IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-100-0000064

BETWEEN	**PAUL WHITE and WILNA WHITE**
	Claimants
AND	**RODNEY DISTRICT COUNCIL**
	First Respondent
AND	**LORELLE JOY KERKIN**
	Second Respondent

COST DETERMINATION
Dated 23 April 2009

Background

1. On 4 March 2009 the Tribunal issued a final determination ordering the Rodney District Council and Mrs L J Kerkin to pay compensation of $173,801.48 to the claimants, Paul and Wilna White.

Correction

2. Paragraph 12 of that determination mentioned a date of 13 January 2002. It should have read 13 **February** 2002. The Tribunal orders the correction of that date to read 13 **February** 2002, pursuant to section 92(2)(b) of the Weathertight Homes Resolution Services Act 2006 (the Act). This section empowers the Tribunal to correct minor errors.

Costs Application

3. On 16 March 2009, the claimants, through their counsel, filed a comprehensive memorandum seeking an award of costs against the second respondent, Mrs L J Kerkin, of $50,000 together with disbursements of $23,509.50. The application asks the Tribunal to make a costs award in terms of section 91 of the Act.

4. The costs application submits that by section 125(3) of the Act, the Districts Court Rules 1992 apply to the assessment of costs; and in this application the claimants seek increased costs above the Schedule 2C calculation of r 47 C of the those Rules.

5. The claimants' application submits that the scheme of the Act is not to allow a party to cause unnecessary costs to others by pursuing arguments that lack substantial merit.

6. The application states that the claimants have been put to unnecessary expense in conducting proceedings for three years through to the end of an adjudication hearing because the second respondent purported to defend the contractual breach of warranty claim made by the claimants when the defence had no substantial merit, and that the second respondent exhibited bad faith in conducting the proceedings. That is, that Mrs Kerkin did not sensibly and realistically assess her liability exposure early on, and that the claimants were thereby penalised financially for her failings.

7. The second respondent, Mrs Kerkin, through her counsel, filed extensive submissions in reply on 6 April 2009.

8. The second respondent's reply refutes the two grounds advanced by the claimants in support of their costs application. Counsel for Mrs Kerkin rejects the argument that the second respondent's defence to the warranty claim was without substantial merit, and asserts that she did not deliberately delay proceedings or frustrate meaningful and sensible attempts to settle the claim.

9. The claimants then replied by stating that the second respondent misstates factual events and that essentially there is nothing in Mrs Kerkin's response to deflect the claimants' request that the Tribunal order an award of costs under section 91.

10. The claimants' submissions expand on their allegation that Mrs Kerkin's defence to the liability for breach of the vendor

warranty claim lacked substantial merit, that the second respondent did not engage in any genuine or meaningful attempt at a settlement outcome, and that in doing so she contributed unnecessarily to the costs of the claimants in having to proceed to an adjudication.

11. The two parties' respective arguments, and the authorities which they advanced in support, are set down in their respective submissions. Both parties' submissions were carefully and properly advanced.

12. The basis of the costs application is that the second respondent pursued arguments which lacked merit, failed without reasonable justification to accept legal argument advanced by the claimants, and failed without reasonable justification to accept an offer of settlement.

13. The second respondent refutes both allegations and argues that she did proactively and constructively advance settlement possibilities. Indeed, the second respondent submits 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.

Statutory Provision

14. Section 91 of the Act is as follows:

> **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.

Costs Award Principles

15. The Tribunal has discretion to award costs in limited circumstances, and it follows that in exercising its discretion, it should so do judiciously and not capriciously.

16. The presumption which the claimants must overcome to successfully secure an award of costs is set down in section 91 (2) of the Act, namely, that the parties must meet their own costs and expenses.

17. The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which have caused costs and expenses to have been incurred unnecessarily by, in this case, the claimants.

18. The phrase "bad faith" has received judicial consideration in a number of decisions including: *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721,[2006] NZSC 98 (SC) at [87]-[89]; *R v Reid* [2008] 1 NZLR 575 SC; *R v Williams* [2007] 3 NZLR 207(– ruling that police had acted in bad faith); NZLR; *WEL Energy Trust v Waikato Electricity Authority*, 31 August 1994, HC Hamilton Penlington J.; *Cannock Chase District Council v Kelly* [1978] 1 AII ER 152; *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA); *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328;(CA); *R v Strawbridge (Raymond)* [2003] 1 NZLR 683;

Transpac Express Ltd v Malaysian Airlines [2005] 3 NZLR 709, Smellie J at [61] (bad faith by in-house counsel).

19. 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.

20. Context and statutory intent were held to be the keys in the recent High Court of Australia decision in *Parker v Comptroller-General of Customs* [2009] HCA; (2009) 252 ALR 619.

21. In that case French CJ undertook a consideration of the statutory framework (in that case it was the Customs Act) before considering the contextual meaning of "impropriety" at paragraphs [27] and [29]. 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. This is the approach to be taken here in deciding what amounts to bad faith.

22. In terms of public policy, “bad faith” as used in section 91 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 (often in the hope of escaping any liability), and who in so doing jeopardise the settlement process. But in this proceeding, the second respondent did partake in settlement negotiations and mediation and an early resolution was not frustrated by any deliberate refusal to participate by her.

Decision on Application for Costs

23. The claimants' submissions on their face do make out an arguable case for a costs award. The second respondent's defences and arguments to the contractual claim were imaginative, and her decision to continue to persist with the Contractual Remedies Act argument and the time limitation arguments were perhaps, in hindsight, bold.

24. Nevertheless, in the circumstances of the claim and after considering all the submissions, I cannot characterise any of the second respondent's defence arguments as improper or lacking in substantial merit at the time they were made.

25. I make my suggestion that some of the respondent's defences were bold only after all the evidence has been advanced and tested at the hearing. In proceeding with certain arguments the second respondent was not wilfully advancing arguments that had no substantial foundation.

26. If anything, and in hindsight, there was probably a failure to recognise some inadequacies in such arguments, but that only became evident at a hearing. Those arguments that were inadequate were not able to be identified as such before exposure at a hearing.

27. The claimants counsel is correct when he submits that section 125(3) of the Act provides that the District Court Rules apply, with all necessary modifications, in determining a costs award in this jurisdiction. However, the scheme of the Act is that generally costs in this jurisdiction should lie where they fall.

28. In summary, I find that the second respondent did not pursue litigation in defiance of reason or common sense, and, in

respect of some of her defending argument, she could not have discerned the weakness of her case earlier than at exposure at a hearing. It was only after the hearing and findings of fact that she (and her late husband) was found to be the head-contractor (there being no "turn-key" contract with Contemporary Design & Build Limited) and that it was the Kerkins who made the decision to depart from the permitted plans, and that therefore her cross-claim against the first respondent thereby failed. Furthermore, the Tribunal's findings as to the quantum of remedial costs and the claimants' failure to mitigate their loss was determined after, in part, the second respondent's evidence and arguments.

29. Section 57(2) requires that in managing adjudication proceedings under the Act, the Tribunal must comply with the rules of natural justice (section 57(2)). The rules of natural justice mandate that parties have a right and opportunity to put there case, and to be heard.

30. I accept the second respondent's submissions that she did not deliberately delay proceedings, she did genuinely attempt to settle and gave careful consideration to the grounds of her defence.

31. A party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegation. I am satisfied that there is no basis for a finding of bad faith on the part of the second respondent in pursing her grounds for defence. Having heard from and seen Mrs Kerkin at the hearing, I accept her submission that she entered in to the process of mediation and adjudication in good faith.

32. For those reasons I do not find that costs were unnecessarily imposed on the claimants by Mrs Kerkin. I do not find bad

faith on her part or that her allegations or objections to the claimants' claim were without substantial merit. The presumption set out in section 91 (2) of the Act is not overturned.

Order

33. The claimants' application for a costs determination in terms of section 91 of the Act is dismissed.

DATED this 23rd day of April 2009

_____

K D Kilgour

Tribunal Member