SUMMARY

Case: Tabram & Anor v Slater & Ors – COSTS DECISION
File No: TRI 2007-100-000041/ DBH 05001
Court: WHT
Adjudicator: S Pezaro
Date of Decision: 27 June 2009

Background
The Tribunal has jurisdiction under s91 of the Weathertight Homes Resolution Services Act 2006 to make an award for costs. Under that provision there is a clear presumption that costs lie where they fall unless incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit. The first, second and fourth respondents filed applications for costs. However as the first respondents' application for costs was dismissed in the Tribunal's substantive decision, this determination is based on the remaining costs applications by the second respondent (Ojo Limited) and fourth respondent (Mineral Plaster Technologies Limited).

Claims for Costs
Application by Ojo Limited (Ojo)
Ojo applied for costs against the claimants and the second respondents (Slaters) on the following grounds:

- The claim by the Slaters that they relied on Ojo's plans and specifications had no reasonable basis as Mr Slater acknowledged that he did not carry out the construction in accordance with those plans and specifications and he accepted that the alterations he made to the plans were identified by the experts as a cause of water damage
- The Slater's expert witness, Mr Morrison, did not provide sufficient evidence to support the Slaters' allegation that Ojo caused weathertightness defects
- The claimants had no legal basis for their claim as they failed to provide any evidence of a link between Ojo's designs and the relevant defects

Application by Mineral Plaster Technologies Limited (MPTL)
MPTL applied for costs against the Slaters on the following grounds:

- The Slaters knew that MPTL did not supply the cladding and thereby knew that the producer statement was false
- There was no evidence that the cladding was defective, the Slaters' claim that they relied on the producer statement was untenable.

Both applications were opposed.

Summary of Decision
Costs Application by Ojo
In regards to the claimants, the Tribunal accepted the claimants' opposition that the claimants' allegations against Ojo were supported by expert evidence which the Tribunal rejected as a result of Mr Slater's concession at hearing that he substantially

altered the design without consulting Ojo. The Tribunal was satisfied that the claimants were not aware before the hearing of the extent of Mr Slater's involvement in the design. For that reason, the claimants' claim against Ojo was not made in bad faith, as it was not apparent to them prior to the hearing that this claim had no substantial merit.

The Slaters however were not in the same position as the claimants as Mr Slater *knew* that he had not followed Ojo's plans and that the decisions he made were linked to the weathertightness defects. The Tribunal did not accept that Ojo had to incur the costs of proceedings as a result of the claimants' claim, regardless of whether or not the Slaters cross-claimed. Had Mr Slater acknowledged the full extent of his work prior to hearing, the claimants would have had the opportunity to make an informed evaluation of the strength of their claim against Ojo.

For these reasons, Ojo's claims for costs against claimants were dismissed. However the claim for costs against the Slaters succeeded as that claim lacked substantial merit. The sum claimed for costs, $14,405.13, was considered by the Tribunal to be fair and reasonable (this sum was based on one third of the District Court scale costs on a 2B basis and half the costs of its expert).

Costs Application by MPTL
During the proceedings, Mr Slater provided an affidavit supporting the opposition to MPTL's application for removal stating that Mr Paul inspected Mr Tindale's work, and that it was "extraordinary" that Mr Kathagen denied the origin of the producer statement and workmanship guarantee. Although Mr Slater confirmed at a telephone conference prior to the hearing that MPTL had not provided the cladding, the Slaters did not withdraw their claim but pursued it on the basis that they acted in reliance on the producer statement issued by MPTL. It was not until the hearing that Mr Slater accepted that he knew that both the workmanship guarantee and the producer statement he obtained were false and that he also knew that when Mr Tindale installed the cladding, he was self-employed and not working for Mr Paul. In evidence, Mr Slater stated that he did not oppose the removal application of Mr Tindale, who installed the cladding and signed the workmanship guarantee, because he is a family member.

The Tribunal had no doubt that Mr Slater's evidence at the hearing could have been produced prior to the hearing, and yet the Slaters applied to join MPTL and opposed its removal on the basis that the workmanship guarantee was on MPTL letterhead and signed by Mr Tindale. The Tribunal was therefore satisfied that MPTL was entitled to costs against the Slaters as their claim amounted to bad faith and lacked substantial merit.

MPTL claimed costs of $10,538.38 against costs on the District Court scale of $13,240. After deducting costs for production and inspection of documents (as these were not represented by counsel at this stage of proceedings), the Slaters are liable to pay MPTL that amount of $9,920 for costs.

Result
The Slaters were ordered to pay Ojo the sum of $14,405.13 immediately.
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The claim by Ojo against the claimants was dismissed.