IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-100-000041

BETWEEN	**RICHARD TABRAM and HAYLEY TABRAM** Claimants
AND	**ARRAN SLATER and MICHELLE SLATER** First Respondents
AND	**OJO LIMITED** Second Respondent
AND	**BRUCE TINDALE** (Removed) Third Respondent
AND	**MINERAL PLASTER TECHNOLOGIES LIMITED** Fourth Respondent

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DECISION ON COSTS
Adjudicator: S Pezaro

JURISDICTION

[1] The Tribunal has jurisdiction under section 91(1) of the Weathertight Homes Resolution Services Act 2006 ("the Act") to make an award of costs.

> **91 Costs of adjudication proceedings**
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> (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.

There is a clear presumption in the Act that costs lie where they fall unless incurred unnecessarily as a result of either bad faith or allegations that are without substantial merit.

[2] The first, second and fourth respondents to these proceedings filed applications for costs. The application by the first respondents ("the Slaters") was dismissed in my substantive decision delivered on 17 April 2009. The costs applications by the second and fourth respondents were filed on 5 May 2009. The second respondent ("Ojo") applies for costs against the claimants and the first respondents. The application by the fourth respondent, Mineral Plaster Technologies Limited ("MPTL") is against the Slaters. Both applications are opposed.

THE APPLICATION BY OJO

[3] Mr Slater acknowledged, as recorded at paragraphs [53] and [54] of my decision, that he did not carry out the construction in accordance with the plans and specifications prepared by Ojo and he

accepted that the alterations that he had made to the plans were identified by the experts as a cause of water damage. Therefore, Mr Maclean submits for Ojo, the Slaters' claim that they relied on Ojo's plans and specifications had no reasonable basis. Further, the Slaters' expert witness, Mr Morrison, did not provide sufficient evidence to support the Slaters' allegation that Ojo caused weathertightness defects.

[4] Mr Maclean submits that the Tabrams had no legal basis for their claim as they also failed to provide any evidence of a link between Ojo's design and the relevant defects.

[5] In opposition to the application against the Tabrams, Mr Rainey submits that the claimants' allegations against Ojo were supported by expert evidence which I rejected as a result of Mr Slater's concession at hearing that he substantially altered the design without consulting Ojo. I accept this submission and am satisfied that the claimants were not aware before the hearing of the extent of Mr Slater's involvement in the design. For this reason, I am satisfied that the Tabrams' 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.

[6] However, the Slaters were not in the same position as the Tabrams as Mr Slater knew that he had not followed Ojo's plans and that the decisions he had made were linked to the weathertightness defects. I therefore do not accept Mr Taia's submission that Ojo had to incur the cost of proceedings as a result of the claim by the Tabrams, regardless of whether or not the Slaters cross-claimed. Had Mr Slater acknowledged the full extent of his work prior to hearing, the Tabrams would have had the opportunity to make an informed evaluation of the strength of their claim against Ojo.

[7] For these reasons I dismiss the claim for costs against the Tabrams. I find that the claim by Ojo for costs against the Slaters succeeds as that claim lacked substantial merit.

[8] Ojo claims that the Slaters are liable for one third of the District Court scale costs on a 2B basis and half the costs of its expert, Mr Smith. The calculation for the costs claimed of $14,405.13 is set out at paragraphs 21 to 23 o f Ojo's submissions. I am satisfied that the sum claimed is fair and reasonable and therefore order the first respondents to pay this sum to the second respondent.

THE APPLICATION BY MPTL

[9] The application by MPTL for costs is made on the basis that because the Slaters knew that MPTL did not supply the cladding they also knew that the producer statement was false. In addition, as there was no evidence that the cladding was defective, the claim that the Slaters relied on the producer statement was untenable. For these reasons Mr Maclean submits that the Slaters' claim meets the criteria of ss91(1)(a) and (b) as it was an act of bad faith and had no merit.

[10] The Slaters' oppose this application on the ground that the relevant evidence was already before the Tribunal as a result of MPTL's application for removal. This submission has no merit. Mr Slater provided an affidavit in support of the Slaters' 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 instead pursued it on the

basis that they acted in reliance on the producer statement issued by MPTL.

[11] It was not until the hearing that Mr Slater accepted that he knew that both the workmanship guarantee and the producer statement that he obtained were false and that, when Mr Tindale installed the cladding, he was self-employed and not working for Mr Paul. [24 February 2009 at 2.33 pm.] Mr Slater stated in evidence that he did not oppose the application for removal of Bruce Tindale, who installed the cladding and signed the workmanship guarantee, because Mr Tindale is a family member.

[12] I have no doubt that the evidence which Mr Slater gave on these matters at hearing could have been produced prior to hearing 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 as the installer. The Slaters' pursuit of MPTL when Mr Slater knew that there was no basis for the claim must amount to bad faith.

[13] For these reasons I am satisfied that MPTL is entitled to costs under s 91(1)(a) and (b) against the Slaters as their claim amounted to bad faith and lacked substantial merit.

[14] MPTL claims costs of $10,538.38 against costs on the District Court scale of $13,240. As Mr Taia submits, MPTL is not entitled to costs for production and inspection of documents as it was not represented by counsel at this stage of proceedings. If these items (4.6, 4.7 and 4.8) are deducted from the scale, the sum remaining costs is $9,920.00 which the first respondent is liable to pay to MPTL.

ORDERS

I. The first respondents, Arran Slater and Michelle Slater, are to pay the second respondent, Ojo Limited, the sum of $14,405.13 immediately.

II. The first respondents, Arran Slater and Michelle Slater, are to pay the fourth respondent, Mineral Plaster Technologies Limited, the sum of $9,920.00 immediately.

III. The claim by Ojo Limited against Richard Tabram and Hayley Tabram is dismissed.

Dated this 27th day of May 2009

S. Pezaro
Tribunal Member