IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-1302
[2016] NZHC 2327

BETWEEN	JOHN RAMAGE AND MARY ANN RAMAGE Plaintiff
AND	EARTHQUAKE COMMISSION First Defendant
	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Second Defendant

Hearing:	27 July 2016
Appearances:	AJD Ferguson and J S Morriss for Plaintiffs No appearance by or for First Defendant BRD Cuff and S K Swinerd for Second Defendant
Judgment:	30 September 2016

JUDGMENT OF MANDER J

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[1] As a result of formal mediation between the plaintiffs, Mr and Mrs Ramage (the Ramages), and the second defendant, Southern Response Earthquake Services Limited (Southern Response), agreement was reached in respect of the Ramages' insurance claim arising from damage to their property as a result of the Canterbury earthquakes. As part of that settlement costs and disbursements were to be fixed by the Court. This judgment addresses that issue which was not otherwise able to be agreed between them.

Background

[2] The Ramages own a property in New Brighton that suffered damage during the Canterbury earthquakes. They made claims in respect of that damage which were accepted by the Earthquake Commission (EQC) and Southern Response. The

Ramages and EQC were not able to reach agreement regarding the remediation of the damage, and in particular whether the scope of the damage exceeded the statutory EQC cap of $100,000 plus GST. EQC maintained the cost of remediation was under cap.

[3] The Ramages commenced proceedings against both EQC and Southern Response in July 2013 seeking the sum of $792,136.08. Both EQC and Southern Response defended the proceeding.

[4] In December 2015, EQC resiled from its original position and notified the Ramages it now considered the cost of repairing the damage to be over the statutory cap. Proceedings were discontinued against EQC after that concession was made. Thereafter, Southern Response accepted liability for all amounts exceeding the EQC payment, however, there remained dispute as to how much that was.

[5] The proceeding was settled at mediation on 13 April 2016. Southern Response's offer to pay the Ramages $205,000 was accepted. It was agreed that costs and disbursements were to be fixed by the Court. The proceeding against Southern Response was discontinued.

[6] EQC has paid the Ramages $32,677.51 in costs. This sum represents 50 per cent of the total costs based on reasonable 2B costs and disbursements.

The parties' respective positions

Submissions for the Ramages

[7] The Ramages submitted the position taken by Southern Response prior to them commencing their proceeding was that it had no liability apart from damage to driveways and paths (out of scope external works). Once proceedings were commenced, Southern Response maintained the damage to their house was under the EQC cap and therefore it did not have any liability, potential or otherwise.

[8] The Ramages contend that because Southern Response has now paid in excess of $230,000 it is apparent its original stance was erroneous, and only by

commencing the proceeding have the Ramages achieved that result. While it is acknowledged the Ramages did not recover the figure originally sought, the proceedings have sustained their original fundamental position that Southern Response was liable under the insurance policy for damage incurred as a result of the earthquakes and they therefore have been successful. The Ramages submitted that accepting the settlement sum should not be equated with abandonment of their original position that the house should have been rebuilt.

[9] The proceedings are appropriately categorised as 2 under r 14.3, and band B should be applied to all steps in the proceeding. An initial submission by the Ramages that band C should be applied to witness statement preparation was abandoned. In summary, the Ramages submitted that it was just and equitable that Southern Response be ordered to pay costs and disbursements in the sum of $38,251.46.

Submissions for Southern Response

[10] In response, Southern Response sought to emphasise that at the time the proceedings were filed by the Ramages no formal claim had been lodged with Southern Response for building damage in excess of the EQC cap. The only claim received by the insurance company from the Ramages was for EQC out of scope external works. As a result, Southern Response at the time it was served with the proceedings had not undertaken any inspection or assessment of building damage, other than in respect of the out of scope external works.

[11] Southern Response submitted it had been in regular communication with the Ramages prior to the proceedings being filed in relation to the out of scope external works claim. It contended that at no time had the Ramages raised any issue in relation to EQC's repair strategy, nor had they indicated to Southern Response their belief the damage to their home was over cap. It submitted the filing of the proceedings was premature and that Southern Response was entitled to defend the proceeding given the circumstances in which they were initiated.

[12] Southern Response submitted that costs should lie where they fall because the settlement reached at formal mediation was a compromise where both parties could

be considered to have obtained a level of success. It argued that it was successful on the key issue in dispute, namely whether the Ramages house was required to be repaired rather than replaced under the insurance policy. The settlement reached at mediation was based on Southern Response's repair strategy.

[13] Immediately prior to the mediation the Ramages' position was that their home needed to be rebuilt at a cost of $683,395.00. Southern Response took the position the house could be repaired at a cost of $219,054.00. The ultimate figure agreed of $205,000 (not including the EQC payments) represented a compromise by both parties as a result of the mediation which both parties agreed to enter into.

Relevant principles

[14] In *Earthquake Commission v Whiting* the Court of Appeal considered a number of appeals from EQC where costs had been awarded against it after discontinuances were filed.[1] The Court observed that the starting point when assessing the issue of costs after a discontinuance is r 15.23:

> **15.23 Costs**
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> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[15] The application of the rule is subject to the defendant agreeing otherwise or the court ordering to the contrary. There is an onus on the plaintiff to persuade the court that it should order otherwise.[2]

[16] The Court's discretion may be exercised where it is "just and equitable to displace the [r 15.23] presumption".[3] When determining whether it is just and equitable to exercise its discretion, the court may consider:[4]

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1 *Earthquake Commission v Whiting* [2015] NZCA 144.

2 At [68].

3 At [66], citing *Kroma Colour Prints Ltd v Tridonicato NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12] and [29].

4 At [68], citing *Kroma Colour Prints Ltd v Tridonicato NZ Ltd*, above n 3, at [12] and [29]; *Powell v Hally Labels Ltd* [2014] NZCA 572 at [22]; Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HRPt15.23.01]; and G E Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Chatswood (NSW) 2013) at [14.64].

> …the parties' conduct in the matter and the reasonableness of the parties' respective stances, including the reasons why the plaintiff brought and continued the proceeding and the defendant opposed it.

[17] If one of the parties had acted unreasonably or were almost certain to have been unsuccessful, then that party may be ordered to pay the costs.[5] However, the court should not undertake a review of the merits of the plaintiff's claim unless they are immediately apparent.[6]

[18] The predecessor to r 15.23 was previously held by the Court of Appeal to be aimed largely at unilateral discontinuances, rather than those resulting from settlement.[7] Dal Pont on *Law of Costs* examined the situation where proceedings are settled prior to the hearing and the difficulties which arise in the Court attempting to award costs:[8]

> **14.66** Where a suit is compromised before hearing, and the parties have reached no agreement as to costs, the issue may arise as to whether, and if so how, a court can exercise its costs discretion in the absence of a full hearing on the merits. The lack of such a hearing deprives the court of the main factor that determines whether or how it will make a costs order: the ultimate outcome of the case. It is tempting as a starting point to simply say that the appropriate course is that each party bear its own costs. There is, to this end, considerable case authority supportive of the view that it is rarely appropriate, without a trial on the merits, for a court to seek to determine a case on the merits for the purpose of making a costs order, particularly if such a trial would involve complex factual matters where credit could be an issue…
>
> It follows that, at least in cases where the conduct of each party in the litigation has been reasonable, and there is no satisfactory basis upon which the court can make an assessment of the merits, each party will ordinarily be ordered to bear his or her own costs.
>
> (Citations omitted)

[19] Accordingly, where proceedings have been discontinued by agreement costs generally will lie where they fall, unless:

(a) one of the parties has clearly been successful; or

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5 *Earthquake Commission v Whiting*, above n 1, at [70].
6 At [71], citing *Powell v Hally Labels Ltd,* above n 4, at [23]-[24].
7 *Uttinger v Baycity New Zealand Ltd* [2008] NZCA 330, (2008) 19 PRNZ 54 at [12].
8 Dal Pont, above n 4..

(b) one of the parties has acted unreasonably.

I will consider each of those questions in turn.

Were the Ramages successful?

[20] The Ramages sought to draw support for their argument they had been successful in the litigation by reference to two analogous cases of *Zygadlo v Earthquake Commission* and *Driessen v Earthquake Commission*.[9]

[21] In *Zygadlo*, the plaintiffs commenced proceedings against EQC and Southern Response in August 2013 before reaching settlement with EQC in August 2015 and, finally, with Southern Response in March the following year. Davidson J held that notwithstanding the insurance company having achieved a settlement less than a third of what had been claimed, the plaintiff was the successful party. However, the costs award was reduced due to the "unsatisfactory marshalling" of the plaintiffs' experts which caused the defendants to incur unnecessary costs.[10] Further reductions and adjustments were also made to reflect the plaintiffs' conduct in the proceedings.[11]

[22] In terms of the division of liability between EQC and Southern Response, Davidson J held EQC was only jointly liable for costs up until the date proceedings were discontinued against it.[12] However, because significant costs were incurred while EQC delayed its decision, EQC was liable for a greater proportion of those costs than Southern Response. Ultimately, a two-thirds/one-third split was considered appropriate.[13]

[23] In the earlier decision of *Driessen*, Davidson J dealt with a similar situation. The proceedings had been commenced in November 2013. EQC acknowledged it was over the cap in May 2015 and in February 2016, immediately prior to trial, settlement was reached with Southern Response. Davidson J again held the fact the

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9 *Zygadlo v Earthquake Commission* [2016] NZHC 1699; *Driessen v Earthquake Commission* [2016] NZHC 1048.
10 At [49].
11 At [60].
12 At [53].
13 At [61].

plaintiff came up short of the initial claim did not negate a costs order.[14] In reaching that decision the Court concluded the plaintiff was entitled to be considered successful where it had achieved a settlement far in excess of the position adopted by both defendants at the outset of the proceedings. The defendants' decision to press on with the litigation was ultimately vindicated.

[24] Davidson J did not accept the plaintiff should have waited before issuing proceedings against Southern Response until she had settled with EQC. The ultimate result in that case, as with the present one, demonstrated that the property required repairs well in excess of EQC's liability which necessarily required joining both EQC and Southern Response as defendants. Davidson J held that a 50 per cent award against EQC was appropriate and consistent with authority.[15]

[25] In *Littlejohn v Southern Response Earthquake Services Ltd*, Miller J took a different approach.[16] In that case the Court refused to award costs where the plaintiff and Southern Response had managed to reach settlement. The figure was for substantially more than what the defendant had initially offered:

> [2] …Costs are sought on the footing that the plaintiffs won, since the defendant has agreed to pay them a sum of money which they say is not far short of the amount originally claimed and substantially more than the defendant initially offered.
>
> …
>
> [4] Costs are always in the Court's discretion, but it will not ordinarily speculate about what would have happened had there been a trial. Only in exceptional cases will the Court take a different view: *Auckland City Council v Southborne Holdings Ltd* HC Ak CIV-2010-404-4076, 8 November 2011. I do not think this case is sufficiently exceptional. It is not enough to compare amounts initially claimed against those offered. All of that might have changed by the time of trial. The reasons for any disparity between the claim and the amount paid might also be relevant, as might the defendant's reasons for not paying before action.

[26] The approach taken by the Court in *Littlejohn* is consistent with the commentary I have cited at [18] from Dal Pont on *Law of Costs*. In the absence of it being clear that one party would almost have certainly succeeded had the matter

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14 *Driessen v Earthquake Commission*, above n 10, at [23].
15 At [34].
16 *Littlejohn v Southern Response Earthquake Services Ltd* [2013] NZHC 1072.

proceeded to judgment, or where the terms of the settlement essentially vindicates the case advanced by one of the parties and one party has effectively capitulated to the other, caution is required because settlement terms "may not necessarily equate to the outcome as adjudicated by the Court."[17] Absent that type of situation, it would appear that notwithstanding the discretionary nature of costs, it will not usually be just for a Court to make an award where a settlement has been achieved where the conduct of each party to the litigation has been reasonable unless an accurate and informed assessment of what may have happened at trial can be made.

[27] Assessing success where proceedings have been discontinued against EQC is likely to involve a simpler exercise because success in that context is essentially binary: either EQC has conceded the claim to be above cap in which case the plaintiffs case is vindicated or the plaintiff concedes the claim to be below cap in which case EQC's defence will have been sustained. The plaintiffs can do no better when litigating against EQC than to obtain the concession the claim is over cap. In respect of a private insurer the evaluation of success is necessarily more complex, particularly where the essential dispute is focussed on quantum and both parties have compromised their position to achieve a settlement. In the absence of success being clear to the extent that a party can be viewed as having essentially capitulated upon settlement, a Court should be wary of assessing the merits of each party's case.

[28] I do not consider the present case to be one where it can be said that either party has capitulated to the other. The Ramages' decision to bring proceedings against EQC was vindicated when EQC finally acknowledged the Ramages' claim was above cap. The Ramages therefore achieved complete success in obtaining that concession. I also accept the Ramages' decision to bring proceedings against Southern Response can be held to have been vindicated to the extent it achieved settlement above that which Southern Response had previously assessed the damage to the property to be, about which I will say more later in this judgment.

[29] However, Southern Response's decision to defend the proceedings also proved to be justified, at least to the extent that it achieved settlement for a figure

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[17] See *Thomson v Mosman Council* [1999] NSWLEC 86 at [61]; *Edwards Madigan Torzillo Briggs Pty Ltd v Stack* [2003] NSWCA 302; Dal Pont, above n 4, at [14.69], citing *Aussie Red Equipment Pty Ltd v Antsent Pty Ltd* [2001] FCA 1641.

less than the plaintiffs' original claim. Notably its position that the house could be repaired rather than rebuilt appears to have remained intact. Both parties therefore achieved a measure of success, and neither can be said to have capitulated in their approaches to the litigation.

[30] It follows that in the circumstances the Court is not realistically in a position to accurately assess the merits of each party's respective positions. It will therefore be necessary in order for the Ramages to succeed in its claim for costs to show that Southern Response's conduct during the course of the proceedings, or at least at some stage in the proceedings, was unreasonable in order for a costs award to be made.

Did Southern Response act unreasonably?

Southern Response's conduct prior to proceedings being filed

[31] The litigation manager for Southern Response, Ms Elizabeth Fife, provided an affidavit in opposition to the application for costs. Ms Fife deposed that the Ramages had not made any approach to resolve their claim with Southern Response prior to the service of the statement of claim. Southern Response's only involvement with them was for the out of scope external works claim which had been lodged in March 2011 and subsequently settled in October 2014.

[32] Ms Fife deposed that Southern Response only became aware of the difficulties the Ramages were experiencing in relation to the damage to their house when it was served with the proceedings. Southern Response submitted that, rather than issuing proceedings, the Ramages could have made a formal claim with it based on their belief the damage was over the EQC cap. If that had occurred, Ms Fife's evidence was that it would have arranged for an initial assessment of the damage to be carried out within Southern Response's repair programme to determine whether the claim should be managed by it or remain with EQC. If there was disagreement between Southern Response and EQC's experts, further investigations would have taken place to clarify the position.

[33] The Ramages disputed that Southern Response was unaware of the issue relating to earthquake damage to their house prior to the commencement of proceedings. They referred to an email sent by their representatives to Southern Response on 11 June 2013. The email reads:

> The property is severely damaged.
>
> A repair strategy is non-compliant. The damage to the property is such that a rebuild is required to produce the property in new condition.
>
> Attached is a rebuild costing for $528,019.05.
>
> Please organise settlement of this claim by 25 June 2013. Otherwise the insured will probably commence court proceedings.

[34] The email demonstrates that Southern Response was formally notified prior to the commencement of the civil action, however, notice was provided effectively only on the eve of the commencement of proceedings. The email took the form of a demand for payment of a claim that Southern Response had not previously been made aware and had not been able to investigate in the absence of any knowledge of such a claim. Although the email placed Southern Response on notice, it was not realistic to consider Southern Response would have been able to investigate the claim and meet the stated deadline.

[35] While I accept the Ramages were entitled to join Southern Response to the proceedings against EQC, on the information available there is little, if anything, to suggest the insurance company's conduct prior to the proceedings being commenced was deficient. Once the proceedings were started, Southern Response had little realistic option but to defend the proceeding until it had the opportunity to undertake its own investigations and assess the merits of the Ramages' claim.

Southern Response's conduct post proceedings being filed

[36] The statement of claim filed by the Ramages sought $792,136.08 to remediate the damage to the house. Of this, EQC would be liable for $113,850[18] (inclusive of GST), in accordance with its statutory liability, and Southern Response

[18] $115,000 less the excess.

for the balance, being $676.936.08.[19] The Ramages also sought $50,000 in general damages from Southern Response.

[37] Southern Response filed a statement of defence on 20 August 2013. It acknowledged its liability for the out of scope external works but denied liability to remediate damage to the house.

[38] On 29 and 30 August, Southern Response's agent, Arrow International (Arrow), undertook its first evaluation of the damage to the home itself. A visual and and non-intrusive inspection was conducted and a detailed repair analysis (DRA) prepared. The first DRA, DRA Rev A, assessed the damage to the house as $82,096.86 including GST, not including "below the line" costs such as project contingency, design and internal administration. If those costs were included the total sum assessment would have been $164,214.25, not including the out of scope external works costs. In April 2015, the DRA Rev C calculated a reparation figure for the damage to the house of $100,551.77 not including below the line costs, or $179,707.91 including those additional costs.

[39] After hearing oral argument on the costs application, I sought further information from the parties about the DRA documents Southern Response had disclosed to the Ramages prior to settlement. The Ramages had submitted Southern Response only provided them with two DRA documents; DRA Rev B, by email on 14 November 2013, and DRA Rev D, by email on 2 June 2015. Importantly, neither of the DRA documents disclosed referred to the "below the line" figures.

[40] The remedial costs set out in DRA Rev B were shown as:

(a) cost of house repair - $81,196.03 ($70,605.24 excluding GST);

(b) out of scope repairs - $25,232.15 ($21,941.00 excluding GST);

(c) total house and out of scope repairs - $106,428.18 ($92,546.24 excluding GST).

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[19] $677,136.08 less the excess.

[41] DRA Rev D provided the following remedial costs:

(a) cost of house repair - $100,551.77 ($87,436.32 excluding GST);

(b) out of scope repairs - $30,947.94 ($26,911.25 excluding GST);

(c) total house and out of scope repairs - $131,499.71 ($114,347.57 excluding GST).

[42] It is apparent the figures provided to the Ramages indicated the damage to their house as assessed by Southern Response was under cap and was being treated accordingly.

[43] Ms Fife gave evidence about the nature of a DRA. She deposed that not all the DRAs were provided to the Ramages because they were not offers of settlement but simply records of Southern Response's investigations undertaken at the particular time stated. Ms Fife described a DRA as a "living document" and that there would often be more than one revision of a DRA prepared as further information was received. She observed the first DRA is often prepared without the input of engineers. Its objective was to provide an initial view of the extent of damage to a house and what further inspections would likely be required. Ms Fife described the central purpose of the initial DRA as providing Southern Response and its customer with an initial view as to whether the house was going to be repairable or not, and whether the cost of repairing the damage was likely to exceed $100,000. It was not intended as a final repair strategy.

[44] Southern Response submitted that immediately prior to mediation it was of the view the house could be effectively and economically repaired for a cost of $219,000.54. In the absence of completing its repair strategy, it would not have been appropriate to have made a settlement offer. Because EQC was treating the claim as being below the statutory cap, Southern Response, in its submission, was essentially hamstrung and unable to take ownership of the claim.

[45] Somewhat surprisingly given the approach taken by Southern Response until EQC's concession that the Ramages' claim was over the cap, Ms Fife deposed that "Southern Response had, from its first inspection after being served with the proceeding, been of the view this was an over cap EQC repair". However, it does not appear this position was ever articulated to the Ramages by Southern Response. They were not provided with figures which included the below the line costs. The figures disclosed to the Ramages, on their face, showed the repair figure as assessed by Arrow as being under the EQC cap.

[46] I am not aware of any reason why Southern Response could not have advised the Ramages of its assessment that the claim was over cap if that had always been its position. Instead, it appears to have internally taken one position while externally conveying a different position. I can only conclude that approach was taken for the purpose of litigation strategy. No evidence was provided to me of any efforts on the part of Southern Response to communicate that it disagreed with EQC's assessment of the repairs being under cap, nor of any attempt by it to dissuade EQC that its stance was not realistic in light of its own assessment.

[47] I accept that because of the statutory framework an insurer is in an unusual position. The insurance company's liability relates to the difference between the maximum amount payable by the EQC and the sum insured under the policy. When EQC is unwilling to recognise a claim to be over cap, the insurance company is not realistically in a position to effect a settlement with the insured until the dispute with EQC is resolved. However, I do not accept the insurer can do nothing in that situation. Ms Fife herself made clear in her affidavit that ordinarily where the insurer's experts disagree with EQC's experts, a joint review exercise is undertaken. If the insurer disagrees with EQC's assessment, I do not understand there to be any impediment to the insurance company communicating to its client that in its assessment the claim is over cap. There is no evidence of this having occurred. Southern Response appears to have essentially been content to accept EQC's position and, indeed, to have adopted it for the purpose of the litigation.

[48] In a joint memorandum filed for the purpose of a telephone conference before Wylie J on 9 June 2015, EQC and Southern Response provided cost estimates based

on their respective engineers' remediation strategies. EQC's cost estimate was $99,490.30 (inclusive of GST). Southern Response's cost estimate was $131,499.71 (inclusive of GST), but which was stipulated as including $26,911.25 (exclusive of GST) for out of scope external works. It is apparent therefore that Southern Response was representing, as at 9 June 2015, that its cost estimate based on its engineer's remediation strategy was below cap. Only after EQC conceded the Ramages' claim to be over the statutory cap did Southern Response acknowledge that position.

[49] I need to assess whether Southern Response's conduct as a party to the litigation up until December 2015 when EQC accepted the Ramages' claim was over the statutory cap justifies a cost award being made against it.

[50] I have already acknowledged Southern Response was entitled to consider itself caught by surprise when the proceedings were filed with minimal notice and in the absence of a formal claim having been made by the Ramages under the insurance policy. Similarly, I have recognised that Southern Response's legal liability arises in respect of the cost of remediation over the statutory amount for which EQC is liable. However, I am satisfied Southern Response chose, for over two years, to approach the litigation by effectively adopting EQC's stance that the Ramages' claim was under cap. Instead of providing them with the full content of the DRAs, they left the Ramages with the impression the claim was being treated as under cap. As noted, there is no evidence of Southern Response actively engaging with EQC to disabuse it of the fact its assessments showed the cost of repairs went beyond the statutory cap. It did not inform the Ramages nor the Court of that position. To the contrary, in June 2015, it was formally representing, in line with EQC's approach, that its cost estimate based on its engineer's remediation strategy was below cap.

[51] For that reason, I consider Southern Response's conduct was sufficiently unreasonable to justify a cost award being made against it. The extent of that award must be mitigated by the fact that once EQC accepted the claim as being over cap it moved swiftly to obtain a negotiated settlement. I consider Southern Response's conduct warrants a 25 per cent award of reasonable costs and disbursements being

made against it notwithstanding the negotiated compromise settlement that was achieved between the parties.

The award

[52] The Ramages seek an award of costs and disbursements in the sum of $38,251.46.

[53] Southern Response disputes the calculation of costs and disbursements claimed by the Ramages. In summary, it disputes:

(a) certain costs sought by the Ramages as being claimable as full scale costs;

(b) the Ramages have inappropriately included some invoices in their claim for disbursements; and

(c) the Ramages inappropriately sought costs on certain steps in the proceeding on a band C basis. That claim was abandoned at the hearing of the application.

[54] Southern Response submitted that, should an award of costs and disbursements be made in favour of the Ramages, they should be based on a percentage figure allocated from the total sum calculated under the High Court scale. Similarly, in respect of disbursements which Southern Response calculates should be taken from a total figure of $36,303.02.

Costs

[55] In elaboration of its objections, Southern Response identified a number of items which I now review and make rulings upon:

(a) *Conference attendance:* The Ramages claim for the attendance at four conferences. Southern Response has objected on the basis there were only two teleconferences. From a review of the file it appears there was a teleconference on 27 February 2014 and a further

conference on 11 June 2015. Accordingly, I allow for recovery of only two conferences.

(b) *Discovery costs:* Southern Response submitted that full-scale costs in relation to discovery should not be allowed because no formal discovery process took place and the Ramages did not prepare a formal list of affidavits or documents. I accept that objection is justified. The time allocation listed in sch 3 of the High Court Rules for discovery is based upon a time consuming formal discovery process having been completed. Where that has not occurred an adjustment to scale costs will be required. The Ramages will be allowed 1.5 days for discovery.

(c) *Preparation of briefs or affidavits:* Initially, the Ramages took the position the band B allowance of 2.5 days for preparation of briefs or affidavits was inadequate because they served nine witness statements in chief. Seven of these statements were expert witness statements and the other two lay witnesses. Although numerous, the briefs are all reasonably short in length and in respect of two witnesses comprised a covering statement to which the expert's report was annexed. Had the claim not been abandoned, I would not have considered it appropriate to depart from the band B allowance in any case.

(d) *Inspection:* The Ramages also claimed twice for the inspection of documents. Reasons were not provided as to why they had claimed this item twice. They will be allowed 1.5 days for inspection.

[56] Allowing for these adjustments, the total sum of scale costs is $24,377.00. Of this, I consider Southern Response should be liable for 25 per cent, which would amount to an award of $6,094.25.

Disbursements

[57] Southern Response disputes that Mr John Johnston qualifies as an expert. It maintains the High Court has previously made such a ruling. In *Jardin v Earthquake*

Commission, Kos J in a pre-trial decision held that Mr Johnston was an expert in terms of his experience as a loss adjuster and claims investigator.[20] The Court, however, did not consider Mr Johnston had demonstrated expertise beyond those disciplines, "for instance in construction and remediation of damaged buildings".[21] The invoicing in question, in the sum of $6,069.01, is for:

> Site attendances for inspections, photography, meetings. Scala penetrometer testing. Plotting off 3rd party drawings to make clean floor plan drawings for plotting of calculated spot heights and slopes. Drawing of dam[a]ge location plan, Review of multiple 3rd party reports and preparation of rebuttal notes. Preparation of a witness statement for filing in the High Court. Review and updating of exhibit notes.

[58] From the information made available to me it is difficult to assess how much of Mr Johnston's evidence was pertinent to his expertise as a loss adjustor and claims investigator. From the narration provided in the invoice there are arguments that can be made both ways in terms of whether the work undertaken falls within or outside Mr Johnston's expertise as recognised by the Court.

[59] Applying the principle that the determination of costs should be predictable and expeditious,[22] and that it is not possible to undertake a full assessment of the evidence of Mr Johnston which would be contrary to this principle, arbitrary as it may be, I consider the 25 per cent allowance applied across all costs and disbursements sufficiently provides for the concerns expressed by Southern Response.

[60] Southern Response also submitted that the USS Engineering fee and the 8D QS fee were not reasonably necessary for the proceeding, and that a deduction of 50 per cent should be made. Again, it is not realistic to engage in a detailed assessment of the relevant merits of each piece of evidence, particularly when that evidence was not ultimately required. To do so would be contrary to principle.

[61] A further disbursement objected to by Southern Response was a small claim of $57.50 for service. Southern Response maintains service was effected

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20 In *Jardin v Earthquake Commission* [2015] NZHC 204 at [6].
21 At [6].
22 High Court Rules, r 14.2(g).

electronically. In the absence of any invoice relating to that disbursement, I accept it is not recoverable.

[62] The total sum for disbursements is $42,372.03. Of this, Southern Response is liable for 25 per cent, being $10,593.01.

Orders

[63] Accordingly, I make an order that Southern Response is to pay the Ramages costs in the sum of $6,094.25, together with disbursements totalling $10,593.01, being a total sum of $16,687.26. A schedule of those costs and disbursements is annexed and forms part of this judgment.

[64] The Ramages also sought to recover costs on this application which required the convening of a half day hearing. Both parties can claim some success on the defended costs application, however, the Ramages have been vindicated in their claim of being entitled to an award of costs. In the circumstances I consider they should recover costs on the application. Certifying for second counsel on a half day hearing, that amounts to $1,672.50.

[65] I make an order that Southern Response is to pay the Ramages costs in the sum of $1,672.50 on this application.

Solicitors:
Grant Shand, Auckland
DLA Piper, Wellington

COSTS				
Item	**Step**	**Daily rate**	**Days**	**Amount**
1	Commencement	$1,990	3	$5,970.00
10	Preparation for conference	$1,990	0.4	$796.00
11	Filing memorandum	$1,990	0.4 x 5	$3,980.00
11	Filing memorandum	$2,230	0.4	$892.00.
13	Attend conference	$1,990	0.3 x 2	$1,194.00
20	Discovery	$1,990	1.5	$2,985.00
21	Inspection	$1,990	1.5	$2,985.00
30	Briefs	$2,230	2.5	$5,575.00
TOTAL				**$24,377.00**
AWARD $24,377 x 0.25				**$6,094.25**

DISBURSEMENTS	
Claimed disbursement	**Amount**
Certificate of title	$5.95
Filing fee	$1,350
Scheduling fee	$1,600
Sturek Engineering Ltd	$7,158.75
Geoconsult	$5,750
Grant Hunt	$9,799.67
USS engineering	$6,957.50
8D QS	$2,967.00
Garlick	$714.15
John Johnstone	$6,069.01
TOTAL	**$42,372.03**
AWARD $42,372.03 x 0.25	**$10,593.01**

COSTS ON APPLICATION				
Item	**Step**	**Daily rate**	**Days**	**Amount**
26	Appearance of principal counsel	$2,230	0.5	$1,115.00
10	Second and subsequent counsel	$2,230	0.25	$557.50
AWARD				**$1,672.50**