IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000018
[2013] NZWHT AUCKLAND 31

BETWEEN	MAX AND JILLIAN GRIFFITHS Claimants
AND	PLASTER SYSTEMS LTD First Respondent
AND	AHI ROOFING LTD Second Respondent
AND	JAMES WILLIAM THOMSON Third Respondent
AND	TYRONNE HUGH HARTNETT Fourth Respondent
AND	JOSEPH EVAN TITO Fifth Respondent

Decision: 19 December 2013

COSTS DETERMINATION
Adjudicator: K D Kilgour

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BACKGROUND TO CLAIMS AGAINST THIRD RESPONDENT

[1] Max Griffiths and Jillian Griffiths are the registered proprietors of an alleged leaky home situated at 1054 State Highway 2, RD 1, Katikati.

[2] On 26 March 2012 they applied for adjudication of their claim before this Tribunal.

[3] James Thomson, the third respondent, was the original designer of the Griffiths's home. Mr Thomson had no supervisory role in relation to the building of the home which was constructed between January and November 2000. Any claim in relation to the original design or construction is statute barred.

[4] The claim against Mr Thomson related solely to his visit to the Griffiths's property in January/February 2004. Mr and Mrs Griffiths say they asked Mr Thomson to try to identify the source of two leaks in the office and the second bedroom, and the claim arises from the advice he allegedly gave in relation to those two leaks. It is based on two causes of action:

a) Breach of the Fair Trading Act 1986 for allegedly providing advice that was false, misleading or deceptive or likely to have misled or deceived; and
b) Negligent mis-statement.

HEARING IN TAURANGA AND WITHDRAWAL OF CLAIMS

[5] Mr and Mrs Griffiths claim was scheduled for a five day hearing in Tauranga commencing on Monday 9 September 2013. Near the end of the third day of the hearing, when Fraser Wood (Counsel for Mr Thomson) was cross examining Mr Hartnett I indicated that in my view the claims lacked a factual foundation and were unlikely to be proven by Mr and Mrs Griffiths. After an adjournment Mr and Mrs Griffiths withdrew all claims against all respondents. The claim was terminated, subject only to the third respondent being entitled to make an application for costs.

ISSUES

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

a) Did Mr Thomson incur costs unnecessarily either as a result of bad faith on the part of Mr and Mrs Griffiths or as a result of Mr and Mrs Griffiths making allegations that were without substantial merit?
b) If so, should the Tribunal exercise its discretion to award costs?
c) If so, what costs are appropriate?

JURISDICTION AND RELEVANT PRINCIPLES

[7] The application for costs is made under s 91(1) of the Weathertight Homes Resolution Services Act 2006 (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 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.

[8] 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.

[9] 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.

[10] 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]

[11] In *Riveroaks Farm Limited v Holland,*[4] 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.

[12] In *Phon v Waitakere City Council*[5] the Tribunal concluded that the bar for establishing that a claim was 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 on the basis of allegations, which a party ought reasonably to have known they could not establish.

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[2] Above n 1 at [51].
[3] Above n 1 at [52].
[4] *Riveroaks Farm Limited v Holland* HC Tauranga, CIV-2010-470-584, 16 February 2011.
[5] *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

[13] *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.

APPLICATION FOR COSTS

[14] Mr Thomson seeks costs against Mr and Mrs Griffiths, on the basis that:

a) The claims against him proceeded either in bad faith and/or the allegations were without substantial merit.
b) The evidence put forward by Mr and Mrs Griffiths fell short of what was pleaded against Mr Thomson.
c) It was evident following mediation on 6 May 2013 that the factual and legal claims brought by Mr and Mrs Griffiths were fatally flawed and they could not possibly succeed.
d) Mr and Mrs Griffiths were put on notice that if they proceeded to an adjudication hearing an order for costs on a solicitor/client basis would be sought against them.

Mr and Mrs Griffiths's Response

[15] Mr and Mrs Griffiths oppose costs on the basis that:

a) They did not act in bad faith.
b) Once they became aware that Mr Hartnett was unreliable as a witness they reviewed their case and discontinued against Mr Thomson (and the other parties); and
c) They relied upon expert professional building advice.

[16] Mr and Mrs Griffiths's costs submissions included an affidavit from Mr Griffiths recording their financial position. I have paid little regard to Mr Griffiths's affidavit, as Mr and Mrs Griffiths's financial position is not relevant to the issue of whether and to what extent costs should be awarded against them.

[6] *Max Grant Architects Limited v Holland* DC Auckland, CIV-2010-004-662, 15 February 2011 at [81].

[17] The costs incurred by Mr Thomson are detailed in the affidavit of Catherine Punter, a secretary employed by Mr Wood, and total $56,313.23.[7]

DID THE GRIFFITHS CAUSE COSTS TO BE INCURRED UNNECESSARILY BY MR THOMSON EITHER BY BAD FAITH OR ALLEGATIONS WITHOUT SUBSTANTIAL MERIT?

[18] The Griffiths's own evidence did not support their claim against Mr Thomson. This was apparent from Mr Griffiths's letter to Gerard Roofs of 18 February 2004[8] which suggests that Mr Hartnett's evidence was not reliable and their expert's evidence was based upon incorrect information.

[19] Mr Griffiths did not refer to Mr Thomson in his evidence and accepted at the hearing that he had not instructed Mr Thomson to investigate the leaks. Mr Griffiths also confirmed that he had not disclosed to Mr Thomson the history of the other leaks with the home or the information that had been provided to Mr and Mrs Griffiths and Mr Hartnett by Plaster Systems Limited on the cause of leaks at the roof to wall junctions.

[20] Mrs Griffiths's evidence failed to detail the instructions or information, if any, given to Mr Thomson. At the hearing it emerged that Mr Thomson had no dealings with Mrs Griffiths and much of the evidence she gave was hearsay.

[21] Although Mr Hartnett was the person responsible for the substantial building work on the Griffiths's home and the failure to properly undertake the remedial work, Mr and Mrs Griffiths relied on him to support their claim against Mr Thomson.

[22] Mr Thomson's evidence was that the damage caused to the Griffiths's home existed prior to his involvement in 2004, that there was no new damage following his involvement in 2004, and that he could not be held liable for the failure of Mr and Mrs Griffiths or their builder, Mr Hartnett,

[7] Submissions on behalf of third respondent in support and order for costs against the claimants dated 30 October 2013 at [34].
[8] Above n8 at 168.

to follow the advice he gave to undertake the required remedial work and to investigate other areas of the home.

[23] Mr and Mrs Griffiths failed to produce any reliable evidence that Mr Thomson's advice was flawed or that they followed his advice. It was accepted at the hearing that the advice provided by Mr Thomson regarding the remedial work was not followed by either Mr Griffiths or Mr Hartnett. It would have been impossible for Mr and Mrs Griffiths to establish that any new damage arose as a result.

[24] I am satisfied that the claims against Mr Thomson were misconceived from the outset because it should reasonably have been apparent to Mr and Mrs Griffiths early in the proceedings that their continued claim against Mr Thomson had no substantial merit. As a result Mr Thomson was put to a number of unnecessary interlocutory steps, attended mediation and prepared for the hearing.

[25] For these reasons I am satisfied that Mr Thomson has met the threshold of s 91 (1)(b) that the allegations made against him were without substantial merit.

[26] I am not satisfied that there was bad faith on the part of Mr and Mrs Griffiths. An overview of the case law indicates the meaning of "bad faith" depends on the circumstances at which it is alleged to have occurred. The range of conduct constituting bad faith can range from dishonesty to a disregard of legislative intent. The party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegations. The application has not met the required threshold.

SHOULD THE TRIBUNALS DISCRETION BE EXERCISED TO AWARD COSTS TO THE CLAIMANTS?

[27] The Griffiths were misconceived regarding their claim from early on in the proceedings when Mr Thomson applied for removal. His grounds for removal were explained in his affidavit dated 15 April 2012. Mr and Mrs Griffiths opposed his removal and Mr Thomson was retained in the proceeding notwithstanding that the alleged tenable case against him was

then understood to be marginal. I consider that their behaviour warrants the exercise of my discretion to award costs.

WHAT LEVEL OF COSTS IS APPROPRIATE?

[28] Mr Thomson is seeking solicitor client costs, that is, full or indemnity costs or, in the alternative, an amount as determined by the Tribunal.

[29] Mr and Mrs Griffiths have not challenged the level of costs claimed by Mr Thomson.

[30] The Act does not provide guidance as to how I should exercise my discretion in calculating the quantum of costs to be awarded. The Tribunal has in some cases been guided by the District Court Scale and the High Court Scale and such an approach has been upheld by the High Court.[9]

[31] Indemnity or actual costs may only be awarded where a party has behaved either badly or very unreasonably.[10] The threshold to be met for an award for indemnity costs is a high one.[11] Indemnity costs are awarded sparingly. The threshold for an order of indemnity costs has not been made out. Nevertheless I do consider that the costs awarded should reflect the complexity of the proceedings to which Mr Thomson has been put. He has had to pursue otherwise unnecessary steps due to Mr and Mrs Griffiths failing to withdraw their claims earlier without reasonable justification. The fact Mr and Mrs Griffiths have been legally represented throughout reinforces my conclusion that the claim for costs should warrant an amount that reflects the unreasonableness of Mr and Mrs Griffiths pursuing their claims when they should have known how flawed their allegations were earlier on in the proceedings.

[32] I had the benefit of hearing all of the claimants' evidence in support of their claims. No speculation is required on my part to assess that the claims were flawed and nothing in the evidence and submissions to follow

[9] *Trustees Executors Limited v Wellington City Council* above n 1; *White v Rodney District Council* (2009) 11 NZCPR 1 (HC).
[10] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.
[11] *Paper Reclaim Limited v Aotearoa International Limited* [2006] 3 NZLR 188 (CA).

could save them.[12] Mr and Mrs Griffiths acted unreasonably in continuing their claims, certainly from mediation.

[33] I determine that Mr Thomson is entitled to costs, although for the reasons outlined not full costs. I consider a just and fair result is to use the High Court scale[13] as a guide given the amount of the claim. Because of my finding that Mr and Mrs Griffiths failed to act reasonably in continuing with their proceedings, particularly following mediation knowing then that their claims were flawed, Mr Thomson is entitled to an uplift from the scale. High Court Rule 14.6(3)(b)(ii) allows an award to be increased if the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by taking or pursuing an unnecessary step or an argument that lacks merit. Baragwanath J in *Bradbury v Westpac Banking Corporation*[14] stated increased costs may be ordered where there is a failure by the paying party to act reasonably. The Court of Appeal has made it clear that an uplift is justifiable where particular conduct unreasonably increases costs above what might ordinarily have been expected,[15] but it is only to that extent that any uplift from the scale is justified.

[34] I conclude that Mr Thomson is entitled to the following costs:

i) From commencement through to and including Mr Wood's letter on 10 May 2013 an amount calculated in accordance with category 2B scale,[16] which equals $24,875; and

ii) From 11 May 2013 through to termination of the adjudication hearing the sum of $20,696 (based on category 2B scale costs), plus an uplift of 30 per cent of $6,209 which in total amounts to $26,905.

[12] *N-Tech Limited v Abooth Limited* [2012] NZHC 1167.
[13] High Court Rules 14.3 and 14.5.
[14] Above n 13.
[15] *Commissioner of Inland Revenue v Chesterfields Preschools Limited* [2010] NZCA 400, (2010) 24 NZTC 24,500.
[16] High Court Rules 14.3 and 14.5, note Mr Wood on direction filed recalculated costs charged in accordance with the High Court category 2B scale and I have accepted his calculations.

ORDER

[35] I order Max Curteis Griffiths and Jillian Margaret Griffiths to pay William James Thomson the sum of $51,780.00 immediately.

DATED this 19th day of December 2013

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K D Kilgour
Tribunal Member