

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2011-100-000083  
[2012] NZWHT AUCKLAND 50**

**BETWEEN**                    **NICHOLA JOAN TURNER  
AND TRACEY ANN  
MACLEOD**  
Claimants

**AND**                            **AUCKLAND COUNCIL**  
First Respondent

**AND**                            **NICOLA TRESSIDER**  
Second Respondent

**AND**                            **SIMON GUINNESS**  
Third Respondent

**AND**                            **CAPSTONE PROFESSIONAL  
SERVICES LIMITED**  
Fourth Respondent

**AND**                            **RICHARD DONALDSON**  
Fifth Respondent

**AND**                            **BARFOOT AND THOMPSON  
LIMITED**  
**(Removed)**  
Sixth Respondent

**AND**                            **NORMAN LLOYD**  
**(Removed)**  
Seventh Respondent

Decision:                    29 November 2012

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**ORDER AS TO COSTS**  
**Adjudicator: M Roche**

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[1] The Tribunal issued a determination on 22 August 2012 finding Auckland Council and Capstone Professional Services Limited liable for the full amount of the established claim.

[2] The claimants have applied for costs against Capstone which has been placed in liquidation. The liquidator, Digby Noyce, has consented to the Tribunal determining the application in accordance with s 248(1)(c)(i) of the Companies Act 1993. Mr Noyce has also filed a pro-forma opposition to an award of costs being made against Capstone in reliance upon “the applicable common law principles that regulate the Tribunal’s approach to awarding costs.”

## **ISSUES**

[3] The issues are:-

- i. Did Capstone cause costs to be incurred unnecessarily by either bad faith or allegations without substantial merit?
- ii. If so, should I exercise my discretion to award costs?
- iii. If so, what costs should be awarded?

## **RELEVANT PRINCIPLES**

[4] Section 91 of the Weathertight Homes Resolution Services Act 2006 provides that:

### **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.

- (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

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

**DID CAPSTONE CAUSE COSTS TO BE INCURRED UNNECESSARILY EITHER BY BAD FAITH OR ALLEGATIONS WITHOUT SUBSTANTIAL MERIT?**

[6] In *Trustees Executors Ltd v Wellington City Council*,<sup>1</sup> Simon France J identified the competing considerations to be balanced in making costs decisions in this jurisdiction. These are the need to avoid establishing disincentives to use an important resolution service and the need to avoid allowing a party to cause unnecessary costs to others in pursuing unmeritorious arguments. The words without “substantial merit” employed in s 91 do not set a high bar and costs can be awarded in respect of allegations which a party ought reasonably to have known they could not establish.<sup>2</sup>

[7] The claimants’ application for costs is made in reliance on a number of actions taken on behalf of Capstone. It is submitted that each of these actions by Capstone’s director, Mr Sutherland, amounted to bad faith or allegations or objections without substantial merit. I will consider each in turn.

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<sup>1</sup> *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-739, 16 December 2008.

<sup>2</sup> *Phon v Waitakere City Council* [2011] NZWHT Auckland 24.

### **A. Non disclosure of documents**

[8] The claimants allege that the failure by Capstone to disclose documents amounted to bad faith and/or allegations or objections without substantial merit. It is submitted that this non-disclosure was made in circumstances “where there is a real question whether the relevant documents were destroyed prior to the seven year requirement under the Tax Administration Act.” In the application a reference is made to pages 14 and 15 of the hearing transcript.

[9] It is correct that Capstone did not disclose any documents. However, there is no foundation for the submission that there is a question as to whether the documents were destroyed prior to the seven year requirement. The transcript does not assist. In any case, that seven year requirement was passed prior to the claimants’ application for adjudication being lodged. The proposition that the documents were destroyed prior to the seven year requirement was not put to Mr Sutherland in cross-examination. I reject this basis for the costs application.

### **B. Failure to provide the name(s) of subcontractors/contractors/employees at preliminary conference**

[10] The identity of the Capstone employees on site was an issue at the hearing. It is claimed that Mr Sutherland declined to name the Capstone employees when asked at the preliminary procedural conference for the claim. Unfortunately, there is no transcript of this conference and no record of this question being put to Mr Sutherland. Procedural Order 1 recorded some of the discussions that took place at the conference but not this. This basis for costs is not established.

### **C. Capstone's statement of response**

[11] A statement of response was filed the day before the scheduled mediation that alleged for the first time that Capstone was a "labour only" contractor. This led to an application for an adjournment of mediation (which was declined) and allegedly caused the claimants considerable stress.

[12] It is correct that Capstone filed a response the day before the mediation in which it was claimed that Capstone had been a labour only contractor. While it is accepted that this and the adjournment application it gave rise to caused stress to the claimants, it is not established that Capstone's conduct resulted in costs and expenses being incurred unnecessarily. This basis for the costs application is rejected.

### **D. Interrogatories and hearing**

[13] The claimants allege that Mr Sutherland provided evasive and deliberately misleading answers to interrogatories causing them to apply for further and proper answers. The interrogatories were put to both Capstone and the fifth respondent, Richard Donaldson. Question 4(f) asked for the names of the Capstone subcontractors and employees on site. Mr Donaldson stated that he did not know the names of the employees and Mr Sutherland adopted this answer.

[14] At the hearing, Mr Donaldson disclosed that he did know the names of the Capstone employees and that he had withheld them in an attempt to protect the individuals involved. Mr Sutherland maintained at the hearing that he could not recall the names of the Capstone employees. I rejected this evidence for reasons given in the decision.

[15] I accept that the failure of Capstone to provide the names of the Capstone employees in its answer to the claimants' interrogatories caused them to incur the expense of their counsel's further interlocutory application for further and proper answers. I also accept that the withholding of the employees' names both in the answer to interrogatories and in Mr Sutherland's evidence resulted in the lengthening of the hearing. Time was spent questioning Mr Sutherland and Mr Donaldson regarding the identity of the Capstone employees. Considerable time was also spent testing the evidence of Mr Sutherland and Mr Donaldson regarding Capstone's role in the construction of the claimants' house. This questioning may have been avoided if further witnesses to the construction had been available.

[16] It is difficult to quantify the amount of hearing time that can be attributed to the withholding of the Capstone employees' names. The hearing took approximately four days. There were a large number of factual and legal issues contested between the five parties that participated in the hearing. Considerable time was spent pursuing the negligence allegations made by the claimants against the designer, Simon Guinness which were not upheld. There was also considerable time spent examining the legal and factual issues arising from the claimants' use of RotStop.

[17] I estimate that, at most, one day of hearing time can be attributed to the exploration of the role that Capstone and its employee, Richard Donaldson, played in the construction.

[18] In terms of s 91, I find that withholding the names of the employees was an act of bad faith and it resulted in the claimants unnecessarily incurring the costs of the further interlocutory application and one day of the hearing.

## **SHOULD THE TRIBUNAL'S DISCRETION BE EXERCISED TO AWARD COSTS TO THE CLAIMANTS?**

[19] I have found that the s 91 criteria for costs have been established in respect of the withholding of the names of the Capstone's employees in answers to interrogatories and in evidence by Mr Sutherland.

[20] It is next necessary to determine whether to exercise the Tribunal's discretion to award costs. Meeting the statutory threshold goes a considerable distance to successfully obtaining costs. However, there is still discretion to be exercised. In *Trustees Executors Ltd v Wellington City Council*,<sup>3</sup> Simon France J gave some guidance on the exercise of this discretion. He identified as relevant factors whether the appellants should have known about the weaknesses of their case and whether they pursued litigation in defiance of common sense. These factors are not relevant in the present case. However, Mr Sutherland, on behalf of Capstone should have known that it was wrong to conceal the names of the Capstone employees and that in doing so he was making the claimants' case more difficult to conduct. In the circumstances, I consider that his behavior warrants the exercise of my discretion to award costs.

## **WHAT LEVEL OF COSTS IS APPROPRIATE?**

[21] The claimants have sought costs on an indemnity basis (\$80,030.04) or in the alternative, at a 25 per cent uplift of scale costs on a 2B basis (\$74,376.25). They also claim the cost of their expert fees which were \$54,384.40.

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<sup>3</sup> Above n 1.

[22] The difficulty with this is that although I have accepted that Mr Sutherland's conduct on behalf of Capstone led to the claimants incurring unnecessary costs, this conduct by no means caused the majority of the claimants' costs. It must be remembered that Capstone was only one of the parties in dispute with the claimants at the hearing.

[23] The claimants pursued an unsuccessful claim in negligence against the designer which included the convening of an expert's panel on this issue alone. They unsuccessfully attempted to have a settlement sum added to the established quantum and then attempted to re-litigate the issue following my determination against them. Considerable hearing time was spent on the issue of RotStop. Considerable hearing time was also spent examining the appropriate remedial scope which was disputed by the Council and was the subject of extensive expert evidence.

[24] Having regard to the above, the claim for full indemnity costs cannot succeed.

[25] With regard to the claimed expert's costs, it is not established that the behaviour of Capstone gave rise to any of the claimants' expenditure on experts. The expert evidence addressed matters unrelated to the issues litigated against Capstone and its employee, Richard Donaldson.

[26] I have determined that the behaviour of Capstone caused unnecessary expenditure to the claimants in the form of one hearing day, preparation for the hearing and the preparation of an interlocutory application. I also consider that an allowance for one day of preparation is warranted. Although the Act does not provide guidance on quantum, the High Court has approved the Tribunal's previous use of the District Court scale as a guide.<sup>4</sup> In *Trustees*

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<sup>4</sup> Above n 1.



*Executors Ltd*, the District Court scale was used so it endorsed the District Court scale not the High Court scale. Given the amount in dispute to the claim however, I consider the High Court scale to be more appropriate. Costs calculated on the 2B scale in respect of this are allowed. I do not accept that the claimed uplift is appropriate. The hearing was made longer but not more complex by Capstone. Costs totalling \$ 5,174.00 are awarded. This is made up as follows:

Filing Interlocutory Application- 0.6	\$ 1,194.00
Preparation for Hearing x 1	\$ 1,990.00
Hearing x 1	\$ 1,990.00
<b>TOTAL</b>	<b>\$ 5,174.00</b>

**ORDER**

[27] Capstone Professional Services Limited (in liquidation) is to pay Nichola Joan Turner and Tracey Ann MacLeod the sum of \$ 5,174.00

**DATED** this 29<sup>th</sup> day of November 2012

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M A Roche  
Tribunal Member