IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000065
[2013] NZWHT AUCKLAND 24

BETWEEN	CARL SANTO SAFFIOTI AND EIJA MARITA SAFFIOTI Claimants
AND	GREGORY PAUL AND KIM MACHELLE WARD First Respondents
AND	NORMAN OLIVER PORTMAN Second Respondent
AND	JOHN STEPHEN HANCOCK Third Respondent
AND	JIM STEPHENSON: ARCHITECT LIMITED Fourth Respondent
AND	MARTYN CLEARY (Not Served) Fifth Respondent
AND	TONY HERON Sixth Respondent
AND	AUCKLAND COUNCIL (Removed) Seventh Respondent
AND	QUINTON DAVID DALGLISH (Removed) Eighth Respondent
AND	NU AGE PLASTER LIMITED (Removed) Ninth Respondent
AND	FREDERICK ALFRED CHARD (Removed) Tenth Respondent
AND	ACR REROOFING LIMITED Eleventh Respondent

Decision: 6 September 2013

COSTS DETERMINATION
Adjudicators: P A McConnell and G D Wadsworth

CONTENTS

Introduction

[1] Jim Stephenson: Architect Limited (JSAL), the fourth respondent to this claim, seeks a costs determination following the dismissal of the claim against JSAL in the Tribunal's Final Determination.[1] JSAL submits, in terms, that the two alternative grounds in s 91(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) have been met because the claim against it was made in bad faith and was without substantial merit.

[2] Mr and Mrs Saffioti oppose JSAL's application for costs. They submit that the threshold for either of the two s 91 grounds has not been met. In the alternative Mr and Mrs Saffioti submit that any costs awarded should be limited to the District Court scale and should omit specific periods and certain items claimed by JSAL.

[3] The issues that need to be decided are:

a) Did JSAL incur costs unnecessarily either as a result of bad faith on the part of Mr and Mrs Saffioti or as a result of Mr and Mrs Saffioti making allegations against JSAL that were without substantial merit?

b) If the answer to the question in paragraph [3] (a) is yes, should the Tribunal exercise its discretion to award costs?

c) If the answer to the question at paragraph [3] (b) is yes, what costs should be awarded?

Relevant Principles

[4] The application for costs is made under s 91(1) of the Act. 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

[1] *Saffioti v Ward* [2013] NZWHT Auckland 17.
[2] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16

> 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.

[5] There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily. This presumption is only overcome if the Tribunal is satisfied that either bad faith or allegations that lack substantial merit have caused unnecessary costs or expenses to a party.

[6] In *Trustees Executors Ltd v Wellington City Council*[2] 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 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.

[7] 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."[3] The important issue is whether the weakness

[2] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.
[3] Above n 2 at [51].

of the case was apparent and whether litigation was pursued in defiance of common sense.[4]

[8] In *River Oaks Farm Limited v Holland,*[5] the High Court concluded that preferring other evidence does not generally lead to the conclusion that a claim lacks substantial merit. It considered that the appropriate test for substantial merit was whether it required serious consideration by the Tribunal.

[9] However in *Max Grant Architects Limited v Holland,*[6] 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 issues that needed to be established and that had been identified by the Tribunal at an earlier stage when it considered Max Grant Architects Limited's application to be removed.

Procedural History

[10] The evidential and legal basis of the claim against JSAL has already been scrutinised on three occasions. First in the context of JSAL's successful application to be removed from the Tribunal proceedings; second in Mr and Mrs Saffioti's successful appeal against JSAL's removal and most recently in the Final Determination which dismissed the claim against JSAL.

[11] JSAL's and Mr and Mrs Saffioti's submissions each refer to information produced during or as a result of the removal application, the appeal and the Final Determination. As these are germane to the basis of the costs application it is appropriate to briefly record the relevant steps taken in the proceedings focussing on the period when those events occurred.

[12] JSAL was identified as a party involved in the construction of Mr and Mrs Saffioti's house in the assessor's report dated 24 February 2010. It

[4] Above n 2 at [52].
[5] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[6] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81].

was named as the fourth respondent when the claimants filed their adjudication statement of claim dated 25 July 2011.

[13] JSAL applied to be removed from these proceedings initially on 5 August and again on 18 October 2011 after it had instructed solicitors. Mr and Mrs Saffioti opposed JSAL's application.

[14] JSAL filed memoranda in support of its removal application on 18 October, 1 December 2011 and 29 February 2012. Mr and Mrs Saffioti filed an affidavit sworn by Mr Saffioti on 8 November and opposing memoranda on 22 November 2011 and 24 February 2012. It is not necessary to record the content of those memoranda in any detail apart from the following material:

(a) Mr Saffioti's affidavit exhibited a letter dated 31 October 2011 from an expert architect, Norrie Johnson who had apparently been instructed on behalf of Mr and Mrs Saffioti and in response to JSAL's removal application.

(b) Mr and Mrs Saffioti's submissions dated 24 February 2011 referred to and exhibited extracts from an addendum report from the assessor and a report from Mr Gill, Mr and Mrs Saffioti's expert building surveyor.

[15] In the ninth Procedural Order dated 14 March 2012 the Tribunal directed that JSAL be removed from the adjudication proceedings. This was because the Tribunal considered that there was no tenable basis to refute JSAL's evidence that its involvement was limited to partially preparing the drawings submitted for building consent, the defects which JSAL was allegedly liable for were due to installation errors, the absence of a causative link between allegedly deficient design and defects causing leaks, and the application of relevant case law as to the extent of a designer's liability for building defects where the designer's drawings are incomplete.[7]

[7] *Body Corporate 1885269 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [502] and *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] NZLR 486 at [120], [121].

[16] Mr and Mrs Saffioti filed an appeal against that direction on 11 April 2012 which JSAL opposed. In a judgment dated 1 October 2012,[8] the High Court allowed Mr and Mrs Saffioti's appeal and reinstated JSAL as a respondent. The main reasons why the appeal was allowed were that Mr and Mrs Saffioti, who are recorded as having put JSAL's credibility in issue, wished to examine and test JSAL's evidence as to its limited design involvement, and because allegations regarding the effect of poorly-built junctions might impact on JSAL's design liability.

[17] The claim against JSAL and the other participating respondents proceeded to adjudication on 9, 10 and 11 April 2013. The outcome of that hearing was recorded in the Final Determination which made the following findings in respect of the claim against JSAL:

a) JSAL was contracted by the main contractor, 345 Builders Limited, on a limited or partial service basis and after an initial meeting with Mr and Mrs Saffioti it produced partially complete design drawings.

b) Those drawings were uplifted by the second respondent, Norman Portman and, after the addition of engineering details, were included with the application for building consent without JSAL being asked or given the opportunity to complete the drawings.

c) This was the limit of JSAL's involvement. It did not produce a specification.

d) Mr and Mrs Saffioti provided no further evidence in addition to that which was generated as a result of JSAL's removal application and the subsequent appeal to support their claim that JSAL's involvement was not limited to the steps referred to above.

e) Mr Johnson's advice to Mr and Mrs Saffioti was that, taking into account JSAL's then allegedly limited involvement, the design drawings were sufficiently complete to the extent that a

[8] *Saffioti v Jim Stephenson Architect Limited* [2013] NZHC 2519.

reasonably competent builder could have built the house based on those drawings.

f) Mr and Mrs Saffioti did not file a brief from Mr Johnson and he was not called to give evidence at the hearing. The only expert evidence which Mr and Mrs Saffioti did call at the hearing to support their claim against JSAL was from their building surveyor, Mr Gill. However at the hearing Mr Gill, accepted in terms that if JSAL had only provided a limited service he did not consider that JSAL had any liability for the defects.

[18] Based on those findings the Final Determination dismissed the claim against JSAL. It held that JSAL did not breach the duty of care owed to Mr and Mrs Saffioti and that the Saffiotis had not established that JSAL's drawings had been prepared negligently. It also held that the defects at the Saffioti's house were as a result of a failure to comply with technical and materials specifications of the cladding system manufacturer and with good building practices, and that no material loss was suffered as a result of the alleged deficiencies in JSAL's drawings.

[19] On 4 July 2013 Mr and Mrs Saffioti filed an appeal against some of the Final Determination. However that appeal does not relate to the dismissal of the claim against JSAL. Nor does it challenge any of the findings on which the claim against JSAL was dismissed.

The Application for Costs

[20] JSAL's submissions focus on the grounds of its earlier removal application, the grounds of Mr and Mrs Saffioti's appeal against the removal order as well as the basis on which the High Court allowed that appeal. JSAL submits that as a result of that appeal Mr and Mrs Saffioti were aware and effectively on notice of the necessary information and evidence and that they failed to adduce and to provide this at the adjudication hearing. As a result, JSAL submits that the Tribunal should exercise its discretion to award costs under either of the two alternative grounds in s 91.

[21] In summary, JSAL's submissions are that the bad faith threshold at s 91(1)(a) is met because the law and evidence on behalf of JSAL was put

to Mr and Mrs Saffioti during JSAL's removal application and the Saffiotis ought to have known then and from a legal and evidential stand point that the claim against JSAL had no prospect of success.

[22] JSAL submits that without the substantial merit threshold in s 91(1)(b) is met because:

a) Mr and Mrs Saffioti had received expert architect opinion from Mr Johnson that JSAL's drawings were sufficiently complete and that a reasonably competent builder could have built the house based on those drawings. Despite this advice Mr and Mrs Saffioti proceeded to the adjudication hearing without adducing any further competent expert opinion evidence to support their claim against JSAL.

b) In the circumstances where JSAL's drawings were sufficiently complete or where the absence of detail should not have prevented a competent builder from building the house and by application of relevant case law JSAL could not be responsible for the absence of any detail on its drawings.

c) Apart from the assessor's and Mr Gill's comments, Mr and Mrs Saffioti adduced no evidence at the adjudication hearing to:

    i. Challenge JSAL's evidence that its involvement was limited to preparing the partially complete drawings submitted with the building consent application; or

    ii. Establish whether the absence of any details on JSAL's drawings relating to the junctions at various locations in the house led to damage.

[23] Mr and Mrs Saffioti's submissions opposing JSAL's costs application may be summarised as follows:

a) JSAL's application based on the bad faith ground in s 91(1)(a) is not particularised and cannot now be raised because JSAL did not raise the bad faith ground in an

opening or closing argument. Nor was such an allegation put to Mr and Mrs Saffioti during the adjudication hearing.

b) When Mr and Mrs Saffioti successfully appealed against JSAL's removal the High Court determined that JSAL's role and the design/construction responsibility for the junctions were evidential issues that could only be resolved at a substantive hearing. This is either a determination or an inferential acceptance by the High Court that Mr and Mrs Saffioti's case against JSAL was not without substantial merit.

c) The opinions expressed by the WHRS assessor and Mr and Mrs Saffioti's expert Mr Gill supported the basis of their claim against JSAL. The combination of that expert opinion and the outcome of the appeal meant that the pursuit of the claim against JSAL was not "against common sense".

d) Mr Johnson's 31 October 2011 letter was not in evidence before the Tribunal and there is no evidential basis to refer to or rely on that letter. Alternatively, Mr Johnson's opinion to the effect that a competent builder could have built the house based on JSAL's incomplete design is qualified by a requirement that the builder would have had to ensure that any works which were insufficiently detailed were constructed in compliance with the Code. That qualification is significant because of JSAL's acknowledgement that it knew its drawings were incomplete.

e) JSAL's submission as to the applicable case law regarding the claim against JSAL is inconsistent with the view expressed at paragraph [62] of the High Court judgment on appeal where the High Court held that the extracts from the first instance and Court of Appeal decisions in *Sunset Terraces*[9] do not say that a designer

[9] Above n 7.

would never owe a duty of care in circumstances where drawings were silent on a design aspect that led to or caused damage.

f) JSAL's submission that Mr and Mrs Saffioti did not adduce evidence is wrong because the assessor's opinion evidence was admissible, but it was open to the Tribunal what weight was given to that evidence and the Tribunal also had the benefit of the assessor's opinion evidence.

[24] JSAL's reply to Mr and Mrs Saffioti's opposition submits that they have not engaged the thrust of JSAL's application, which is said to be that Mr and Mrs Saffioti adduced no evidence before or during the adjudication as to how JSAL could be liable. In addition to this primary submission JSAL's response makes the following submissions:

a) In the absence of an appeal and as Mr Johnson's letter was referred to during JSAL's removal application and as it was also referred to in the Final Determination that letter is in evidence.

b) The success of Mr and Mrs Saffioti's appeal against JSAL's removal and the findings in that appeal judgment do not answer JSAL's complaint that the case which Mr and Mrs Saffioti needed to prove against JSAL extended beyond its involvement and included what act or omission by JSAL caused damage and whether the incomplete or absent design details were negligent. JSAL says that Mr and Mrs Saffioti's case presented at the adjudication did not attempt to address either of these necessary elements to any enquiry as to the existence or the extent of JSAL's liabilities.

c) Once JSAL had been identified as a potential party, Mr and Mrs Saffioti had to obtain appropriate expert evidence as to the standard expected of an architect at the time. Neither the assessor nor Mr Gill were qualified to give this evidence and the only other expert who was apparently consulted by the

claimants, Mr Johnson, advised in terms that JSAL's drawings were satisfactory.

d) Mr and Mrs Saffioti's election to proceed against JSAL after receiving Mr Johnson's advice is the major plank for the bad faith claim under s 91(1)(a) and fact that such a bad faith allegation was not put directly during the adjudication hearing is either not relevant or was addressed because the matters of fact underlying the bad faith claim were put directly by the Tribunal to Mr and Mrs Saffioti's counsel.

[25] Before considering the two grounds on which costs may be awarded there are two issues arising from the submissions that need to be addressed. The first is Mr and Mrs Saffioti's submission that Mr Johnson's letter was not in evidence before the Tribunal and that there is no evidential basis for the Tribunal referring to or relying on that letter. This submission is incorrect and is rejected for the following reasons:

a) The letter was exhibited to Mr Saffioti's affidavit sworn on 8 November 2011 and was directly referred to at paragraph [22] of that affidavit.

b) The letter was expressly referred to at paragraph [26] of Mr and Mrs Saffioti's memorandum of opposition dated 22 November.

c) Mr and Mrs Saffioti's disclosed the letter at page [151] of their index to relevant documents which was filed on 22 November 2011.

[26] It is correct to say that Mr Johnson's letter was not included in the bundle of documents prepared by Mr and Mrs Saffioti and provided to the Tribunal before the April 2013 adjudication. However, it soon became clear during that hearing that Mr and Mrs Saffioti's bundle was incomplete. Consequently throughout the hearing a number of documents, including a copy of Mr Johnson's letter were handed up either by Mr and Mrs Saffioti or by the respondents. Mr and Mrs Saffioti raised no objection when a copy of Mr Johnson's letter was handed up to the Tribunal.

[27] The second issue is Mr and Mrs Saffioti's successful appeal against JSAL's removal. The High Court accepted that Mr and Mrs Saffioti, who had put JSAL's credibility in issue, should have the opportunity of testing JSAL's evidence as to its limited involvement. We do not accept that the High Court's findings when it allowed that appeal are conclusive as to the merits of the claim against JSAL or that they have any material bearing on the merits of JSAL's claim for costs under s 91(1).

[28] The two grounds on which the Tribunal may award costs under s 91(1) are disjunctive. In other words if JSAL succeeds in establishing that the threshold for either ground has been met then, subject to the residual exercise of the Tribunal's discretion, JSAL will succeed in its costs claim. For this reason and although some of the grounds on which JSAL seeks costs overlap each ground it is appropriate to consider them separately.

Have costs been incurred unnecessarily by bad faith on the part of Mr and Mrs Saffioti?

[29] The term "bad faith" has been considered in several decisions.[10] An overview of the relevant case law indicates that the meaning of bad faith depends on the circumstances in which it is alleged to have occurred. The type of conduct which can amount to bad faith can range from dishonesty to a disregard of legislative intent.

[30] JSAL says that the combination of the advice given to Mr and Mrs Saffioti in Mr Johnson's letter, coupled with the stance taken by Mr and Mrs Saffioti in their successful appeal against JSAL's removal meant that, once JSAL had been reinstated as a respondent Mr and Mrs Saffioti knew or ought to have known what evidence was required in order for their claim against JSAL to succeed. JSAL's short point is that Mr and Mrs Saffioti failed to adduce any such evidence.

[31] Mr and Mrs Saffioti's submission that JSAL cannot now rely on the bad faith ground because it was not put to them during the adjudication hearing, is plainly wrong. The adjudication hearing was necessary to determine whether and to what extent any of the participating respondents

[10] *Cannock Chase District Council v Kelly* [1978] 1 All ER 152*; Webster v Auckland Harbour Board* [1983] NZLR 646 (CA).

were liable and if so to what amount. It was not a forum in which the parties were obliged or could reasonably have been expected to address issues of costs. This was because no such costs entitlement would arise until the Final Determination had been issued.

[32] For the reasons recorded in paragraphs [36] to [43] of this determination concerning the second limb of s 91(1) we consider that Mr and Mrs Saffioti made little, if any real attempt to adduce evidence to support their claim against JSAL at the adjudication hearing. By reference to the Final Determination and Mr and Mrs Saffioti's opposition to JSAL's costs application the only evidence which the Saffiotis adduced was Mr Gill's brief and, apparently, the possibility that further factual evidence may arise from cross examination of Mr Stephenson or in analysis of JSAL's drawings.

[33] By reference to paragraphs [105] to [124] of the Final Determination it is evident that Mr Gill's opinion evidence as to JSAL's liability, to the extent that it was admissible, was retracted and was not accepted. Mr and Mrs Saffioti adduced no further evidence as to the extent of JSAL's design involvement beyond that which was contained in Mr Stephenson's brief. This effectively repeated the position set out as one of the grounds on which JSAL had applied to be removed.

[34] In *Clearwater Cove Apartments v Auckland Council,*[11] after finding that the claimants failed to comply with Tribunal orders to disclose documents which were relevant to the respondents' defence, the Tribunal made a cost award on the bad faith ground of s 91(1). In *Tank Family Trust v Auckland Council,*[12] the Tribunal awarded costs on the grounds of bad faith against a party after finding that the party had altered its pleaded position as to liability in breach of a direction by the Tribunal and where an adjournment had been allowed to enable the claimant to call expert opinion evidence in order to address the point at issue.

[35] After receiving Mr Johnson's advice and despite the outcome of their successful appeal Mr and Mrs Saffioti's election to pursue their claim against JSAL, without adducing further, relevant expert and factual

[11] *Clearwater Cove Apartments Body Corporate 170989 v Auckland Council* [2012] NZWHT Auckland 35.
[12] *Tank Family Trust v Auckland Council* [2013] NZWHT Auckland 20.

evidence may be properly described as optimistic and even speculative. However, there was nothing in Mr and Mrs Saffioti's conduct up to and including the adjudication hearing that can be properly described as dishonest. Nor did Mr and Mrs Saffioti's continued pursuit of their claim against JSAL constitute a failure to follow or a breach of the Tribunal's directions. With some hesitation, and although Mr and Mrs Saffioti's conduct of their claim against JSAL can be rightly criticised, we do not consider that their conduct amounted to bad faith. JSAL's claim for costs based on s 91(1)(a) is dismissed.

Have costs been incurred unnecessarily by allegations or objections by Mr and Mrs Saffioti that are without substantial merit?

[36] During the course of JSAL's removal application and by no later than the date of the High Court's judgment allowing Mr and Mrs Saffioti's appeal against the Tribunal's removal of JSAL from these proceedings the Saffiotis:

a) Were aware that JSAL asserted that its only involvement in the design was the preparation of partially complete drawings, that it did not prepare a specification and was not involved in the application for building consent.

b) Had been advised by Mr Johnson that JSAL's drawings were sufficiently complete so that a reasonably competent builder could have built the house based on those drawings.

c) Were aware of the approach taken by the High Court and the Court of Appeal in *Sunset Terraces* to the likely absence of any design liability when a competent builder could build the house in question based on incomplete drawings.

[37] By reference to the Final Determination and Mr and Mrs Saffioti's opposition to JSAL's cost application, the only evidence which Mr and Mrs Saffioti adduced and relied on at the adjudication hearing to support their claim against JSAL consisted of the assessor's reports, Mr Gill's report and cross examination of Mr Stephenson, JSAL's director and only witness. In particular Mr and Mrs Saffioti produced no credible evidence to suggest let

alone establish that JSAL's role was more extensive than the extent first set out in its removal application.

[38] Mr Gill is a chartered building surveyor, not an architect. It is nevertheless apparent from his brief that he was the only independent expert witness called by Mr and Mrs Saffioti to comment on and support their claim against JSAL. Mr Gill's commentary on JSAL's liability consisted of a tick in one column of the defect schedule to his brief, by which he attributed liability to JSAL for a number of the alleged defects at Mr and Mrs Saffioti's house. By reference to paragraph [118] of the Final Determination Mr Gill's evidence on this point was resolved as follows:

> ... However, at the hearing Mr Gill said that if the architect had only provided a limited service he would have to revise his opinion. He stated that it would not be fair to conclude the architect was responsible in these circumstances and said that if he had known the architect was engaged on a limited contract he would not have ticked the column.

[39] As a result of this concession by Mr Gill, as well as his evidence that some of the defects or omissions during the construction of Mr and Mrs Saffioti's house were due to failures to follow or observe the cladding manufacturer's technical material and various BRANZ Practice Guides the Tribunal accepted that the house could have been built weathertight by competent builders and other tradesmen based on JSAL's incomplete drawings and good building practices.

[40] By reference to paragraph [121] of the Final Determination the Tribunal also had no hesitation in distinguishing the facts here from those in *Coughlan v Abernethy.*[13] This was the principal authority relied on by Mr and Mrs Saffioti in support of their claim against JSAL and to distinguish the approach taken in *Sunset Terraces.* However, Mr and Mrs Saffioti's evidence and submissions failed to address the clear difference between the facts in that case and during the construction of Mr and Mrs Saffioti's house; - see paragraph [121] of the Final Determination.

[41] Mr and Mrs Saffioti had ample opportunity to prepare the evidence necessary to support their claim against JSAL. They had six months

[13] *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010.

between the High Court judgment and the adjudication hearing. This period can arguably be extended as far back as JSAL's formal application for removal and supporting affidavit dated respectively 17 and 18 October 2011.

[42] Mr and Mrs Saffioti were, at best, optimistic in electing to rely solely on Mr Gill's opinion evidence to establish their liability claim against the architect. Like the assessor, Mr Casey, Mr Gill is a building surveyor. His opinion evidence as to JSAL's liability is either irrelevant or of little weight to that of a qualified architect. It can also be contrasted with Mr Johnson's forthright opinion that, in terms, JSAL had a clear liability defence. By reference to paragraph [38] above when Mr Gill was asked to take into account JSAL's limited involvement he retracted his view that JSAL was liable.

[43] In these circumstances we consider that Mr and Mrs Saffioti's allegations against JSAL were without substantial merit. They were made and pursued when Mr and Mrs Saffioti were or ought to have been aware of JSAL's limited involvement, and when Mr and Mrs Saffioti had been advised by an expert architect that JSAL had a liability defence and were not supported by factual or credible opinion evidence. In addition Mr and Mrs Saffioti relied on an authority that was clearly distinguishable on the facts in this case. Mr and Mrs Saffioti's election to pursue their claim without factual evidence to properly challenge JSAL's unwavering assertion of limited involvement and without credible expert opinion evidence was unreasonable. In the absence of such evidence we find Mr and Mrs Saffioti's continued pursuit of JSAL was against common sense.

Discretion

[44] We consider that JSAL have unnecessarily incurred costs because of Mr and Mrs Saffioti pursuing allegations against JSAL that were without substantial merit. The lack of any substantive merit in the claim against JSAL was apparent when Mr and Mrs Saffioti received Mr Johnson's advice. In the absence of suitable advice from an expert architect to the effect that their claim against JSAL may have been likely to succeed, Mr and Mrs Saffioti ought to have appreciated that their claim against JSAL could not succeed. Instead we consider that Mr and Mrs Saffioti adopted

an unrealistic and intransigent attitude in their pursuit of the claim against JSAL.[14]

[45] In contrast, we do not consider that JSAL's conduct can be criticised or that it affects any exercise of the discretion. JSAL prepared for and participated fully during the adjudication. They did not call evidence or take any steps which resulted in the adjudication hearing being protracted or prolonged.

What costs should be awarded?

[46] JSAL's application is for indemnity costs. The submissions in support of such an award are contained at paragraphs [24] and [25] of its 2 July 2013 memorandum. It seeks costs of $46,750.00. Its memorandum appends six invoices from Alan Jones Law Partnership which collectively total $47,637.00. No reason has been given for the difference between that figure and the amount sought by JSAL. By reference to the narrative part of these invoices it is apparent that they cover all of the period during which JSAL has been involved in the proceedings up until the April 2013 adjudication.

[47] We do not accept Mr and Mrs Saffioti's arguments that any award of costs must be limited to the District Court scale. As noted, in the Tribunal decision in *Harbourview Trust v Auckland City Council*,[15] the Tribunal is not bound by the District Court cost scale in calculating costs in circumstances such as this. Nor do we accept that any of the other reasons relied on by Mr and Mrs Saffioti are sufficient to base any award of costs to the District Court scale.

[48] Taking into account the undertaking contained at paragraph [11] of JSAL's 30 July 2013 memorandum we do not consider that the costs should be deemed irrecoverable because the invoices were not addressed to JSAL. We also dismiss the criticism of JSAL's solicitor's hourly rate. Mr and Mrs Saffioti must accept that, within reasonable grounds, a respondent is entitled to instruct a legal representative of their choosing. The quoted hourly rate does not seem sufficiently high as to be considered

[14] A useful illustration of this attitude can be found in the transcript of the adjudication hearing at p 303 line 35 to p 306 line 20 ; p 318 line 10 to p 322 line 5.
[15] *Harbourview Trust v Auckland City Council* [2010] NZWHT Auckland 7.

unreasonable. Mr and Mrs Saffioti have not provided any material or published data on which the hourly rate can be assessed or on which it can be considered to be unreasonably high.

[49] Taking into account the dismissal of the claim for costs under s 91(1)(a) and the circumstances generally we consider that an award of indemnity costs would unfairly punish Mr and Mrs Saffioti. Instead we consider that Mr and Mrs Saffioti's costs liability should be assessed by reference to the High Court scale. As Mr and Mrs Saffioti successfully appealed against JSAL's removal we do not consider that JSAL is entitled to any costs relating to either its removal application before the Tribunal or the High Court proceedings.

Conclusion

[50] We conclude that the JSAL is entitled to costs and any relevant disbursements for the period from 2 October 2012 (being the date following the High Court judgment) onwards and assessed by reference to category 2B of the relevant High Court scale. Those costs are to include the costs incurred in respect of the April 2013 adjudication hearing as well as the memoranda generated by the current costs application.

Directions

[51] JSAL and Mr and Mrs Saffioti are directed to confer and, if possible, agree on the amount of costs payable in accordance with paragraph [50] above within the next 14 days. In the event that no agreement is possible then we direct as follows:

a) By 4 pm on 27 September 2013 JSAL is to file and serve a memorandum which is to outline the basis on which its costs have been assessed and quantified and which is to append any relevant documents.

b) By 4 pm on 4 October 2013 Mr and Mrs Saffioti are to file a memorandum in response which is to outline those areas where JSAL's costs are challenged.

c) The Tribunal will then issue a quantified costs order on the papers.

DATED this 6th day of September 2013

P A McConnell	G D Wadsworth
Tribunal Chair	Tribunal Member