SUMMARY

Case: White & Anor v Rodney District Council & Anor – COSTS DECISION
File No: TRI 2007-100-000064/ DBH 01814
Court: WHT
Adjudicator: KD Kilgour
Date of Decision: 23 April 2009

Background
An application was filed by the claimants seeking costs against the second respondent, Mrs Kerkin pursuant to s91 of the Weathertight Homes Resolution Services Act 2006 (Act). However the claimants were not successful as the Tribunal found that the defences raised by Mrs Kerkin did not lack substantial merit and neither did her conduct during the proceedings amount to bad faith.

Summary of Facts
On 4 March 2009, the Tribunal issued a substantive determination regarding the claims filed by the claimants against the Rodney District Council and Mrs Kerkin who remained as a respondent jointly and severally in her personal capacity and as sole trustee of her late husband's estate. In that substantive determination the Tribunal ordered the Rodney District Council and Mrs Kerkin to pay the amount of $173,801.48 in compensation to the claimants.

On 16 March 2009, in pursuant to s91 of the Act, the claimants filed a memorandum at the Tribunal seeking an award of costs against Mrs Kerkin.

Claim for Costs
The basis of the claimants' costs application is that:

- Mrs Kerkin pursued arguments that lacked substantial merit – ie, Mrs Kerkin purported to defend the contractual breach of the vendor warranty claim made by the claimants when her defence lacked substantial merit
- Mrs Kerkin failed without reasonable justification to accept legal argument advanced by the claimants – ie, Mrs Kerkin exhibited bad faith during the proceedings for she did not sensibly and realistically assess her exposure to liability early on
- Mrs Kerkin failed without reasonable justification to accept and offer of settlement – ie, Mrs Kerkin did not engage in any genuine or meaningful attempt at a settlement outcome

Based on those arguments, the claimants submitted that Mrs Kerkin's failings contributed unnecessarily to their costs in having to conduct proceedings for 3 years through to the end of an adjudication hearing.

Mrs Kerkin refuted those allegations and asserted that she did proactively and constructively advance settlement possibilities, and did not deliberately delay proceedings or frustrate meaningful and sensible attempts to settle the claim. Mrs

Kerkin submitted that it was the obdurate stance the claimants adopted over the quantum of their claim which more than anything else, determined that the respondents were unable to achieve an early settlement.

Summary of Decision
An overview of the case law indicates that the meaning to be attached to the words "bad faith" depends on the circumstances in which it is alleged to have occurred, and the range of conduct warranting the label can range from the dishonest to a disregard of legislative intent. In *Parker v Comptroller-General of Customs*, the High Court of Australia undertook a consideration of the statutory framework before considering the contextual meaning of "impropriety". The Court arrived at the intended meaning of the words by taking into account their meaning in ordinary usage and by considering the overall statutory framework. The Tribunal held that this is the approach to be taken here in deciding what amounts to "bad faith".

In terms of public policy, the Tribunal held that "bad faith" as used in s91 of the Act, could apply to parties who are obfuscate or take few or no steps and refuse to participate in the process or settlement negotiations, and in so doing jeopardise the settlement process. In the present proceedings however, the Tribunal found that Mrs Kerkin did partake in settlement negotiations and mediation, and an early resolution was not frustrated by any deliberate refusal to participate by her.

It was also found that Mrs Kerkin did not pursue litigation in defiance of reason or common sense, and in relation to some her defending arguments, the Tribunal held that Mrs Kerkin could not have discerned the weakness of her case earlier than its exposure at the hearing. Moreover, section 57(2) of the Act also requires that in managing adjudication proceedings, the Tribunal must also comply with the rules of natural justice. That provision therefore mandates that parties have a right and opportunity to put their case and to be heard.

The Tribunal was therefore satisfied that there was no basis for a finding of bad faith on the part of Mrs Kerkin in pursuing her grounds for defence. Having heard from and seen Mrs Kerkin at the hearing, the Tribunal accepted that she entered into the process of mediation and adjudication in good faith.

For those reasons, the Tribunal did not find that Mrs Kerkin unnecessarily imposed costs on the claimants.

Result
The claimants' application for a costs determination from the Tribunal was dismissed.