

CLAIM NO: TRI-2007-100-000042

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an adjudication

BETWEEN **PETER BRIAN DOWLING and
ALESSANDRA ZECCHINI**

Claimants

AND **JACOBSEN CREATIVE SURFACES
LTD**

First Respondent

AND **MAPEI NEW ZEALAND LTD**

Second Respondent

AND **NEIL ROLFE
TRADING AS CREATIVE
FLOORING**

Third Respondent (Now Removed)

AND **DARRELL COX and
MICHAEL FERRIS
TRADING AS CREATIVE BUILDING**

Fourth Respondent (Now Removed)

AND **B.W. AGENCIES LIMITED**

Fifth Respondent

AND **BRENT WORTHINGTON**

Sixth Respondent

COSTS DETERMINATION

Adjudicator: S. Pezaro

Dated 13 June 2008

1.0 Costs

1.1 I determined this claim after a two day hearing that commenced on 27 March 2008. My decision dismissing the claim was delivered on 17 April 2008. I now determine the applications by the first and second respondents for costs. I have considered the submissions filed by these respondents and the response from the claimants.

1.2 Section 91 of the Weathertight Homes Resolutions Services Act 2006 (“the Act”) provides that:

(1) The tribunal may determine that the 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.

1.3 Section 91 makes it clear that there is a presumption in proceedings in this Tribunal that the parties will bear their own costs unless the grounds in s 91(1) are made out. I have therefore considered whether the claimants acted in bad faith or made allegations without merit and caused the first or second respondent to incur unnecessary costs or expenses.

2.0 The submissions on costs

- 2.1 The first respondent, Jacobsen Creative Surfaces Limited (“Jacobsens”) applies for costs on the grounds set out in its application. In summary these grounds are that the claimants proceeded after being put on notice that Jacobsens believed that the claim against it could not succeed and that costs would be sought if the claim failed; that the claimants failed to establish that Jacobsens had supplied the liquid membrane to them; that the claimants failed to prove that Jacobsens provided any advice on which the claimants could claim reliance; and that the claim under the Consumer Guarantees Act 1993 could not succeed as there had been no opportunity for Jacobsens to remedy.
- 2.2 The submissions by the second respondent, Mapei New Zealand Limited (“Mapei”) are that there was no evidence of why the product had failed; what advice had been given to the claimants or that Mapei product had been used.
- 2.3 The claimants’ response is, in essence, that they relied on the evidence and expertise of the WHRS assessor.
- 2.4 The applications by the first and second respondents for costs do not have equal merit. Mr Swan appeared for Mapei at conferences and filed an application for strike out. This was in the form of a one page letter with no evidence or affidavits provided in support. Mapei did not file a response to the claim and therefore did not call witnesses. At the hearing Mr Swan conducted limited cross-examination of some witnesses. The

application for costs was not supported by any proof of costs incurred.

2.5 The steps taken by Mapei in these proceedings have been minimal and it has failed to comply with the Chair's Directions and my orders. For these reasons, even if I am satisfied that the claimants have pursued a claim without merit, I dismiss the claim by the second respondent for costs.

3.0 Bad faith

3.1 I recorded in paragraph 13 of my determination that the claimants had difficulty in clearly stating the legal basis for their claim. They did not have legal representation but state that they sought some legal advice. To this extent Mr Dowling and Ms Zecchini attempted to present their claim as effectively as possible. It is simply not possible however for any representative who does not participate fully in proceedings to provide comprehensive advice.

3.2 The assessor did identify defects in the application of the membrane and the construction of the deck, for example, at paragraph 6.1.1 (3) of his report and it is possible that, if the claimants had legal representation, they may have claimed against the third respondents and perhaps located and pursued the fourth respondent. However, their failure to pursue other parties did not affect the outcome of their claim against the first and second respondents.

3.3 For these reasons I am satisfied that there was no element of bad faith in the manner in which these claimants pursued their claim.

4.0 The substantive determination

4.1 I made the following findings when determining the substantive claim which are relevant to the question of whether the claimants made allegations without substantial merit:

- the claimants' design to engage Neil Rolfe was not made in reliance on advice from Jacobsens
- Jacobsens was the manufacturer for the relevant period of Mapei product in New Zealand
- Mapei supplied product to the claimants
- Under cross-examination, the WHRS assessor could not substantiate the findings made in his report that the primary cause of the water ingress was membrane failure.

5.0 Allegations without substantial merit

5.1 The claimants did pursue an aspect of their claim which had no merit, that is, their claim that they relied on the advice of Jacobsens in engaging Neil Rolfe to apply the membrane and lay the tiles. However I am not satisfied that this aspect of the claim caused significant costs to Jacobsens.

5.2 The claim against Jacobsens that the product was defective relied on the WHRS assessor's report. This claim failed because the assessor's evidence was not substantiated at the hearing. Jacobsens' did not engage an independent expert witness but did provide evidence from two company officers. Although their briefs contradicted that of the WHRS assessor, it

was not unreasonable for the claimants to rely on the assessor's evidence to support their claim.

5.3 As recorded at paragraph 37 of my decision, it was not necessary for me to make any finding on whether Jacobsens supplied product to the claimants, due to my decision on the cause of water ingress. However, at paragraph 36 I referred to the sales records that Jacobsens relied on but failed to produce and at paragraph 37 I recorded that, if I had considered these records necessary to make a finding on the source of supply of the liquid membrane, I would have required Jacobsens to produce them.

5.4 It was not necessary for me to make any finding in relation to the question of whether, if Jacobsens had supplied defective product, it was given an opportunity to remedy. However, I do not accept Mr Commons argument that there was no basis for arguing that an opportunity had been provided.

5.5 For these reasons I find that the claim against Jacobsens was not without substantial merit.

DATED this 13th day of June 2008

S. Pezaro

Tribunal Member