**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**CIV-2015-409-000222**
**[2017] NZHC 482**

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| BETWEEN | GREGORY PETER YOUNG AND MALLEY & CO TRUSTEES LIMITED<br>Plaintiffs |
| AND | TOWER INSURANCE LIMITED<br>Defendant |

Hearing: (Dealt with on the papers)

Counsel: P F Whiteside QC and H T Shaw for Plaintiffs
M C Harris and ATB Joseph for Defendant

Judgment: 16 March 2017

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**JUDGMENT OF GENDALL J**
**[As to Costs]**

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## Introduction

[1] In a judgment I issued in this proceeding on 7 December 2016 (the substantive judgment) I found that the plaintiffs' claim, under its home insurance policy with the defendant, in the main succeeded. The policy claim related to significant damage caused to the plaintiffs' home as a result of the Canterbury earthquake sequence. My decision included a declaration that the house was beyond repair in terms of the policy. Therefore, given that it was regarded as a rebuild, the maximum payable by the defendant in terms of the policy was to be $1,620,887.

[2] The case before me involved one cause of action whereby the plaintiffs claimed that the defendant had breached the insurance policy contract. Although the plaintiffs did effectively succeed on claim, the ultimate outcome, as I have noted, was that the rebuild cost under the contract was to be $1.62m dollars, some $500,000 less than the amount the plaintiffs ultimately claimed. In addition to the declaration noted at para [1] above, in my substantive judgment the plaintiffs were also successful to a limited degree in their ground-breaking claim for general damages against the defendant. A "nominal" award of general damages of $5000 was made.

[3] In giving my substantive judgment I reserved questions of costs, disbursements and experts' fees. On these issues, at para [191] of the substantive judgment I made a direction that:

> …in the absence of the parties being able to agree these issues between them, they are to file submissions on the question on a sequential basis. These are to be referred to me and, in the absence of either party indicating they wish to be heard on the issue, I will decide those questions on the basis of the submissions filed and the material before the Court.

[4] Counsel have confirmed that the parties have been unable to agree these issues between themselves. Accordingly, counsel for the plaintiffs has filed an initial memorandum seeking costs dated 13 February 2017. Counsel for the defendant in turn has filed his memorandum on costs in response dated 2 March 2017. Counsel for the plaintiffs has then filed a memorandum in reply dated 3 March 2017.

[5] I have had an opportunity to consider all those memoranda filed, together with the other material before the Court. I now give my decision on costs, disbursements and experts' fees relating to this proceeding.

**Plaintiffs' position**

[6] From the memoranda filed by Mr Whiteside QC, counsel for the plaintiffs, it is apparent the plaintiffs as the largely successful parties in this proceeding seek an order against the defendant as costs, disbursements and experts' fees on the following basis:

| | | | |
|---|---|---|---|
| (a) | Costs calculated on a category 2B scale basis for steps in this proceeding up to 1 July 2015 - | $7,562.00 | |
| (b) | Costs calculated on both a category 2B and 2C basis for steps in this proceeding taken from 1 July 2015 (to include on a 2C basis trial preparation, completion of briefs and attendance at the 11 day trial hearing (with second counsel) | $85,632.00 | |
| | ***Total*** | | **$93,194.00** |
| (c) | Expert witness costs incurred by the plaintiffs | | |
| | - Mr W Sillitoe | $12,730.50 | |
| | - Ms H Trappitt | $18,503.50 | |
| | - Dr A Buchanan | $2,875.00 | |
| | - Mr A Cowie | $34,500.00 | |
| | ***Total*** | | **$68,609.00** |
| (d) | Other witnesses' expenses | | **$150.00** |
| (e) | Court fees and other disbursements (including hearing fees of $30,400 for 11 day trial) | | **$33,500.91** |
| | ***Total*** | | **$195,453.91** |
| | Less Credit to the defendant 0.6 of a day for amended statement of defence filed in response to amended claim | | **($1,338.00)** |
| | **TOTAL** | | **$194,115.91** |

[7] Thus, the total amount sought by the plaintiffs for costs, disbursements and experts' fees here is $194,115.91. According to Mr Whiteside QC's submissions, even on the basis of the plaintiffs' category 2B and category 2C scale claim for costs, (noted above at $93,194.00), this would fall well short of recovering two thirds of their actual legal costs incurred in this proceeding.

**Defendant's position**

[8] Mr Harris, counsel for the defendant, in his memorandum on costs, acknowledged that the plaintiffs had succeeded in their claim against the defendants here, but he said in only a rather limited way. As a result, Mr Harris reached an entirely different conclusion on the costs award which he said should be made in favour of the plaintiffs. This was on the basis that their degree of success in this proceeding was limited, they failed, it is alleged, on a number of matters and, in addition, they incurred experts' fees and certain disbursements which were unnecessary and excessive in the circumstances.

[9] Essentially, the defendant's position here is:

(a) The appropriate level of scale costs to be awarded should be category 2B only (with allowance for second counsel) and not category 2C for any of the attendances involved.

(b) Scale cost awards for trial preparation, preparing the common bundle and appearance at trial should only be 40 per cent of the total category 2B allowances. This is because, Mr Harris says, only 70 per cent of the trial was spent on matters on which the plaintiffs succeeded and thus in accordance with the Court of Appeal decision in *Paper Reclaim Ltd v Aotearoa International Ltd*[1] netting is required here. That said, given that the percentage of the trial time on which the plaintiff was successful, according to Mr Harris, was only 70 per cent this meant that for 30 per cent of the trial time the plaintiff was unsuccessful. The plaintiffs' net success position therefore for which they are entitled to costs was only 40 per cent. Aligning costs with success, Mr Harris says the plaintiffs should only be entitled to 40 per cent of their costs for trial preparation, preparing the common bundle and appearance at the trial.

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1 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZCA 544 at [23].

(c) In addition, on the basis of current authorities, this costs award should be subject to a further 30 per cent reduction, according to Mr Harris, on account of the plaintiffs' failure to succeed on their allegations of deliberate wrongdoing on the part of the defendant.

(d) The expert witness fees claimed should be reduced for Mr Sillitoe and Mr Cowie (and also for the small amount charged by Mr Lilly as other witnesses' expenses) for reasons I will outline below.

(e) In addition, the court fee disbursement claimed for hearing fees for 11 days should be reduced to a claim for 4.5 hearing days only, on the basis that the hearing time required was unnecessarily extended by the plaintiffs' actions.

[10] The impact of these submissions from Mr Harris would result in a substantial reduction in the costs, disbursements and witness expenses to be awarded to the plaintiffs here.

**Legal principles and my decision**

[11] The starting point in any costs assessment is that all matters with regard to costs are at the discretion of the Court – r 14.1 High Court Rules. This discretion, however, is not an unfettered one and is to be guided by the general principles contained in rr 14.2 – 14.5. A fundamental costs principle starting point, however, is set out in r 14.2(1). This provides that the party who fails with respect to a proceeding should generally pay the costs of the successful party. It is apparent too that the rules are intended to create a framework for determining costs in individual cases that is both "predictable and expeditious". This is confirmed in r 14.2(g).

[12] It is a generally accepted principle that a common sense approach is to be taken in relation to which party in a proceeding has succeeded whether in whole or in part. This was noted in the decision *Driessen v Earthquake Commission & Southern Response Earthquake Services Ltd*:[2]

> [22] Mr Ferguson (counsel for the plaintiff) submits correctly that a common sense approach should be taken as to which party has succeeded, whether in whole or in part. The success of the plaintiff is here said to lie in the fact that the proceedings resulted in recovery of (much) more money than she was able to

[2] *Driessen v Earthquake Commission & Southern Response Earthquake Services Limited* [2016] NZHC 1048.

> achieve without bringing the proceedings. Counsel refers to authority including *Fox v Foundation Piling Ltd* [2011] EWCA Civ-790.
>
> [23] The fact that a party came up short of what it claimed does not negate a costs order. Success may be reflected in a complete win, or a win in the sense that viewed overall, one party substantially succeeded. There may have been legitimate contest. Often a successful party will not succeed in all respects [*Goodwin v Bennetts UK Ltd* [2008] EWCA Civ1658 at [13]].
>
> [24] A costs judgment is not to be reached simply by identifying which party pays money to another. It depends on what was claimed, the position taken in the litigation, and the result. However, where a claimant essentially succeeds by pressing and sustaining litigation, then that claimant should be regarded as the successful party and here in this long, and in this context, trying litigation, Mrs Driessen has largely been vindicated.

[13] On these aspects there seems to be little disagreement between counsel for the plaintiffs and counsel for the defendant (and I agree) that on a commonsense approach, it is the plaintiffs who have substantially succeeded on the technical dispute between the parties over damage to their house and the question of possible repair or rebuild. As I have noted above, and despite strenuous argument to the contrary advanced on the part of the defendant, I found in the substantive judgment that this was not a repair but a rebuild situation.

[14] Notwithstanding this, the defendants' position is that on this issue the plaintiffs did fail in relation to the quantum sought and, further, that they substantially failed in a second area before the Court. This second area, which involved allegations of (deliberate) wrongdoing by the defendant and its experts, had resulted in claims by the plaintiffs for general and exemplary damages which were largely unsuccessful.

[15] On the quantum question it is true that before me the plaintiffs had claimed rebuild costs in the region of $2.1 million but ultimately succeeded on this aspect only to the extent of $1.62 million. This was, as I understand it, however, some $300,000 more than a pre-trial settlement offer the defendant had made. The defendant, on the other hand, in advancing and maintaining its unsuccessful argument that the damage to the plaintiffs' house was repairable and not a rebuild (and this argument occupying significant trial time here) effectively failed in its major opposition to the plaintiff's claim.

[16] The general result in this case has been that the plaintiffs as claimants have succeeded by sustaining this litigation to trial, albeit the quantum is less than advanced by an "expert" called on their behalf. I am satisfied overall that the plaintiffs must be seen as the successful party here, and although the quantum amount was less than they had hoped for, nevertheless it significantly exceeded settlement amounts put forward by the defendants earlier. This quantum argument, in my view, does not assist the defendant here.

[17] As to the second area noted at para [14] above, involving the plaintiffs' allegations of deliberate wrongdoing by the defendant and its experts resulting in claims for general and exemplary damages, I will address these at paras [47] to [58] below.

[18] I turn next to issues over the proper categorisation of the costs sought by the plaintiffs. As I have noted at [9](a) above, Mr Whiteside QC's request here is for scale costs calculated in part on a category 2B basis and in part on a category 2C basis. This is opposed by the defendant, with Mr Harris suggesting all costs should be assessed only on a category 2B basis.

[19] As to the appropriate daily recovery rates under r 14.4 High Court Rules, from the outset counsel for both parties accepted this was a category 2 proceeding, being one of "average complexity". But counsel have disagreed on what are the appropriate "time bands" to be applied in this case. Rule 14.5 High Court Rules deals with this aspect and the determination of what is a reasonable time for a step in a proceeding. It states:

> **14.5 Determination of reasonable time**
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> (1) For the purposes of rule 14.2(c), a reasonable time for a step is—
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> (a) the time specified for it in Schedule 3; or
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> (b) a time determined by analogy with that schedule, if Schedule 3 does not apply; or
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> (c) the time assessed as likely to be required for the particular step, if no analogy can usefully be made.
>
> (2) A determination of what is a reasonable time for a step under subclause (1) must be made by reference—
>
> (a) to band A, if a comparatively small amount of time is considered reasonable; or
>
> (b) to band B, if a normal amount of time is considered reasonable; or
>
> (c) to band C, if a comparatively large amount of time for the particular step is considered reasonable.

[20] McGechan on Procedure at para HR14.5.01, in dealing with these time bands, states:

> **HR14.5.01 The time bands**
>
> The "time bands" are the second of the two classifications central to the routine working of the costs rules. While the r 14.3 categorisation is made at the earliest practicable point, the appropriate "time band" for each interlocutory step is fixed by the Judge or Associate Judge who deals with that step and the banding for the trial stages by the trial Judge.

> The bands may differ at each step. A blanket assessment for banding does not accord with the Rules, unless it reflects that the case is an average one requiring a normal amount of time for each step: Commissioner of Inland Revenue v Chesterfields Preschools Ltd [2010] NZCA 400, (2010) 24 NZTC 24,500 at [161], citing Paper Reclaim Ltd v Aotearoa International Ltd [2007] NZCA 544, (2007) 18 PRNZ 743.

[21] So far as this time banding is concerned, it is clear from *Paper Reclaim v Aotearoa International* that a blanket approach to time banding is not appropriate under the High Court Rules. If a party, such as the plaintiffs here, seeks a band other than band B (which provides for the normal amount of time considered reasonable for a proceeding), then it must demonstrate why a normal amount of time for that particular step is insufficient.

[22] Two initial issues arise in this case from these principles. These are:

(a) whether costs claimable by the plaintiffs here should be assessed only on the basis of what is said to be the net success they have achieved at trial, which the defendants claim is simply a 40 per cent net success rate.

(b) whether, on the one hand, the plaintiff's claim for category 2C costs for trial preparation, completion of briefs and attendance at the 11 day trial hearing is justified or whether, on the other, as the defendant contends, all costs here should simply be on a category 2B basis.

[23] I now turn to consider each of these aspects.

**Should the plaintiff be entitled to costs here claimed only on the basis of their net success at trial?**

[24] Submissions advanced before me on behalf of the defendant rely on the judgment of the Court of Appeal in *Paper Reclaim* to suggest that, as the plaintiffs in this case had only a 40 per cent net success rate, their costs should be reduced and determined on that 40 per cent basis.

[25] In my judgment the situation in the present case, however, is fundamentally different from that which existed in the *Paper Reclaim* case. The plaintiffs' claim here essentially involved one principal cause of action for breach of the insurance policy contract terms whereby the plaintiffs maintained the defendant had refused to pay the full replacement cost of the required rebuild for the house. On this cause of action the plaintiff succeeded. Much of the expert and other evidence at the trial of this matter was addressed to this issue.

[26] In *Paper Reclaim* the plaintiffs failed on five of their seven causes of action against the defendant. That is the reason the Court of Appeal there adopted the netting approach because 70 per cent of the hearing time was spent on the cause of action on which the plaintiff succeeded and 30 per cent on the causes of action on which the defendant succeeded. That approach is not appropriate in the present case because the plaintiffs won on their principal pleaded cause of action.

[27] Mr Whiteside QC went further. He has contended that this entire litigation would have been avoided had the defendant accepted what he suggested was the very obvious outcome from the start, that is, that the plaintiffs' house was a rebuild. It was this primary issue he said that forced the plaintiffs to come to Court and on which they succeeded. It is accepted, however, that the final quantum awarded was significantly less than the plaintiffs had sought, but this is not altogether unusual.

[28] In its defence, the defendant contended that it acted properly throughout. The defendant says it relied on advice it received that the repair strategy and methodology for the plaintiffs' house put forward by their instructed expert, Mr Sinclair (an expert who Mr Young at one stage specifically requested), was appropriate and would work. Mr Harris contends this advice was such that the defendant was entitled to rely on it.

[29] In my view, however, that is a long bow to draw without proper questioning. I reach that conclusion, given what I found to be the rather novel and untried nature of the repair methodology proposed on a site acknowledged to be difficult, the relatively high repair costs that were estimated relative to rebuild costs, and the distinct possibility of a repair costing blowout given the untested nature of the repair strategy.

[30] The defendant's claim that the plaintiffs are only entitled to 40 per cent of the total trial costs I find is flawed. A large part of the trial in this matter was directed to the question whether this was truly a rebuild case on the basis that the repair strategy advanced by the defendant's experts simply did not meet the policy terms.

[31] I conclude therefore that the plaintiffs must be seen largely as the successful party here in achieving substantially what they sought in this litigation. This was the finding I reached that their house was a rebuild and not a repair. As such, I am satisfied the plaintiffs are entitled to all their reasonable costs as the successful party, and certainly far more than 40 per cent.

[32] As an aside, I note also that the plaintiffs were successful, even though on only a reasonably limited basis, under their ground-breaking claim for general damages against the defendant. Many plaintiffs in earlier earthquake claims cases have sought general damages from respective insurance policy company defendants without success. To the extent noted at [2] above, the plaintiffs were successful in this aspect of their claim, although their final general damages award of $5000 I described in the substantive judgment as "nominal".

**Should the plaintiffs be entitled to claim costs on a category 2C rather than 2B basis for trial matters?**

[33] The second issue, as noted at para [22](b) above, to be addressed now, relates to the question whether the plaintiffs' claim for category 2C costs for trial preparation, completion of briefs and the common bundle for the trial hearing is appropriate or whether, as the defendant contends, these costs, along with all other costs here, should be assessed simply on a category 2B basis.

[34] At paras [19] and [20] above I note first, the provisions of r 14.5 of the High Court Rules dealing with this "time banding" aspect and secondly, that the time bands may differ with each step and that category 2C is to apply here "if a comparatively large amount of time for the particular step (in the proceeding) is considered reasonable". This is, of course, as opposed to category 2B which is to apply "if a normal amount of time is considered reasonable".

[35] Paragraph [21] above confirms the position that so far as this time banding is concerned, a blanket approach is not appropriate. And, if a party seeks assessment on a band other than the normal band B, it is clear they must demonstrate why a normal amount of time for that particular step is insufficient.

[36] Before me on this aspect, Mr Whiteside QC noted quite properly that each case must turn on its own facts. His essential submission, in his words, was:

> For a successful party in a hard-fought complex Earthquake List case lasting 11 days to recover anything close to two thirds of its actual costs reasonably incurred, band C must be awarded, particularly for briefs, the common bundle and preparation. Even a five day preparation allowance for a 10 day trial falls woefully short of compensating the successful party for two thirds of its actual costs reasonably incurred. The band has nothing to do with the number of cases cited in submissions. To only allow 2B costs for these three items means the plaintiffs will fall even further behind in not meeting the two thirds threshold for this complex 11 day case.

[37] Mr Whiteside QC noted that in addition to this trial lasting 11 days, the common bundle comprised six volumes and 1505 pages. As such, preparation of the bundle, preparation for a trial of that length including cross-examination of seven witnesses over a week, in his submission justified the five days under category 2C claimed for each of briefs and hearing preparation time, and the common bundle.

[38] Mr Harris in response, contends that cases in the Earthquake List such as the present case do not exhibit the characteristics of litigation like long running "leaky building" claims, complex tax and competition law matters and some judicial reviews that typically justify band C allowances. He referred to other earthquake litigation such as *Rout v Southern Response Earthquake Services Ltd*,[3] a similar case that involved an eight day trial, and *Jarden v Lumley General Insurance (NZ) Ltd*,[4] another Earthquake List case that went to trial involving a six day hearing, both of which involved costs awards on only a 2B basis.

[39] Mr Harris maintained that other factors here also pointed against the band C allowances sought by Mr Whiteside QC on behalf of the plaintiffs. First, he noted this case involved a single plaintiff group and a single defendant and, with the exception of Mr Young's reply brief, all other briefs he said were of modest scope and length. Secondly, he suggested that the costs of the various experts lay substantially in the production of their reports, which themselves are claimed as disbursements. Thirdly, Mr Harris contended that the five or six volume common bundle was simply of average length and, lastly, he suggested that the plaintiffs' case did not draw significantly on case authorities to any extent. As such, Mr Harris maintained that 2B costs was the appropriate allowance for all steps in this case.

[40] Although there is some substance in many of the matters raised by Mr Harris on this aspect of the plaintiff's costs claim, by a reasonably fine margin I accept the counter contentions advanced by Mr Whiteside QC that this is one of those earthquake claim cases on which a differential time banding for trial preparation and related steps should be adopted. I reach this view on the basis that a comparatively large amount of time for these particular steps was properly required for a 10 or 11 day hearing here and in the circumstances prevailing in this case in terms of r 14.5(2)(c) High Court Rules. I accept the comment from Mr Whiteside QC that in the situation here, even a category 2C assessment for these particular aspects does not result in the plaintiffs achieving a two-thirds reimbursement of their actual legal costs as is the general aim implicit in the High Court

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3 *Rout v Southern Response Earthquake Services Ltd* [2014] NZHC 1053.
4 *Jarden v Lumley General Insurance (NZ) Ltd* [2016] NZHC 2820.

Rules. There was, in my view, a degree of complexity in this case involving assessment of earthquake caused damage on a difficult site, and the defendant's proposed repair strategy and repair and rebuild costings on this site, which themselves required additional attention on the plaintiffs' part. I do accept here that on their individual facts other insurance claim cases have attracted overall costs awards made simply on a category 2B basis (those cases, including the two mentioned at [38] above, generally, however, involving trial hearing times significantly less than 10 or 11 days). I repeat that the present case, occupying as it did at least 10 days of trial time and involving a range of reasonably complex issues is one which required, but only by a relatively fine margin, that trial preparation aspects reasonably needed a comparatively large amount of time. Thus I find that category 2C is appropriate but only for those trial preparation aspects.

[41] For these reasons I am satisfied that the plaintiffs' claim for category 2C costs for trial preparation, completion of briefs and the common bundle is justified. An order to this effect is to follow.

**Other factors defendant maintains justify a costs reduction**

[42] In his submissions, Mr Harris contends that there are three other matters in this case which justify a significant costs reduction. According to the defendant, these mean that an appropriate reduction in costs otherwise claimable by the plaintiffs should be made at a level of 30 per cent.

[43] I turn now to briefly consider these three matters.

*1. Erroneous claims by the plaintiffs regarding the positioning of the house*

[44] As to this, the defendant contends that it expended much time and cost responding to erroneous claims made by Mr Young about the nature and extent of the movement of the house and, in particular, related to a Budget Set Out surveying report which was in error. In response, the plaintiffs say that no significant time was spent on this issue at trial, although it seems Mr Harris for the defendant may dispute this. There is little to be gained, in my view, debating this issue at this point, however. Suffice to say that I do not accept that trial and related costs were significantly increased in terms of r 14.7(d) or otherwise as a result of this erroneous claim made well before the trial in this matter took place. I dismiss the defendant's attempt to achieve a reduction in the costs it is to pay under this head.

*2. Overstated quantum claim*

[45] The second matter which the defendant states justifies a costs reduction is what is said to be the plaintiff's failure in their overstated quantum claim. I have already broadly addressed this aspect at paras [14] to [16] above. It is true that the final assessed rebuild at about $1.6 million was approximately $500,000 less than rebuild costings advanced at the hearing for the plaintiffs by Mr Miles. Mr Harris complains that much of what he describes as the $500,000 "overstatement" comprised claimed design and other fees to be paid to Mr Young himself. On this, Mr Harris, in his submissions, has referred me to a post judgment media report attributing certain comments relating to quantum to Mr Young. I put this to one side however. Mr Young is only one of the plaintiffs. And, indeed, as I comment later in this judgment, it can only be regarded as unfortunate that he has seen fit to make a number of what I see as unprofessional and ill-intentioned comments in the past which may well have had some negative impact on others including affected members of his family, in particular his wife and children. Suffice to say on this point that, although the successful plaintiffs have been "knocked back" at trial on quantum which is not unusual, I do not accept that in all the circumstances in this case that should be a matter which sounds against them, for example in a reduced costs award.

*3. No foundation for plaintiffs' allegations of dishonesty and bad faith on the part of the defendant*

[46] These allegations, which amount to suggestions of (deliberate) wrongdoing on the part of the defendant and its experts, were led in part to support the plaintiffs' claims against the defendant for general and exemplary damages. Regrettably they have been matters of some concern in this whole proceeding. A large part of Mr Harris' submissions to me on costs (involving at least six pages of his 11 ½ page submissions) have been directed at this aspect.

[47] In particular, in these submissions Mr Harris in part maintained:

> 24. One of the regrettably memorable and, frankly, baffling features of this proceeding was Mr Young's dogged pursuit of the notion that Tower was not just wrong but that Tower and its experts had lied, cheated and colluded in an effort to deny that his house was damaged beyond repair. These allegations were no afterthought: they were, as Your Honour put it (at [3]), part of the plaintiffs' "core thesis".
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> …
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> 26. These were not allegations of innocent or even careless wrongdoing; they were avowedly allegations of deliberate misconduct, by Tower's experts as well as by Tower, for which exemplary damages were sought.

…

28. There is no finding of deliberate wrongdoing by Tower or any of its experts as was alleged. The breach (of the) duty of good faith that Your Honour found does not equate to a finding of bad faith. The findings were that: Stream did not pass on the subfloor report; Tower was legally responsible as Stream's principal for the ensuing delay; that Tower itself disclosed the report as soon as it came to its attention. The delay constituted a breach of the duty of good faith, but there was no finding that it was done in bad faith for the malevolent purposes alleged.

…

34. The allegations of deliberate wrongdoing by Tower and its experts were a "core thesis" of the plaintiffs and included remarks found to be "ill intentioned". They were made, irresponsibly and without foundation, from the moment the proceeding was commenced, not long after Mr Young told Mr Ashe that he had reviewed his claim file and discovered that Tower had done "everything right". He knew then that he was not dealing with an insurer or experts dealing with his claim in bad faith, despite his firm views that his house was not repairable. For reasons that, frankly, are inexplicable and, it must be said, inexcusable, he resolutely refused to pull out of that trajectory, preferring instead to double down through to the end, even now in his costs submission claiming "success".

35. Your Honour appears to have taken some care to address those allegations, removing some of the sting, in the main liability judgment. But that serious misconduct must now sound in costs…

[48] Generally for those reasons, the defendant sought a 30 per cent reduction in the adjusted scale costs award to the plaintiffs. In response, Mr Whiteside QC for the plaintiffs focussed first on Stream's withholding of the subfloor construction report. In doing so, he noted again that this breached the defendant's full and continuing disclosure obligation and went so far as to suggest it "was not innocent wrongdoing". This was, however, despite my finding in the substantive judgment that the defendant had made the report available to the plaintiffs as soon as it became aware of it from Stream.

[49] Many of the other matters alleged against Mr Young of which the defendant complains are the subject of some dispute advanced by Mr Whiteside QC. Relations between these parties clearly reached a difficult and antagonistic point at a reasonably early stage of this proceeding. It is my view that there is little to be gained here in pursuing these aspects further at this point.

[50] Suffice to say that, as I see the position, there is no justification for what is a large global 30 per cent costs reduction suggested by the defendant here, because of what it says are the unfounded allegations of wrongdoing made by one of the plaintiffs. And as Mr Whiteside QC has properly noted, the plaintiffs themselves were successful (but only to

a limited extent) against the defendant in their general damages claim with a nominal damages award relating to the withheld subfloor construction report.

[51] That, however, does not conclude matters, in my judgment, so far as Mr Young's allegations of dishonesty and bad faith against the defendant and its experts are concerned.

[52] It is useful, as I see it, on this aspect to turn to consider the costs reduction rule, r 14.7 High Court Rules. This states in part:

> **14.7 Refusal of, or reduction in, costs**
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> Despite rules 14.2 to 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if—
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> …
>
> (f) the party claiming costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> …
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> …
>
> (g) some other reason exists which justifies the court refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditious.

[53] And, on the suggestion from the defendant that there was no foundation for the allegations on the part of Mr Young that the defendant and its experts were guilty of dishonesty and bad faith here, it is useful also to turn to my substantive judgment where I made certain remarks which are appropriately repeated here:

> [3] Sadly, I need to say at the outset that, since the time the plaintiffs' initial insurance claim was made in 2011, the relationship between the parties has deteriorated to such an extent that many allegations and counter allegations have flowed between them. A core thesis of the plaintiffs it seems is that the defendant has sought to foist upon them a repair knowing that it fell short of their policy entitlement and further, that the defendant deliberately engaged and promoted experts first, to reject the view that a rebuild was necessary and appropriate here and secondly, to prove that the house had not moved to any significant extent…
>
> [and]
>
> [38] Mr Young responded [to recommendations from Mr Sinclair] by challenging Mr Sinclair's expertise. He even resorted to requesting details of Mr Sinclair's professional indemnity insurance. The plaintiffs' position is also that Mr Sinclair continually modified his original repair proposals in the face of surveying

> evidence that the house had moved laterally, he was evasive and unprofessional and it was not until June 2016 his final plans were prepared.
>
> [39] The defendant disputes this. It says now that, as matters progressed, and given Mr Sinclair's failure to endorse the rebuild of the house that Mr Young wanted, Mr Sinclair was the subject of a number of scurrilous and unfounded allegations from Mr Young, including accusations of "incompetence", "cheating" and "lying". Before me submissions were advanced on behalf of the plaintiffs contending that in this matter Mr Sinclair was partisan and could not in any sense be considered impartial. Indeed, the plaintiffs' position outlined to me was that Mr Sinclair entirely dictated the repair strategy and went out to find contractors who would go along with it. On these claims I find that there was nothing in the evidence put before me to call into question Mr Sinclair's impartiality or professionalism here.
>
> … [and]
>
> [150] In any event in the present case, it could not be said on the evidence before me that the behaviour of the defendant has approached the standard required for an award of exemplary damages in tort or otherwise to be made.
>
> … [and]
>
> [174] The plaintiffs allege that there have been many high-handed actions by Tower in this case. However, overall on all the evidence which is before the Court, I do not find generally that Tower acted unprofessionally in its correspondence or dealings with Mr Young. To the contrary, some comments made by Mr Young, especially to and about Mr Sinclair, seem ill-intentioned. That is unfortunate because Mr Young has been seen throughout as speaking on behalf of the plaintiffs and his family, including his wife and children, all of whom have been substantially affected by the earthquake damage caused to their home.

[54] It is true that the plaintiffs in this proceeding were successful to a rather limited degree in their claim for general damages against Tower, but this clearly related only to the failure to disclose the early subfloor report. Otherwise, the plaintiffs' claim both for general damages and their entire claim for exemplary damages, based upon dishonesty and bad faith on the part of Tower, failed. In my view too, the level of intensity of Mr Young's allegations in this area, and the hearing time involved in addressing those aspects, including the evidentiary and cross-examination requirements, were such that the trial in this proceeding was unnecessarily extended. It appears that all these matters were driven largely by Mr Young alone. In doing so, however, it must be acknowledged that Mr Young acted on behalf of the plaintiff trust and his affected family members and although this may well be seen as unfortunate, it has an impact on the plaintiffs overall.

[55] In my view these actions have meant, in terms of r 14.7(f)(ii) and (g) High Court Rules, that the plaintiffs' costs award here should be reduced to some extent. This is because the plaintiffs, in advancing this dishonesty and bad faith argument on the part of the defendant and its experts at some length, have insisted on pursuing points and an argument that I have found lacked merit. Although it is difficult to tell the precise impact this had on

trial time in this case, taking a broad brush approach I find that it extended the 11 day hearing in this matter by one full day.

[56] The plaintiffs' trial costs to be awarded here are therefore to be reduced to amount to costs on a 10 day hearing rather than on an 11 day hearing.

**Conclusion on costs**

[57] The plaintiffs' claim for $93,194 costs (calculated on both a category 2B and category 2C scale basis for an 11 day trial hearing) is approved but on a reduced 10 day trial hearing basis. Accordingly, and for clarification purposes, this scale costs award is to be $89,849 calculated as follows:

Costs as per Schedule 3 of the High Court Rules:-

*(i) Steps taken before 1 July 2015 with a category 2 daily rate of $1,990*

| Item | | Days | | |
|---|---|---|---|---|
| (1) | Commencement | 3 | | |
| (10) | 1st Conference | .4 | | |
| (11) | Memorandum for 1st Conference | .4 | | |
| | | 3.8 x $1990 | | |
| | | | $7562.00 | |

*(ii) Steps taken from 1 July 2015 with a category 2 daily rate of $2,230*

| Item | | Days | | |
|---|---|---|---|---|
| 11 | Memos for 3 further conferences x 4 | 1.2 | | |
| 13 | Four subsequent conference appearances x 3 | 1.2 | | |
| 15 | Pre-trial conference | .5 | | |
| 20 | List of documents | 2.5 | | |
| 21 | Inspection | 1.5 | | |
| 30 | Briefs | 5 | | |
| 31 | Common Bundle | 5 | | |
| 33 | Preparation | 5 | | |
| 34 | Hearing | 10 | | |
| 35 | Second counsel | 5 | | |
| | | 36.9 x $2,230 | $82,287.00 | |
| | | | | $89,849.00 |

## Disbursements

[58] As I note at [6] above, in addition to their costs claim, the plaintiffs make claims for expert witnesses' costs in this proceeding totalling $68,759 and for general court fees and other disbursements totalling $33,500.91. On these aspects, Tower appears to accept that it is liable first, for some, but not all, of the expert witness costs and secondly, for most of the court fees and other disbursements (although a reduction in hearing fees claimed is sought).

[59] Rule 14.12 of the High Court Rules addresses disbursements and relevantly provides:

> **14.12 Disbursements**
>
> (1) In this rule,—
>
> **disbursement**, in relation to a proceeding,—
>
> (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
>
> (b) includes—
>
> (i) fees of court for the proceeding:
>
> (ii) expenses of serving documents for the purposes of the proceeding:
>
> (iii) expenses of photocopying documents required by these rules or by a direction of the court:
>
> (iv) expenses of conducting a conference by telephone or video link; but
>
> (c) does not include counsel's fee.
>
> **relevant issue**, in relation to a disbursement, means the issue in respect of which the disbursement was paid or incurred.
>
> (2) A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extent that it is—
>
> (a) of a class that is either—
>
> (i) approved by the court for the purposes of the proceeding; or
>
> (ii) specified in paragraph (b) of subclause (1); and
>
> (b) specific to the conduct of the proceeding; and
>
> (c) reasonably necessary for the conduct of the proceeding; and
>
> (d) reasonable in amount.
>
> (3) Despite subclause (2), a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding.

*Expert witnesses' costs*

[60] The expert witness costs sought by the plaintiffs clearly fall within the definition of disbursement in r 14.12(1) noted above. However, they do not fall within any of the categories within r 14.12(1)(b) and thus they need to be approved by the Court under r 14.12(2)(a)(i). This Court has a discretion to grant approval if certain criteria are met:

(a) The disbursement is specific to the conduct of the proceeding;

(b) It was reasonably necessary for the conduct of the proceeding; and

(c) It is reasonable in amount.

[61] The expert witness costs claimed as disbursements by the plaintiff are as follows:

(a) Mr W Sillitoe (Geotechnical Engineer)- $12,730.50

(b) Ms H Trappitt (Structural Engineer) - $18,503.50

(c) Dr A Buchanan (University Professor of Civil Engineering) - $2,875.00

(d) Mr A Cowie (Surveyor) - $34,500.00

[62] As to these claims, Mr Harris confirms that the defendant accepts the charges and disbursement claims for Ms Trappitt and Dr Buchanan. Orders regarding their expert witness costs are to follow.

[63] So far as Mr Sillitoe is concerned, however, the defendant disputes his costs in part relating to work that relied on what is said to be the discredited Budget Set Out surveying work on the position of the house. This apparently affects one invoice levied by Mr Sillitoe amounting to $621. The balance of Mr Sillitoe's charges, the defendant appears to accept, are properly claimable.

[64] This contention advanced for the defendant here has been met with no real response from Mr Whiteside QC for the plaintiffs. Given that it seems Mr Sillitoe did admit under cross-examination that the parts of his advice relating to the incorrect Budget Set Out work should be disregarded, then it does seem the defendant should not be responsible for Mr Sillitoe's $621 invoice relating to this. This $621 therefore is to be deducted from Mr Sillitoe's total costs of $12,730.50. An order is to follow that the defendants are to meet Mr Sillitoe's adjusted expert costs totalling $12,109.50.

[65] Turning now to the claim for Mr Cowie's costs, these are challenged by the defendant on the basis that they are said to be "exceptionally high". In addition, the charges relating to preparing for and giving evidence at Court appear to be "excessive". It is claimed that Mr Cowie spent long periods in Court unnecessarily both before and after giving his evidence. As a result, the defendant contends that only half of a final invoice rendered by Mr Cowie for $6500 plus GST is properly claimable here. The rest, at least, it is said relates to his remaining at Court simply as "a spectator".

[66] In response, Mr Whiteside QC maintains that the defendant's challenge to Mr Cowie's fees and, in particular, his final fee, is 'meritless". He contends that Mr Cowie remained in Court for the period he did, so that he would be further and fully informed when he gave evidence and thereafter when Mr Haynes was giving evidence, so that he was in a position to assist Mr Whiteside QC in his cross-examination of Mr Haynes. Mr Whiteside QC contends that there is no reason why the plaintiff should be out of pocket for Mr Cowie's fee when his evidence was necessary and supported the necessity for a rebuild.

[67] It goes without saying that assessing the reasonableness of these costs charged by Mr Cowie, is not an easy task. As the plaintiffs' expert surveyor finally engaged to ascertain survey positions for the house and its movement as a result of the earthquakes, Mr Cowie played a major role here. That he remained in Court at times when he was not himself giving evidence does not necessarily make his charges for the resulting expert advice unreasonable in the circumstances. On this

aspect, *McGechan on Procedure* at para HR14.12.01(4)(d) in dealing with recovery of actual fees and expenses of a party's expert witnesses states:

> That encompasses not only the expert's fees for time spent preparing and giving evidence, but also for time critiquing other parties' experts in order to assist counsel to understand the issues and opposing contentions, and to assist counsel with cross-examination: *Air New Zealand Ltd v Commerce Commission* [2007] 2 NZLR 494…

[68] As an "independent" expert, issues of partisanship on the part of Mr Cowie, however, may arise at times given the circumstances here, but these were matters not raised by Mr Harris in his submissions. Nor did he place before the Court any independent evidence to support his claims that Mr Cowie's charges were excessive and exceptionally high.

[69] Given all these matters, on balance, I am satisfied that Mr Cowie's total charges can only be seen on the material which is before me as reasonably necessary for the conduct of this proceeding. Also, I have no reason to find they were otherwise unreasonable in amount. An order will follow that his costs of $34,500 are to be paid by the defendant as a disbursement.

*Other witnesses' expenses*

[70] Small amounts of $100 for Mr G Young's expenses for two days, $25 for Mr A Miles' expenses for half a day, and $25 for Mr B Lilly's expenses for half a day are also claimed as disbursements by the plaintiff.

[71] Mr Harris for the defendant confirms that the expenses charged by Mr Young and Mr Lilly are accepted. The defendant however disputes any payment of witness expenses for Mr Miles, given that it contends his evidence was "put aside entirely".

[72] On that aspect, however, I disagree. Mr Miles as a director of the building firm Miles Construction prepared the rebuild estimates for the plaintiffs' home at their request. In my substantive judgment I noted certain errors in the Miles Construction rebuild estimates, some of which Mr Miles himself conceded in his evidence. Nevertheless, in that substantive judgment I was able to make reference to Mr Miles' evidence of rebuild costs, deducting certain accepted amounts for excess

design fees, consent fees, contingency in margin and inflation, to reach a position which was not excessively beyond the rebuild cost figure that I accepted from the quantity surveyor, Mr Eggleton.

[73] Accordingly, it follows that I did not "put aside entirely" Mr Miles' evidence which was evidence he gave openly and frankly in Court. I reject the defendant's suggestion that the $25 sought for Mr Miles' witness expenses should be disallowed.

[74] An order for the other witnesses' expenses of Mr Young, Mr Miles and Mr Lilly totalling $150 will follow.

*Court fees and other disbursements*

[75] As I have already noted, the plaintiffs' claim in total $33,500.91 for Court fees and other disbursements (which includes hearing fees noted at $30,400). A credit to the defendant of 0.6 of a day for the amended statement of defence in response to the amended claim totalling $1338.00 is allowed.

[76] So far as these Court fees and other disbursements are concerned, Mr Harris for the defendant raises no issues other than the suggestion that the claim of $30,400 for hearing fees should be reduced. This is on the basis that the plaintiffs should not be compensated for the full 11 day hearing which eventuated, and this amount should be reduced accordingly.

[77] On this aspect, given that as I note at para [56] above, I have reduced the plaintiffs' 11 day hearing claim down to 10 days, then the hearing fee actually paid totalling $30,400 should similarly be reduced by one day or 1/11$^{th}$. This amounts to a $2764 reduction. Hearing fees to be reimbursed by the defendant therefore will now total $27,636. An order will be made for Court fees and other disbursements to be paid by the defendant amounting to a revised total of $30,736.91.

**Costs on costs**

[78] Finally, in his submissions before me, Mr Whiteside QC suggested that in the earlier negotiations with Mr Harris, the plaintiffs' claim for costs and disbursements

(a claim which he describes as "very reasonable") should have been accepted and, in these circumstances, Mr Whiteside QC made a further claim for an order for costs against the defendant of $3000 on the costs issue itself. I have not been a party to any earlier costs negotiations between the parties, needless to say. Under all the circumstances here, however, I am satisfied that it is not appropriate for an order for costs to be made against the defendant on this costs issue itself. In *Paper Reclaim v Aotearoa International Ltd (Costs)*[5] the Court of Appeal determined that there was to be no order for costs made in respect of the costs application itself as neither sides' position had been completely upheld. Similar considerations apply here in my view. The plaintiffs' claim for a further $3000 costs is therefore rejected.

**Result**

[79] For all the reasons I have outlined above, the plaintiffs are entitled to an award of costs, disbursements and witness expenses on this proceeding totalling $188,723.91 calculated as follows:

| | | | | |
|---|---|---|---|---|
| (a) | Costs calculated on both a category 2B and 2C basis as outlined above including for 10 days' hearing time | | | **$89,849.00** |
| (b) | Expert witness costs | | | |
| | (i) | Mr W Sillitoe | $12,109.50 | |
| | (ii) | Ms H Trappitt | $18,503.50 | |
| | (iii) | Dr A Buchanan | $2,875.00 | |
| | (iv) | Mr A Cowie | $34,500.00 | **67,988.00** |
| (c) | Other witness expenses | | | |
| | (i) | Mr G Young | $100.00 | |
| | (ii) | Mr A Miles | $25.00 | |
| | (iii) | Mr B Lilly | $25.00 | **$150.00** |
| (d) | Revised Court fees and other expenses (including reduced hearing fees totalling $27,636.00) | | | **$30,736.91** |
| **TOTAL** | | | | **$188,723.91** |

[5] *Paper Reclaim v Aotearoa International Ltd (Costs)* [2007] 18 PRNZ 743 at 753.

An order to this effect requiring the defendant to pay $188,723.91 is now made.

.....
**Gendall J**

Solicitors:
Wynn Williams, Christchurch
Gilbert Walker, Auckland

Copy to Mr Whiteside QC