

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000050
[2013] NZWHT AUCKLAND 22**

BETWEEN VAUGHAN STUART DARBY AND MARY
ANN DARBY as Trustees of the DARBY
TRUST
Claimants

AND AUCKLAND COUNCIL
First Respondent

AND ANTHONY LAWRENCE ALLEN
Second Respondent

AND CEDRIC DUDLEY FRENCH
Third Respondent

AND DARYN MCDONALD
(Removed)
Fourth Respondent

Decision: 29 July 2013

**DECISION AS TO COSTS
Adjudicator: P A McConnell**

APPLICATION FOR COSTS BY AUCKLAND COUNCIL

[1] The Council seeks from Anthony Allen costs and expenses that it submits were incurred unnecessarily due to bad faith on the part of Mr Allen. The actual costs being sought are \$36,601.85 or alternatively, if the Tribunal is of the opinion that they are more appropriately awarded in accordance with the High Court scale, \$24,418.25. Mr Allen has filed no opposition to the application.

RELEVANT PRINCIPLES

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

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:

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

[66] 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.

[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 “must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still discretion to be exercised.”² An important issue is whether the weakness of the case was apparent and whether litigation was pursued in defiance of common sense.³

ISSUES

[6] The issues that I therefore need to decide are:

- Was there bad faith on the part of Mr Allen?
- Did this result in the Council incurring costs unnecessarily?
- If so, should I exercise my discretion to award costs?
- If so, what costs should be awarded?

WAS THERE BAD FAITH ON THE PART OF MR ALLEN?

[7] It is clear from the Tribunal decision that not only did the adjudicator conclude that Mr Allen forged the producer statement but that significant parts of the evidence he gave lacked credibility and was not accepted by the Tribunal.

² Above n 1 at [51].

³ Above n 1 at [52].

[8] Whether behaviour constitutes 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 disregard of legislative intent. In this claim I conclude that there has been clear dishonesty on the part of Mr Allen not only in relation to the forged producer statement but also other documents and evidence presented at the Tribunal. I therefore conclude that the Council has established that Mr Allen acted in bad faith.

WERE COSTS INCURRED UNNECESSARILY AS A RESULT OF MR ALLEN'S BAD FAITH?

[9] The Council submits that significant additional time at the hearing and in preparation for hearing was required because of Mr Allen's bad faith. In particular they submit that much of the hearing was spent in examining Mr Allen's role in the construction of the house and that the only matters at issue by the time the hearing actually commenced were the cross-claims between respondents. They also note they had to adduce evidence from both Darren McDonald and a handwriting expert to establish the fact that Mr Allen forged the producer statement in Mr McDonald's name. The Council says that were it not for the bad faith of Mr Allen this claim may have been resolved without needing to have a hearing.

[10] Based on the submissions made by the Council, which Mr Allen has not attempted to dispute, I accept that the Council has incurred costs unnecessarily as a result of Mr Allen's bad faith.

SHOULD I EXERCISE MY DISCRETION TO AWARD COSTS?

[11] As noted earlier meeting the threshold test goes a considerable distance towards successfully obtaining costs. Where bad faith has been established there would need to be a very good reason why costs should not be awarded. With this claim the Council made a without prejudice as to costs offer with the other respondents, including Mr Allen, prior to hearing. The amount the Council offered to contribute to the settlement was more than what the Tribunal ultimately concluded was the appropriate contribution for the Council to pay. In view of Mr Allen's bad faith and his refusal to accept an

offer of compromise to settle I am satisfied that it is appropriate for costs to be awarded.

WHAT COSTS SHOULD BE AWARDED?

[12] The Council's actual legal and expert costs and disbursements amounted to almost \$120,000. Of these they are only seeking \$36,601.85 being the costs they considered were incurred unnecessarily due to Mr Allen's bad faith. In particular they are seeking the costs of obtaining evidence from a handwriting expert and from Mr McDonald in relation to the producer statement that Mr Allen forged in Mr McDonald's name. They are also seeking costs in responding to Mr Allen's reply evidence, obtaining evidence from Mr Hubbuck and a contribution towards the costs of preparing and attending the hearing.

[13] I am satisfied that all these costs were costs that were incurred primarily as a result of Mr Allen's bad faith or the way Mr Allen managed his defence. In *Bradbury v Westpac Banking Corporation*⁴ the Court of Appeal identified that indemnity costs may be awarded where that party has behaved either badly or very unreasonably.

[14] Given the circumstances surrounding the claim for costs I accept that it is appropriate to award the actual costs that were incurred unnecessarily rather than to calculate the costs in accordance with the District or High Court scale based on roughly equivalent steps.

[15] I accordingly order that Anthony Lawrence Allen is to pay the Auckland Council the sum of \$36,601.85 in costs.

APPLICATION FOR COSTS BY CEDRIC FRENCH

[16] Mr French in a three line email also requests that his costs and disbursements of \$28,356.22 be awarded for the same reasons as outlined by the Council. While I accept bad faith on the part of Mr Allen also affected Mr French he has provided no details of how, or to what extent, he faced

⁴ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400

unnecessary costs as a consequence. His application for costs accordingly fails.

DATED this 29th day of July 2013

P A McConnell
Tribunal Chair