IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-001096
[2018] NZHC 2138

BETWEEN	PETRU HOJU and ANDREEA MONICA WILSON Plaintiffs
AND	EARTHQUAKE COMMISSION First Defendant
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Second Defendant

Hearing: 15 August 2018

Appearances: C Halliday for Second Defendant (applicant for costs)
S P Rennie and R C Harris for Plaintiffs (respondents on costs)
(Appearance by First Defendant excused)

Judgment: 17 August 2018

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[COSTS]

Introduction

[1] The plaintiffs' house suffered damaged in the Canterbury Earthquake Sequence in 2010-2011. They lodged claims with both the Earthquake Commission ("EQC") with whom they were insured up to the statutory cap of $100,000 plus GST (per natural disaster event) and Southern Response Earthquake Services Limited ("Southern Response"). Southern Response is the company responsible for settling claims by AMI policy holders. EQC undertook some repairs and by 2014 viewed the repair as complete. Southern Response cash-settled the plaintiffs' claim for earthquake damage to out of EQC scope items.

[2] Thereafter there was disagreement as to the extent of any further repair required. The plaintiffs, on advice, maintained that the entire concrete slab beneath the house was required to be replaced. Such work would have taken the claim above EQC's statutory cap and brought into play Southern Response's liability.

[3] In November 2016 the plaintiffs commenced this proceeding against both EQC and Southern Response. Usual steps (in terms of proceedings on the Earthquake List) followed. Defences were filed. By consent, directions were made for the exchange of experts' reports, the conferencing of experts and their joint reporting. The defendants effected some savings by sharing the briefing and payment of two sets of experts.

[4] By late 2017 there was a stark difference in the position adopted by the plaintiffs and the defendant. This was largely due to the expert advice they had received. The plaintiffs served a repair costing at $472,604. The separate repair costings served by EQC and Southern Response were $12,154.60 and $13,442 owed to respectively. Shortly before those costings were exchanged the plaintiffs had changed their solicitors.

[5] Soon after the exchange of costings, but still in December 2017, Southern Response initiated discussions with the plaintiffs with a view to having the plaintiffs' claim against Southern Response discontinued. Matters relating to Southern Response's costs following discontinuance were not resolved. By May 2018 the plaintiffs had decided to accept that their claim was under the EQC cap. That month they discontinued the proceeding against Southern Response, with costs reserved.

The costs application

[6] The proceeding was determined to be a Category 2 proceeding. Southern Response applies for its costs and disbursements following the discontinuance. It seeks costs on a 2B basis,[1] and its usual disbursements together with full recovery of the fees it paid to its two experts (which reflect in their amounts the fact that they were shared between EQC and Southern Response).

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[1] High Court Rules, Category 2 under r 14.3(1) and band B under r 14.5(2).

[7] The plaintiffs oppose the awarding of costs. Their primary ground is that costs should be determined when the remaining claim against EQC is determined, in the light of the then-known outcome, with the position likely to be that there should be only one set of costs for the two defendants. An alternative proposition contained in the plaintiffs' notice of opposition is that there should be an immediate refusal of costs on the basis that Southern Response unnecessarily instructed its own solicitors rather than sharing with EQC single legal representation.

Legal principles – costs on a discontinuance

[8] Southern Response invokes the presumption under r 15.23 High Court Rules which states:

> **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.

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

[10] I adopt the following principles established in this jurisdiction by the Court of Appeal in *Yarrall v The Earthquake Commission*:[2]

1. A discontinuance is ordinarily tantamount to judgment for the defendant.[3]

2. That a plaintiff, having chosen to sue a defendant, should ordinarily bear responsibility for the defendant's litigation expenses.[4]

3. The Court has the discretion to order otherwise where it is just and equitable to do so.[5]

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2 *Yarrall v The Earthquake Commission* [2016] NZCA 517, (2016) 23 PRNZ 765.
3 At [22].
4 At [6].
5 At [12].

4. The onus is on the discontinuing plaintiff to persuade the Court to displace the presumption in r 15.23.[6]

5. The presumption is not lightly displaced.[7]

6. The principles apply equally to proceedings in the Earthquake List.[8]

[11] For the plaintiffs, Mr Rennie took issue with the description of r 15.23 as creating a "presumption". He referred to a passage in Professor Dal Pont's Australian text *Law of Costs* which states that the (States' and Federal) Rules do not give the opposing party, upon discontinuance, "any presumptive entitlement to costs".[9] If the other aspects of the principles identified in *Yarrall* are applied, I am not convinced that a refusal to view r 15.23 as creating a presumption would alter the outcome of any costs decision. As it is, the Court of Appeal's approach – which expressly identifies a presumption – binds this Court and is to be applied.

The earthquake litigation context

[12] For the plaintiffs, Mr Rennie places emphasis upon the position which has often confronted plaintiffs in earthquake litigation following the Canterbury Earthquake Sequence. As his written synopsis recorded:

> It is often difficult, in the earthquake cases, for an insured to decide whether to join EQC and the insurer. Typically, it depends upon competing views as to the repair strategy which means accurately predicting the amount in issue is difficult.

[13] The Court is entitled to take judicial notice of the difficulty identified by Mr Rennie which has recurred in earthquake litigation. It is a difficulty which cannot be disregarded in the exercise of a jurisdiction which is informed by what would be the just and equitable outcome in terms of costs.

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6 At [12].
7 At [12].
8 At [12].
9 G E Dal Pont *Law of Costs* (3rd ed, LexisNexis, Wellington, 2013) at [14.63]

[14] That said, parties to litigation in which issues requiring expert evidence are involved will almost invariably have to turn to expert evidence to base their decisions both as to whether to proceed at all and, if so, against whom. Many matters of civil litigation are similarly affected. But ultimately, as between the parties, it is the parties who generally have to accept responsibility for the costs of an unsuccessful outcome. That is reflected both in the primary principle under r 14.2(1)(a) (whereby costs follow the event) and by the presumption under r 15.23, applying to discontinuance in particular.

[15] The plaintiffs' decision to discontinue their claim against Southern Response reflects their acceptance that the basis upon which they issued their claim against Southern Response in the first place was incorrect. That is not a criticism of the plaintiffs who, in their decision to proceed against Southern Response, appear to have acted on expert advice. Their discontinuance means they must have subsequently come to the view that their previous advice could no longer be relied upon. As between the parties when it comes to determination of costs, it is the plaintiffs who must accept responsibility for what has turned out to be an unsuccessful outcome. Southern Response throughout rejected the proposition that the claim was over cap.

[16] As a second factor involved in the choice confronting the plaintiffs, Mr Rennie, in his written submissions, suggested that the Court should take into account the plaintiffs putting their position prior to the proceedings to Southern Response and receiving no response. That submission was based on a statement in the affidavit of one of the plaintiffs (Andreea Wilson) in her opposition affidavit. Ms Wilson stated that her solicitor had written to Southern Response on 29 July 2016 requesting Southern Response to review EQC's repair strategy. In the letter, the lawyer noted that the foundation was a rebuild and that it was anticipated that costs would exceed the EQC cap. Ms Wilson then deposed: "Southern Response did not respond".

[17] That evidence led Southern Response to file a reply affidavit of Allan Bultitude, a claims specialist at Southern Response. Mr Bultitude exhibited an extensive chain of email correspondence between Southern Response and the plaintiffs' solicitors. It began on 2 August 2016 with an acknowledgement of receipt of the lawyer's letter of 29 July 2016. Southern Response requested further

documentation. It culminated, several email exchanges later, with a substantive reply dated 9 September 2016 in which Southern Response rejected any liability for the costs of repair.

[18] Accordingly, contrary to the import of Ms Wilson's evidence and Mr Rennie's initial submissions, it cannot be suggested that Southern Response had left the plaintiffs in any doubt as to Southern Response's position prior to the commencement of the litigation.

[19] As a third factor involved in the situation which confronted the plaintiffs, Ms Wilson deposed that there was around the time the proceedings were issued "a lot of talk about time limitation". She explained that the plaintiffs' then-lawyers recommended the filing of the proceedings in September. She deposed that there was no option other than to file.

[20] Ms Halliday for Southern Response submits that limitation issues did not in fact arise and therefore did not necessitate the joining of Southern Response to the proceeding in 2017. Southern Response had publicly announced twice in the course of 2016, before this proceeding was issued, that it would not rely on a limitation defence for claims arising out of the Canterbury Earthquake Sequence for any court proceedings that were to be filed before 4 September 2018. In short, there was no imperative to join Southern Response at that point. This would clearly have been understood by the plaintiffs' then-counsel who were regularly involved in matters in the Earthquake List.

[21] I find that limitation pressures did not reasonably require the plaintiffs to join Southern Response when they did. The joinder of Southern Response was clearly because the plaintiffs were definitely asserting that the cost of repairs was such that Southern Response would be liable for repair costs in a significant sum.

Failure of Southern Response to have joint representation with EQC

[22] Mr Rennie submitted that Southern Response should not be awarded costs because it did not need to be represented separately from EQC. He characterised the costs of Southern Response's separate representation as an "indulgence" for which the

plaintiffs should not have to pay. He noted in support of the submission that EQC and Southern Response had in fact joined together in instructing their experts.

[23] Mr Rennie was implicitly invoking r 14.15 High Court Rules. Under that rule the Court must not allow more than one set of costs between defendants if they defended the proceeding severally and it appears to the Court that they could have joined in their defence. There is a proviso in the rule in the event that it appears to the Court that there is good reason to award separate costs.

[24] I am not satisfied that both defendants could have appropriately joined in their defence. Mr Rennie refers to points in Southern Response's statement of defence in which Southern Response, when pleading its defence in December 2016, expressly referred to its understanding, based on EQC's assessment, that the policy would not respond to any claim for earthquake damage for a number of reasons. Mr Rennie submits that with that commonly held basis for the defences of the two defendants, there was such a commonality of interest that there should have been joint representation. Mr Rennie submits that that conclusion is reinforced by the fact that both defendants are "Government controlled".

[25] In fact, the two defendants are distinct entities, one with statutory responsibilities, the other with contractual responsibilities. Southern Response's liability would come into play only if EQC's cap were exceeded. There was the potential for conflict between the interests of the two defendants, particularly having regard to Southern Response's pleaded position that the cost of any defective repair work had to be undertaken by EQC regardless of the statutory cap. The fact that on some particular matters which called for expert evidence the defendants might identify no conflict and might choose instead to instruct a common expert does not detract from the appropriateness of their having engaged separate representation. That step might rather be seen as a straight-forward exercise in minimising costs where it could appropriately be achieved.

The option of awaiting the outcome of the claim against EQC

[26] In his synopsis Mr Rennie submitted that in any event the determination of costs as between Southern Response and the plaintiffs should await the outcome of the remaining claim against EQC. He put it this way:

> If, as the plaintiffs allege, the earlier repair was defective, then EQC will be liable. The extent or outcome is unknown at present. But there is the prospect of the plaintiff being successful against EQC and not against Southern Response. In that event, the usual rule that costs follow the event is subject to the Court making *Bullock*[10] and *Sanderson*[11] orders to achieve overall justice.[12]

[27] I do not recognise in this proceeding any prospect that the Court would later entertain the making of a *Bullock* or *Sanderson* order in the event the plaintiffs' claim against EQC succeeds. The difficulty for the plaintiffs is that on the evidence their claim against Southern Response was doomed to fail once the physical evidence was reliably assessed. There is no basis upon which the Court could find it appropriate that EQC should bear a costs responsibility for the plaintiffs' decision to proceed on the basis that their claim exceeded the statutory cap.

Outcome on incidence of costs and disbursements

[28] The plaintiffs have not satisfied me that the primary rule in r 15.23 should be displaced. There will be an order as to the payment of costs and disbursements.

[29] In reaching this conclusion I have not overlooked the evidence of Ms Wilson as to the impact of the unrepaired home upon herself and her husband. In particular, I have not overlooked the significant health effects which Ms Wilson has suffered. While Ms Wilson understandably included that information in her evidence, Mr Rennie responsibly did not submit that in relation to this civil litigation it would be appropriate to alter the otherwise appropriate incidence of costs on account of the distressing personal circumstances identified by Ms Wilson.

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10 Named after *Bullock v London General Omnibus Co* [1907] 1 KB 264.

11 Named after *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

12 Rule 14.14 High Court Rules provides that the liability of each of two or more parties ordered to pay costs is joint and several, unless the court otherwise directs. The shorthand *Bullock* and *Sanderson* refer to costs orders made between a successful and an unsuccessful defendant to achieve overall justice as between the plaintiff and two such defendants: see *Ritchie v Earthquake Commission* [2017] NZHC 1242 at [40].

The quantum of costs

[30] Southern Response sought 2B costs upon the basis of the following table:

TABLE A

Item	Description	Allocation	Units	Cost
2	Commencement by defendant	2	1	$4,460.00
10	Preparation for first case management conference	0.4	1	$892.00
11	Filing memorandum for first or subsequent case management conference	0.4	5	$4,460.00
20	List of documents on discovery	2.5	1	$5,575.00
21	Inspection of documents	1.5	1	$3,345.00
	Sub-total			$18,732.00
	Disbursements			
	Filing fee			$110.00
	Miyamoto invoice dated 28 February 2017 (INV-50015)			$2,222.37
	Miyomoto invoice dated 31 March 2017 (INV-52065)			$1,593.48
	Golder invoice dated 15 May 2017 (INV 49156)			$9,129.94
	Miyamoto invoice dated 31 May 2017 (INV-57915)			$1,091.07
	Miyamoto invoice dated 30 June 2017 (INV-59018)			$1,493.57
	Miyamoto invoice dated 31 July 2017 (INV-51285)			$1,904.80
	Golder invoice dated 31 July 2017 (Inv 49769)			$1,550.98
	Miyamoto credit dated 21 August 2017 (CN-61285-CR)			($197.65)
	Miyamoto invoice dated 31 August 2017 (INV-64865)			$694.32
	Miyamoto credit dated 17 November 2017 (CN-6874CR)			($1,725.01)
	Sub-total			$17,867.87
	TOTAL			**$36,599.87**

[31] The general approach of that calculation is understandable. However, each attendance has been calculated by reference to band B.[13] For four of the conference memoranda band A was more appropriate and I so determine. Similarly, the claim for a list of documents is based on a 2B calculation. The parties in fact agreed to informal discovery without the requirement for a sworn affidavit. Southern Response has not disclosed the list it provided in relation to discovery. Given that Southern Response's part in the investigation of claims had been secondary to EQL's, the best assessment is that a comparatively small amount of time would have been required for Southern Response's list or Band A is therefore appropriate. I so determine.

[32] The consequence is that two items of costs claimed by Southern Response are reduced (respectively from $4,460 to $2,676 and from $5,575 to $1,561).

[33] The costs claimed are otherwise appropriate, with the total costs to be allowed, therefore, $12,934.

The quantum of disbursements

[34] With the exception of the filing fee on the statement of defence, all the disbursements claimed by Southern Response are for the fees paid to its experts (as evidenced by invoices exhibited). All the disbursements claimed qualify as "disbursements" in terms of r 14.12 High Court Rules. While Mr Rennie submitted that aspects of the recorded attendances, especially the number of persons working on the assignment, were unreasonably incurred and charged for, I find nothing unreasonable either in the evident delegation of aspects of the work or in the totality of the invoices fees. The defendants were facing a significant claim (ultimately quantified by the plaintiffs at $472,604). They were entitled to ensure that their experts undertook a thorough investigation and analysis.

[35] What has been incorrectly claimed by Southern Response is the GST content of each disbursement. It should have been excluded.[14]

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13 Under r 14.5(2)(b).

14 *New Zealand Venue & Event Management Ltd v Worldwide NZ LLC* (2016) NZTC 22-058 at [17].

[36] Mr Rennie submitted that, because Southern Response and EQC shared experts, the determination of disbursements as between the two defendants should be held over. I do not consider that appropriate. Southern Response has claimed only for its share of expenses. Disbursements, as with costs, should follow the event.

Orders

[37] I order that the plaintiffs pay to the second defendant:

(a) costs which I fix in the sum of $12,934.00;

(b) disbursements which I fix in the sum of $15,537.28.

Associate Judge Osborne

Solicitors:
Rhodes & Co, Christchurch
DLA Piper, Auckland