IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA510/2018
[2019] NZCA 82

BETWEEN	TOWER INSURANCE LIMITED Appellant
AND	ELIZABETH MARY KILDUFF AND VERITAS (2012) LIMITED AS TRUSTEES OF THE EMOSH FAMILY TRUST Respondents

Hearing:	24 October 2018
Court:	Brown, Courtney and Katz JJ
Counsel:	M C Smith for Appellant C R Johnstone for Respondents
Judgment:	29 March 2019 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Katz J)

[1] The appellant (Tower) insured the respondents' property, which was substantially damaged in the 2010 and 2011 Christchurch earthquakes.

[2] In 2016 the respondents issued proceedings against Tower pursuant to their insurance policy. The key issues at trial were the scope of the required repair, the appropriate costing of the repair, and a claim by the respondents for general damages.

[3] In his substantive decision of 17 April 2018 (as subsequently amended on 30 May 2018 pursuant to the slip rule)[1] Gendall J determined that the maximum amount payable by Tower for repair of the respondents' house was $628,516.01.[2] This was calculated on the basis that the cost of repairs was $871,042.14, from which $242,526.13 was deducted (being the amount that the respondents had already received from the Earthquake Commission (EQC)).

[4] In his subsequent costs decision, Gendall J ordered Tower to pay the respondents costs totalling $81,249, together with disbursements totalling $122,515.20.[3]

[5] Tower now appeals the costs decision. The key issues raised by its appeal are:

(a) Did the Judge err in concluding that the respondents were the successful party?

(b) Did the Judge err in his assessment of Tower's Calderbank offers?

(c) Did the Judge err in his quantification of the costs award?

Background

[6] The factual background is set out in the substantive decision.[4] We briefly summarise key aspects below.

---

1 High Court Rules 2016, r 11.10.
2 *Kilduff v Tower Insurance Ltd* [2018] NZHC 704 [substantive judgment] and *Kilduff v Tower Insurance Ltd* [2018] NZHC 1243 [subsequent judgment].
3 *Kilduff v Tower Insurance Ltd* [2018] NZHC 2021 [costs judgment].
4 Substantive judgment, above n 2, at [6]–[21].

[7] The respondents, as trustees of a family trust, own a residential property in Sumner, Christchurch. The property was damaged during the Christchurch earthquakes of 2010 and 2011.

[8] The respondents lodged their claim with their insurer, Tower, in September 2011. The cost to repair the house was initially assessed by Tower as being around $188,000. Tower then sent the respondents a proposed scope of works for discussion in October 2012. In June 2014 Tower made a cash settlement offer of $85,074.34, plus any additional costs reasonably incurred in conducting the repairs within two years. That offer was based on a total estimated repair cost of $317,600.47, less EQC payments. It was the only settlement offer that was made prior to the issue of proceedings.

[9] Gendall J summarised the next steps as follows:[5]

> [19] In the meantime, the plaintiffs instructed Wynn Williams solicitors in Christchurch on the matter. Wynn Williams notified Tower on 24 July 2015 that the plaintiffs did not agree with Tower's approach and were appointing their own experts. In light of the letter, Tower appointed experts and asked the plaintiffs to co-operate with them. The Tower experts conducted an initial site visit in October 2015. Although they required further access, Wynn Williams informed Tower that it would not be able to access the property until the plaintiffs' experts' reports were available. The plaintiffs disclosed these to Tower on 24 March 2016. Wynn Williams' letter to Tower advised that the plaintiffs had resolved that a repair was not viable. This was the first time anyone had suggested that. Tower was advised its experts could visit in early April 2016. The plaintiffs sought a meeting to resolve the claim in late April 2016, as Ms Kilduff would be overseas in May.
>
> [20] Tower's experts visited the site but were unable to finish their reports for the meeting given the tight timeframe. The plaintiffs then filed these proceedings on 12 May 2016. Tower's expert reports were disclosed to the plaintiffs in July 2016. After conferral, the parties' engineers finalised their joint report in December 2016. The parties then obtained quantity surveyor costings. After considering the costings, Tower elected to settle the claim by making payment.

[10] In their original statement of claim, the respondents alleged that the damage to the house was "objectively beyond feasible and economic repair". They quantified the rebuild cost at $1,952,891.00. The parties' geotechnical and structural engineers subsequently conferred, and produced a comprehensive joint report in

---

5 Substantive judgment, above n 2.

December 2016, with an addendum in June 2017, in which the repair methodology was substantially agreed. As a result of this further work, the respondents conceded in June 2017 that the house was repairable, and this was reflected in their amended statement of claim dated 6 September 2017.

[11] Tower made a Calderbank offer to settle the respondents' claim on 15 August 2017, in the sum of $650,000. On 27 October 2017, it made a further Calderbank offer of $734,000. The October offer was met with a counter offer of $1,025,000.

[12] At the outset of the trial, the respondents sought, by way of relief, an upfront payment of $925,765.82. Most of this sum related to their estimated repair cost of $1,106,019.40, less EQC payments the respondents had already received (resulting in a net total of $778,882.24). The respondents also sought reimbursement of various professional fees, and general damages for breach of good faith duties. An additional sum for temporary accommodation and storage was sought (this appears to have been agreed).

[13] Tower denied that it was liable under the policy to make an upfront cash payment of the respondents' policy entitlements. It also submitted that the true cost of repairs was only $812,127, and opposed the respondents' claims for reimbursement of professional fees and general damages.

[14] The final adjusted repair costings presented by the parties' respective quantity surveyors, as at the conclusion of the trial, were $770,698 or $800,524 (Tower, based on two different models) and $980,703 (the respondents).

[15] Gendall J found that the cost of repairs was $871,042.14 (inclusive of GST).[6] Once the EQC payments that had already been made were deducted, the net repair cost payable by Tower was $628,516.01. He dismissed the respondents' general damages claim. He accepted Tower's submission that the respondents were not entitled under the policy to an immediate upfront cash payment. Rather, Tower was obliged to meet

---

6 This is the amended sum following Gendall J's subsequent decision of 30 May 2018, in which various errors in calculation in the substantive judgment were corrected under the slip rule: Subsequent judgment, above n 2, at [31(e)].

the cost of any repair contract once the respondents had incurred a legal obligation to pay for the repairs.[7]

[16] Both parties claimed to be the successful party and sought costs. Gendall J determined that the respondents were the successful party.[8] He compared Tower's pre-trial settlement offers of $650,000 (on 15 August 2017) and $734,000 (on 27 October 2017 — five working days prior to trial) unfavourably to the respondents' post-trial entitlement. In calculating the respondents' entitlement, the Judge added various sums to the net repair costs. These included an allowance for interest up to the likely date of payment, and legal costs, calculated as at the conclusion of the trial. On this approach, the respondents' final entitlement, assessed post trial, was $855,169.20. As this sum was greater than either of Tower's Calderbank offers, Gendall J concluded that those offers had no impact on the respondents' entitlement to an award of costs.[9]

Approach to appeal

[17] Costs decisions of the High Court, whether in the form of orders or a separate judgment, are appealable as of right under s 56(1)(a) of the Senior Courts Act 2016.

[18] An award of costs involves the exercise of judicial discretion. As such, in order to succeed, Tower must show that the High Court acted on a wrong principle, failed to take into account a relevant matter or took into account an irrelevant matter, or was plainly wrong.[10] However, the costs adjudication does not involve an unfettered discretion, and it must be exercised on a principled basis.[11]

[19] A trial judge has a particular advantage when fixing costs, and so the Judge's views can be influential on appeal.[12] Appellate courts will be particularly slow to interfere with a lower court's decision on costs, because that court, in exercising its

---

7 At [129]–[130].
8 Costs judgment, above n 3.
9 At [29].
10 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15].
11 At [16]–[17].
12 *Jarden v Lumley General Insurance (NZ) Ltd* [2018] NZCA 6 at [8], citing *Cunningham v Butterfield* [2014] NZCA 213, (2014) 22 PRNZ 521 at [59].

discretion, will be influenced by a myriad of details that are difficult to replicate on appeal.[13]

Did the Judge err in concluding that the respondents were the successful party?

[20] The Judge determined that overall the respondents were the successful party, describing them as "substantially successful" and noting that "success on more limited terms is still success".[14] His Honour found that there were no exceptional circumstances that justified any departure from the usual principle that costs should follow the event.

[21] Tower submitted on appeal that the Judge had erred in finding that the respondents were the substantially successful party. Tower contended that, on a realistic appraisal, it was the successful party.

[22] Mr Smith, for Tower, submitted that it was relevant to the Court's assessment of who the successful party was that until mid-2017 the respondents' position (based on expert advice) was that a complete rebuild was required. It was only in June 2017 that the respondents accepted that the property could be rebuilt. Mr Smith argued that the respondents' insistence that a rebuild was required made settlement difficult, if not impossible, prior to July 2017. This issue was also raised by Mr Smith in the context of whether the Judge erred in his assessment of Tower's Calderbank offers. In our view it is primarily relevant in that context, and we therefore address this issue at [37] to [40] below.

[23] Tower's next submission was that the Judge's declaration as to the cost of repairs cannot fairly be viewed as "success" on the part of the respondents, as the respondents had not in fact sought such a declaration in their statement of claim. Rather, they had sought an immediate lump sum payment equating to the costs of repairs. The Judge, however, accepted Tower's submission that the respondents were not entitled under the policy to an immediate lump sum payment. Rather, having determined various disputed issues regarding the scope of works and cost of repairs,

---

13 *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA) at [22].

14 Costs judgment, above n 3, at [16], citing *Weaver v Auckland Council* [2017] NZCA 330 at [26].

his Honour made a declaration as to the maximum amount Tower was liable to pay to meet its obligation under the policy to cover the repair of the respondents' house, once those costs had been incurred. This was an orthodox approach to relief in respect of claims under such policies.[15]

[24] It is not unusual for plaintiffs to fail to obtain relief in the precise form sought in their pleading. We reject Tower's submission that the respondents claim should be considered, in effect, to have been unsuccessful simply because they failed to secure the payment of an immediate cash lump sum, but instead were granted a declaration that Tower meet their repair costs up to the specified amount. In practical terms, the only significant difference is likely to be one of timing, in that Tower will not be required to pay until the respondents have incurred a legal obligation to pay for the repairs, for example by entering into a binding building contract.

[25] Tower's next argument as to why it should be found to be the substantially successful party was that the cost of repairs as assessed by Gendall J ($871,042) is closer to the repair estimates Tower advanced at trial than that advanced by the respondents (as set out at [12]–[14] above). Mr Smith contended that this reflected a general preference by the Judge for the evidence of Tower's quantity surveyor, Mr Eggleton, over the respondents' quantum witness. Further, Mr Smith noted that the respondents' claim for general damages was unsuccessful.

[26] Mr Johnstone, on behalf of the respondents, submitted that applying a "realist's lens"[16] and a "common sense approach",[17] the Judge was correct to conclude that the respondents substantially succeeded at trial. Mr Johnstone submitted that they were largely successful in relation to the outstanding issues that went to trial, and that Gendall J generally preferred the respondents' recommendations regarding key aspects of the scope of work.

---

15 See for example *Jarden v Lumley General Insurance Ltd* [2015] NZHC 1427 at [137]. Judgment upheld on appeal: *Jarden v Lumley General Insurance (NZ) Ltd* [2016] NZCA 193.

16 *Fog v Frimley Estate Ltd* [2016] NZHC 314 at [3].

17 *Young v Tower Insurance Ltd* [2017] NZHC 482 at [12].

[27] A common-sense approach must be taken. The respondents' insurance claim had stalled (or at least was progressing very slowly). His Honour noted, before dismissing the claim for general damages, that:[18]

> … I do have considerable sympathy for the position the plaintiffs and Ms Kilduff in particular found themselves in post-earthquakes whilst surviving for year after year in a damaged and at times leaking home. Ms Kilduff complains that Tower was impervious to her plight as she survived in a sodden, damaged and, at times, a mouldy house with temporary fixes that failed and also that she was required to endure numerous site inspections and meetings which achieved little.

[28] As the Judge noted,[19] some of the delays were attributable to the respondents. Nevertheless, to bring matters to a head, they ultimately found it necessary to issue proceedings. The respondents were ultimately vindicated, insofar as they received a declaration from the Court regarding the cost to repair that exceeded the amount of Tower's pre-trial Calderbank offers and also the amount that Tower advanced at trial as being the cost of the necessary repairs. Although the respondents received a declaration for less than the amount they sought, that does not negate a costs order. As this Court observed in *Weaver v Auckland Council* "success on more limited terms is still success".[20]

[29] As for the respondents' failure to obtain an award of general damages, we note that this formed a relatively small part of the overall claim. Further, Gendall J found that the respondents had failed to prove their claim for general damages by a "reasonably fine margin".[21] He further observed that the general damages claim had been fairly pursued and did not unreasonably extend the proceeding.[22] The failure to obtain an award of general damages, in our view, does not materially impact on the assessment of which party was substantially successful in the proceeding.

[30] As the trial Judge, Gendall J was well placed to understand and consider the myriad of factors relevant to an assessment of success. We have carefully considered the specific arguments advanced by Tower as to why it, rather than the respondents,

---

18 Substantive judgment, above n 2, at [123].
19 At [120]–[121].
20 *Weaver v Auckland Council*, above n 14, at [26].
21 Substantive judgment, above n 2, at [123].
22 Costs judgment, above n 3, at [14].

was the overall successful party. We find those arguments unpersuasive, for the reasons we have outlined above. We do not consider that Gendall J erred in concluding that the respondents were the substantially successful party.

Did the Judge err in his assessment of Tower's Calderbank offers?

[31] Tower submitted that Gendall J was wrong to have rejected its alternative claim that it was entitled to be treated as the successful party because of two pre-trial Calderbank offers it had made.

[32] Pursuant to rr 14.10 and 14.11 of the High Court Rules, if a Calderbank offer is made, the party who made the offer is entitled to costs on the steps taken in the proceeding after the offer is made if they offered a sum of money that exceeded the amount of a judgment obtained by the other party, or which would have been more beneficial to the other party than the judgment obtained by the other party. The offer may also be taken into account if the offer does not constitute either of those things, and is close to the value or benefit of the judgment obtained by the other party. These rules are subject, however, to r 14.11(1) which specifies that:

> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

[33] The Court's discretion in making an order for costs to the party that did not succeed at trial, on the basis of a Calderbank offer is broad, and all relevant circumstances must be considered, including whether rejection of the offer or offers was reasonable.[23]

[34] As noted at [16] above, in calculating the respondents' entitlement, his Honour included legal costs to the conclusion of trial, as well as a sum in respect of post-judgment interest. Tower submitted that the Judge was wrong to include in his analysis interest and costs that had accrued *after* Tower's offers were made. In order to compare "like with like," Tower submitted, interest and costs should have been assessed up to the date of the offers only.

---

[23] *Money World New Zealand 2000 Ltd v KVB Kunlun New Zealand Ltd* HC Auckland CIV-2003-404-2542, 23 September 2005 at [58].

[35] We accept that submission. The Judge erred in taking into account all of the costs and disbursements incurred up to the conclusion of the trial (and post trial, in respect of interest) in assessing whether the respondents had obtained a judgment that exceeded either of the Calderbank offers. In order to compare "like with like" the more appropriate course was to only take into account that portion of the costs award that related to the costs and disbursements incurred prior to the date of the relevant Calderbank offer. This is consistent with the purpose of the Calderbank regime, which is to encourage the settlement of disputes, and to impose costs consequences on those who fail to accept reasonable settlement offers prior to trial. Assessing the reasonableness of an offer requires the court to consider the position as at the time the offer was made. Factoring in additional costs, which would not have been incurred if the offer had been accepted, and interest beyond the date of the offer distorts the analysis. In assessing the reasonableness of a Calderbank offer, the usual course is therefore to disregard costs that the winning party had not yet incurred, and which it will never incur if the offer is accepted.[24]

[36] Tower submitted that, in the particular circumstances of this case, it is necessary to go even further, and also disregard the costs incurred by the respondents *prior to* the making of the first Calderbank offer in August 2017. Mr Smith argued that Tower should have been treated as the entirely successful party at that stage, as the respondents had only just conceded that the property could be repaired, and that a complete rebuild was not required. Any costs entitlement, he submitted, could therefore only start to run from June/July 2017. As at the date of the October offer, Tower submitted, costs for the respondents could not have exceeded the $105,000 difference between the October offer and the judgment value. Based on this analysis, Tower submitted that both Calderbank offers exceeded the plaintiff's entitlement, assessed as at the date of the Calderbank offers.

[37] Consistent with this approach, Tower did not undertake any analysis of what portion of the costs award related to costs incurred by the respondents up to the date of either the first Calderbank offer (15 August 2017) or the second Calderbank offer

---

[24] *Gauld v Waimakariri District Council* [2014] NZHC 956 at [20]; and *McDonald v FAI (NZ) General Insurance Co Ltd* (2002) 16 PRNZ 298 (HC) at [11], citing *Health Waikato Ltd v van der Sluis* (1997) 10 PRNZ 514 (CA).

(27 October 2017). Mr Smith appeared to accept at the appeal hearing, however, that if the costs award was apportioned to reflect only the costs and disbursements incurred up to those dates, and that sum was added to the net repair amount, then the respondents had indeed "beaten" both Calderbank offers at trial.

[38] We reject Tower's submission that all costs and disbursements incurred by the respondents prior to June/July 2017 should be disregarded when considering Tower's settlement offers. It is now clear, with the benefit of hindsight, that the respondents initial claim (based on expert advice) that a rebuild was required was incorrect. The effect of that erroneous view was that the quantum initially claimed by the respondents (approximately $2 million as opposed to its revised claim of $1 million) was too high. It revised the quantum sought downwards following updated expert advice.

[39] It is not unusual, however, for parties to amend or refine their position as proceedings progress. It does not follow that, if a plaintiff materially reduces the claim, the opposing party must be considered to be the successful party up to that point. Regardless of the amount the respondents were claiming, it was open to Tower at any stage of the proceeding to make what it believed to be a realistic settlement offer. If Tower had made its final settlement offer of $734,000 significantly earlier in the proceedings, when minimal costs had been incurred, that offer would likely have "beaten" the sum obtained at trial (assessed in the way we have outlined above). In that event, it is likely that Tower would now have minimal costs liability. A party cannot, however, choose not to make a settlement offer on the basis that the plaintiff's claim is unreasonably high, and then seek to secure the costs benefits it would have received if it had made such an offer.

[40] Accordingly, in order to establish that the Judge erred in his assessment of Tower's Calderbank offers, Tower must satisfy us that it offered the respondents a sum of money that exceeded the sum of $628,516.01 (the Judge's assessment of the repair costs, including interest, less the EQC payments) plus that portion of the Court's costs award that related to the costs and disbursements incurred prior to the date of each Calderbank offer. Tower has not undertaken this exercise, and did not advance its appeal on this basis. As noted above, Mr Smith appeared to accept at the hearing that

on this approach Tower's Calderbank offers fell short. This aspect of the appeal accordingly fails.

Did the Judge err in his quantification of the award?

[41] Tower's final ground of appeal (in the event that its other grounds of appeal failed) was that the High Court erred:

(a) in categorising certain costs items as band C rather than band B; and

(b) by declining to reduce the costs otherwise payable to reflect Tower's measure of success in the proceeding and its settlement correspondence.

[42] Gendall J awarded the respondents scale costs, primarily on a 2B basis. Band C scale costs were permitted for witness statements, hearing preparation, and preparation of written submissions.[25] This was on the basis that those steps involved a comparatively large amount of time. His Honour dismissed Tower's submission that, if costs were awarded against it, they ought to be reduced pursuant to r 14.7 of the High Court Rules.[26] The total costs awarded were $81,249.00, together with disbursements of $122,515.20.

[43] Tower submitted that band C costs were inappropriate for the relevant steps for the following reason:

> This was a standard five-day Earthquake List trial for which the usual band B allowance should have applied. Trial preparation was in fact considerably simplified by the comprehensive joint reports that had been completed by the engineers and quantity surveyors. This was not a case like the authority relied on – *Young* – which involved an unusually technically complex 11 day trial.
>
> (Citations omitted.)

[44] As we have noted above, an award of costs involves the exercise of judicial discretion. Tower must show that the Judge acted on a wrong principle, failed to take into account a relevant matter or took into account an irrelevant matter, or was plainly

---

25 At [32].
26 At [37].

wrong. Tower did not explain with any particularity why it believed that band C was inappropriate for the relevant items.

[45] Gendall J is an experienced Earthquake List Judge, who presided over not only this trial but also *Young*,[27] which Tower seeks to distinguish. In our view, his Honour was well placed to assess the appropriate band for particular items. There is nothing to suggest that he was plainly wrong, took into account irrelevant matters or failed to take into account relevant matters. We see no basis for interfering with the exercise of his Honour's discretion as to the appropriate band allocations.

[46] Finally, we accept that it would have been open to the Judge to reduce the costs otherwise payable, to reflect Tower's (fairly modest) measure of success in the proceeding — for example in successfully opposing the claim to general damages. Its settlement offers were also relevant to the overall costs assessment. Although both offers fell short, they were genuine and realistic offers to settle, which were only exceeded at trial by a relatively modest margin.

[47] We are mindful, however, that this is an appeal against the exercise of a discretion. The Judge exercised his discretion on a principled basis, taking into account relevant matters and disregarding irrelevant matters. It was not "plainly wrong" for him not to reduce the costs otherwise payable by Tower, and we see no basis to interfere with the exercise of his discretion in this respect.

Result

[48] The appeal is dismissed.

[49] Tower must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Gilbert Walker, Auckland for Appellant
Wynn Williams, Christchurch for Respondents

---

[27] *Young v Tower Insurance Ltd*, above n 17.