IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000049
[2013] NZWHT AUCKLAND 21

BETWEEN	GEORGE-HUCH FIFITAILA KORIA AND ELIZABETH SISAVAI'I LAVA Claimants
AND	STEPHEN DAVID JOHNSON First Respondent (Removed)
AND	ROB WOODGER LIMITED (Struck off) Second Respondent (Removed)
AND	ROBERT CHARLES WOODGER Third Respondent
AND	NICHOLAS PETER SIMMONS Fourth Respondent (Removed)
AND	MARK HARDY Fifth Respondent
AND	TAYLOR FASCIA (AUCKLAND) LIMITED Sixth Respondent

Decision: 17 July 2013

COSTS DECISION
Adjudicator: P A McConnell

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[1] Mr Hardy, the fifth respondent to this claim, seeks costs against the claimants in relation to the Tribunal claim because he says the claim against him was without substantial merit, or made in bad faith, and as a result he has incurred costs unnecessarily. The claimants oppose the application for costs as they submit the threshold for costs has not been established, and even if it had, the Tribunal should not exercise its discretion to award costs.

[2] The issues I therefore need to decide are:

- Did the claimants cause costs to be incurred unnecessarily by allegations and objections that were without substantial merit?
- Have costs been incurred unnecessarily by bad faith on the part of the claimants?
- If so, should I exercise my discretion to award costs?

RELEVANT PRINCIPLES

[3] Section 91 of the Weathertight Homes Resolution Services Act 2006 provides that:

> **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—
>
> (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.

[4] 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 lacked substantial merit have caused unnecessary costs and expenses to a party.

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

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

[6] His Honour considered that an important issue was whether the claimant should have known about the weakness of the case and whether litigation was pursued in defiance of common sense.[2] In *River Oaks Farm Limited v Holland*[3] the court concluded that preferring other evidence does not generally lead to the conclusion that a claim lacks substantial merit. It considered the appropriate test for substantial merit was whether it required serious consideration by the Tribunal. However in *Max Grant Architects Limited v Holland* [4] the District Court held that a failure to provide evidence of causation at hearing justified an award of costs. In that case the claimants provided some expert evidence in support of their claim against Max Grant Architects Limited but that evidence did not address the key

[1] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[2] Above n 1 at [52].
[3] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[4] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81]

issues that needed to be established that were identified by the Tribunal when dismissing Max Grant's application for removal at an earlier stage.

HAVE COSTS BEEN INCURRED UNNECESSARILY BY ALLEGATIONS THAT LACK SUBSTANTIAL MERIT?

[7] Mr Holland, counsel for Mr Hardy, in the application for costs analyses the factual conclusions that the Tribunal reached in relation to the respective roles of Mr Hardy and Mr Johnson and submits that the allegations made against Mr Hardy were not substantiated and therefore the claim against him was without substantial merit. The difficulty with this approach is that the Tribunal's conclusions could only be reached after examination and testing of the evidence as on several key issues there was a factual dispute. While the Tribunal may have preferred Mr Hardy's evidence on some issues to that of Mr Johnson the Tribunal did not conclude that Mr Johnson's evidence in totality was false or simply wrong as Mr Holland suggests.

[8] In addition Mr Holland states that the claimants should have accepted prior to hearing that Mr Hardy's role was administrative in nature and agreed to release him. This however overlooks the fact that the Tribunal concluded that Mr Hardy's role was more than administrative as it included liaising with the various subcontractors onsite and having some responsibility for building standards. In fact Mr Hardy's own contract stated that he was to ensure building standards were adhered to and that he was to monitor the workmanship of subcontractors.

[9] It is also relevant to note that the claimants were partially successful in their claim against Mr Hardy as the Tribunal concluded that he did owe the claimants a duty of care. Having reached that conclusion the Tribunal then needed to determine whether he breached the duty of care he owed the claimants. This required the Tribunal to analyse each of the defects and determine whether any acts or omissions by Mr Hardy had contributed to those defects. This required not only a consideration and determination on what those defects were but also how they were caused and whether someone in Mr Hardy's role had any liability for them. Such an examination could only appropriately be done after considering and testing all the relevant evidence.

[10] This is not a claim where the claimants proceeded with no evidence to support the key issues that needed to be established in any claim against Mr Hardy. I accept that the adjudicator preferred other evidence to that of the claimants and their witnesses on the question of whether Mr Hardy breached any duty of care. However preferring other evidence does not generally lead to the conclusion that a claim lacks substantial merit.

[11] Mr Hardy has accordingly failed to establish that the claim against him was without substantial merit.

HAVE COSTS BEEN INCURRED UNNECESSARILY BY BAD FAITH ON THE PART OF THE CLAIMANTS

[12] Mr Holland submits by advancing Mr Johnson as a credible witness the claimants acted in bad faith. He says large parts of Mr Johnson's evidence were either false or simply wrong. While this may be Mr Hardy's conclusion it was not what the Tribunal concluded. It was only on some issues that it preferred Mr Hardy's evidence to Mr Johnson and there is no general finding of lack of credibility on the part of Mr Johnson.

[13] Even if I were to accept the submission that large parts of Mr Johnson's evidence were false or simply wrong, I do not consider that any of the alleged credibility problems with Mr Johnson's evidence could or should have been apparent to the claimants prior to the hearing. Mr Johnson's evidence was supported in part by Mr North as well as the express terms of Mr Hardy's written terms of engagement. In addition parts of his evidence were preferred to that of Mr Hardy particularly in relation to the factual background that informed the decision on whether a duty of care was owed. I accordingly do not accept that there was any bad faith on the part of the claimants.

CONCLUSION

[14] Mr Hardy has failed to establish that the claimants caused costs to be incurred unnecessarily by allegations that were without substantial merit or that were made in bad faith. This is not a claim where the claimants proceeded to hearing with no adequate evidence to support their claim

against Mr Hardy. While the Tribunal did find in favour of Mr Hardy on the issue of whether he breached any duty of care owed this was not an issue that the claimants could reasonably have determined in advance of the hearing.

[15] The application for costs is accordingly dismissed.

DATED this 17th day of July 2013

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P A McConnell
Tribunal Chair