IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000105
[2011] NZWHT AUCKLAND 47

BETWEEN	HONG ZHONG AND RUN ZHONG Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	ROSE MARY MCLAUGHLAN Second Respondent
AND	YA WEI LI Third Respondent
AND	STANLEY CHEN Fourth Respondent
AND	ORIENT BUILDERS LIMITED Fifth Respondent
AND	LU ZHENG Sixth Respondent
AND	HBRC LIMITED Seventh Respondent

DECISION ON COSTS
Adjudicator: S Pezaro

Applications for costs

[1] Auckland Council, the first respondent, and Stanley Chen, the fourth respondent, have applied for costs against the claimants. The claimants' claims against these respondents were dismissed on 1 July 2011. The claimants oppose both applications for costs.

Jurisdiction

[2] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) to make an award of costs:

> **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
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> (b) allegations or objections by that party that are without substantial merit.
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> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[3] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. The onus is on the party applying for costs to prove its claim.

[4] In *Trustees Executors Ltd v Wellington City Council,*[1] Simon France J observed that meeting a threshold test of no substantial merit "must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008.

discretion to be exercised".[2] His Honour considered that the important issues were whether the appellants should have known about the weakness of their case and whether they pursued litigation in defiance of common sense.[3]

AUCKLAND COUNCIL

Background

[5] The claim against the Council was that it negligently issued the building consent because the plans specified Insulclad and the specifications referred to Harditex, creating confusion for the builder. The claimants also alleged that the plans lacked sufficient detail. The day before the hearing the claimants amended their claim to plead that the Council breached its duty of care by allowing the second respondent, Rose McLaughlan, to carry out the inspections when she was operating outside the terms of her license. This claim failed and has not been referred to in submissions on costs by either party.

[6] In an affidavit filed on 20 January 2011 the builder, Lu Zheng, deposed that he was instructed by the third respondent/developer, Ya Wei Li, to use Harditex. This evidence was consistent with the contract between Orient Builders Limited and Ms Li. At adjudication the Council was found to have been negligent in issuing the consent however the claim was dismissed as there was no causative link between the consent and the claimants' losses.

Council submissions

[7] The Council applies for costs under s91(1)(b) of the Act on the ground that the claimants proceeded with their claim when they knew or ought to have known that it was without substantial merit.

[2] At [51] per France Simon J.
[3] At [52] per France Simon J.

The Council submits that there was no basis for reasonably concluding that the Council's actions in issuing the building consent caused any loss to the claimant. Prior to adjudication the Council twice applied for removal on this ground and the claimants opposed the applications. In dismissing these applications I concluded that the claim against the Council was tenable however I observed that causation remained to be proved.

[8] During the proceedings the Council put the claimants on notice of the costs it was incurring and offered to accept the claimants' discontinuance of the claim on a no-costs basis. Letters to this effect dated 2 September 2010, 7 February 2011 and 10 March 2011 have been produced. The Council now submits that, despite being put on notice, the claimants failed to address the question of causation and could not reasonably have believed that their claim had merit. The Council further submits that even if it was reasonable for the claimants to rely on the opinion of Neil Alvey, their expert, that the building consent should not have been issued until the type of cladding was clarified, Mr Zheng's evidence demonstrated that there was a deliberate decision to change the cladding from Insulclad to Harditex. Once this evidence was filed, it is submitted that the claimants should have discontinued their claim.

Opposition

[9] Mr Rainey submits that the fact that the claim was dismissed does not mean that it lacked substantial merit. Rather he suggests that the claim must have had merit as it survived two applications for removal and the Council was held to be negligent, only escaping liability by "happenstance".

[10] He submits that the claimants were entitled to rely on Mr Alvey's evidence to support their claim that the plans caused confusion and lacked adequate detail and that the different opinions

of Mr Alvey, and the Council's expert, Clint Smith, needed to be weighed. Further it is argued that there was a factual dispute between Mr Chen, the architect, and Mr Zheng about the sequence of events leading to the construction of the house. Mr Rainey also suggests that any award of costs should not be made solely against the claimants but should include the seventh respondent, HBRC Limited, as it also opposed the Council's removal. As this is not an application made by the Council I have not considered it.

The threshold for assessing substantial merit

[11] In *Trustees Executors*[4] Justice France held that:

> In policy terms, whilst one must be wary of establishing disincentives to the use of the 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:
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> 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.

[12] In *River Oaks*[5] the High Court held that preferring other evidence does not lead to the conclusion that a claim lacks substantial merit. In *Phon & Yun*[6] 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

[4] *Trustees Executors Limited v Wellington City Council* (HC Wellington, unreported, CIV-2008-485-739, 16 December 2008, France J).
[5] *River Oaks Farm Limtied v Holland* HC Tauranga, unreported, CIV-2010-470-584, 16 February 2011, Allan J.
[6] *Phon v Waitakere City Council* [2011] WHT TRI-2009-100-000104, 26 April 2011.

on allegations which a party ought reasonably to have known they could not establish.

[13] In *Max Grant Architects Limited v Holland*[7] the Tribunal declined a removal application by the architect but recorded that the claimant, the party opposing removal, needed to establish causation. At adjudication the claim against the architect failed but the Tribunal declined his application for costs.

[14] On appeal the District Court held that the Tribunal was wrong to conclude that the threshold for an award of costs under s91(1)(b) had not been met because the claimant failed to offer the necessary evidence of causation at hearing.[8]

SUMMARY AND CONCLUSIONS

[15] In this case, when I declined the Council's removal applications, I recorded that causation remained an issue. Unless the claimants had a basis for reasonably believing that they could prove causation at adjudication, they had no basis for believing that their claim had substantial merit.

[16] Mr Alvey's evidence that the plans caused confusion about the type of cladding intended was opinion evidence however whether the builder was confused about the cladding was a question of fact which was resolved once Mr Zheng filed his affidavit. In relation to the claim that the plans lacked sufficient detail, the report of the experts' conference demonstrated that Mr Alvey was the only expert who held this view. At this time it should have been apparent that the claim that the plans were inadequate had little prospect of success.

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[7] *Holland & Ors as Trustees of the Harbourview Trust v Auckland City Council* WHT TRI-2009-100-00008, 17 December 2009.
[8] *Max Grant Architects v Holland* at [81].

[17] These claimants are represented by counsel experienced in this jurisdiction who were aware of the legal and evidential issues raised by the claim against the Council. On receipt of the brief of Mr Zheng and the report of the experts' conference, the claimants should reasonably have been advised that their claim lacked the required evidential and legal foundation. In addition, the claimants' allegation that the installation of the Harditex was not carried out in accordance with the manufacturer's specifications undermined their claim that any lack of detail or confusion in the plans was causative of their loss.

[18] For these reasons I conclude that the Council is entitled to an award of its legal and expert costs incurred after the experts' conference.

[19] Mr Rainey argued that the costs claimed are excessive and do not reflect only those costs that were unnecessarily incurred. He also disputed the amount of time claimed for the hearing. I have awarded legal costs on the basis of Mr Rainey's calculation of the recovery rate which was not disputed by the Council. The only expert costs claimed were incurred after the experts' conference and are therefore awarded in full. The total payable by the claimants to the Council is therefore $20,609.79 calculated as follows:

Description	**Allocation**	**Rate**	**Amount**
Preparation for hearing	6.0	$1,500	$9,000.00
Appearance at trial	3.0	$1,500	$4,500.00
Appearance of second counsel	1.5	$1,500	$2,250.00
Expert fees at 31/3/11 Advance Building Solutions Limited			$4,859.79
TOTAL			$20,609.79

STANLEY CHEN

[20] Mr Chen was the designer of the dwelling and the claim against him was that he created confusion by specifying Insulclad in

the plans and providing specifications which referred to Harditex and that he was negligent in failing to provide sufficient detail in this plans. The claim against Mr Chen failed for the same reasons as the claim against the Council.

[21] Mr Chen seeks legal costs against the claimants. Mr Chen was represented prior to adjudication and his lawyer filed his brief on 7 February 2011. However on 24 March 2011 Mr Chen notified the Tribunal by email that he would be self-represented at the hearing. This was confirmed by his lawyer on 25 March 2011.

[22] The question of whether costs could be awarded to an unrepresented party was considered by the Court of Appeal in *Commissioner of Inland Revenue v The Chesterfields Preschool Limited*.[9] The Court confirmed that there is an established rule in New Zealand that a lay litigant is not entitled, except in exceptional circumstances, to recover costs.[10] A lay litigant is entitled to "reasonable disbursements" at the discretion of the Court which may include out of pocket costs for travel, accommodation and sums paid to a solicitor for help in preparing documents, and preparing to appear and argue the case in person.[11]

[23] An application for costs by an unrepresented party was also considered by the Employment Court in the decision of *Maddern v WorldExchange Communications Limited.*[12] In that case the Court held that, as the plaintiff had succeeded in part in challenging an award of costs against him and had not contributed in any way towards the situation that gave rise to his original claim to the Employment Relations Authority, there were special circumstances which justified a departure by the Court from its general approach to awarding costs to self represented litigants.

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[9] *Commissioner of Inland Revenue v The Chesterfields Preschool Limited* (2010) 24 NZTC 24, 500.
[10] *Re Collier (a bankrupt)* [1996] 2 NZLR 438.
[11] At [6].
[12] *Maddern v WorldExchange Communications Limited* NZEmpC AK [2011] 21 ARC 59/10.

[24] For the reasons given in relation to the costs application by the Council I conclude that if Mr Chen is entitled to costs it is only after the experts' conference. I am not satisfied that he has made out a case for special circumstances and have therefore considered whether he is entitled to costs for assistance in preparation of documents for hearing or for disbursements. The only costs claimed after the experts' conference are those described on an invoice dated 23 March 2011 as "legal fee first half of the agreed fee for hearing $12,500.00 plus GST". There is no indication of what work was done or how this amount is calculated and no reference to any scale. There is an amount of $4,600.00, also identified by date as 23 March 2011, on the schedule in support of the application for costs but the invoice for this amount is dated 25 January 2011. I conclude that this invoice is for legal services prior to the experts' conference and therefore is not relevant.

[25] As there is no description of the services provided by Mr Chen's lawyer for the fee of $12,500.00 and no evidence that he received legal advice or assistance with preparing documents in the relevant period I decline Mr Chen's claim for costs.

ORDERS

[26] The claimants are to pay Auckland Council the sum of $20,609.79 immediately.

[27] The claim by Stanley Chen for costs is dismissed.

DATED this 18th day of October 2011

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S Pezaro

Tribunal Member