IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000028
[2013] NZWHT AUCKLAND 20

BETWEEN	**ANDRZEJ WOJCIECH KROCZAK, SEOK CHING NG AND AYSL TRUSTEE COMPANY LIMITED as Trustees of the TANK FAMILY TRUST** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**WEI WANG** Second Respondent

Decision: 15 July 2013

COSTS DETERMINATION
Adjudicator: S Pezaro

BACKGROUND

[1] Andrzej Kroczak and Seok Ching Ng, the claimants, brought a claim against Auckland Council in respect of their leaky home. I determined this claim on 17 May 2013 and found the Council liable to the claimants. The claimants now seek costs of $12,010.77 for producing evidence on Council practice.

RELEVANT PRINCIPLES

[2] The application for costs is made under s 91(1)(a) and (b) of the Weathertight Homes Resolution Services Act 2006:

> **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.

[3] 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 lack substantial merit have caused unnecessary costs or expenses to a party.

[4] In *Trustees Executors Ltd v Wellington City Council*[1] Simon France J observed that:

> [66] In policy terms, whilst one must be wary of establishing disincentives to the use of an important Resolution Service, one

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.

> 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.
>
> [67] 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.

[5] His Honour considered 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 discretion to be exercised."[2] The important issue is whether the weakness of the case was apparent and whether litigation was pursued in defiance of common sense.[3]

THE APPLICATION FOR COSTS

[6] Mr Rainey submits that the Council acted in bad faith by failing to challenge the evidence of the claimants' expert witness, Neil Alvey, on Council liability. The claimants accept that they had the onus of proving their claim, and that the Act does not alter the burden or standard of proof, but submit that the Council acted in bad faith and subverted the Tribunal's investigative role by contravening Tribunal directions to set out any dispute with reasons.

[7] The claimants also submit that by denying liability in the face of evidence sufficient to prove that liability, without calling any evidence to support its denial, the Council maintained a defence which lacked substantial merit.

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[2] Above n 1 at [51].
[3] Above n 1 at [52].

THE COUNCIL'S OPPOSITION

[8] Ms Harrison frames the Council's position as not conceding liability and putting the claimants to proof. She argues that the Council's interim response clearly set out its denial that it breached its duty and the reasons for that denial. Ms Harrison submits that costs are not justified because:

a) Mr Flay's evidence was necessary for the claimants to prove their claim that the Council was negligent in carrying out inspections on the dwelling.

b) The claimants were aware throughout the proceedings of the need for them to prove all elements of their claim against the Council and there can be no reasonable suggestion that the Council conducted the adjudication in bad faith.

c) The Council cannot reasonably be accused of making allegations or objections that are without substantial merit simply because it declined to concede liability and put the claimants to the proof in respect of their claim against the Council.

ISSUES

[9] The issues that I need to decide are:

- Did the Council cause the claimants to incur the costs of calling evidence on Council liability unnecessarily either by bad faith or pursuing a defence which lacked substantial merit?
- If so, should I exercise the discretion to award costs?
- If so, what costs should be awarded?

DISCUSSION

The investigative nature of the Tribunal

[10] The purpose of the Act is to provide owners of leaky homes with access to speedy, flexible, cost-effective procedures for resolution of their claims.[4] In order to facilitate this purpose there are several provisions in the Act which reinforce the investigative nature of the adjudication proceedings. Section 57 requires the Tribunal to manage proceedings to achieve the purpose of the Act, and in particular to:

> **57 Adjudications to be managed to achieve purpose of Act**
> (1) ...
> (a) encourage parties where possible to work together on matters that are agreed; and
> (b) use, and allow the use of, experts and expert evidence only where necessary; and
> (c) try to use conferences of experts to avoid duplication of evidence on matters that are or are likely to be agreed; and
> (d) try to prevent unnecessary or irrelevant evidence or cross-examination.

[11] The extent to which the investigative procedures of the Tribunal differ from court procedure was noted by Ellis J in *Yun v Waitakere City Council*[5] in relation to removal applications*:*

> [29] ... The Tribunal is, in my opinion, materially different from a Court in a number of important ways. As I have already indicated, I largely accept [the] submission that the Tribunal is primarily inquisitorial in nature, although I also accept that aspects of the adversarial process do have a role to play in its proceedings. Nonetheless, it is because of its fundamental investigative role that I think it is dangerous simply to interpret or gloss its explicit statutory processes by reference to Court procedure.

[12] The Tribunal is empowered by s 73(1)(c) of the Act to request parties to provide copies of any documents that it reasonably requires. Section 73(2) requires parties to comply with any request or direction made under this section.

[13] The Chair's Directions and the standard directions issued prior to mediation and adjudication reflect the Tribunal's investigative role. My

[4] Section 3 of Weathertight Homes Resolution Services Act 2006.
[5] *Yun v Waitakere City Council & Anor* (unreported), HC Auckland, CIV-2010-404-5944, 15 February 2011, Ellis J.

directions for filing responses in these proceedings required the Council to either accept or deny liability for the damage by setting out:

> - Which matters in the claim were accepted or agreed.
> - Which matters were disputed with reasons.
> - An outline of any affirmative defences or mitigation issues intended to be raised at either the mediation or adjudication including any dispute as to the quantum or amounts claimed.
> - Copies of any experts' reports, evidence, schedule or breakdown of costs they will be relying on at mediation.

Did the Council act in bad faith?

[14] In its interim response the Council admitted that it owed a duty of care to the claimants but denied breaching that duty. The Council set out its reasons which were that the alleged defects:

> a) are not defects; and/or
> b) were built in accordance with relevant trade practices; and/or
> c) have not failed or caused damage; and/or
> d) would not have been visible to a Council inspector during the course of its inspections; and/or
> e) would not have been identified by a reasonable Council inspector in the course of its inspections.

[15] The claim did not settle at mediation and on 4 December 2012 the Council filed its final response to the claim. In this final response the Council removed the clear denial of liability in the pre-mediation response and replaced it with a statement that it will "not dispute the existence of any defects that the Tribunal finds to be proved by the claimants". The response also stated that:

> The Council notes that the claimants' expert Mr Alvey does not provide any evidence regarding the Council's liability in respect of the defects referred to in his brief as defects 4(a), 6 and 8.

[16] While the Council did deny liability to the claimants in relation to its cross-claim against the second respondent, the only specific dispute raised here was liability for issuing the building consent, on the basis of limitation, and a dispute with Mr Alvey's evidence in relation to defects 4(a), 6 and 8.

[17] However, defect one, the absence of metal cap flashing on the parapets, was identified by the Council's own expert, Simon Paykel, as the most significant defect. Mr Paykel said this defect accounted for approximately 85 per cent of the total repair costs and caused the need to fully reclad the dwelling. It was also Mr Paykel's opinion that this defect, the installation of the butyl rubber membrane, the omission of metal cap flashing on the parapets, and the inadequate slope on the parapet walls would have been apparent to a site supervisor.

[18] Even if I accept that the claimants must have understood when they sent the Calderbank letter that the Council denied liability for the conduct of the inspections, the Council filed its final response after receiving the Calderbank letter. In its final response the Council did not retain the wording of its pre-mediation response in relation to liability for the claim nor did it challenge Mr Alvey's evidence that defect one was not consistent with the plans and that a prudent Council inspector ought to have identified this defect during the inspections. The Council's amendment to its response combined with its failure to raise any dispute with the (agreed) most significant defect gave the impression that the Council no longer maintained its pre-mediation position of a complete denial of any liability. If the Council had maintained the wording of its interim response in its final response, there could be no reasonable suggestion that it accepted it was liable for the conduct of its inspections. However, had the Council maintained a position of denial, I would have directed it to provide reasons prior to the hearing.

[19] Ms Harrison submitted that there is no requirement in the Chair's Directions obliging respondents to point out gaps in the claimants' evidence, in this case referring to the Council's challenge to Mr Alvey's qualification as an expert on Council practice. However, the directions issued in relation to responses required respondents to clearly identify any dispute with the claim and provide the reasons for their dispute.

[20] I therefore do not accept Ms Harrison's argument that the Council was entitled to challenge Mr Alvey's evidence at hearing without having done so in its response. The Chair's Directions require respondents to identify prior to hearing not only any dispute with the claim but the reasons for that dispute.

[21] The reason the Council denied liability was that it did not accept that Mr Alvey was qualified to give evidence on Council practice. The Council was therefore obliged to articulate any denial of liability and support its denial with reasons. If the reasons were evidence based, that evidence should have been provided. However, the Council's position was not clarified until the hearing. When I asked Ms Harrison why the dispute and reasons were not articulated in the Council's response and why the Council had not raised the issue earlier, she replied that: "If we had raised it they simply would have got another expert".[6]

[22] An overview of the case law indicates that the meaning of "bad faith" depends on the circumstances in which it is alleged to have occurred. The range of conduct constituting bad faith can range from dishonesty to a disregard of legislative intent.

[23] The Tribunal awarded costs on the grounds of bad faith in *Clearwater Cove Apartments v Auckland Council*[7] after finding that the claimants failed to comply with Tribunal orders to disclose documents which were relevant to the respondents' defence.[8]

[24] In my view the failure by the Council in these proceedings to clearly articulate its dispute and provide reasons as directed to do so are comparable. I therefore conclude that the Council acted in bad faith and, if the claimants have incurred costs unnecessarily, an award of costs is justified pursuant to s 91(1)(a).

[6] Transcript, 18 December 2012 at page 18.
[7] *Body Corporate 170989 v Auckland Council* [2012] NZWHT Auckland 35.
[8] This decision is under appeal.

Did the claimants incur unnecessary costs as a result of the Council's actions?

[25] The Council contends that it was always necessary for the claimants to instruct either Mr Flay or someone else with similar expertise on Council practices in order to prove their claim. Ms Harrison argues that the claimants acknowledged in their Calderbank letter that the Council denied any breach of duty or negligence therefore they must have understood the Council's position and been aware that they needed to prove that the Council inspections were negligent when they filed their briefs of evidence. At that point, Ms Harrison submits, the claimants elected to rely on Mr Alvey's evidence. She argues that they made a further election at the hearing, when the Council challenged Mr Alvey's qualifications, to instruct another expert and the Council should not bear the cost of those decisions.

[26] The question I need to consider is whether, if the Council had raised its challenge to Mr Alvey's evidence earlier in the proceedings, it is likely that the claimants would have instructed another expert. If I conclude that they would have done so, the costs now claimed will have been necessary costs of the proceedings.

[27] The question I need to consider is whether, if the Council had raised its challenge to Mr Alvey's evidence earlier in the proceedings, it is likely that the claimants would have instructed another expert. If I conclude that they would have done so, the costs now claimed will have been necessary costs of the proceedings.

[28] The claimants say that they never accepted that Mr Alvey's evidence was insufficient to prove their claim but took the opportunity provided at the hearing to instruct another expert because they could not afford to risk that their claim may not succeed.

[29] Mr Rainey also records that I advised Ms Harrison when I adjourned to allow the claimants to instruct another expert that, if the claimants succeeded on Council liability, an award of costs was likely to follow. Mr Rainey submits that the Council should now face the

consequences of its action. However, the claimants must demonstrate that the costs claimed were incurred unnecessarily by the actions of the Council. The finding that the Council acted in bad faith is not sufficient to justify an award.

[30] I am not satisfied that faced with the same challenge to Mr Alvey's evidence earlier in the hearing, the claimants would make a different choice. The risk to the claimants would have been the same, regardless of when the Council raised its dispute. Therefore I conclude that it is more likely than not that if the Council had maintained a clear denial of liability and provided its reasons earlier in the proceedings the claimants would have instructed another expert. For these reasons I conclude that the cost of Mr Flay's evidence was not incurred unnecessarily as a result of the Council's bad faith.

[31] If the Council had raised its dispute earlier, I would have heard Mr Flay's evidence during the two days allocated for the hearing. For this reason I am not satisfied that the claimants incurred unnecessary costs in calling Mr Flay. However an additional hearing date was required to hear Mr Flay's evidence and the cost of counsel attendance on this date was an unnecessary cost directly resulting from the Council's bad faith.

[32] I therefore conclude that the claimants are entitled to the costs of counsel for that part of the hearing held on 11 March 2013. If the claimants and the Council are unable to agree on quantum, submissions are to be filed for the claimants by 29 July 2013 and for the Council by 12 August 2013. A decision will be made on the papers.

DATED this 15th day of July 2013

S. Pezaro
Tribunal Member