IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV 2016-409-1223
[2020] NZHC 3051

BETWEEN	J T BRUCE, S L BRUCE and L G WILLETTS as Trustees of the Jo and Stephen Family Trust Plaintiffs
AND	IAG NEW ZEALAND LTD Defendant
AND	ORANGE H MANAGEMENT LTD (FORMERLY HAWKINS MANAGEMENT LTD) (in receivership and liquidation) First Third Party
	ORANGE H GROUP LTD (FORMERLY HAWKINS MANAGEMENT LTD) (in receivership and liquidation) Second Third Party
	QBE INSURANCE (AUSTRALIA) LTD Third Third Party

On the papers

Judgment: 18 November 2020

JUDGMENT OF MALLON J

Background

[1] Mr and Mrs Bruce's home, owned through a family trust, was damaged in the Christchurch earthquake. The house was insured with IAG. IAG elected to repair the house. The repairs were extensive. The Bruces were unhappy with the standard of the repairs and commenced this proceeding contending that IAG did not meet the "as when new" standard under the policy.

[2] Pursuant to a pre-trial direction, the claim was divided into two stages. The first stage was to consider whether the alleged defects existed and what was required to remediate them. The second stage was to consider the cost of remediation and the appropriate remedy or quantum of damages.

[3] The trial on the first stage took place in November 2018 and my decision was given in December 2018.[1] Shortly before the trial IAG accepted liability for more than 127 defects. During closing submissions the Bruces abandoned their claim relating to the size of the garage. I determined that IAG had not complied with its obligation to reinstate the house "as when new" in relation to the internal finishing, the wall verticalities, and the floor levels but that IAG had complied with its obligations in relation to the fireplace. I also determined that the Bruces had established a basis for general damages.

[4] My judgment held that the Bruces' evidence did not establish a reasonable and practical method of remediating the wall verticalities and the uneven floors. I proposed a way forward for the parties to resolve what the remedy for these policy breaches might be. The Bruces appealed my findings about the unreasonableness and impracticality of their proposed remedy. IAG cross-appealed on the finding that it breached the "as when new" standard on the wall verticalities. IAG also sought to contend that general damages were not available (although this was not in its cross-appeal). The Court of Appeal allowed the Bruces' appeal on the basis that findings on whether there was a reasonable and practical remedy were for the second stage. It dismissed IAG's cross-appeal and did not determine IAG's general damages submission.[2]

[5] The Bruces sought an order for costs on the first stage. In a judgment given on 31 March 2020 I declined that application.[3] I considered it was premature to decide costs at that stage for the following reasons:

> [19] In the present case I consider it is not appropriate to order costs until the outcome of the second stage is determined. This is because there is a prospect that the Bruces will not succeed in establishing anything beyond their

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1 *Bruce v IAG New Zealand Limited* [2018] NZHC 3444.
2 *Bruce v IAG New Zealand Limited* [2019] NZCA 590.
3 *Bruce v IAG New Zealand Limited* [2020] NZHC 661.

> success at the first hearing. That was acknowledged by the Court of Appeal. It commented that "it might be thought self-evident that the cost of again lifting the house and replacing the slab would be out of all proportion to the resulting benefit". It also noted my finding that the wall verticalities exceeded tolerances by very small and indiscernible margins.[4]
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> [20] It is true the Bruces had a measure of success at the first stage. A large number of defects were accepted shortly before the hearing and the Bruces succeeded on the interior finish issue. However, they did not succeed on the fireplace and garage issues and it is not yet known whether they will ultimately succeed on the wall verticalities. If the Bruces do not achieve anything beyond their success at the first hearing, then IAG may contend that costs should not be ordered because they have significantly increased the costs of IAG in pursuing matters that failed or obviously lacked merit.
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> [21] The fact that IAG agreed to most of the defective repairs shortly before the trial does not necessarily show that IAG acted unreasonably in failing to agree to these earlier. A direction was made by the Court on 22 November 2017 for a joint report and this led to agreement about most of the defective repairs. There were other attempts to settle the matter including a judicial settlement conference. The details of these attempts are not before me at this stage for obvious reasons but they may be relevant when costs are ultimately determined. Moreover, the Bruces were seeking the estimated cost to rebuild the whole house or, alternatively, to lift the house and rebuild the foundation. Its success relative to that claim will be known once the second stage is determined.

[6] The trial of the second stage was due to commence on 3 August 2020. On 30 July 2020 I received a memorandum from counsel for IAG concerned at the Bruces' intention to proceed with a trial when there was by this stage very little difference between the experts about remediation options and costs and IAG was and remained willing to settle the matter. As a result of this memorandum, a judicial settlement conference before Associate Judge Lester was arranged for 3 August 2020, with the first day of the trial on the second stage deferred to the following day if settlement was not reached.

[7] At the settlement conference, the parties agreed to a settlement involving IAG making a payment to the Bruces.[5] The parties also agreed that the costs of the trial on the second stage were to lie where they fall but costs on the first stage were to be determined by the Court. The concerns I expressed in my 31 March 2020 costs judgment about the potential costs implications for the Bruces if they pursued an

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4 *Bruce v IAG New Zealand Ltd*, above n 2, at [39].

5 The sum is confidential subject to some exceptions, including that it can be (and has been) disclosed to me for the purposes of determining costs.

unmeritorious position at the trial on the second stage were resolved by the settlement the parties reached about that. It is costs on the first stage that must now be resolved.

Costs claim

Respective positions

[8] As to the first stage, the Bruces seek an award of costs of $124,434 and disbursements of $121,899.38. The costs are predominantly calculated on a category 2B basis, but a number of items are calculated on a 2C basis. They say they are entitled to costs because they were the successful party. They say that the amount IAG agreed to pay was significantly above any offer that IAG had previously made, and these offers were made late and at a time when significant costs had already been incurred.

[9] IAG submits that, rather than an award of costs in the Bruces' favour, an award of costs for $110,719.50 and disbursements of $220,462.25 should be made in its favour. It says it acted reasonably throughout by attempting to settle the proceeding, and the barrier to settlement was the Bruces' unreasonable insistence that the foundation system needed to be rebuilt at a cost of between $1.4 million and $1.8 million, which was a sum far in excess of the settlement sum IAG ultimately agreed to pay.

Who succeeded

[10] The starting point is that "the party who fails with respect to a proceeding … should pay costs to the party who succeeds".[6] This reflects the primary principle that costs follow the event. Further, a party who is adjudged liable to pay money to the other party is the successful party and a success on more limited terms is still a success.

[11] I accept that the Bruces were successful on the first stage in that they:

(a) obtained admissions of liability for more than 127 repair defects in a statement of defence filed and served a week before the trial on the first stage and nearly two years after the proceeding was commenced;

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6 High Court Rules 2016, r 14.2(1).

(b) succeeded in establishing the "as when new" standard to which IAG was required to repair;

(c) succeeded in establishing that IAG had breached its obligations in relation to three of the five remaining defects that were the subject of the trial on the first stage; and

(d) succeeded in establishing that IAG was liable for general damages.

[12] I agree that the Bruces were the successful party for the purposes of costs orders under the High Court Rules, for these reasons. The starting point is, therefore, a costs order in the Bruces' favour.

Relevance of settlement offers

[13] The starting point can be altered if the unsuccessful party (IAG) made a written offer on a "without prejudice except as to costs" basis.[7] IAG would be entitled to costs for steps taken after such an offer if:[8]

(a) its offer was for a sum of money that exceeded the amount of a judgment obtained by the Bruces; or

(b) its offer would have been more beneficial to the Bruces than the judgment they obtained.

[14] Further, even if either of those criteria is not met, IAG's offers can be taken into account if it made an offer that was close to the value or benefit of the judgment obtained by the Bruces.[9]

[15] The offers involving money sums prior to the trial were:

(a) An offer on 14 November 2018 to pay $222,268 to remediate 111 defects accepted as existing. This sum would be increased if

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7 Rules 14.10 and 14.11.
8 Rule 14.11.
9 Rule 14.11(4).

necessary following discussion between the quantity surveyors for the Bruces and IAG. This offer was made without prejudice to the Bruces' claim on the remaining alleged defects.

(b) An offer on 15 November 2018 for $15,133 to remediate the internal finishes, on top of the $222,268 previously offered, in full and final settlement.

(c) An offer on 19 November 2018 for $78,273 for all remaining matters (including the internal walls), on top of the $222,268, in full and final settlement.

[16] Because the first stage of the trial did not determine the remedy for the uneven floors, the wall verticalities and the interior finish, there is no judgment against which IAG's offers can be measured. However, the Bruces' success in establishing policy breaches for three of the five remaining defects in issue and on the general damages issue suggests they were likely to have done at least a little better than IAG's best offer made prior to or during the trial. Moreover, the settlement that IAG ultimately agreed to was well above IAG's best offer made prior to or during the trial on the first stage. The settlement IAG agreed to include a costs avoidance component (relating to the costs for the second trial). If that component is removed, the settlement remains well above IAG's best offer prior to or during the trial on the first stage. On this basis, it cannot be said that the Bruces were less successful as a result of the first trial than if they had accepted the offer. This means that IAG's offers do not entitle it to an award of costs for the steps taken after the offers were made. Its offers are nevertheless relevant to the next question.[10]

Refusal or reduction of costs

[17] The next question is whether a costs order in favour of the Bruces, as the successful party, should be refused or reduced for any reason recognised under the High Court Rules. Potentially relevant reasons are that:

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[10] Rule 14.11(4) and 14.7(f)(v).

(a) Although the Bruces "succeeded overall" they "failed in relation to … an issue which significantly increased the costs of the party opposing costs";[11]

(b) The Bruces contributed unnecessarily to the time or expense of the proceeding or a step in it by:

(i) "… pursuing an … argument that lacks merit";[12] or

(ii) "failing, without reasonable justification, to … accept a legal argument";[13] or

(iii) "failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding".[14]

[18] IAG contends that it acted reasonably throughout. Prior to the issue of proceedings it had commissioned an expert report. This was to investigate the Bruces' concerns with the repairs with a view to resolving matters with them. IAG had also provided that report to the Bruces. After the proceedings were issued:

(a) On 14 June 2017 IAG proposed that it would pay for the defective workmanship once the defects were identified, scoped and costed. The Bruces did not reply to this and filed an amended statement of claim seeking $2.2 million to rebuild the house.

(b) IAG subsequently set out to identify the defects and their remediation cost. IAG say this process was delayed due to a lack of response from the Bruces, active oppositrtion to a site visit by IAG's expert, and the Bruces' expert being instructed not to discuss issues with IAG's expert.

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11 Rule 14.7(d).
12 Rule 14.7(f)(ii).
13 Rule 14.7(f)(iii).
14 Rule 14.7(f)(v).

> This meant it was not until 14 November 2018 that it was able to put forward its offer to pay for the identified defects.

[19] IAG also says that its efforts to narrow the issues meant that the Court was only required to make findings on five alleged defects, and it was only three of them that were the real barrier to settlement because the Bruces' position was (and remained at trial) that the whole house or alternatively the foundation system needed to be rebuilt. As to that, this Court and the Court of Appeal signalled the likely unreasonableness and impracticality of that remedy, with the Court of Appeal saying, "it might be thought self-evident that the cost of again lifting the house and replacing the slab would be out of all proportion to the resulting benefit".[15]

[20] I agree with IAG that this aspect of the Bruces' claim lacked merit and ought not to have been pursued to the extent it was. I also accept that the Bruces' claim to rebuild the house or replace the entire foundation structure made it difficult for IAG to settle with them. On the other hand, IAG was able to protect its position by making an offer to pay a sum in full and final settlement for the Bruces to either accept or reject. IAG eventually did do this, but that was not until the first day of the trial on the first stage and, as discussed above, was insufficient to provide the costs protection it sought.[16]

[21] I therefore do not accept that the Bruces' insistence on a complete rebuild of the house or its foundations added to IAG's costs by preventing an earlier settlement from being reached. Nor is it apparent to me that it added to the costs at trial. While the experts' evidence discussed the remedial options at the trial, primarily the evidence was directed to whether the defects existed. IAG maintained that they did not (except in relation to the finish in the entrance and the stairwell) and IAG's position on the internal finish, the uneven walls and the wall verticalities was not upheld.

[22] It is more difficult to say whether the Bruces improperly refused to engage with IAG's efforts to resolve matters. IAG and the Bruces attended a judicial settlement conference on 29 November 2017. This indicates that the Bruces were not entirely

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15 *Bruce v IAG New Zealand Limited*, above n 2, at [39].
16 Rule 14.11.

intransigent about, and were potentially interested in, a settlement. The Bruces say they found that conference adversarial and nonconciliatory. While IAG would, I expect, have a different view about that, it does indicate some willingness on the part of the Bruces to engage with IAG to resolve matters.

[23] The failure of that settlement conference, and the Bruces' perceptions about why it had failed, may explain why the Bruces did not engage with IAG's efforts to resolve the dispute after that. The context is also relevant. The evidence was that the Bruces were under a great deal of stress as a result of the considerable damage to their gold award-winning dream home caused by the earthquakes, the lengthy repair process and the poor standard of the repair work. It is apparent that they had lost all confidence in their insurer to put things right and put their efforts into court action rather than working with their insurer to resolve matters.

[24] It might have been better if the Bruces had responded to the offers referred to above at [15]. However, they were made very close to trial and on the first day of the trial. Moreover, they did not include any sum for general damages and so, from the Bruces' perspective, were plainly inadequate. As frustrating as it no doubt was for IAG, on balance it is my view that the Bruces' attitude to IAG's efforts to engage does not provide a sufficient basis to reduce the award of costs for the first stage of the proceeding.

[25] I accept that the Bruces' claim about the garage size proved unfounded. However, in the overall scheme of things, where there was a significant number of defects accepted by IAG close to trial, it was a relatively minor matter. To the Bruces, the garage appeared to be smaller and less functional but in fact, on the evidence, its dimensions were the same. On balance, I consider the Bruces' misperception on this one issue, and the evidence associated with that, does not warrant a reduction of the costs order.

Items and allocations claimed

[26] Turning then to the cost allocations claimed, I do not accept that any item warrants a Band C allocation. None of these steps required a comparatively large amount of time. The discovery and inspection and the trial bundle were of ordinary

and usual size. Many of the briefs of evidence were just a few pages. The hearing preparation was of average complexity.

[27] I am uncertain if the claim for the judicial settlement conference relates to the settlement conference in November 2017 or if it relates to the 3 August 2018 settlement conference. If it is the latter, it is disallowed. This is because the terms of the settlement left only the costs of the first trial to be determined.

[28] IAG submits that the Court should disallow the nearly $65,000 claimed for the expert fees of Mr Sturman and Mr Freeman. This is because Mr Sturman supported the Bruces' claim that the garage was defective and Mr Freeman made some concessions in his evidence. It is also because they supported the Bruces' claim that the house be demolished and the original repair process be repeated. In my view, no reduction to these expert fees is appropriate. Mr Sturman and Mr Freeman gave evidence on a range of matters, some of which were accepted and others which were not. This does not mean that their expert fees were not reasonably necessary for the conduct of the proceeding or they were unreasonable in amount.[17] Their evidence assisted the Court in determining whether defects existed and whether there might be remedial options for them.

Result

[29] Accordingly, I order 2B costs in favour of the Bruces for the items claimed in their schedule to their costs' memorandum dated 18 August 2020, subject to clarification that item 36 does not relate to the 3 August 2020 judicial settlement conference. I also order disbursements as claimed in that memorandum.

Mallon J

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17 Rule 14.12(2).