IN THE COURT OF APPEAL OF NEW ZEALAND

CA396/2015
[2016] NZCA 517

BETWEEN	P J YARRALL AND A STEPHENS Appellants
AND	THE EARTHQUAKE COMMISSION Respondent

Hearing: 3 August 2016

Court: Wild, Mallon and Williams JJ

Counsel: A J McKenzie and D G Beck for Appellants
N S Wood and J A Knight for Respondent

Judgment: 27 October 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent two-thirds of the respondent's costs of this appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Williams J)

[1] This appeal is against a costs judgment given by Wylie J in the High Court at Christchurch on 25 June 2015.[1] The appellants had discontinued a proceeding they had brought against the Earthquake Commission (EQC) and the Judge ordered them

[1] *Yarrall v Earthquake Commission* [2015] NZHC 1451.

to pay EQC costs of $23,482, plus disbursements.[2] The appellants say the Judge erred in awarding costs to EQC and submit costs should lie where they fall.

Background and judgment under appeal

[2] The appellants' house in Christchurch suffered damage as a result of the Canterbury earthquakes. They claimed against EQC for this damage. EQC apportioned 10 per cent of the damage to the 4 September 2010 earthquake and 90 per cent to the second earthquake on 22 February 2011. It did not apportion any damage to the third earthquake on 13 June 2011. By the time EQC had made its apportionment decision, the appellants' private insurer had already accepted that a complete rebuild was required.

[3] In the proceeding they brought in August 2013, the appellants sought judicial review of EQC's apportionment decision, essentially on the ground that EQC should have made an additional payment in respect of the third (13 June 2011) earthquake. The appellants eventually accepted that the proceeding would serve no practical purpose, and on 23 May 2014, they filed a notice of discontinuance in the High Court at Christchurch. It is common ground that EQC did not receive the notice of discontinuance the appellants filed, although the appellants say it was posted to EQC.

[4] EQC, being unaware that this step had been taken, contacted the High Court Registry in February 2015 with a view to advancing the proceeding and discovered the appellants had filed the discontinuance. On 15 April 2015 EQC applied for costs pursuant to r 15.23 of the High Court Rules. It provides:

> **15.23 Costs**
>
> 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.

[5] In his decision, Wylie J set out the relevant background. He noted that the discontinuance was filed after a telephone conference on 8 May 2014. In the minute

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2 At [29].

that followed the conference, he had recorded that it appeared EQC's apportionment of damage between the three earthquakes had not prejudiced the appellants. The Judge warned the Court would not become involved in a proceeding that served no purpose.

[6] The Judge then set out r 15.23 and explained that it creates a presumption that a discontinuing plaintiff will pay the defendant's costs. He noted EQC did not agree otherwise so the issue for the Court was whether it was appropriate to make an order rebutting the presumption. He set out the reasons for the presumption — that a discontinuance is ordinarily tantamount to judgment for the defendant; that a plaintiff, having chosen to sue the defendant, should ordinarily bear some responsibility for the defendant's litigation expenses; and that a plaintiff who has discontinued can bring a fresh proceeding against the defendant on substantially the same facts, which would mean the defendant's costs of defending the first (discontinued) proceeding were wasted but for the application of r 15.23 — but the Judge also acknowledged that costs awards are at the discretion of the Court.[3] It was noted that the onus is on the plaintiff to persuade the Court to displace the presumption.

[7] Wylie J concluded the appellants had not discharged that onus and so EQC should have costs on a 2B basis. In particular, the Judge noted:

(a) EQC's apportionment was carried out at an early stage and did not affect the appellants' rights as against their private insurer;

(b) the appellants had not established EQC had any additional liability to them;

(c) the appellants' affidavit in support of their claim was inadequate;

(d) to the extent merits were relevant, they lay with EQC, which did not change its apportionment decision;

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3 At [19], citing *Earthquake Commission v Whiting* [2015] NZCA 144 at [65].

(e) there was no change of circumstances during the course of the proceeding that might warrant displacement of the r 15.23 presumption. It was important that the appellants' private insurer had proceeded based on EQC's apportionment decision and had agreed to replace the appellants' home before the commencement of the proceeding; and

(f) the appellants, through their counsel, had failed repeatedly to comply with Court orders and to respond to EQC in a timely manner.

[8] The Judge did not accept the appellants' submission that he had indicated to the parties during the teleconference referred to at [5] above that costs would not be an issue if the appellants discontinued by 23 May 2014. The Judge noted that neither he nor counsel for EQC could recall any such indication, and any comment to that effect would have been inappropriate — there was no costs application and therefore no submissions at that stage. In any case, he noted, the appellants had not complied with the direction in the minute because they had failed to serve a copy of the notice of discontinuance on EQC, as r 15.19(1)(a) requires.

Grounds of appeal

[9] The appeal was brought on the basis that Wylie J failed to take into account relevant considerations and took into account irrelevant considerations. Mr McKenzie, for the appellants, submitted the Judge erred in the following respects:

(a) failing to consider the indication he (the Judge) gave during the teleconference that costs would not be an issue if the proceeding was withdrawn by 23 May 2014;

(b) failing to take into account the fact that EQC did not make its application for costs until nine months after the discontinuance. Even though EQC did not receive the notice of discontinuance, the appellants argued it must have been apparent that the proceeding was

not progressing. While there is no time limit for seeking costs, this was a relevant consideration;

(c) failing to take into account the specialist nature of the earthquake list. Although there are not distinct costs rules applying to the earthquake list, a court should give consideration to the nature of the list and Wylie J should have given weight to the fact the appellants' proceeding was a public law claim that was brought in good faith as part of an ongoing dispute between the parties, which had already been before the office of the Ombudsman;

(d) failing to take into account the appellants' settlement with their private insurer, which was a properly intervening event that made discontinuance a responsible course;

(e) double-counting a factor supporting a costs award against the appellants. Mr McKenzie argued that the Judge mentioned EQC's apportionment of the appellants' claims at an early stage and the fact this did not change twice, at [21](a) and (d) of the judgment under appeal;

(f) criticising the appellants' affidavit in the judicial review proceeding when there had been no prior notice that it was deficient and any deficiencies had not prevented EQC from responding;

(g) requiring the appellants to have established additional liability on the part of EQC. The proceeding was discontinued at an early stage when no professional evidence had been filed — additional liability being thus undecided, costs should lie where they fall;

(h) characterising the proceeding as moot. Until settlement with the appellants' private insurer, the amount EQC contributed was relevant; and

(i) criticising the appellants' counsel for not meeting deadlines, when EQC had failed to progress its application for costs for several months. Mr McKenzie pointed to r 6 of the High Court Rules, which provides relevantly that where a party accepts service by mail, service is treated as effected by the fifth working day after the day on which it was posted.[4]

Mr McKenzie submits it is the combination of these errors that warrants appellate intervention.

[10] The appellants also argued that two items claimed by EQC were not properly claimable. Following discussions between the parties after the hearing, this quantum-based ground was abandoned, as EQC agreed to revise the quantum by removing those items. We return to this matter at the end of this judgment.

Decision

[11] Costs orders are made in the court's discretion. To succeed on appeal the appellants must show Wylie J erred in law or principle, took into account irrelevant considerations, failed to take into account relevant considerations or was plainly wrong.[5] The weight properly accorded to each relevant consideration is for the Judge at first instance.

[12] Wylie J correctly set out the applicable principles in this case. Rule 15.23 imposes an obligation on a plaintiff who discontinues a proceeding to pay the defendant's costs, unless the defendant agrees or the court orders otherwise. This Court has recognised the discretion to order "otherwise" may be exercised where it is "just and equitable".[6] The onus is on the discontinuing plaintiff to persuade the court to exercise that discretion.[7] The presumption is not lightly displaced.[8] We do not

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4 High Court Rules, rr 6.1(1)(d)(i) and 6.6(1)(a)(i).

5 *May v May* (1982) 1 NZFLR 165 (CA) at 170, approved in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Tipping J.

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

7 *Powell v Hally Labels Ltd* [2014] NZCA 572 at [21]; *Earthquake Commission v Whiting*, above n 3, at [68].

8 *Powell v Hally Labels Ltd*, above n 7, at [20].

accept Mr McKenzie's suggestion that these well-settled principles should be applied differently in earthquake list proceedings. This Court in *Earthquake Commission v Whiting* took a similar view.[9]

[13] We are satisfied Wylie J took into account all relevant considerations and did not take into account anything that was irrelevant.

[14] First, the Judge dealt carefully with the appellants' assertion that he (the Judge) had indicated during the teleconference that costs would not be awarded if the proceeding was discontinued by 23 May 2014. Neither the Judge nor counsel for EQC recalled him giving any such indication. It was not recorded in the subsequent minute. The Judge also explained that it is highly unlikely he would have made such a comment because he had not been called upon to determine a costs application during the teleconference; but even if he had given such an indication, it still could not affect EQC's right to apply for costs on discontinuance. This last-mentioned observation effectively answers Mr McKenzie's submission.

[15] Second, although the Judge did not expressly refer to EQC's alleged delay in seeking costs, he was aware of it, as he had the timeline before him and he had been involved in case managing the proceeding prior to the notice of discontinuance being filed. From the Judge's outline of events, which noted a number of failures by the appellants to respond to EQC either at all or in a timely manner, it is evident that he not only turned his mind to the issue of timing but considered it counted against the appellants not the respondent. The appellants accept EQC did not receive the notice of discontinuance. To meet this point, Mr McKenzie submitted EQC should have been alerted to the possibility of discontinuance because of the appellants' inactivity.

[16] But counsel for EQC had contacted counsel for the appellants to inquire whether they intended discontinuing, and received no response. EQC had checked and re-checked with counsel for the appellants and eventually got tired of his apparent lassitude. What more could counsel for EQC have reasonably done? All

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[9] *Earthquake Commission v* Whiting, above n 3, at [62]–[72]. See also *Kraal v Earthquake Commission* [2015] NZCA 13, [2015] 2 NZLR 589 at [84], where this Court declined to treat as in a special category for costs purposes a proceeding relating to the interpretation of "natural disaster damage" in the Earthquake Commission Act 1993.

the Judge could properly have been required to take into account was whether the delay caused prejudice to the appellants and as he found them, the facts disclosed no basis for such a finding.

[17] Third, the Judge did not err in failing to adapt his application of costs principles to this proceeding. We have dealt (at [12] above) with Mr McKenzie's submission that the costs principles apply differently to proceedings in the earthquake list.

[18] Fourth, the Judge clearly did take into account the fact the appellants settled with their private insurer during the course of the proceeding. He found the insurer had proceeded at all material times based on EQC's apportionment decision and had already agreed to replace the appellants' home before the commencement of this proceeding. Mr McKenzie submitted the Judge erred in drawing that conclusion for two reasons: first, because the amount EQC contributed remained relevant to the appellants until final settlement was reached with their private insurer; and second, because, if the appellants had been successful in establishing EQC should have made an extra payment, they would have had the benefit of that money in the interim (although they would have had to account to their private insurer).

[19] A change of circumstances that renders the proceeding unnecessary may provide a ground for rebutting the r 15.23 presumption, but it must be clear that the plaintiff would have succeeded had the circumstances not changed.[10] That is not the case here — the nub of the remaining dispute between the appellants and their private insurer was as to whether certain historic features of the house needed to be included in the rebuild. So even if Mr McKenzie's first argument was right, the resolution of that dispute could have no impact on EQC's liability. Thus the settlement was not an intervening event that would justify a different costs outcome.

[20] Fifth, we agree with Mr Wood that the Judge did not double-count the apportionment factor but noted, separately, that EQC had apportioned the claims at an early stage and that EQC had later successfully resisted the appellants' claim.

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[10] See Andrew Beck (ed) *McGechan on Procedure* (online looseleaf ed, Westlaw NZ) at [15.23.01]; *The Star Trust v Hamilton City Council* [2016] NZHC 821 at [10].

[21] Sixth, the inadequacy of the appellants' affidavit was not an irrelevant consideration for Wylie J. Although a court dealing with the application of r 15.23 will not normally consider the merits of the respective cases, the Judge was entitled to consider the whole course of the proceeding and whether it was reasonable for the appellants to bring the proceeding. This may include the strength of the parties' cases.

[22] The seventh point is a related one. The Judge was right that discontinuance is ordinarily tantamount to judgment for the defendant. Thus, in commenting that the appellants had not established any additional liability on EQC's part, the Judge was simply highlighting a reason why they had failed to rebut the r 15.23 presumption.

[23] Eighth, for the reasons set out at [18] and [19] above, the Judge did not err in characterising the proceeding as moot.

[24] Finally, we are satisfied the Judge did not err in taking into account counsel's conduct. That a party through its counsel has failed to comply with directions is a relevant factor to consider when determining costs. The Judge was right to point out, as part of his overall assessment, that the appellants breached timetabling directions at an early stage and did not respond to inquiries from EQC's counsel in May and September 2014 as to whether they intended to continue the proceeding.

Result

[25] The appeal is dismissed.

[26] Before us Mr McKenzie submitted that any costs award against the appellants in this Court should be reduced if the High Court costs are decreased. The appellants took issue with two items in EQC's schedule of costs in the High Court. After the hearing before us, EQC revised that schedule of costs leading to the appellants abandoning their ground of appeal based on quantum. In those circumstances we think it is appropriate to recognise that the appellants have had some success on appeal, albeit limited.

[27] The appellants must pay two-thirds of the respondent's costs of this appeal on a band A basis and usual disbursements.

Solicitors:
S B Law, Christchurch for Appellants
Chapman Tripp, Wellington for Respondent