11/06/08	0.3	384
2	Preparation of statement of defence	06/04/09	1	1,280
8.1	Preparation for judicial settlement conference (mediation)	21/07/09	0.25	320
16.5	Defendants preparation of affidavits or written oral evidence	12/08/09	2	2,560
9.1	Preparing and filing interlocutory application (removal)	09/09/09	0.4	512
9.9	Judicial conference (pre-hearing conference)	14/09/09	0.3	384
17.1	Preparation for hearing	16/09/09	3	3,840
18.1	Appearance in Court	16/09/09	1.5	1,920
	Expert's fee – Colin Hill (invoice annexed)			3,023
				$14,223

[61] I have disallowed the extra charge that the claimant made against the fifth respondent. The total due is therefore $13,903. All amounts are inclusive of any GST.

[62] I award costs to the sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs as follows:-

> [59.1] The first and second respondents, Michael Graham Pearson and Karen Frances Tucker are jointly and severally liable for the sum of $9,583.00

[59.2] The third respondent the Palmerston North City Council is liable for the sum of $1,400.00

[59.3] The fourth respondent Paul Humphries is liable for the sum of $1,400

[59.4] The fifth respondent Steven Boyce Harley is liable for the sum of $1,400.

Conclusion

[63] The first and second respondents Michael Graham Pearson and Karen Frances Tucker shall pay the Palmerston North City Council the sum of $1280.00 and the sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs $9,583.00

[64] The third respondent the Palmerston North City Council shall pay the sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs $1,400.00.

[65] The fourth respondent Paul Humphries shall pay the Palmerston North City Council the sum of $640.00 and the sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs $1,400.00.

[66] The fifth respondent Steven Boyce Harley shall pay the Palmerston North City Council the sum of $640.00 and the sixth respondents Sarah Smith and Barry Nix trading as Barrakuda Designs $1,400.00.

DATED in Wellington the 4th day of March 2010.

Roger Pitchforth
Tribunal Member