IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000818
[2021] NZHC 456

BETWEEN	JOAN MARGARET FRASER SLEIGHT and ALAN LEITHFIELD SLEIGHT Plaintiffs
AND	BECKIA HOLDINGS LIMITED (PREVIOUSLY FR 2012 LIMITED and FARRELL RESIDENTIAL LIMITED First Defendant
	ORANGE H MANAGEMENT LIMITED (PREVIOUSLY HAWKINS MANAGEMENT LIMITED) (In Receivership and In Liquidation) Second Defendant
	IAG NEW ZEALAND LIMITED Third Defendant
	QBE INSURANCE (AUSTRALIA) LIMITED Fourth Defendant

Counsel:	D J Cooper and M J Borcoski for Plaintiffs N S Gedye QC, O V Collette-Moxon and M K Booth for Third Defendant D H McLellan QC, S D Galloway and L Green for Fourth Defendant
Judgment:	10 March 2021

JUDGMENT OF GENDALL J
AS TO COSTS AND INTEREST
(Determined on the papers)

Costs

[1] In a judgment I issued in this proceeding dated 30 October 2020[1] I reserved costs. I then went on to indicate that, in the event, counsel were unable to settle the costs issue between themselves, then memoranda could be filed and, in the absence of any party indicating they wished to be heard on the costs question, I would decide that based on the memoranda filed and the material then before the Court.

[2] Initially, counsel advised that no agreement had been reached on the issue of costs. A significant number of memoranda on costs have since been filed, the latest being a joint memorandum received from counsel for the third defendant IAG and the fourth defendant QBE dated 4 March 2021 and filed 5 March 2021. That joint memorandum indicates that, as between IAG and QBE, they have now settled their respective costs claims and they no longer require this Court to determine those costs. The memorandum confirms there is also no issue as to costs on the various cost applications as between IAG and QBE.

[3] That leaves outstanding the plaintiffs' claim for costs as effectively the successful party, confirmed in my 30 October 2020 substantive judgment.

[4] Here, the plaintiffs seek an order against QBE (and effectively against IAG jointly and severally) for the following:

(a) High Court scale costs totalling $177,180.63 calculated largely on a scale category 2B basis, although in relation to attendances for trial, calculated on a category 3 basis.

(b) Disbursements outlined in a memorandum of submissions totalling $6,814.09.

(c) Expert costs totalling $204,802.61 also outlined in this memorandum of submissions.

---

1 *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851.

[5] As to these matters, I am satisfied r 14.2(1)(a) of the High Court Rules applies here enabling the plaintiffs as the party who largely succeeded in the proceeding being entitled to a payment of costs from both IAG and QBE as the parties who effectively failed as against the plaintiffs. Given this, as I see it, those parties would ordinarily be jointly and severally liable for the plaintiffs' costs, disbursements and experts' costs.

[6] Counsel for the plaintiffs has acknowledged, however, that the plaintiffs did reach an agreement with IAG prior to the trial on a package of financial assistance, given that the plaintiffs were entirely impecunious at the time. In accordance with that agreement IAG contends the plaintiffs agreed to make no claim for costs or disbursements against IAG in relation to the High Court proceeding. This was said to be without prejudice to all other rights which the plaintiffs and IAG respectively might have in connection with the proceeding. No precise details of this financial assistance package are before the Court, however. Costs can only be awarded here, as I see it, leaving these arrangements to one side. If they are relevant, they are matters for the parties to resolve.

[7] The plaintiffs initially, did indicate they were seeking payment of the full entitlement of their costs and disbursements (including expert fees), by way of an order, from QBE. Properly, however, an order also against IAG as being jointly and severally liable with QBE for payment of these amounts is also appropriate and one to be made here. What arrangements QBE and IAG might then have with respect to their relationship with each other is a matter for them.

[8] The amounts I have noted above for costs, disbursements and expert costs claimed by the plaintiffs total $388,779.70. In an updating memorandum for QBE dated 23 February 2021, counsel states that QBE does not oppose the quantum calculation of these costs, disbursements and expert fees at $388,779.49. Also, QBE's counsel confirms that any submissions that IAG may make, opposing this costs calculation by the plaintiffs, are made only on IAG's behalf.

[9] Although it seems clear on IAG's arguments here that, as between the plaintiffs and IAG, the arrangements reached earlier may suggest that IAG might not technically be responsible to the plaintiffs for costs in this proceeding other than in terms of the

earlier agreement reached, counsel for IAG has chosen to advance certain submissions before me with respect to the plaintiffs' claimed costs.

[10] First, the plaintiffs' assessment of costs for the trial on a category 3 basis is challenged. Presumably IAG suggests these should only be calculated on a category 2B basis. I disagree. The plaintiffs' categorisation of attendances at trial on a category 3 basis is entirely appropriate here. This case did involve complex factual and legal issues and involved senior counsel on all sides. The proceedings were significant in terms of the precedential effect they would have on other defective repair cases and the expert evidence was detailed and lengthy. There is nothing in this objection advanced on behalf of IAG.

[11] Secondly, IAG contends that the plaintiffs' right to costs against QBE, in any event, should be reduced by $120,000, reflecting what IAG says is "costs already received" by the plaintiffs.

[12] I reject this contention. This $120,000, is said to be truly "financial assistance" at the time provided by IAG (for its own purposes) to the plaintiffs who, as I understand it, were in some financial difficulty then. As counsel for the plaintiffs has suggested, I accept, for present purposes, this is not payment of an award of costs. Rather, it is properly described as financial assistance for impecunious plaintiffs made for reasons to assist IAG at that time to ensure this proceeding moved towards trial.

[13] These suggestions advanced on behalf of IAG are rejected, as is a second proposal I understand IAG has advanced which is that the plaintiffs' rights to costs against QBE should be reduced by 50 per cent. There is no factual justification for this as I see it in all the circumstances which prevailed in this case.

[14] The conclusion I reach here is clear. I am satisfied that the usual position outlined in High Court Rule 14.14, that the liability of two parties ordered to pay costs is to be joint and several unless the Court otherwise directs, should prevail here. What arrangements might then exist between the parties are matters for them.

[15] In conclusion then on this issue as to the plaintiffs' costs, an award is now made to the plaintiffs against QBE and IAG jointly and severally for:

(a) Scale costs as sought of $177,180.63

(b) Disbursements of $6,814.09

(c) Expert costs as sought totalling $204,802.61

[16] This total award of $388,779.70 is to be paid to the plaintiffs forthwith (less any amounts that may already have been paid by QBE and accepted as payment for these costs) with any arrangement QBE and IAG may wish to make a matter between those parties. I repeat, however, that liability for the full costs, disbursements and expert fees due to the plaintiffs is to be a joint and several liability of QBE and IAG.

Interest

[17] As I noted at [720] – [721] of my 30 October 2020 judgment, the plaintiffs sought interest in this proceeding in their statement of claim. The Interest on Money Claims Act 2016 does not apply to that interest claim because the plaintiffs' substantive proceeding was filed on 6 October 2017 and the Act in question related to claims commenced only after 1 January 2018.

[18] Clause 1 of Schedule 1 of the Interest on Money Claims Act 2016, however, provides that the previous regime under s 87 of the Judicature Act 1908 is to apply.

[19] That s 87(1) provided:

> In any proceedings…for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[20] At all relevant times here the "prescribed rate" was five per cent per annum.

[21] It is noted, too, that the power to award interest under s 87 is discretionary and is to be exercised as the justice of the case requires. The general purpose of the power to award interest is to enable the Court properly to compensate successful plaintiffs for their loss. This involves issues of general principle including factors such as the need for a defendant which has had the use of money which should have been available to the plaintiff to compensate the plaintiff accordingly. Awards of interest generally are not dependent on proof of either the plaintiff's loss or the defendant's gain as it is assumed this has occurred.

[22] In this case and bearing in mind the principles I have noted above, I am satisfied the plaintiffs are entitled to an award of interest against IAG in respect of their claim for breach of contract from the date on which IAG failed to make the payment required under the policy, that payment being the amount to remedy the defective workmanship of Farrells so as to discharge IAG's contractual obligation under the insurance policy. That date, as I see it, was at the latest, the 29 June 2015 date of the Axis report commissioned by IAG and which identified the significant defects. Ten days after that report on 29 June 2015, IAG wrote to the plaintiffs denying any liability for the costs of remedying the defective work and stated:

> State is not a party to the building contract and has no obligations in relation to the defective repair works, other than to benefit from the exclusion of liability agreed to by you and Farrells.

[23] If IAG instead had acknowledged its obligation to pay the costs of the repairs at this time, the plaintiffs would have received payment then and would have been able to complete repairs. They would, therefore, have had the benefit for the past five or so years of a house which was properly repaired and which they could have sold or tenanted if they wished to do so. Instead, the plaintiffs have been required to wait, as I understand it, until, at the earliest, November 2020 to receive a part of the payment which was due to them in June 2015.

[24] As I see the position, it is a matter of fairness and principle that this Court should exercise the discretion under s 87 in favour of making an award of interest to the plaintiffs here. This is to be at the rate of five per cent per annum from 19 June 2015 to the date of judgment on 30 October 2020 to compensate them for the delayed

payment. It is my view that without such an interest award the plaintiffs are not properly compensated for their loss.

[25] In all the circumstances of this case, I reject the opposition argument counsel for QBE and IAG have endeavoured to advance that an appropriate course here is to reject the interest claim because "where damages are awarded based on costs current at the time of trial, then no interest should be awarded calculated on the earlier date."[2]

[26] I do accept, however, that both of the cases I have noted in the footnote, below, *Bowen* and *Tocker & Bayliss*, do provide some support for this argument advanced by QBE and IAG. But it is my view that justice in the circumstances of this case requires that interest should be paid here especially by IAG for the period sought.

[27] A just result is required in this case for the plaintiffs who have been required to live in a defectively repaired home for some years. The factors here which support the view I take are:

(a) Unlike the position in the cases of *Bowen* and *Tocker & Bayliss* noted above, the plaintiffs' claim here against IAG arises in contract under their insurance policy. IAG's policy obligation was to pay for the costs of repair which included all costs that were necessary to achieve the standard required by the policy, which it failed to do. Instead, IAG breached the terms of the policy by refusing to pay amounts payable to the Sleights from, at the latest, June 2015.

(b) Therefore, IAG has been in breach of a direct payment obligation under the policy since June 2015. This was not the case in the *Bowen* or *Tocker & Bayliss* decisions, both of which involved claims of negligence and so the payment obligation arose only upon entry of judgment.

---

2 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA); and *Tocker & Bayliss v Goodwill Holdings Ltd* (HC) Tauranga CP39/87, 5 March 1993.

(c) Next, it must follow the Sleights have been deprived of the money to which they were entitled since 2015. This has meant they have not been able to repair their house over that period and have practically been unable to sell their house for its true value. Those are real and further losses caused, in my view, by IAG's delayed payment for which they should be compensated in order to achieve what I see as a just result.

(d) Lastly, and importantly, it is no answer for IAG to say the damages have been assessed at repair rates which were current in October 2020. The evidence before me as to that was scanty at best and much disputed. Had IAG paid what it was obliged to pay in 2015, the Sleights would have been able to repair their house at that time. The amount IAG is now required to pay means the Sleights will be better able to repair their house in 2021, although with steadily increasing building costs, this may well not be an easy proposition still. The Sleights had been entirely deprived of their contractual policy entitlement for the intervening period. The discretion available in s 87, as I see it, is a means by which the plaintiffs can fairly be compensated for that loss.

[28] For all these reasons an order is now made that the Sleights as plaintiffs are entitled to a payment of interest on the judgment sums awarded to them at the prescribed rate of five per cent per annum with respect to those awards here for breach of the policy contract by IAG from 19 June 2015 to the date of judgment, 30 October 2020, to compensate them for the delayed payment. An order to this effect is now made.

.....
Gendall J

Solicitors:
Saunders Robinson Brown, Christchurch for Plaintiffs
Clark Boyce, Christchurch for First Defendants
Hazelton Law, Wellington for Second and Fourth Defendants
DLA Piper, Wellington for Third Defendant

Copies to:
Nathan Gedye QC, Barrister, Auckland for Third Defendant
Oliver Collette-Moxon, Barrister, Auckland for Third Defendant
Daniel McLellan QC, Barrister, Auckland for Fourth Defendant