IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-987
[2014] NZHC 2763

BETWEEN	STEPHEN CHARLES RYDE AND CONCEPCION ARGUTA RYDE Plaintiffs
AND	THE EARTHQUAKE COMMISSION First Defendant
	IAG NEW ZEALAND LIMITED Second Defendant

In Chambers: On papers

Judgment: 6 November 2014

JUDGMENT OF THE HON JUSTICE KÓS
(Costs on discontinuance)

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[1] Mr and Mrs Ryde own a house in Wainoni, Christchurch. It was damaged in three earthquakes in September 2010 and February and June 2011.

[2] The focus of dispute in this case has been whether the cost of repairs is "over cap". That is, that the cost of reinstatement exceeds the Earthquake Commission's (EQC) maximum statutory liability of $100,000 (plus GST, but less a 1 per cent excess). If the foundations of the house needed to be rebuilt, the claim would almost certainly be over cap. In that case IAG's insurance policy would respond.

[3] The Rydes lodged claims for each earthquake with EQC and IAG. EQC took the initial position that all three claims were under cap. IAG took the position that it was not liable to pay anything until it could ascertain the loss was over cap.

[4] By May 2013, more than two years after it initially assessed the house, EQC had paid $3,978.08 for emergency repairs, but nothing more. IAG had paid nothing.

[5] Dissatisfied with this response, the Rydes brought proceedings against EQC and IAG on 15 May 2013. In August 2013 EQC accepted that the February 2011 quake claim reached cap. They paid the Rydes $171,179.20, which plainly reflected loss from more than one event.

[6] There was some dispute whether that amount was sufficient. But on 10 June 2014 the parties agreed that the August 2013 payment settled the Rydes' EQC claims. There was no agreement as to costs. On 9 July 2014 the Rydes filed a notice of discontinuance against EQC.

[7] The usual rule is that costs are awarded against a discontinuing party. It is not invariable however. The Rydes now apply for an award of costs against EQC. EQC opposes that application. It says costs should lie where they fall. It does not seek costs against the Rydes.

Chronology

[8] In order to assess the Rydes' claim for costs, it is helpful to set out the order of events.

[9] On 19 September 2011, an EQC assessor inspected the house. The scope of works document noted damage to the concrete perimeter foundation. The proposed method of repair was filling the cracks with epoxy. It did not require complete replacement of the foundations. EQC estimated repairing the damage would cost $126,718. It appears none of the claims individually were over cap, as that sum related to all three quakes.

[10] In October 2011 the house was referred for repair under the Canterbury Home Repair Programme (CHRP). Mr Brendon Stiven, who manages the CHRP, has sworn an affidavit. He deposes that houses assessed as requiring repairs under cap have generally been referred to the CHRP. Referral also means that it is likely that EQC will exercise its right to reinstate damage, rather than make a cash payment to settle the claim. Apparently however it does not mean EQC has made a final determination that the claim is under cap. That final determination takes place

during a joint inspection between the CHRP contractor, Fletcher EQR, and the homeowner.

[11] Mr Stiven deposes that the volume and complexity of Christchurch earthquake claims has meant that process can take a very long time. EQC is attempting to manage over 470,000 claims, affecting approximately 170,000 properties. As Mr Stiven notes, EQC's claim exposure (in terms of individual insurance exposure) has been exceeded only in the Hurricane Katrina disaster in the United States. EQC has had to grow its Canterbury office from 22 personnel to over 1200.

[12] Back to the Rydes. Nothing much appears to have happened for nearly a year. In August 2012, the plaintiffs opted out of the CHRP. In November 2012, Mr Bert Tijsen of EQC sent the plaintiffs an un-costed scope of works for the purpose of obtaining quotes. It appears to be the same as that produced in September 2011.

[13] On 15 May 2013 the plaintiffs filed these proceedings. They claimed the necessary repairs (including new foundations) would cost $524,147. From EQC, they claimed $298,372 (two under cap amounts for September 2010 and June 2011, and one full cap amount for February 2011) plus $50,000 in general damages.

[14] On 4 June 2013, Mr Tijsen produced a new scope of works. The repair method for the concrete perimeter foundation had now changed to record "Structural damage… Remove dispose replace ring foundation… 50lm".

[15] On 17 June 2013 Mr Steven Horne, an EQC assessor, visited the house. He found that EQC had incorrectly assessed the house on 19 September 2011. Damage to the foundations meant the floor slope exceeded the maximum allowable under Department of Building and Housing guidelines. Either there had been hogging (lifting) of piles in the centre of the house or settlement of the concrete perimeter foundation due to the weight of the brick exterior walls. More than 30 per cent of the foundations and piles required replacement, which under the Department guidelines meant 100 per cent of the foundations and piles should be replaced.

[16] Mr Stiven deposes that after this assessment, EQC came to the view that the damage would likely be over cap. On 5 July 2013 in its statement of defence, EQC denied that it was liable for the sums claimed by the plaintiffs, saying:

> The first defendant is reviewing the extent of natural disaster damage to the residential building, and is also reviewing these apportionment figures.

[17] On 18 July 2013 EQC said in a memorandum to the Court:

> EQC is currently reviewing the damage to the property and its apportionment between the earthquake events. However it has indicated that it expects some of the damage suffered to exceed the EQC cover.

[18] On 25 July 2013 Wylie J recorded in a minute that:

> [I]t is likely that EQC will reassess the claim at $210,000…
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> The majority of the claim is apparently attributable, according to EQC, to the February quake. Once the caps are applied, it seems likely that EQC will be making a payment of approximately $170,000 to the plaintiffs. EQC anticipates that that payment will be made in approximately six weeks' time.

[19] On 6 August 2013 EQC paid the plaintiffs $171,179 on top of the emergency repair payments. A total of $175,157. EQC's letter of 11 September 2013 stated EQC's assessment of the total repair cost as $210,992. That amount apportioned 77.33 per cent of the damage to the February 2011 earthquake, meaning that particular claim was over cap.

[20] The plaintiffs did not accept that the amount paid settled their claim. Geotechnical engineering reports were obtained. On 23 October 2013 EQC accepted that it had omitted to allow for a foundation appropriate to a TC3-zoned site. EQC revised the total cost of repairs up further, to $264,510. But it did not make any further payments to the plaintiffs.

[21] Eventually, in June 2014 the plaintiffs accepted that EQC's August 2013 payments fulfilled its obligations. On 9 July 2014 the plaintiffs discontinued their proceeding against EQC.

[22] The plaintiffs and IAG then agreed that the property was uneconomic to repair and a total rebuild would be required. Settlement with IAG has not yet occurred.

Legal principles

Rules

[23] Under the High Court Rules, the plaintiffs bear the onus of displacing the presumption that they must pay the defendants' costs:[1]

> **15.23 Costs**
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> 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.

[24] The relevant principles are summarised in *McGechan on Procedure*:[2]

> 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.
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> (a) Although the Court is not limited in the factors it may take into account when considering whether the presumption is displaced, generally:
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> (b) The Court will not consider the merits of the respective cases, unless they are so obvious that they should influence the costs outcome.
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> (i) The Court will consider the reasonableness of the stance of both parties: whether it was reasonable for the plaintiff to bring and continue the proceeding, and for the defendant to oppose the proceeding up to the point of discontinuance.
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> (ii) Conduct prior to the commencement of the proceeding may be relevant (for example, if any conduct by a defendant precipitated the litigation), as may be the reason for discontinuing (for example, a change of circumstances rendering the proceeding unnecessary).

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1 High Court Rules, r 15.23.

2 Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR15.23.01], citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 and *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [10]-[12].

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

Case law

[25] In *Carmel College Auckland Limited v North Shore City Council* Venning J was confronted with a claim in which a secondary school had demolished and rebuilt six classrooms and four science laboratories.[3] The Council assessed a development contribution payable by the school of $102,540. In separate proceedings brought by a non-party, the High Court held in March 2007 that the development policy was inconsistent with the requirements of the Local Government Act 2002. The Council suggested that the dispute with the school then be placed on hold while it reconsidered its policy. In August 2007 the school asked the Council to accept that the assessments were unlawful. If a response was not received within 14 days, it would commence judicial review proceedings. The Council did not respond. The school issued proceedings in late September 2007. A defence was filed, and the proceedings were allocated a fixture for April 2009. In the meantime, the Council consulted the community as part of its 2008-09 Draft Annual Plan Consultation Process. As a result of that it changed its policy. Development contributions were no longer payable by the school, and credit notes were issued. The school discontinued its judicial review proceedings, but sought costs. Venning J said:[4]

> While counsel for the respondent is strictly correct that the merits of the plaintiffs' claim have not been determined, the practical effect of the subsequent decisions made by the Council to change its policy and give the new policy retrospective effect is that the development contribution has been set aside. Given the change in policy the development will not and cannot be the subject of a development contribution. To that extent the practical situation is that the plaintiffs' have achieved the result they sought in issuing the proceedings.

The Judge considered that the school was prima facie entitled to costs as a successful party. There was no reason to reduce those costs and the school was awarded costs of $13,840.

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3 *Carmel College Auckland Limited v North Shore City Council* HC Auckland CIV-2007-404-5894, 20 January 2009.

4 At [19].

[26] The decision in *Carmel College* was, however, distinguished by Collins J in *F v Minister of Internal Affairs*.[5] That case concerned judicial review proceedings against a decision of the Minister of Internal Affairs to cancel the plaintiff's New Zealand passport. Before the hearing the Minister revoked his decision to cancel the passport. The plaintiff then discontinued and sought costs. Collins J held that it was not a case where the merits were obvious, and he did not consider it appropriate to express a view on the apparent strengths or weaknesses of the parties' respective positions.[6] The Court could not say that the decision to revoke the earlier decision to cancel the passport was prompted by perceived merit in the plaintiff's case. The Minister himself said it was an exercise of independent judgement based on new information that the plaintiff no longer posed a security risk. Collins J resolved to leave costs lying where they fell. It is not clear from the judgment whether that position was supported by the defendant, but it does not seem that the defendant sought costs on the discontinuance. So probably it was.

[27] The next relevant case is a short decision of my own in *Van Limberg v Earthquake Commission.*[7] In that case proceedings were issued by the plaintiff some 28 months after the February 2011 earthquake damaged his house. The plaintiff claimed payment from EQC of $113,850 pursuant to ss 18, 27 and 29 of the Earthquake Commission Act 1993. The proceedings were filed in June 2013. EQC denied such liability in its statement of defence. At an issues conference in August 2013 EQC indicated that it believed the natural disaster damage involved would exceed EQC's cover and that it would therefore settle the claim. Four days after the issues conference EQC paid the plaintiff $84,375. That was less than the sum claimed. But it was the right sum payable because the parties now accepted that the house had been insured under s 18(1)(b) of the Act for a specified EQC sum of less than $100,000. The plaintiff did not then discontinue his proceeding against EQC but sought (by way of informal application) an award of costs and disbursements against EQC. I declined to award costs. The decision is distinguishable because it was a case where the proceeding had not been concluded at all, and the application

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5 *F v Minister of Internal Affairs* [2013] NZHC 2117.
6 At [14].
7 *Van Limberg v Earthquake Commission* [2014] NZHC 502.

was simply premature. Costs are awarded only exceptionally where proceedings have yet to be concluded.[8]

[28] The most relevant case is *Whiting v Earthquake Commission*.[9] There, Mander J awarded costs in favour of the discontinuing party (the plaintiffs). There EQC had assessed the plaintiffs' house in July 2011. EQC said the foundations did not need to be replaced.[10] On 22 January 2012 the plaintiffs filed proceedings against EQC and IAG, claiming that the foundations needed to be replaced and the claims were over cap. On 23 January 2012 EQC assessed the house again. The EQC assessor said the foundations did not need to be replaced and that EQC's position was firmly held.[11] On 8 March 2013 EQC filed its first statement of defence. It said all claims were under cap but that it was carrying out further engineering assessments. After receiving further engineering reports, in November 2013 EQC filed an amended statement of defence confirming that position, but saying it was "subject to change upon receipt of additional information".[12] As far as the Court was aware, no further engineering advice was provided to EQC after October 2013. Finally in April 2014, EQC accepted the foundations needed replacing, and the claim was over cap.[13]

[29] Mander J held that at the time the proceeding was brought "the prospect of EQC revising its position was at best minimal".[14] A clear inference was available that bringing the proceedings caused EQC's change of position. Mander J also held that EQC could not point to "the particular advice it received which made it change its mind".[15] The inference was therefore open that by October 2013 at the latest, five months before April 2014, EQC had all the information necessary to conclude the claim was over cap and ought to have conceded liability then.[16] Mander J effectively awarded costs against EQC because it ought to have conceded at least one claim was

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8 See for example r 14.8 of the High Court Rules in the case of opposed interlocutory applications.
9 *Whiting v Earthquake Commission* [2014] NZHC 1736.
10 At [38].
11 At [39].
12 At [14].
13 At [15]-[16].
14 At [51].
15 At [45].
16 At [45].

over cap in October 2013. He did so, rather than finding that the merits of the claim were obvious from the time of filing.

Relevant questions

[30] In light of these authorities, it is helpful to ask six questions:

(a) Was it reasonable to bring this proceeding?

(b) Was it reasonable for EQC to defend this proceeding?

(c) Why were the proceedings discontinued?

(d) Were the merits so obvious that they should influence the costs outcome?

(e) Have the plaintiffs displaced the r 15.23 presumption?

(f) Does the outcome represent vindication of the plaintiffs' commencement of proceedings?

Was it reasonable to bring this proceeding?

[31] I find that it was reasonable for the plaintiffs to bring this proceeding.

[32] The plaintiffs wanted the earthquake damage to their house repaired. They claimed the foundations needed full replacement. EQC concluded in September 2011 that they did not and that the claim was likely to be under cap. It did not revise that position until June 2013, more than 20 months later, and a month after proceedings were filed. EQC now accepts its September 2011 assessment was wrong, although it says it was not a final assessment. It also says that the plaintiffs' decision to opt out of the CHRP scheme in August 2012 delayed the final assessment, which would have occurred as part of that programme. However I do not think the plaintiffs can be criticised for opting out of a programme that, so far as

they were concerned, was proceeding – as eventually demonstrated – on an incorrect premise because of EQC's flawed methodology.

[33] At the time of filing, the plaintiffs plainly had an arguable claim that EQC had breached its obligation to determine the amount of damage to the house "as soon as reasonably practicable".[17] It was also arguable that EQC had failed to pay the amount due to the Rydes "as soon as reasonably practicable, and in any event not later than one year after the amount of the damage has been duly determined".[18] However, and as I note shortly, a costs decision on the papers is not the place to resolve rights and wrongs under s 29.

[34] The plaintiffs' action in issuing proceedings to vindicate a statutory obligation for payment of a larger sum than EQC was willing to pay, based on its flawed methodology, was plainly reasonable.

Was it reasonable for EQC to defend this proceeding?

[35] For completeness, I note that it was also reasonable for EQC to deny liability for the amounts claimed. That much is apparent from the fact that $348,372 was claimed and slightly less than half of that ($171,179) was then accepted as having discharged EQC's statutory obligations.

Why were the proceedings discontinued?

[36] The plaintiffs wanted their house repaired. Importantly EQC's acceptance in August 2013 that the February 2011 claim was over cap engaged IAG's liability to pay. The practical purpose of the plaintiff's claim was therefore to have EQC accept one or more of the claims were over cap. Once EQC agreed the February 2011 claim was over cap, the plaintiffs' dispute became one with IAG as to the precise cost of repairs.

[37] The claim against EQC was kept alive after the August 2013 payment apparently in the hope that additional amounts were due on the under cap September

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17 Earthquake Commission Act 1993, s 29(4).
18 Section 29(4).

2010 and June 2011 claims. It seems from the eventual discontinuance without further payment that the plaintiffs accept that no further sums were due from EQC.

Were the merits so obvious that they should influence the costs outcome?

[38] This is not a case where the merits are so obvious that they should influence the outcome on costs. Each side had an arguable claim or defence. The plaintiffs at the time of issuing the proceedings, had not received due payment from EQC 23 to 32 months after the earthquake events, and EQC was proceeding on the erroneous September 2011 assessment of the foundations. But on the other hand, the claim against EQC for $348,372 was extravagant.

[39] As far as I can discern, no Court has considered the scope of the timing provisions in s 29(4) of the Act. As I have said, a papers costs decision is no place to resolve the factual issues that might be raised under s 29. It would be wrong for me to "speculate on the strengths and weaknesses of the parties' cases" without cross-examination.[19] It follows that the merits of this case do not influence the costs outcome in a clear sense.

Have the plaintiffs displaced the r 15.23 presumption?

[40] In the circumstances, it is just and equitable that the presumption in r 15.23 not apply. Despite submitting that "the plaintiffs have not discharged their onus to displace the costs presumption", EQC as much as concedes this point later in its submissions:

> EQC submits that against the background outlined above, costs should lie where they fall.

Does the outcome represent vindication of the plaintiffs' commencement of proceedings?

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[19] *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12].

[41] Given I have found the presumption displaced, costs would at least lie where they fall. But the plaintiffs submit that I should go further and order EQC to pay their costs.

[42] Once the presumption is displaced, ordinary costs principles apply.[20] Costs are awarded at the discretion of the Court.[21] The Supreme Court has described r 14.2(a) of the High Court Rules as a "fundamental principle".[22] The rule says:

> … the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds.

The plaintiffs submit that they are in the position of a successful party. They "achieved the result they sought in issuing the proceedings".[23]

[43] Given I do not find the merits obvious, I do not consider the vindication here to be clear cut at all. At best, it is a modest and brief vindication of the initiation, but not continuation, of the proceedings.

[44] I am prepared to infer that the issuing of proceedings propelled EQC into prompt action and that the August 2013 payments – three months after proceedings were issued – were at least partly a consequence of their issue. I accept that EQC's position here was not intransigent. But it is quite unclear when it might have made its final assessment but for the issue of proceedings. A correct and final assessment probably should have been made earlier in time. The plaintiffs cannot be blamed for that evaluation becoming so protracted. And EQC's initial methodology for repair was flawed. Earlier recognition of that fact would have seen the plaintiffs' entitlements paid earlier.

[45] On the other hand, the payments made in August 2013 did meet EQC's obligations. And they were substantially less than the comparatively extravagant sums in fact claimed by the plaintiffs.

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20 See *Carmel College Auckland Ltd v North Shore City Council* HC Auckland CIV-2007-404-5894, 20 January 2009; Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR15.23.03].

21 High Court Rules, r 14.1.

22 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7].

23 *Carmel College Auckland Ltd v North Shore City Council* HC Auckland CIV-2007-404-5894, 20 January 2009 at [19].

[46] The just course in the exercise of my discretion to award costs is to grant the plaintiff half its costs on a category 2 band B basis, together with reasonable disbursements, up to the point at which EQC paid the sums which the plaintiffs ultimately accepted met EQC's statutory obligations. That is, up to 6 August 2013. Thereafter, costs will lie where they fall. The award is as to 50 per cent only because the plaintiffs' claim against IAG remains live.

Result

[47] The plaintiffs' application for costs is granted to the extent of 50 per cent of costs calculated on a category 2, band B, basis up to 6 August 2013 (together with their reasonable disbursements up to that point also).

[48] The plaintiffs will have their costs in relation to this application also.

[49] The final amount payable shall now be agreed in accordance with this judgment or be fixed by the Registrar.

Stephen Kós J

Solicitors:
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Chapman Tripp, Wellington for First Defendant
Gilbert Walker, Auckland for Second Defendant