IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000383
[2018] NZHC 3017

BETWEEN	VIKTOR AND BEATA LIMITED Plaintiff
AND	THE EARTHQUAKE COMMISSION First Defendant
AND	TOWER INSURANCE LIMITED Second Defendant

Hearing: On the papers

Judgment: 20 November 2018

JUDGMENT OF NATION J

Introduction

[1] This is a case in which both parties say they are entitled to costs. The substantive proceedings concerned the plaintiff, Viktor and Beata Ltd, the Earthquake Commission (EQC) and Tower Insurance Ltd (Tower). The plaintiff discontinued its claim against EQC on 31 January 2018. On 9 February 2018, the plaintiff and Tower reached a full and final settlement (including as to costs). Costs were not agreed as between the plaintiff and EQC at the time of discontinuance. The plaintiff and EQC have not been able to agree on costs. The plaintiff now seeks a determination of the Court on costs against EQC.

Background

[2] The substantive proceedings concerned an insurance claim for earthquake damage to a house at 8A Lamorna Road, Queenspark. EQC carried out repairs to the

property in 2013 and made a cash payment of $130,232.43 for the September 2010, February 2011 and June 2011 earthquake sequences.

[3] The plaintiff alleged both that existing repairs were defective and further repairs were required. The plaintiff filed pleadings on 19 May 2016 on two grounds:

(a) A challenge to the validity of EQC's election. The plaintiff sought judgment against EQC for $211,316.98 being three "caps" or payments of $115,000 for each of the earthquakes on 4 September 2010, 22 February 2011 and 13 June 2011, less payments already made by EQC.

(b) For loss arising from defective repair work. The plaintiff sought $25,000.

[4] In its statement of defence dated 11 July 2016, EQC pleaded that on or around 28 April 2016 (before the proceeding had been filed) EQC had paid the plaintiff's mortgagee $130,232.43 in respect of the earthquake damage to the dwelling, and that the total amount EQC had paid in respect of the 22 February 2011 earthquake was the statutory "cap" or limit on EQC's liability of $115,000.

[5] In the joint memorandum of counsel for the first case management conference, counsel for EQC recorded that it appeared the plaintiff had not appreciated that EQC had already settled its claims by a combination of payment and reinstatement and had not appreciated that EQC already considered the 22 February 2011 earthquake claim to be "over cap".

[6] In June 2017, the proceeding was set down for trial to commence 19 March 2018. In the joint memorandum seeking trial directions, EQC recorded that the plaintiff had failed to seriously contend that the payments EQC had made in settlement of the claims were insufficient to meet EQC's liability.

Discontinuance

[7] On 25 January 2018, two months before the seven-day High Court trial, EQC wrote to the plaintiff outlining that EQC's position before the litigation was, and had remained, that the amount of the damage that occurred in the 22 February 2011 earthquake exceeded EQC's statutory liability and that EQC had settled the plaintiff's

claims to it for earthquake damage. EQC offered $19,311 in reimbursement for the defective repairs already carried out and invited the plaintiff to discontinue. The plaintiff agreed to discontinue the claim shortly after EQC sent its letter.

[8] The plaintiff then settled with Tower insurance, the settlement included payment by Tower of $25,000 for costs.

[9] On 31 January 2018, the plaintiff filed a notice of discontinuance against EQC with the issue of costs reserved.

Plaintiff's position on costs

[10] The plaintiff says it is entitled to costs. It says High Court Rule 15.3, which provides for a presumption that the defendant is entitled to costs upon discontinuance, must be read in conjunction with r 14.2 which states that the successful party is entitled to claim costs. Mr Dwyer for the plaintiff points to earthquake list costs decisions supporting a common-sense approach which focusses on substantial success and the concept of vindication.[1]

[11] The plaintiff says its actions were justified. It was inappropriate to discontinue the proceedings against EQC earlier for two reasons:

(a) The plaintiff faced the risk that Tower would allege that EQC had not paid the full amount in respect of the September and June events (which were under cap) and could therefore challenge apportionments.

(b) Tower accepted no responsibility for redoing repairs.

[12] Counsel submits that EQC's dealings showed a pattern of "deniability, unreasonable delay and mishandling" over a simple issue that could have been settled with payment of a modest sum. The plaintiff alleges that EQC's conduct was unreasonable as follows:

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1 *Driessen v EQC & Ors* [2016] NZHC 1048 at [23], [24] and [50]; *Whiting v EQC and IAG* [2014] NZHC 1736 at [48].

(a) at no point did EQC engage an expert to examine the scopes/ further reports provided by the plaintiff or Tower;

(b) EQC did not send a representative/expert to attend the joint conferral where the experts agreed on a need for a more robust repair strategy than EQC had originally proposed;

(c) EQC never engaged with the plaintiff when genuine attempts were made to clarify what was in dispute regarding the repair works. EQC instead stated that repairs had been identified prior to litigation and the plaintiff had been partially reimbursed for the cost of the repairs;

(d) EQC chose to rely on outdated reports rather than engage in the earthquake list process;

(e) despite EQC's confidence that the plaintiffs did not have a tenable cause of action, EQC did not apply to strike out the claim at any stage.

(f) EQC never directly responded to the plaintiff without prejudice save as to costs letter dated 22 August 2017 which requested payment of $24,966.43 within 10 working days;

(g) EQC's lack of response was the reason for the plaintiff delaying the filing of an amended statement of claim as no amendment was required on the claim against Tower; and

(h) EQC ultimately made the payment for reimbursed wasted repair works as had originally been requested by email on 23 February 2017.

[13] In summary, the plaintiff submits that EQC had relied on out of date engineering and costing reports obtained from prior litigation and argues its failure to engage with the plaintiff and its experts unnecessarily drew out the litigation and substantially contributed to costs. That, along with the fact that the proceedings were discontinued after EQC made a further cash payment, should entitle the plaintiff to costs.

[14] Presumably because the proceedings were against two defendants, and the plaintiff has received a payment on account of costs from one of those defendants, the plaintiff seeks costs against EQC for only part of the costs it would be entitled to on a 2B basis. It however seeks an uplift under r 14.6(3)(b) because of the submitted unreasonableness of EQC's position. Rule 14.6(3)(b) states that increased costs may be payable when a party opposing costs has unnecessarily contributed to the time or expense of a proceeding. With an uplift, the plaintiff seeks 75 per cent of 2B costs in the sum of $24,752.54. Alternatively, the plaintiff seeks 50 per cent of 2B costs in the sum of $16,501.70.

EQC's position on costs

[15] EQC points to the presumption under r 15.23 that a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant unless the Court orders otherwise or a defendant agrees otherwise. EQC states that the presumption is not lightly displaced and the plaintiff has not discharged the burden on it to show that the presumption should be displaced.

[16] In accordance with the presumption in r 15.23, EQC says it is entitled to scale costs of $18,286.00 and disbursements of $205.70.

[17] EQC submits it is well-settled that the r 15.23 presumption will be displaced only "in a clear case" or where the merits are "immediately apparent" and that the Court will ordinarily not conduct a post-discontinuance inquiry into the merits or the reasonableness of the parties' conduct, as doing so is contrary to the objectives behind r 15.23.

[18] EQC rejects the assertion it acted unreasonably or that the plaintiff was ultimately successful. EQC says the plaintiff sought judgment against EQC for $211,316.98 being three "caps" or payments of $115,000 for each of the earthquakes. However, prior to the filing of proceedings, EQC asserted the February 2011 claim was over cap and said it had settled the claims against EQC by a combination of payment and repair work. EQC says the plaintiff never meaningfully challenged EQC on this ground and discontinued this aspect of the claim without success.

[19] EQC conceded that it paid $19,113.14 in January 2018 after EQC's internal review of the repairs. However, it says this cannot be "in any real sense a win". It represented nine per cent of the judgment sum sought by the plaintiff and was paid only because EQC had internally reviewed its previous settlement position.

[20] EQC thus claims that the plaintiff has not displaced the r 15.23 presumption. EQC submits that, in the alternative that the presumption has been displaced, under r 14.2(f) an award of costs should not exceed the costs incurred by the party claiming costs. Here the plaintiff's total costs were $33,003.39. Counsel for the plaintiff has disclosed that Tower paid $25,000 of the plaintiff's costs as part of the settlement between the parties. EQC submits that a maximum of $8,003.39 would be payable and should be further reduced to $6,569.74 by setting off EQC's 2B costs ($1,338) and reasonable disbursements ($95.65) in pleading in response to the plaintiffs first amended statement of claim.

The approach to be adopted

[21] High Court Rule 15.23 provides:

> 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.

[22] EQC has not agreed to dispense with the application of r 15.23. Accordingly, the Court must award to EQC the costs of the proceeding up to discontinuance unless it finds that it is proper to order otherwise.

[23] I approach this matter upon the basis of the principles set out by the Court of Appeal in *Kroma Colour Prints v Tridonicatco NZ Ltd*:[2]

> (a) The r 15.23 presumption obviates any requirement for the defendant to demonstrate that the plaintiff acted unreasonably in commencing and then discontinuing the proceeding. The defendant has the advantage of the presumption even where there has not been such unreasonableness.

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2 *Kroma Colour Prints v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at 975.

(b) Although the r 15.23 presumption is designed to give a certain and predictable outcome upon discontinuance, it may be displaced if the court finds there are circumstances which make it just and equitable that it should not apply.

(c) Although the court is not limited in the factors it may take into account when considering whether the presumption is displaced, generally:

(i) The court will not consider the merits of the respective cases, unless they are so obvious that they should influence the costs outcome.

(ii) The court will consider the reasonableness of the stance of both parties up to the point of discontinuance: whether it was reasonable for the plaintiff to bring and continue the proceeding; and for the defendant to oppose the proceeding. The plaintiff will not be able to avoid the presumption by showing that at one point it had reasonable grounds for believing it would be successful in the proceeding.

(iii) Conduct prior to the commencement of the proceeding may be relevant, for example, conduct by the defendant that precipitated the litigation.

(iv) The reason for discontinuing may be relevant, for example a change of circumstances rendering the proceeding unnecessary. However, it must be clear that the plaintiff would have succeeded had the circumstances (in this case new legislation) not changed: *The Star Trust v Hamilton City Council* [2016] NZHC 821 at [10].

(d) The court's general discretion in r 14.1 as to costs can also override the general principles relating to discontinuance.

[24] In the Earthquake list context, I note the following principles established in this jurisdiction by the Court of Appeal in *Yarrall v The Earthquake Commission*:[3]

1. A discontinuance is ordinarily tantamount to judgment for the defendant.[4]

2. That a plaintiff, having chosen to sue a defendant, should ordinarily bear responsibility for the defendant's litigation expenses.[5]

3. The Court has the discretion to order otherwise where it is just and equitable to do so.[6]

4. The onus is on the discontinuing plaintiff to persuade the Court to displace the presumption in r 15.23.[7]

5. The presumption is not lightly displaced.[8]

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3 *Yarrall v The Earthquake Commission* [2016] NZCA 517, (2016) 23 PRNZ 765, adopted in *Hoju v Earthquake Commission* [2018] NZHC 2138.
4 At [22].
5 At [6].
6 At [12].
7 At [12].
8 At [12].

6. The principles apply equally to proceedings in the Earthquake List.[9]

[25] The plaintiff was unsuccessful with respect to the primary ground of its claim challenging EQC's election. The plaintiff's decision to discontinue its claim against EQC reflects its acceptance that the basis upon which it issued the claim against EQC in the first place was incorrect. It was unsuccessful to a significant extent on the claim it had filed.

[26] The plaintiff was apparently successful regarding one aspect of its claim, the adequacy of the repair strategy. The Court is not able to speculate on the merits of the claimed repair strategy without hearing the extensive evidence of the experts, however, the plaintiff said it would settle for a further $24,996.43 on 22 August 2017. Prior to the discontinuance, EQC paid $19,311 in reimbursement for the defective repairs. EQC says it did so not as a settlement but as a voluntary additional payment. In my view, EQC's further payment is inconsistent with its defence that it had fully settled the claim. Such conduct suggests EQC accepted its earlier position in relation to the quantum paid for repairs was incorrect.

[27] There could have potentially been some problems for the plaintiff if it had discontinued against EQC by wanting to continue with a claim against Tower. Therefore, it cannot be said the plaintiff acted unreasonably in continuing with a claim against EQC. It did continue with the proceedings only up to a point where EQC made a further payment reflecting what EQC then accepted was the appropriate quantum for repairs. Had EQC reviewed its position earlier and made payment accordingly, the proceedings involving EQC and the cost of those proceedings might well have ended much earlier than happened. With EQC's payment of a further sum on account of the claim that was made, there is reason to displace the presumption under a 15.23 that would otherwise entitle EQC to costs. This Court has a general discretion in r 14.1 as to costs which overrides the general principles relating to discontinuance.

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9 At [12].

[28] Given the partial successes and failures of each party in this case, I find that costs should lie where they fall.

Order

[29] I order that costs lie where they fall for the substantive and costs proceedings.

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