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

**CIV-2013-409-001511**
**[2017] NZHC 1599**

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| BETWEEN | PRATTLEY ENTERPRISES LIMITED<br>Plaintiff |
| AND | VERO INSURANCE NEW ZEALAND LIMITED<br>Defendant |

Hearing: 11 July 2017 (On the papers)

Appearances: FMR Cooke QC with S P Rennie for Plaintiff
D J Goddard QC with SWB Foote and C M Brick for Defendant

Judgment: 11 July 2017

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**JUDGMENT OF DUNNINGHAM J**
**(RE: COSTS DECISION)**

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## Introduction

[1] On 24 June 2015 I dismissed Prattley Enterprises Limited's (Prattley) claim against Vero Insurance New Zealand Limited (Vero) for misrepresenting Prattley's entitlement under its insurance contract.[1] I reserved the question of costs. Although Vero filed submissions seeking costs shortly after the judgment, Prattley sought a deferral until all appeals were determined, and I ordered accordingly.[2] Prattley was unsuccessful in its appeals to the Court of Appeal[3] and the Supreme Court.[4] Vero now seeks determination of the costs it is owed for the proceedings before the High Court.

[2] Vero claims costs of $1,069,308.48, being:

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1 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2015] NZHC 1444.
2 Minute, 4 August 2015.
3 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67.
4 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [201] NZSC 158.

(a) $298,254 for schedule costs, with a 100 per cent uplift to $596,508;

(b) $26,323.13 for general disbursements; and

(c) $446,477.35 for expert witness fees.

[3] Prattley contests that claim and submits that the appropriate quantum of costs is $405,072.36, being:

(a) $160,460 for schedule costs, with a 5 per cent discount to $152,437 to recognise Vero's unsuccessful counterclaim;

(b) $17,538.36 for general disbursements; and

(c) $235,097 for expert witness fees.

**Issues**

[4] The parties agree that, due to the level of complexity involved, the proceeding is in Category 3 which affords the highest daily recovery rate.[5]

[5] However, the parties disagree on the following matters:

(a) Which time allocation band in Schedule 3 of the High Court Rules is appropriate for various steps taken in the proceedings by Vero?

(b) What extent of discovery should be claimed for?

(c) Should Prattley pay costs for the preliminary issues hearing?

(d) Should there be an uplift? If so, how large?

(e) Should there be a reduction in costs for Vero's unsuccessful counterclaim?

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5 See High Court Rules, r 14.3(1).

(f) Should costs be awarded for preparation of Vero's costs memorandum?

(g) Should Vero be certified for three counsel?

(h) Should Prattley pay for all of Thornton Tomasetti and Compusoft's costs?

(i) Should leave be reserved for Vero to seek costs against Risk Worldwide if necessary?

[6] I discuss each of these issues in turn under the headings below.

**Which band is appropriate for the work done by Vero in defending the claim?**

*Submissions*

[7] Vero provided a table of Schedule costs, submitting that a Band B time allocation was appropriate for some steps, while Band C was appropriate for others.

[8] Prattley responded to Vero's table of Schedule costs. It acknowledges that Band C is justified for some steps. However, it submits that Vero cannot show that some other steps for which Band C was claimed, involved a "comparatively large amount of time" nor has Vero demonstrated why a normal amount of time for those steps is insufficient.[6] It therefore submits that a range of A, B and C Band categorisations are appropriate, as set out in commentary to its own version of Vero's table of Schedule costs.

*Discussion*

[9] This issue engages the principle that costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding,[7] along with the principle that,

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6 *Paper Reclaim Ltd v Aoteraroa International Ltd (Costs)* (2007) 18 PRNZ 743 at [35].
7 High Court Rules, r 14.2(c).

insofar as possible, the determination of costs should be predictable and expeditious.[8]

[10] While some scrutiny is justified into whether a time category, such as Band B or C, is appropriate for individual steps in a proceeding, the determination of costs would become more time consuming and unpredictable if parties were too readily encouraged to seek item by item variations from the general categorisation of the proceedings.

[11] Band C is appropriate when "a comparatively large amount of time for the particular step is considered reasonable".[9] These were complicated proceedings where it could be expected that a comparatively large time would be needed for Vero to complete most steps. However, it has also responsibly only claimed a B time allocation where a Band C allocation would be too much. In my view, having reviewed the various comments made by the parties on the costs claimed for each step in the proceeding, Vero's allocation of a mixture of Band B and C is appropriate.

[12] In particular, I make the following observations on the claims for steps where there was the greatest divergence between the parties:

(a) Vero claims Band C costs for commencement of defence by a defendant, at a total of $17,640, whereas Prattley says Band B costs should apply, resulting in a claim for $5,880. I accept that the term "commencement of defence" embraces more than simply preparation of a statement of defence. The claims raised a wide range of issues, including that they were advanced in breach of a settlement agreement, and considerable legal research and factual enquiries would need to have been made before the statement of defence was prepared. In the context of these proceedings, I am satisfied the Band C time allocation is appropriate.

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8 Rule 14.2(g).
9 Rule 14.5(2)(c), High Court Rules.

(b) Similar claims were made in response to the Band C claims for responding to the amended pleadings and, for the same reasons, I consider a Band C allocation is appropriate, rather than a Band B allocation.

(c) Vero claims Band C costs for answering the plaintiff's interrogatories, at a total of $11,760, whereas the Band B allocation promoted by Prattley amounts to a costs award of $1,990. Prattley relies on the fact that the response produced was only nine pages long and, for the second claim, was only four pages. However, I accept that a substantial amount of time would have been consumed in preparing the responses to these questions, and the one day time allowance suggested for each of these two claims would be quite inadequate. Again a Band C time allocation is justified.

(d) The preparation of some memoranda for case management conferences was elevated by Vero to a Band C allocation. Prattley argued these only warranted a Band B time allocation and that some memoranda where a B allocation was claimed, should in fact be a Band A allocation. However, reading the explanations of why the C allocation was sought in each case, I am satisfied that Vero has properly justified its claim for additional time over a Band B allocation, or, for a Band B allocation over a Band A allocation. For example, where a Band C allocation was sought the memoranda were not straightforward but addressed complex issues arising, such as the formulation of questions for the proposed preliminary hearing.

[13] For these reasons, I accept that Vero's categorisation of its schedule cost claims should be awarded as claimed (although the appropriateness of the claims for particular groups of steps is discussed further below).

**What extent of discovery should be claimed for?**

*Submissions*

[14] Vero makes extensive claims for costs relating to discovery. It submits that this is reasonable in light of the late discovery by Prattley of highly relevant documents. In particular, Vero points to Prattley's failure to disclose the first Ford Baker valuation without prompting, despite it falling within the tailored discovery orders. Vero also submits that discovery was provided in a haphazard way, resulting in more extensive review by counsel than would normally be required. Vero also had to respond to numerous requests for further discovery by Prattley.

[15] Prattley submits that it is inappropriate for Vero to be granted multiple awards for providing discovery when this is because of the inadequacy of Vero's initial discovery. Prattley accepts that Vero is entitled to a series of claims for inspection as Prattley's discovery was provided in tranches, but submits that a lower amount is appropriate.

[16] In reply submissions, Vero submits that its discovery was not incomplete but fully compliant. Prattley's later requests were sweeping and many were concerned with Vero's internal assessments of the value of the claim. The time allowances claimed are reasonable in light of this and fall far short of the actual time taken.

*Discussion*

[17] Vero has explained why it has made such extensive claims for discovery. Prattley made a number of further requests to Vero beyond the tailored discovery order. Vero then complied with these. Consequently, I do not accept Prattley's claim that Vero is attempting to rely on its own failure to provide proper and comprehensive disclosure at the outset. Vero is entitled to the discovery attendances claimed at items 6 - 13 of the table of schedule costs on a Band B basis.

**Should Prattley pay costs for the preliminary issues hearing?**

*Submissions*

[18] Prattley submits that Vero should not be awarded costs for matters relating to the preliminary issues hearing on the enforceability of the settlement agreement, as it was Vero which pressed for the hearing and then changed its position. To make Prattley responsible for the costs would be unjust. Prattley submits that each party should bear its own costs regarding this matter, including disbursements.

[19] Vero submits that Prattley's position is unreasonable given that both parties requested the preliminary issues hearing and were initially content with the form of the questions. Vero submits that the hearing did not proceed because Prattley subsequently amended its pleading, introducing a mistake claim. This required proof of inequality which significantly changed the issues which would need to be covered in the hearing. While Prattley suggested this could be overcome by proceeding on the basis that its correct entitlement would be the amount it claimed in its pleadings, that position was unacceptable to Vero. Therefore, there was no basis to attribute blame to Vero. Vero submits that, as the successful party, it should recover costs and disbursements for all the steps in defending the claim, including the abandoned hearing.

*Discussion*

[20] As the successful party of the proceeding, there is a presumption that Vero should receive costs for all aspects of the proceeding.[10] As Vero notes, both parties originally agreed to the preliminary issues hearing as they accepted that resolving the issue of the enforceability of the interim settlement agreement would likely advance matters.[11] However, I accept that the primary reason for the hearing not proceeding as planned, was because Prattley amended its pleadings which meant the issues to be determined could not be confined in the way originally envisaged. As a consequence, the parties needed to review whether they wanted the hearing to proceed and on what questions.[12]

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10 Rule 14.2(a), High Court Rules.
11 Minute of Wylie J, 16 December 2013 at [3].
12 As recorded in the minutes of Kós J on 14 March 2014 and 16 July 2014.

[21] Vero's reluctance to proceed on the basis proposed by Prattley was understandable. A contractual mistake requires there to be a substantially unequal exchange of value. Vero disputed this (correctly as it transpired), and so was not prepared to assess the enforceability of the agreement on the basis of facts which were disputed and which, if canvassed, would have significantly have enlarged the scope of the preliminary hearing. In those circumstances, it was reasonable to abandon the proposed preliminary hearing. As this change in circumstances was not of Vero's making, I do not consider it unjust that Vero be awarded costs for steps taken in relation to that aspect of the proceeding.

**Should there be an uplift? If so, how large?**

*Submissions*

[22] Vero claims increased costs under r 14.6(3) of the High Court Rules. It submits that Prattley contributed unnecessarily to the time and expense of the proceeding by:

(a) Pursuing a challenge to the settlement agreement (which was premised on Vero having misled it about the nature of its entitlements under the insurance policy) in circumstances where it must have known the challenge was without merit;

(b) Failing to provide the first Ford Baker valuation in its discovery, despite being required to provide it under the terms of the tailored discovery order. Vero also had difficulties in obtaining discovery and inspection of communications between Prattley and the trustees which Prattley failed to provide or wrongly withheld on the basis they were privileged;

(c) Pursuing the challenge to the settlement agreement when three of the four trustees were unable or unwilling to give evidence that they relied on the allegedly misleading conduct by Vero; and

(d) Failing to agree the scope of works and costing issues, and serving late quantity surveying evidence from a new expert when Prattley ultimately led no scope or costing evidence but instead agreed with Vero's.

[23] Vero seeks an increase in costs of 100 per cent to reflect the cost to Vero of:

(a) The additional time and resources required to deal with the proceedings as Prattley chose to run it; and

(b) Retaining commercial counsel with the appropriate experience and skills.

[24] Vero recognises that the Court of Appeal has previously suggested that an increase above 50 per cent is unlikely because the daily recovery rate is supposed to be set at two-thirds of the daily rate considered reasonable for the proceeding.[13] However, it points to *Air New Zealand v Wellington International Airport Ltd* where the Court of Appeal recognised that the daily rates in the schedule did not reflect the costs of retaining experienced commercial counsel needed for that case.[14] Vero also notes that it has had to wait nearly two years for costs.

[25] Prattley submits that there should not be an uplift of the costs award. It notes that the Court of Appeal rejected Vero's claim for uplifted costs before it as it did not consider that the case involved exceptional circumstances. Prattley also responds to each of Vero's particular grounds, submitting as follows:

(a) While Prattley must accept that its market value calculation was inflated, this does not mean that its claim that its entitlement under the policy was misrepresented was hopeless;

(b) The Ford Baker valuation was provided, although not initially. However, Vero's discovery was also incomplete, and completed over

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13 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [46].

14 *Air New Zealand v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [89]-[92].

four tranches. This late discovery would not have had any impact on costs for Vero, apart from the additional inspection time which Prattley has accepted;

(c) The Court considered that the other trustees' evidence would not have assisted Prattley's claim. Vero benefitted by this as it shortened the trial. The fact the other trustees were not called does not indicate the case was hopeless; and

(d) Prattley should not be penalised for making the pragmatic decision at trial to accept Vero's quantity surveying evidence. This was done to reduce the amount of time and effort required to resolve the disputes.

[26] Prattley submits that its claim was not always going to fail. The decisions of each Court, who all found against Prattley but on different bases, demonstrates that the question of the measure of indemnity was not straightforward. Vero's other complaints relate to matters that are part of the usual interaction in significant litigation. Prattley submits that none of these materially increased the cost of litigation, as required by High Court r 14.6. Prattley further submits that the delay in the costs decision is not a reason to increase costs, but is a normal incidence of costs decision-making.

[27] In reply submissions, Vero submits that the factors relied on by it for increased costs for the substantive hearing in the High Court differ from those considered by the Court of Appeal. It notes that Prattley's argument on appeal was much narrower, and it did not pursue its claim that it was misled by Vero or any aspect of the technical case. Vero submits that had Prattley not pursued these meritless arguments before the High Court, Vero's costs would have been greatly reduced, and Prattley is wrong to suggest otherwise.

*Discussion*

[28] Rule 14.6(3)(b) provides that the court may order a party to pay increased costs if:

the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

[29] The party seeking increased costs carries the onus of persuading the court that their award is justified.[15] An uplift from scale can only be justified to the extent to which the failure to act reasonably contributed to the time or expense of the proceeding.[16]

[30] The primary submission Vero relies on is that Prattley's claim that Vero misrepresented to Prattley Prattley's entitlement under the agreement was hopeless. In support of that Vero points to the fact that Prattley only called evidence from one of the four trustees about the misrepresentation. Vero also points to Prattley's failure to initially disclose the Ford Baker valuation. However, these factors must have contributed to the time and length of the proceeding before they will justify an uplift. While Prattley did initially resist disclosure of the valuation until a discovery application was made, and this would have caused some increased cost to Vero, this was taken into account by Vero's claims for further discovery in its claim for schedule costs. The fact the other trustees were not called does not necessarily indicate that Prattley's case was hopeless though it clearly made Prattley's case

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15 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011 at [27].

16 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].

weaker. However, as Prattley notes, Vero benefitted from this as it shortened the trial. Therefore it does not justify an uplift of costs.

[31] Finally, Vero's complaint that Prattley contributed unnecessarily to the time and expense of the proceeding in the manner it dealt with the scope of works and costing issues really relates to matters that are part of the usual interaction in significant litigation. In my view, Prattley did not act in a way that was sufficiently unreasonable as to justify an increase in costs.

[32] On each issue, Vero has not demonstrated that Prattley's actions or inactions contributed unnecessarily to the time and expense of the proceeding. Therefore I do not consider there is a basis to justify an uplift of costs beyond that set out in the schedule.

**Should there be a reduction in costs for Vero's unsuccessful counterclaim?**

*Submissions*

[33] Prattley submits that it is entitled to recognition of its successful defence of Vero's counterclaim. It submits that this success should reduce the costs payable to Vero.[17] Recognising that Prattley's costs in bringing the counterclaim were significantly less than those for Vero's defence, Prattley submits that a five per cent reduction on the scale costs sought is appropriate.

[34] Vero accepts that it was unsuccessful in its counterclaim. However, it submits that the only step Prattley took against the counterclaim was a brief defence. It was not even addressed in opening or closing submissions by Prattley. Given the negligible costs, Vero submits that no reduction is warranted.

*Discussion*

[35] Rule 14.7 sets out the situations in which an order of costs can be reduced. It includes situations where:[18]

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[17] Referring to *Sanford Limited v The Chief Executive of the Ministry of Fisheries* HC Wellington CIV-2009-485-379, 18 February 2010.

[18] Rule 14.7(d).

> although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs…

[36] Vero was unsuccessful in its counterclaim against Prattley. However, this was a very small claim in relation to the overall proceedings. Prattley did little to oppose the counterclaim and it did not significantly increase Prattley's costs. Therefore, I am not prepared to make a reduction of the costs owing to Vero.

**Should costs be awarded for preparation of a costs memorandum?**

*Submissions*

[37] Vero's calculation of scale costs include a claim of one day's costs for preparation of its costs submissions. It says, in relation to this claim that an order for costs on costs is inappropriate because "neither side's position has been completely upheld".[19]

[38] Vero's reply submissions record that preparation of the submissions has been time consuming and its claim for costs is modest. It also notes that Vero also made an offer to Prattley to settle costs on a without prejudice save as to costs basis, which offer was not accepted by Prattley.

*Discussion*

[39] The without prejudice save as to costs offer has no bearing on this claim as the offer made exceeds the amount of this costs award. However, I still need to consider whether, as the successful party, Vero is entitled to costs on this step. While there has been some judicial divergence on the question of whether costs should be awarded on an application for costs, I accept that, particularly where the costs application is complex, an application for costs should be treated no differently for costs purposes from an ordinary interlocutory application.[20]

[40] While in this case the parties have had mixed success in respect of their positions on costs, I have upheld the defendant's position on a significant number of

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[19] *Paper Reclaim Ltd v Aoteroa International Ltd (Costs)* (2007) 18 PRNZ 743 at [62].
[20] *Body Corporate Administration Ltd v Mehta* (No. 4) [2013] NZHC 213 at [85].

issues. In those circumstances, and given the claim is modest in light of the time obviously expended in preparing the submissions, I consider it appropriate to award costs as sought, being a one day time allocation amounting to $3,300.

**Should Vero be certified for three counsel?**

*Submissions*

[41] Vero submits that it was necessary for it to instruct Mr Simon Foote as junior counsel to deal with the technical issues relating to the underlying policy entitlement. This was a result of the short period of time between the initial hearing and the adjourned and expanded hearing, combined with senior counsel's other commitments. Vero submits that this cost was unavoidable.

[42] Prattley submits that it should not bear the burden for Vero's third counsel. It submits that the trial was capable of being prosecuted by two counsel and points to the fact that unavailability of Vero's senior counsel that lead to the cost. Prattley therefore submits that it should not pay schedule costs or disbursements for the third counsel.

[43] In reply submissions, Vero submits that its request for certification of three counsel is reasonable. The expedited hearing was allocated at Prattley's request and occurred after Prattley had significantly expanded the issues. This necessitated engaging a third counsel to deal with the technical issues arising in the case. Vero notes that it has only claimed seven days for each of its second and third counsel (half the number of days in the trial), so is a modest cost in the context of the cost of the proceedings as a whole.

*Discussion*

[44] The default position in the Schedule 3 of the High Court Rules is that provision is made for only one counsel in a proceeding. The Court then has a discretion to certify a second or third counsel, depending on the individual case. The general approach is that second counsel will be allowed in category 3 cases but that a

category 2 case must have some exceptional feature to justify a second counsel allowance.[21]

[45] In *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd*, Chambers J discussed whether second counsel should be certified in a category 2 case.[22] He held:[23]

> … I do not consider that the plaintiffs should have to pay anything towards Elders' second counsel. In saying that, I am in no way decrying the actual contribution made by Elders' junior counsel, Mr Crossland. It must be remembered that it is a fundamental principle of the new costs regime that the determination of costs is not related to the actual counsel involved: see r 47(e). The approach is always objective and is focused on the nature of the proceeding, not the actual counsel involved and how he or she or they choose to conduct the litigation. Elders may well have received considerable value from having Mr Crossland as second counsel. That is irrelevant, however, to the question I have to determine, namely whether the nature of this proceeding, given the way the trial was conducted, was such as to justify requiring the losing party to contribute to the winning party's cost in having a junior counsel present.

Chamber J's focus on the nature of the proceedings is applicable to the consideration of whether certification for a third counsel is appropriate in a category 3 case, such as here.

[46] As Prattley submits, the trial was capable of being prosecuted by two counsel and Vero appears only to have needed to instruct a third counsel because of senior counsel's unavailability. Although Vero submits that this was necessary due to the short period of time between the initial hearing and the adjourned and expanded hearing, Prattley should not bear the burden for this. Certification of costs for third counsel is unusual, and must be justified by the nature of the proceedings.

[47] This is unlike cases, such as *Commerce Commission v Bay of Plenty Electrical*, where both parties were represented by three counsel.[24] The Judge considered there that third counsel was appropriate given the nature of the

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21 Andrew Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, Wellington, 2012) at [13.3.5].

22 *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155.

23 At [21].

24 *Commerce Commission v Bay of Plenty Electrical* HC Wellington CIV-2001-485-917, 4 December 2008.

proceeding and its legal and factual complexity.[25] The need for third counsel was prompted by lead counsel's other commitments, as opposed to the nature of the proceedings themselves.

[48] Therefore, Vero's claim for the costs (both schedule costs and disbursements) for third counsel fails. However, I accept allowance should be made for the disbursements associated with the attendance of Ms Cecily Brick (third counsel) at the preliminary hearing. At this stage she was acting as second counsel, prior to Mr Foote's instruction.

**Should Prattley pay for all of Thornton Tomasetti and Compusoft's costs?**

*Submissions*

[49] Prattley submits that the Thornton Tomasetti and Compusoft costs are unreasonably high and should be decreased.

[50] For Thornton Tomasetti, about 20 per cent of the invoices relate to travel, presumably from the US where Mr Kahanek resides. Prattley submits that there is no reason why Vero could not have retained local engineers or had someone from Thornton Tomasetti's Christchurch based office. Prattley therefore submits that all travel claims should be excluded.

[51] Prattley notes that a further 60 per cent of the invoice relates to work done by others in the firm, not Mr Kahanek. Prattley submits that the claim ought to be confined to the actual time spent by the particular witness, with an addition of 50 per cent for team assistance.

[52] For Compusoft, Prattley submits that the time spent on the matter by the expert (284 hours) is disproportionate to a reasonable level for the involvement of an expert witness. Adopting the approach in *Auckland Waterfront Development Agency v Mobil Oil New Zealand,* Prattley submits that a 30 per cent reduction should be

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[25] At [46].

applied to the Compusoft invoices in order to ensure that Vero is "only reimbursed for its necessarily incurred and reasonable expert costs".[26]

[53] Prattley also disputes payments for the travel of Vero's other experts. It submits that it is not reasonable to claim the costs of a local expert witness travelling to see out of town solicitors when Vero chose to use out of town counsel or solicitors.

[54] In reply, Vero submits that the work undertaken by Thornton Tomasetti was reasonable. The firm needed to do extensive computer modelling work in order to recreate the damage that occurred and make plans for how the building should be reconstructed. The Court accepted this evidence and found it the most reliable evidence provided. Vero submits that there is no expectation that all preparation work needs to be done by a particular expert personally.

[55] Vero submits that travel costs should be allowed in full as they are part of the usual basis on which Thornton Tomasetti charges for its services. It submits that there were not suitable experts available in Christchurch at the time, due to the demand for engineers and the costs were actually and reasonably incurred.

[56] Vero also submits that the amount of work done by Compusoft was reasonable in the circumstances. The models produced by Dr Brooke were central to the technical case of whether Prattley's policy entitlement should be assessed on a reinstatement basis and, in particular, to the allocation of damage to each earthquake event. Therefore, Vero submits that Prattley should cover the entire cost of Compusoft's work.

[57] Vero also submits that travel allowances should be allowed for its other expert witnesses.

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[26] *Auckland Waterfront Development Agency v Mobil Oil New Zealand* (2015) 23 PRNZ 200) at 210.

*Discussion*

[58] Rule 14.12(2) allows for a party to claim for the cost of disbursements that are reasonably necessary for the conduct of the proceeding and reasonable in amount. Rule 14.12(3) provides that "a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding".

[59] Prattley takes issue with Vero's claim for the travelling costs of its expert witnesses, submitting that it could have retained local experts.

[60] Dal Pont states that the party seeking costs for an expert witness outside the locale must demonstrate that:[27]

(a) Proper inquiries have been made locally for those with the necessary qualifications and expertise; and

(b) The party would have been prejudiced by being restricted to a local expert.

[61] I accept that the work done required particular expertise and the demand for such experts in the post-earthquake period in Christchurch easily exceeded their availability. It was unsurprising that for a large case such as this, out of town experts were engaged, and indeed Prattley also brought in overseas witnesses to support its case. For this reason, I accept the travel costs of these experts was reasonably incurred.

[62] In regards to the work done by Thornton Tomasetti, Prattley takes issue with the amount charged, highlighting that 60 per cent of the invoice relates to work done by others in the firm, not Mr Kahanek. However, there is no expectation that all preparation work needs to be done by a particular expert personally and it is often more cost effective for aspects of the work to be delegated to others in the expert's firm. I consider Mr Kahanek was entitled to have others in his firm help him in his preparation of evidence and this is not a reason to reduce these costs.

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[27] G E Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Chatswood, 2013) at [17.34].

[63] While significant fees were incurred for the work done by Thornton Tomasetti, it was relied on by the Court. It was also apparent to me that considerable work went into the preparation of this expert brief, including analysing and responding to the plaintiff's expert technical evidence. As a result, I accept the costs for this work to be both reasonably necessary for the conduct of the proceeding and reasonable in amount, given the nature of the work and the expertise required. Therefore, Vero is entitled to be reimbursed for the costs of Thornton Tomasetti.

[64] As for Thornton Tomasetti work, I am also satisfied that the evidence provided by Compusoft and Dr Brooke to the case, was reasonably necessary for the conduct of the proceedings. The evidence was complex and required to respond to Prattley's case on damage apportionment and that necessitated the amount of work done by Compusoft. It is therefore reasonable that Prattley be liable for all of Compusoft's fees.

[65] Vero has successfully demonstrated that the expert fees, including travel costs claimed, are appropriate.

**Should leave be reserved for Vero to seek costs against Risk Worldwide if necessary?**

*Submissions*

[66] Vero notes that any costs awarded against Prattley will be met by Risk Worldwide, which agreed to fund Prattley's litigation.

[67] Vero does not currently seek an order for costs against Risk Worldwide, given the wording of the agreement. However, Vero recognises a risk that Prattley has no assets and would not be able to pay a costs award. In that case, Vero would wish to pursue a claim for costs directly against Risk Worldwide. Vero seeks that the Court expressly reserve leave to Vero to apply for costs directly against Risk Worldwide, if required.

[68] Prattley submits that Vero's request for leave to seek costs from Risk Worldwide is unnecessary and that Vero's criticism of the litigation funding

arrangements is misplaced. It emphasises the importance for parties, such as itself, to have access to litigation funders to enable them to pursue claims.

[69] In reply submissions, Vero notes that it is not currently looking for leave to seek costs from risk Worldwide. Reservation of leave is sought simply to avoid an argument that the Court is *functus officio* and could not consider an application for costs by Vero against a third party if Prattley fails to meet the costs judgment. Vero does not seek to argue the merits of such an application in the present application.

*Discussion*

[70] I accept that reservation of leave is sought to avoid an argument that the Court is *functus officio* and therefore unable to consider an application for costs by Vero against a third party. A court is *functus officio* and no longer seized of jurisdiction once it has issued its order and sealed its judgment.[28] An order expressly reserving leave would simply avoid any argument that this court is *functus officio*. If Vero did make such an application, it would then have to persuade the Court that the order should be made.

[71] I am satisfied it is sensible not to foreclose this argument until and unless Vero knows whether Prattley will meet the costs award. There is no need at present to consider the merits of such an application and I do not. Leave is therefore reserved for Vero to apply for leave to seek costs directly from Worldwide. Such an application must be made within 12 months of the date of this decision, failing which, the leave which has been reserved is revoked.

**Conclusion**

[72] Vero has succeeded in demonstrating, for the most part, why the costs it claims are reasonable in the circumstances. However, it has failed to show that Prattley acted unreasonably in the proceedings in a way contributed to the length of the proceedings beyond what is already reflected through my award of schedule

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[28] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington 2014) at [21.6.4], referring to *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at 457; *Re Victim X* [2003] 3 NZLR 220 (CA) at 233.

costs, and so I have made no uplift on the schedule costs. Vero is also unsuccessful in claiming the costs of its third counsel.

[73] Accordingly, I award Vero:

(a) $277,674 for legal costs as set out in the attached schedule;

(b) $467,571.67 for disbursements comprising $20,894.32 for general disbursements and $446,477.35 for expert witness fees.

[74] I also make an order reserving leave for Vero to apply for leave to seek costs directly from Risk Worldwide. This leave is revoked if it is not applied for within 12 months of the date of issue of this judgment.

Solicitors:
Rhodes and Co., Christchurch
Jones Fee, Auckland

**LEGAL COSTS**

**(At daily rate of $2,940 except where specified)**

| Defendant's Claim Reference | Schedule 3 Reference | Description | Band | Time (days) | Amount |
|---|---|---|---|---|---|
| 1 | 2 | Commencement of defence by defendant | C | 6 | $17,640 |
| 2 | 36 | Notice requiring particulars of statement of claim | B | 0.4 | $1,176 |
| 3 | 9 | Pleading in response to amended pleading | C | 2 | $5,880 |
| 4 | 9 | Pleading in response to amended pleading | C | 2 | $5,880 |
| 5 | 9 | Pleading in response to amended pleading | C | 2 | $5,880 |
| 6 | 20 | List of documents on discovery | B | 2.5 | $7,350 |
| 7 | 21 | Inspection of plaintiff's documents | B | 1.5 | $4,410 |
| 8 | 20 | Providing further discovery in response to plaintiff's discovery request | B | 2.5 | $7,350 |
| 9 | 20 | Providing further discovery | B | 2.5 | $7,350 |
| 10 | 21 | Inspection of plaintiff's documents | B | 1.5 | $4,410 |
| 11 | 20 | Providing further discovery | B | 2.5 | $7,350 |
| 12 | 20 | Providing further discovery | B | 2.5 | $7,350 |

| | | | | | |
|---|---|---|---|---|---|
| 13 | 21 | Inspection of plaintiff's documents | B | 1.5 | $4,410 |
| 14 | 17 | Defendant's answer to plaintiff's interrogatories | C | 4 | $11,760 |
| 15 | 16 | Defendant's notice to plaintiff to answer interrogatories | C | 4 | $11,760 |
| 16 | 10 | Preparation for first case management conference | B | 0.4 | $1,176 |
| 17 | 11 | Filing memorandum for first case management conference | B | 0.4 | $1,176 |
| 18 | 13 | Appearance at first case management conference | B | 0.3 | $882 |
| 19 | 36 | Filing defendant's memorandum in respect of preliminary questions hearing and draft statement of facts | C | 1 | $2,940 |
| 20 | 11 | Filing defendant's memorandum for case management conference | B | 0.4 | $1,176 |
| 21 | 13 | Appearance at case management conference | C | 0.7 | $2,058 |
| 22 | 36 | Filing defendant's memorandum in respect of pre-hearing directions for preliminary issues hearing | B | 0.4 | $1,176 |
| 23 | 36 | Filing defendant's memorandum in respect of amendment to timetable for pre-hearing steps for preliminary questions hearing | B | 0.4 | $1,176 |

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| 24 | 13 | Appearance at case management conference | B | 0.3 | $882 |
| 25 | 36 | Filing defendant's memorandum challenging admissibility of plaintiff's proposed evidence | B | 0.6 | $1,764 |
| 26 | 36 | Filing defendant's memorandum for pre-trial conference | C | 1 | $2,940 |
| 27 | 15 | Preparation for and appearance at pre-trial conference before Mander J | C | 1 | $2,940 |
| 28 | 36 | Filing defendant's memorandum for judicial telephone conference | C | 1 | $2,940 |
| 29 | 15 | Preparation for and appearance at conference before Kós J | B | 0.5 | $1,470 |
| 30 | 36 | Filing defendant's memorandum proposing timetabling directions | B | 0.4 | $1,176 |
| 31 | 36 | Filing defendant's memorandum challenging admissibility of plaintiff's proposed evidence | B | 0.6 | $1,764 |
| 32 | 36 | Filing defendant's memorandum regarding pre-trial matters | B | 0.4 | $1,176 |
| 33 | 36 | Filing defendant's memorandum for pre-trial conference | B | 0.4 | $1,176 |

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|---|---|---|---|---|---|
| 34 | 15 | Preparation for and appearance at first pre-trial conference | B | 0.5 | $1,470 |
| 35 | 15 | Preparation for and appearance at second pre-trial conference before Dunningham J | B | 0.5 | $1,470 |
| 36 | 30 | Defendant's preparation of briefs for preliminary questions hearing | B | 2.5 | $7,350 |
| 37 | 31 | Defendant's preparation of authorities and common bundle for preliminary questions hearing | B | 2.5 | $7,350 |
| 38 | 33 | Preparation for preliminary questions hearing | B | 3 | $8,820 |
| 39 | 34 | Appearance at preliminary questions hearing for principal counsel | | 1 | $2,940 |
| 40 | 35 | Second counsel at preliminary questions hearing | | 0.5 | $1,470 |
| 41 | 30 | Defendant's preparation of briefs for trial | C | 5 | $14,700 |
| 42 | 32 | Defendant's preparation of authorities and common bundle | C | 4 | $11,760 |
| 43 | 33 | Preparation for hearing | C | 5 | $14,700 |
| 44 | 34 | Appearance at hearing for principal counsel | | 14 | $41,160 |
| 45 | 35 | Second counsel at hearing (Simon Foote) | | 7 | $20,580 |

| | | | | | |
|---|---|---|---|---|---|
| 46 | 35 | Subsequent counsel at hearing (Cecily Brick) | | 7 | Nil |
| 47 | 36 | Preparation of defendant's costs submissions | | 1 at $3,300 | $3,300 |
| 48 | 29 | Sealing judgment | B | 0.2 at $3,300 | $660 |
| **Total** | | | | | **$277,674** |

**DISBURSEMENTS**

| **Description** | **Amount (GST exclusive)** |
|---|---|
| Filing Fees | $383.00 |
| Photocopying (external) | $4,355.74 |
| Air fares ($4,970.48 less $1,320.02 for Third Counsel's airfares for substantive hearing) | $3,650.46 |
| Taxis/Transport | $1,292.85 |
| Counsel accommodation ($13,968.70 less $4,072.41 for Third Counsel's accommodation for substantive hearing) | $9,896.29 |
| Witness accommodation | $524.34 |
| Meals (as agreed, or as per plaintiff's calculation excluding third counsel) | $791.64 |
| Expert Witness Fees – Christopher Kahanek | $248,434.88 |
| Expert Witness Fees – Dr Nicholas Brooke | $96,448.00 |
| Expert Witness Fees – Scott Vaughan | $13,911.00 |
| Expert Witness Fees – Robert Spence | $45,384.00 |
| Expert Witness Fees – Christopher Stanley | $42,299.47 |
| **Total** | **$467,571.67** |