IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-001024
[2019] NZHC 349

BETWEEN	RACHEL MARY HOOD Plaintiff
AND	EARTHQUAKE COMMISSION Defendant
AND	IAG NEW ZEALAND LIMITED Second Defendant

Hearing: 5 February 2019

Appearances: G D R Shand and A Mackey for Plaintiff
K Rouch for First Defendant

Judgment: 5 March 2019

JUDGMENT OF DUNNINGHAM J

A The defendant's application for review is allowed and the costs award of $3,345 against the defendant is set aside.

B Extension of time is granted for plaintiff to bring an application for review.

C The plaintiff's application for review is dismissed.

D The plaintiff is to pay the defendant costs on her costs application to the High Court on a 2A basis plus reasonable disbursements.

D The plaintiff is to pay the defendant costs on this application on a 2A basis plus usual disbursements.

Introduction

[1] A key principle of the High Court Rules 2016 costs regime is that, so far as possible, the determination of costs should be "predictable and expeditious".[1]

[2] That principle is particularly important in cases managed in the High Court Earthquake List. The List is intended to see earthquake cases dealt with as swiftly as the Court's resources permit. It encourages early resolution of cases by getting the parties' respective experts together to refine and isolate points of genuine difference with a view to shortening trials and, where possible, reaching settlement.

[3] Because this process will usually result in an agreed settlement, it is important, too, that parties have clear expectations about what costs are likely to be awarded should the Court have to determine costs. That will mean that these, too, can more readily be settled without Court intervention.

[4] This application for review involves a modest costs award of $3,345 against EQC. However, the applicant, EQC, considers that in awarding those costs the Judge erred in principle and acted inconsistently with other decided cases on costs in earthquake cases. EQC says that it is important that costs decisions in earthquake cases are consistent and predictable in order to assist parties in achieving settlement of such cases.

[5] The plaintiff, Ms Hood, opposes the application for review. She says the award of additional costs (over and above that paid voluntarily by EQC) was not erroneous. She also asks the Court to consider her "cross-application" for review of the Judge's decision to only award the plaintiff 50 per cent of 2B costs because she settled against the second defendant, IAG New Zealand Ltd (IAG), without seeking costs from it.

---

1 High Court r 14.2(1)(g).

The costs decision

[6] The award of $3,345 in additional costs against EQC was given in a decision dated 12 September 2018 following settlement of Ms Hood's claim for earthquake damage to her home.[2]

[7] EQC's initial assessment was that it would cost $10,729 to repair Ms Hood's home. That was not accepted, and Ms Hood issued these proceedings in October 2016 against both EQC and her insurer, IAG. The defendants jointly sought further engineering advice which concluded that a full rebuild was required at a cost of $438,292.63. Once EQC paid its assessed statutory liability, IAG immediately settled by paying the balance of that sum.

[8] Ms Hood's settlement with IAG was on the basis that costs would not be paid. She sought payment of her costs of $31,049.45 (comprising legal costs of $21,631 and disbursements of $9,418.45) from EQC alone.

[9] EQC paid $12,179.37, being its calculation of 50 per cent of scale costs under the High Court Rules and 50 per cent of disbursements claimed. Ms Hood sought payment of the balance, being $18,870.08, from EQC.

[10] The Associate Judge was not prepared to make a finding that attributed all blame for the delay in payment and the need for the proceedings on EQC, as urged by Ms Hood's solicitor, particularly when IAG was not a party to the costs application. He noted that the usual approach in earthquake cases where there are two defendants, is that each defendant will be liable for half the overall costs payable to the plaintiff.[3] Despite accepting that the early assessment by EQC of the cost of repairs was wrong, the Associate Judge was not persuaded to depart the general guideline that each defendant was responsible for 50 per cent of the costs of the case.

---

2 *Hood v Earthquake Commission and IAG New Zealand Ltd* [2018] NZHC 2393.

3 At [5], citing *Deo Gratias Developments Ltd v Tower Insurance Ltd* [2018] NZHC 1881 at [31]-[32].

[11] In relation to the costs claimed for discovery, the plaintiff claimed costs assuming a time allocation for this step of two and a half days, whereas EQC assessed it as one day and accepted responsibility for 50 per cent of that. The Court held EQC had to pay 50 per cent of the costs for discovery based on a Band B time allocation for this step in the proceedings of two and a half days.

[12] The plaintiff claimed two fees for inspection, each at 1.5 days in accordance with a Band B time allocation. However, the Court held the plaintiff could not claim for two inspections, because only EQC provided discovery which required inspection and for that reason the costs of the inspection process devolved solely to EQC.

[13] The net amount payable by EQC, taking into account that EQC had already paid the plaintiff $12,179.73, was $3,345.

[14] Because neither side had been entirely successful, the Associate Judge declined to award costs on the application.

The issues

[15] The parties agree on the issues arising. They are:

(a) Did the Associate Judge err when he ordered that EQC should pay the plaintiff an additional $1,672.50 in respect of the plaintiff's costs for discovery?

(b) Did the Associate Judge err when he ordered that EQC should pay the plaintiff an additional $1,672.50 in respect of the plaintiff's cost for inspection?

(c) If the Court accepts EQC's position, then should EQC have been awarded costs on the plaintiff's costs application?

(d) Should the plaintiff be granted leave to apply for review of the Associate Judge's decision when that application is made out of time?

(e) If leave is so granted, should EQC be required to pay Ms Hood 100 per cent, rather than 50 per cent, of 2B costs?

[16] Of course, both parties also seek costs on this application if they are successful.

Review principles

[17] The principles applying on an application for review of an Associate Judge's decision are settled. The applicant bears the burden of persuading the Court that the Associate Judge's decision was wrong. That requires the applicant to show that the Judge acted on a wrong principle, or failed to take into account some relevant matter, or took into account some irrelevant matter, or was "plainly wrong".[4]

[18] However, as the decision being reviewed is a decision made in chambers, without oral evidence, this Court is not required to defer to the decision of the Associate Judge if it considers it is wrong.[5]

Should costs for discovery have been awarded using the Band B time allocation or a lesser time allocation?

EQC's submissions

[19] EQC says the Associate Judge was wrong to award the Band B allowance of two and a half days for discovery because only 36 documents had to be discovered, and they were discovered informally. That award involved an error in principle and was also plainly wrong.

[20] EQC argues that the principles applying to the determination of costs include that costs should be assessed by applying the daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceedings.[6] In assessing what is a reasonable time for each step, the Court must refer to the bands set out in sch 3 of the High Court Rules, and then exercise its discretion by reference to the bands, which may differ for each step.

---

4 *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481 (HC) at 491.

5 *Teinangaro v Fastway Couriers (NZ) Ltd* HC Napier CIV-2009-441-751, 25 November 2011 at [23].

6 High Court Rules 2016, r 14.2(1)(c).

[21] EQC takes particular exception to the statement in the costs judgment that "the band for costs was stipulated and should be followed".[7] EQC notes that while the proceeding had been allocated category 2 for cost purposes, no band was set and the Associate Judge was plainly wrong in finding that Band B for costs "was stipulated and should be followed".

[22] In this case, a reasonable time for (informally) discovering 36 documents by reference to the bands was nearer to Band A, which would have mandated a time allowance of 0.7 days. EQC had already paid 50 per cent of a one day time allocation and that time allocation was "generally in line with established precedent in the Earthquake List for discoveries of this size". In that regard, EQC refers to four cases where 2B costs were claimed for completing informal discovery, but lesser amounts were allowed. These are as follows:

Decision	Allowance	Reason
Driessen v Earthquake Commission and Southern Response Earthquake Services Ltd[8]	Claimed 2.5 days – 1 day allowed	No formal process or list, only one email plus builder's report (11 pages) discovered.
Zygadlo v Earthquake Commission and Southern Response Earthquake Services Ltd[9]	Claimed 2.5 days – 1 day allowed	22 documents provided.
Ramage v Earthquake Commission and Southern Response Earthquake Services Ltd[10]	Claimed 2.5 days – 1.5 days allowed	No formal discovery, no affidavit.
Oakes v Earthquake Commission and Tower Insurance Ltd[11]	Claimed 2.5 days – 0.7 of a day indicated.	No formal discovery, 25 documents only.

---

7 Above n 2, at [16].

8 *Driessen v Earthquake Commission and Southern Response Earthquake Services Ltd* [2016] NZHC 1048 at [41] and sch 3.

9 *Zygadlo v Earthquake Commission and Southern Response Earthquake Services Ltd* [2016] NZHC 1699 at [61] and sch 3.

10 *Ramage v Earthquake Commission and Southern Response Earthquake Services Ltd* [2016] NZHC 503 at [55].

11 *Oakes v Earthquake Commission and Tower Insurance Ltd* [2018] NZHC 1193 at [15]. EQC had paid for one day but the Court indicated it would have been "minded to determine costs by reference to Band A (0.7 days)".

[23] The combination of the Judge stating that the band for costs had been "stipulated", and the decision to grant the plaintiff 2.5 days when that was not explained and was not a predictable outcome, means the Judge was "plainly wrong".

The plaintiff's submissions

[24] Mr Shand's submission for the plaintiff is that all issues relating to costs are at the discretion of the Court and there should in any event be a reluctance to disturb a decision of the Court on a matter as discretionary as that of costs. In this case, the Court ought not to interfere with the Judge's discretion for such a small amount. That would be contrary to the objective of the High Court Rules which is to secure the just, speedy and inexpensive determination of any proceeding.[12] Mr Shand submits that an award of costs is "not about forensically analysing what each party did and did not do in the proceeding", such as counting the number of documents provided in discovery, as that would be inconsistent with that objective.

Discussion

[25] I consider the Judge was wrong to state that the band for costs was "stipulated and should be followed" in this case. All that had been stipulated was the category of the proceedings as category 2, being proceedings of average complexity. There was no stipulation as to the time allocation, whether Band A, B or C. Given that misunderstanding I must assess the matter afresh.

[26] Rule 14.2(c) requires costs to be determined by, among other things, looking at the time "considered reasonable for each step". Rule 14.5 says the time that is considered reasonable for each step must be determined by reference to the time allocations in sch 3. Specifically, r 14.5(2) provides that a reasonable time for each step must be determined by reference:

> (a) to Band A, if a comparatively small amount of time is considered reasonable; or
>
> (b) to Band B, if a normal amount of time is considered reasonable;
>
> …

[12] Rule 1.2.

[27] I am satisfied that approaching the matter afresh, and applying the rules in this way, the time required for completing this step was more analogous to Band A than Band B. Having regard to the need for consistency with other earthquake cases, I consider a time allocation of one day to be sufficient for this step, noting the limited number of documents which were discovered and the fact that discovery was not required to be completed by formal affidavit. I therefore set aside the Associate Judge's decision on this point and hold EQC's liability for costs on discovery should be on the basis that one day was required for this step, not two and a half days.

Was the costs award for inspection wrong?

[28] The plaintiff claimed two awards of costs for inspection, each at 1.5 days. The Judge noted that where there are multiple parties, "a fee for inspection may properly be claimed and awarded in respect of each defendant".[13] However, the Judge only awarded one allowance for inspection, but allocated all the costs to EQC on the grounds that IAG had given no discovery, so no inspection costs were incurred in relation to that party.

EQC's submissions

[29] EQC submits that the Associate Judge erred in principle and was plainly wrong in deciding that costs for inspection may be claimed and awarded in respect of each party who provides discovery. Where there are multiple defendants there should still be only one award for inspection, although the time allocation may be greater if there is inspection of more than one defendant's documents. EQC also disputes that IAG did not give discovery. IAG did informally disclose all relevant documents and they had to be inspected by the plaintiff. The correct approach therefore was that EQC should only pay 50 per cent of one allowance for the plaintiff's inspection.

---

13 At [17].

The plaintiff's submissions

[30] The plaintiff considers the Judge's award is correct as "the inspection allowance is per inspection". As the plaintiff had to inspect EQC's documents, a full award of costs from EQC for that inspection should be upheld.

Discussion

[31] While the Judge commented on the possibility that a costs claim for inspection could "in principle" be made against each party, that observation was clearly obiter as in this case, the Judge did not allow for multiple inspections. He allowed one award, on a 2B basis, for inspection. However, he required this to be paid entirely by EQC as he understood that IAG did not contribute to the need for inspection because it did not discover any documents.

[32] Given EQC's explanation that IAG did discover documents, albeit informally (which is not contested by the plaintiff), it is clear the Judge proceeded on an erroneous understanding. For this reason, it is proper that the claim for two and a half days for inspection should have been shared between the parties (subject of course to my findings on the plaintiff's cross-claim, which argues EQC should bear all the costs).

[33] I am satisfied that the Judge did not allocate costs on the basis that there should be a separate claim for inspection of two and a half days for each defendant, nor do I consider that would have been appropriate in this case, where it seems, overall, the exercise of inspecting both defendants' documents would only have taken an average amount of time.

[34] As I am satisfied that the Judge apportioned all the costs for inspection to EQC on the mistaken understanding that IAG did not provide discovery, the additional award of costs against EQC of $2,787.50 for inspection is set aside. EQC should only be liable for half the costs of inspection calculated on a 2B basis.

Should I grant leave to hear the plaintiff's cross-review/appeal?

[35] EQC objects to the plaintiff's application for a "cross-review/appeal" of the judgment, noting there is no jurisdiction for an appeal and her application for review

is out of time, as she filed her "cross-review" application outside the five working day time frame for filing an application for review.[14] EQC notes that strict time compliance with time limits under the High Court Rules is required in the case of reviews.[15] The plaintiff has given no reason for filing her application out of time and EQC submits that it should be struck out. In any event, EQC submits that the plaintiff's "cross-review" cannot succeed.

The plaintiff's submissions

[36] The plaintiff submits that the Court has a discretion to extend the time limit for filing an application for review under High Court r 2.32,[16] and the Court in deciding whether to extend the time limit is required to consider where the interests of justice lie. In this case, the delay is short and it was EQC's application for review of a costs award of $3,345 which prompted the plaintiff to review the whole decision. There is no prejudice to EQC by the Court considering the issue, and EQC's liability for costs is an important issue for parties in Earthquake List proceedings. Furthermore, given EQC has applied for review in any event, allowing her application to proceed as well will not cause further delay.

Discussion

[37] I accept in this case that the delay in making the application is brief and it is understandable that the application was not filed until after receipt of EQC's application for review. Both parties consider that these issues have precedent value for resolving issues of costs in Earthquake List proceedings and no party has been prejudiced by the delay in filing the application. For these reasons, I grant an extension of time to the plaintiff to file her application for review of the Associate Judge's decision.

---

14 High Court Rules 2016, r 2.3(2) (repealed), preserved under Senior Courts Act 2016, sch 5, cl 11(3)(b).

15 *Zeng v Cai* [2016] NZHC 503 at [19].

16 Which, while repealed, continues to apply to this proceeding as a consequence of the transitional provisions in the Senior Courts Act 2016, sch 5, cl 11(3)(b).

Was the Judge right to divide the costs 50/50 between EQC and IAG?

The plaintiff's submissions

[38] The key ground of the plaintiff's cross-application is to argue that the Judge was wrong to allocate only 50 per cent of the cost to EQC. Mr Shand submitted that there was no binding rule that EQC could only be liable for 50 per cent of the costs when it was one of two defendants, and the task of the Court is to make an assessment of overall justice between the parties. He accepted that to depart from the 50/50 approach would require something which attaches a greater responsibility to EQC than the insurer. For example, EQC may have "dragged the chain" in the critical assessments of damage and repair.[17] He pointed to the fact that in two other cases, *Zygadlo* and *Ramage*, the Court apportioned costs unequally between EQC and the insurer, because of greater fault on the part of that defendant.[18]

[39] In this case, EQC initially assessed the damage as only $10,729.77. It was understandable therefore that no claim was made from IAG until the plaintiff commenced proceedings in late 2016. Mr Shand submitted that since October 2017 at the latest, EQC knew that IAG wanted to settle based on the rebuild costs claimed, but IAG could not do so until EQC paid its statutory liability and the claim went "over cap". It was not until March 2018 that EQC paid up to the cap and IAG almost immediately paid the agreed balance.

[40] Mr Shand also argued that the effect of the relevant insurance policy meant that IAG could not do anything until EQC had paid. The policy provision relied upon states as follows:

> You are not covered for loss to the extent it is covered by the Earthquake Commission Act or that would have been covered but for:
>
> (1) the deduction of the Earthquake Commission's excess, or
>
> (2) the Earthquake Commission exercising its power to decline a claim for that loss.

---

17 *Deo Gratias Developments Ltd v Tower Insurance Ltd*, above n 3, at [39].

18 *Zygadlo v Earthquake Commission and Southern Response Earthquake Services Ltd*, above n 9; *Ramage v Earthquake Commission and Southern Response Earthquake Services Ltd*, above n 10.

> Where the Earthquake Commission agrees to cover it, but your loss exceeds the Earthquake Commission payment, the most we will pay is the difference between what the Earthquake Commission pays, or would have covered, and your maximum entitlement under this Section 1- Home Insurance.

[41] Mr Shand said this was reflected in IAG's statement of defence, which said that as EQC had assessed the loss as being fully covered by the Earthquake Commission Act 1993, IAG had no liability. Given IAG promptly paid the balance of the rebuild cost when EQC paid up to cap in March 2018, it is a logical inference that IAG would have done so many years ago and without litigation, had EQC promptly assessed the claim and paid up to cap. Mr Shand argues that as EQC was the "sole cause" of Ms Hood incurring legal costs and disbursements, it should be liable for 100 per cent of the costs. He also argues that she should not be left out of pocket.

Submissions for EQC

[42] EQC disputes the suggestion that EQC should bear more than 50 per cent of the costs. It notes that the established approach to costs on discontinuance of Earthquake List cases, as endorsed by the Court of Appeal in *Earthquake Commission v Whiting*, is that where there are two defendants (EQC and an insurer), and the plaintiff has been successful, each defendant is liable for only 50 per cent of the plaintiff's costs, unless there is a justification on the facts for increasing the costs contribution of one of the defendants.[19] EQC says no such justification arises here.

[43] EQC does not consider that the cases relied upon by the plaintiff to warrant a greater position of costs being met by EQC, are relevant. The case of *Ramage* was an exception because it involved an insurer acting unreasonably by adopting a stance it knew was inconsistent with engineering advice it had received. Furthermore, in *Deo Gratias* (which involved a review of the costs award against EQC and the insurer in relation to four separate claims which had settled), Davidson J acknowledged the "well settled guideline" of apportioning costs equally which was applied in Earthquake List cases to avoid the need for parties to come to Court seeking cost orders, and that it was only when differentiating features were identified that it should

---

19 *Earthquake Commission v Whiting* [2015] NZCA 144.

not apply.[20] He noted that *Zygadlo* was not an example of true unequal apportionment as the 50 per cent approach was adopted for all but three steps.

[44] In the case of the Aulds, one of the sets of plaintiffs in *Deo Gratias*, EQC had been ordered to pay 75 per cent of scale costs by the Associate Judge. That percentage was based on an inference which had been drawn from the timing of settlement with the insurer, namely that EQC's litigation stance held up overall settlement. Davidson J, however, rejected this inference. He held that the insurer needed to reach a view of the claim independently of EQC. In the Aulds' case, the insurer had pleaded that the proceedings against it were unnecessary, as the claim was "under-cap"[21] and it denied the costs which the plaintiff said were required to remediate the property. Davidson J also rejected the suggestion that until EQC makes the cap payment, an insurer has no liability, holding that:[22]

> The loss covered by the EQC Act requires objective assessment, not simply EQC's view of that. The insurer is not bound by EQC's subjective view.

[45] For these reasons, Davidson J held that:[23]

> [t]o depart from the 50/50 approach requires something which attaches a greater degree of responsibility to EQC or the insurer, sometimes EQC in the context of the over-cap setting, and in this case the "reliable inference" in my view is not available. … If the evidence was that EQC "dragged the chain" in the critical assessments of damage and repair, so as to "drag" the insurer with it, the position would be quite different.

[46] In my view, there is no material distinction to be made between the position in the Aulds' case which was reviewed in *Deo Gratias*, and the present case. While EQC's initial assessment was plainly deficient, the focus must be on the parties' behaviour once proceedings have issued. IAG filed a statement of defence denying liability in the usual way. That said, IAG and EQC then worked co-operatively to prepare a report responding to the plaintiff's claim. That report was finalised on 20 December 2017. Issues of apportionment between the two earthquakes still needed to be resolved before EQC's liability could be quantified and EQC set out, in a letter

---

20 *Deo Gratias Developments Ltd v Tower Insurance Ltd*, above n 3, at [32].
21 That is, below the statutory limit on EQC's liability.
22 At [37].
23 At [39].

dated 13 March 2018, how it calculated that. IAG and the plaintiff then promptly finalised settlement terms for the balance.

[47] In my view, during the course of the proceedings, there is nothing to attribute disproportionate responsibility for delay on EQC. The two defendants worked together to complete the critical assessment of damage and repair costs. Settlement with both defendants occurred promptly once that assessment had been done. There is nothing to suggest EQC dragged the chain in this regard. I therefore uphold the Associate Judge's decision to award 50 per cent of the costs against EQC rather than 100 per cent as sought by the plaintiff.

Costs

[48] There are two issues for determination in respect of costs:

(a) Should the Associate Judge's decision refusing to award costs on the costs application stand, or should it be adjusted in light of the outcome of this application?

(b) Should costs be awarded on this application?

[49] Rule 14.2 sets out the principles applying to the determination of costs, including that the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds. Unless there are "exceptional reasons", costs should follow the result.[24] Although not always sought or awarded, costs can be awarded on a successful costs application.

[50] As a result of my judgment, the plaintiff's application for additional costs from EQC was entirely unsuccessful. Costs should have been awarded in favour of EQC as it had successfully resisted the claim for an increased costs award. I therefore set aside the Associate Judge's decision to make no award of costs, and I award costs to EQC on a 2A basis, along with the usual disbursements.

---

[24] *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].

[51] Similarly, EQC has been successful in its application for review, and the plaintiff unsuccessful in her cross-application. Again, costs should go to the successful party.

[52] Costs are awarded in EQC's favour on a 2A basis, along with the usual disbursements.

Solicitors:
G D R Shand, Barrister, Auckland
Chapman Tripp, Wellington