IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-000079
[2014] NZHC 1736

BETWEEN	JACQUELINE ELLEN WHITING AND KENNETH JAMES JONES AND RICHARD SCOTT PEEBLES Plaintiffs
AND	THE EARTHQUAKE COMMISSION First Defendant
	IAG NEW ZEALAND LIMITED Second Defendant

Judgment: 24 July 2014

JUDGMENT OF MANDER J
(Dealt with on the papers)

Introduction

[1] The plaintiffs seek an award of costs against the first defendant (EQC). The plaintiffs sued EQC and the second defendant, IAG New Zealand Limited (IAG) alleging failure to settle claims in relation to earthquake damage caused to a house they purchased in May 2012.

[2] The plaintiffs allege that the conduct of EQC in not promptly meeting its statutory obligations necessitated the filing of proceedings. They say these proceedings ultimately succeeded in causing EQC to alter its position and meet its obligations. In turn that enabled the plaintiffs and the second defendant to settle the insurance claim.

[3] EQC resists any award of costs arguing that it has not admitted the claim and denies that it has breached any legal obligations owed to the plaintiffs. Further, that it settled the plaintiff's insurance claims independently of the proceedings and on the

same basis that it would have otherwise settled in the absence of those proceedings having been issued. EQC submits costs should be awarded in its favour upon the discontinuance of the proceedings by the plaintiff.

Factual background

[4] In May 2012 the plaintiffs entered into an agreement for the sale and purchase of a house situated at 64 Garden Road, Christchurch. That agreement became unconditional in June 2012 and was settled in September of the same year. The vendor of the house made claims with IAG and EQC in respect of the September 2010, February 2011 and June 2011 earthquake events. Upon settlement of the sale, the vendors assigned these claims to the plaintiffs.

[5] At the time of the house purchase the plaintiffs were provided with a copy of EQC's scope of works carried out in the wake of each earthquake event. They also obtained expert professional advice which agreed with the EQC assessment after the February 2011 earthquake that new foundations and piles would be required for the house. The plaintiffs' experts advised that the cost to repair the house would be well over EQC's statutory liability of $100,000 plus GST for one or more events.

[6] Mr Brendon Stiven, EQC's manager of the Canterbury Home Repair Programme, has confirmed that inspections were carried out by EQC after each of the earthquakes. He deposes that as a result of these inspections the property was referred to EQC's *Canterbury Home Repair Programme* (CHRP) in October 2012. Mr Stiven explained that the reference of a claim to CHRP indicates that EQC considers it likely that it will elect under s 29 of the Earthquake Commission Act (the Act) to reinstate earthquake damage rather than settle the insurance by payment. Repairs estimated at up to $100,000 plus GST (per earthquake event) are generally referred to CHRP.

[7] Mr Stiven deposed that no final determination of the earthquake damage to buildings referred to CHRP is made until EQC undertakes a joint inspection with the home owner under that scheme. He states that it is not unusual for this inspection to identify damage that has not been picked up in the original post-earthquake inspections, or to result in a conclusion that the damage exceeds the EQC $100,000

limit for a particular earthquake. In the latter situation EQC will settle the claim by payment, otherwise EQC will proceed to repair the earthquake damage under the auspices of Fletcher Construction which project manages repairs under the CHRP.

[8] The plaintiffs requested to opt out of CHRP. Mr Stiven deposed that it is EQC's usual practice upon receiving a request to opt out, to arrange a meeting with the property owner on site for the purpose of discussing the earthquake damage and potential repair strategy. EQC then endeavours to agree a scope of works with the home owner which incorporates any amendments discussed on site. Once there is agreement as to the scope of works, EQC will pay the agreed amount to the customer. It then becomes the customer's responsibility to manage the repairs. As a result of the plaintiffs' decision to opt out, EQC contacted the plaintiffs in January 2013 to arrange an "opt out site inspection". The parties' accounts as to what happened at this stage in the process are at variance.

[9] Mr Richard Peebles, one of the plaintiffs, has deposed that it was in early February 2013 that an EQC assessor came out and inspected the house. His evidence is that this assessor advised that EQC would not be replacing the foundations and that only limited work was required in respect of the concrete perimeter foundation and to the damaged chimneys. As a result Mr Peebles states they were unable to reach agreement as to the scope of the earthquake damage and in the absence of being able to agree as to EQC's obligations they were deadlocked. In the absence of any suggestion that EQC would review its stance, Mr Peebles deposes that he wrote an email to EQC on 20 February 2013 but received no response. A copy of that email however was not exhibited to his affidavit.

[10] Mr Peebles states somewhat confusingly that he "subsequently instructed" his solicitor to file proceedings against EQC and IAG but then deposes that these proceedings were commenced on 22 January 2013 which would be before, on his evidence, he had met with the EQC opt out assessor in early February 2013.

[11] Mr Stiven's evidence relating to the events at this time is that EQC having on or around 5 December 2012 received the plaintiff's request to "opt out", contacted the plaintiffs in January 2013 to arrange an "opt out site inspection". This took place

on 23 January 2013. Mr Stiven deposes that after the inspection one of EQC's engineers was asked to review engineering reports provided by the plaintiffs and advise what further assessment, if any, was required for the purposes of the opt out process.

[12] The parties are agreed that the plaintiffs filed the High Court proceeding against EQC on 22 January 2013, the day before the opt out site inspection. Mr Stiven disputes Mr Peeble's account that the parties were deadlocked and that EQC would not change its position. Mr Stiven deposed that EQC's actions to that point demonstrated a willingness to review the initial assessment in order to determine the extent of the damage and settle the EQC claims in accordance with the established process for the Canterbury earthquakes.

[13] In the initial stages of the litigation the parties obtained further expert engineering and geo-technical advice. The plaintiffs' experts, together with engineers instructed on behalf of EQC and IAG, prepared a schedule of agreed and disagreed matters which was completed on 1 July 2013. The litigation however did not settle and was scheduled for trial commencing 18 August 2014.

[14] In defence of its claim EQC pleaded in its first statement of defence of 8 March 2013 that it had assessed all of the claims as being under cap, but that "EQC is in the process of carrying out further engineering assessment of the property". In a second statement of defence filed in November 2013, EQC confirmed that the earlier under cap apportionment figures were "accurate at the date of the pleading", but that they "may be subject to change upon receipt of additional information".

[15] As a result of discussions between counsel for IAG and the plaintiffs in early April 2014 a proposal was made for the parties to attend mediation. A date of 29 April 2014 was proposed for that mediation. On 22 April EQC advised the figures it had determined it was obliged to pay to settle its obligations under the Earthquake Commission Act 1993 ("the Act"):

(a) $30,942.38 in respect of the September 2010 event;

(b) $70,081.00 in respect of the February 2011 event; and

(c) $6,546.92 for the June 2011 event.

[16] EQC had previously made payments totalling $45,822.05 for urgent repairs for the February event. The effect of this acknowledgment was that EQC accepted that the repairs for the February earthquake were over cap.

[17] Prior to this notification, EQC advised on 16 April 2014 that it was taking instructions on the proposed mediation. Subsequently, on the same day as the provision of the revised figures, EQC informed the other parties it was unable to attend the proposed mediation as senior staff members who would otherwise have attended on its behalf were not available and that EQC's solicitor on the proceeding had another commitment in Auckland. EQC stated however that in light of its amended determination of the EQC payment, its attendance may be considered unnecessary. EQC indicated that if either of the parties (IAG or the plaintiffs) considered there would be some benefit in EQC attending then they should so advise.

[18] Subsequent to the notification of 22 April, EQC received advice from the plaintiffs that they accepted EQC's determination in fulfilment of its insurance obligations. The focus turned to IAG's responsibility for costs of reinstatement, it having now been accepted by EQC that its liability for any one event did exceed the statutory cap of $100,000 plus GST.

[19] Mediation between IAG and the plaintiffs was held on 29 April 2014. The plaintiffs and IAG resolved all outstanding issues and final settlement of matters between those two parties was agreed. As a result no issue of costs arises between the plaintiffs and IAG.

[20] The parties are agreed that EQC has paid the amounts accepted by it pursuant to its obligations under the Act. Although they disagree as to the date of that payment that fact is immaterial for present purposes. The plaintiffs have discontinued proceedings against both IAG and EQC.

Plaintiffs' submission

[21] The plaintiffs submit they have succeeded in their litigation against EQC and that its letter of 22 April 2014 was an acknowledgment that the position EQC had previously taken (that its obligations were under cap) was erroneous. Further, by that acknowledgment, EQC accepted that the plaintiffs had been entitled to bring and pursue their action in respect of which they substantially succeeded. By requiring EQC to acknowledge that the damage to the property was over cap, a position EQC was not previously willing to accept, the plaintiffs were able to settle their claim pursuant to the terms of their insurance policy with IAG. It therefore follows, so the plaintiffs submit, that on a "realistic appraisal of the end result" the plaintiffs have prevailed in the litigation.[1] Had EQC acknowledged that the damage was over cap in January 2013 prior to the commencement of the proceeding, the plaintiffs would not have incurred significant legal and expert fees.

[22] The plaintiffs submit that EQC was obliged under the Act to make any payments due as soon as reasonably practicable and in any event not later than one year after the extent of the damage and its cost had been duly determined. The plaintiffs argue that EQC took its position on the determination of the damage to the house during its inspection of 30 November 2011. That at least since 30 November 2012 it has been in breach of its statutory obligation, its position having remained unchanged throughout this period. Alternatively, the determination of the damage was required to be assessed "as soon as reasonably practicable". If the letter of 22 April 2014 is accepted as that determination it was not, submit the plaintiffs, "as soon as is reasonably practicable" in terms of the statutory duty upon it.

[23] The plaintiffs frankly submit that in the absence of them issuing proceedings, EQC would not have changed its position and that prior to the issuing of their claim, there was no indication that EQC would alter its position. The construction of EQC's pleadings, the plaintiffs submit, could only be interpreted as an attempt to reserve its position and to defer proper assessment indefinitely.

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1 *Packing In Ltd (In Liquidation) v Chilcott* (2003) 16 PRNZ 869 (CA), at [6].

[24] In response to EQC's submission that it was still in the process of assessing the plaintiff's entitlement the plaintiffs submit that such an interpretation of the circumstances is unrealistic. The plaintiffs submit there is evidence that EQC had taken a final position in respect of the extent of the damage and the plaintiffs' entitlements and that EQC should not be allowed to benefit from its prevarication nor avoid its liability for costs with impunity having unilaterally admitted its liability after such a lengthy delay. EQC only reassessed its position after the filing of proceedings by the plaintiff and only after the plaintiffs had completed the majority of their preparation for trial including the filing and serving of witness briefs.

[25] Relying on *North Shore City Council v Local Government Commission*,[2] the plaintiffs submit this is a situation the merits of which are so obvious that it warrants an exception to the usual rule, that a Court will not when considering costs on a discontinuance consider the merits of the parties' competing contentions in the litigation. The plaintiffs have throughout provided EQC with its own reports and it is submitted, co-operated with it in an attempt to resolve the fact that the damage to their property was over cap. Such information should have resulted in EQC acknowledging the correct position well before finally accepting that the damage was over cap nearly a year after the commencement of the litigation.

First defendant's position

[26] EQC submits that its letter of 22 April 2014 does not amount to an admission of the claim made against it. EQC continues to deny that it has breached any legal obligations to the plaintiffs. It is submitted on its behalf that the plaintiffs' insurance claims would have been determined on the same basis whether or not the proceedings had been issued. It emphasises that the amount paid by EQC to settle the claim since the proceedings were commenced, $107,552.30 inclusive of GST and less excess, must be compared to the amount contended for by the plaintiffs in their amended statement of claim, some $188,135.65 more, which was not recovered.

[27] EQC submits that costs should be awarded in its favour relying upon the presumption contained in r 15.23 HCR that a discontinuing plaintiff will pay costs in

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2 *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182, (HC).

the absence of being able to satisfy the Court to the contrary. Alternatively, EQC submits that if costs are not awarded in favour of EQC they should lie where they fall. As a second alternative submission if costs are to be awarded against EQC those costs should be limited to no more than half of the costs that are determined reasonable. The plaintiffs' proceeding involved two defendants and related to essentially the same factual issues. Therefore the costs should be shared between those two defendants.

[28] Relying on r 15.23 HCR, EQC submits that the plaintiffs have not been able to satisfy the Court that in these particular circumstances the normal presumption of costs in favour of a defendant should not apply. It emphasises that the plaintiffs have not succeeded in recovering the quantum claimed, and that the proceedings were issued at a time when EQC was engaged with the plaintiffs and had agreed to review its position regarding the assessment of the damage to the plaintiffs' property. The plaintiffs have been unable to establish that the merits of their case were so obvious as to influence costs, and it contests the proposition that the plaintiffs should be viewed as the "successful" party. Even if the acknowledgement by EQC that the damage to the property placed it over cap was to be considered in such terms, it is submitted the plaintiffs would have received the same insurance settlement from EQC had they not sued but allowed EQC to settle their claim in the ordinary way.

[29] EQC submits that it was reasonable for it to defend the proceedings up to the point that it completed its assessment of the damage. It submits that it did not have an obligation to settle the claims until it had completed its determination of the earthquake damage which did not occur until after the proceedings had been commenced. Ultimately, the plaintiffs accepted EQC's determination when it was completed and abandoned their pleaded claim for a significantly greater payment.

Legal principles

[30] The starting point for consideration of an application for costs by a plaintiff who discontinues a proceeding is r 15.23.

15.23 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.

[31] The learned authors of *McGechan on Procedure* conveniently summarise the relevant principles:[3]

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

[32] The plaintiffs rely upon *Van Limburg v EQC & Ors*[4] where on an unsuccessful application by the plaintiff for costs Kós J observed that where the reason for discontinuance is satisfaction by the defendant of the sum claimed, the plaintiff can reasonably expect the Court to order costs in his favour (unless there was good reason not to bring the proceedings). The Court further noted that payment of the full amount claimed would in effect be an admission as to the merits.

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3 *McGechan on Procedure* (online looseleaf ed, Brookers) at HR 15.23.01, citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973; *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [10] – [12].

4 *Van Limberg v EQC* [2014] NZHC 502.

In that case there had been no filing of a discontinuance and the informal application for costs was declined without prejudice to reconsideration of the issue in that event.

[33] In my view *Van Limburg* does not advance the position beyond the principles previously enumerated and in any event cuts both ways in terms of the competing contentions of the parties. While capable of supporting the plaintiffs' argument that it had substantially succeeded in its claim against EQC, that party is able to point to the considerably lesser sum that was accepted in satisfaction of the claim. Kós J referred to the payment of the full amount as being an admission as to the merits and that was not the case here.

[34] EQC seeks to distinguish the relevance of *Packing In Ltd (In Liquidation) v* Chilcott.[5] While it is correct in its observation that the decision was in the context of assessing identification of the "successful party" on an application for leave to appeal against a standard costs judgment following trial, it still provides useful guidance, at least in terms of what is just and equitable in the particular circumstances. In making that observation I am mindful that the merits of the respective cases where a discontinuance has been filed needs to be obvious before such considerations should be used to influence the costs outcome.

Discussion

[35] The merits of the parties' respective arguments requires consideration of the following questions:

- What was the position as between the parties at the time the proceedings were issued?
- What were the plaintiffs attempting to achieve by issuing proceedings?
- Was it reasonable for the plaintiffs to commence litigation?
- Why did EQC not settle the plaintiffs' claim before April 2014?

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5 *Packing In Ltd*, above n 1.

- Did EQC's settlement of the claim represent vindication of the plaintiff's decision to issue proceedings?

The position between the parties at the time the proceedings were issued

[36] The proceeding was commenced on 22 January 2013. By that time the plaintiffs' claim had been referred to CHRP. As EQC has acknowledged, this meant the claim was likely to be dealt with under s 29 of the Act whereby EQC would reinstate the earthquake damage. Mr Stiven in his affidavit acknowledges a reference to CHRP reflects an initial assessment that the claim is less than $100,000, although further assessment would be carried out prior to final determination and settlement being made. EQC referred the property to CHRP in October 2012. In early December the plaintiffs made a request to "opt out" of the CHRP scheme.

[37] In early 2013 an on-site inspection was conducted of the plaintiffs' property. Some reliance is placed by EQC on the timing of that inspection as part of the ongoing process of review. It is clear however that the only reason the inspection took place at this time was because of the plaintiffs' request to opt out of CHRP and both Messrs Stiven and Peebles in their affidavits refer to this event as an "opt-out site inspection". Mr Stiven refers to the inspection taking place on 23 January 2013 whereas Mr Peebles refers to it occurring in February 2013. Having regard to the formal record keeping of an organisation like EQC I accept Mr Stiven's evidence as to the date the inspection took place. While EQC would like to place emphasis on the fact that proceedings had been filed the day before the inspection, in my view little turns on this.

[38] The inspection was in furtherance of the opting out process and not strictly for the purpose of progressing the overarching dispute between the parties relating to whether the damage to the property was over or under the cap. In any event, the uncontested evidence of Mr Peebles which is not referred to by Mr Stiven, is that the EQC assessor who inspected the house made it plain that EQC would not be replacing the foundations and was of the view that only limited work was required which clearly was going to be under the cap. Mr Stiven's affidavit is also silent as to why the plaintiffs' claim was referred to CHRP for further assessment when the

original scope of works in the wake of the February earthquake undertaken on 15 July 2011, referred to the removal, disposal and reinstatement of the house's foundations.

[39] While I accept that the process of assessment is an ongoing one which will be subject to review, Mr Peebles' account of the position taken by the EQC assessor at the time of the opt out assessment, understandably, gave him no confidence that EQC might change its position. I accept that Mr Peebles timing of the on-site inspection in early 2013 and the issuing of the proceeding is erroneous but it makes little difference. Mr Peebles uncontradicted account of what was communicated to him by the EQC assessor confirmed the position EQC had taken to that point. I also observe that in the absence of any contest as to the representations made by the EQC assessor to Mr Peebles at this time, Mr Stiven's statement in his affidavit that "EQC's actions plainly indicated its intention and willingness to review the initial earthquake assessments in order to determine the extent of the damage and settle the EQC claims", appears to be without foundation. Apart from confirmation that EQC had received two engineers' reports from the plaintiffs which is documented in an EQC record of 5 February 2013 and were passed on to an EQC engineer for appraisal, there is no evidence of any representation having been made to the plaintiffs' that EQC's position would change. To the contrary, the representations made by the EQC assessor at the time of the opt-out-inspection was that EQC's position was firmly held. I therefore conclude that it was not an unreasonable step on the part of the plaintiffs to commence proceedings when they did.

What were the plaintiffs attempting to achieve by issuing proceedings?

[40] The plaintiffs in their statement of claim alleged that EQC was in breach of its obligation under the Act to settle the claim within a reasonable time frame and that it had failed or refused to make payments. The plaintiffs allege that EQC was liable to pay the plaintiffs $341,550 being a capped payment for each of the three earthquake events that damaged the property. More importantly however until EQC accepted that the required repairs were over cap, IAG considered that it had no liability. The plaintiffs therefore had the choice of either accepting EQC's position that the damage was under cap in the hope the engineers' reports would change its

stance; a view which by that time had been held by EQC for some 18 months. Alternatively, the plaintiffs could commence proceedings to challenge that position. The plaintiffs chose the latter course.

Was it reasonable for the plaintiffs to commence litigation

[41] In defence of the application for costs and in support of its own application, EQC submits that it was not reasonable for the plaintiffs to have brought the proceeding without warning and within a matter of days of having agreed to a joint review of the property with EQC. There is no evidence of the parties having agreed to a joint review of the property. Engineering reports were provided to EQC at the time of the opt-out inspection but that was the extent of any hope that the plaintiffs may have held at that stage that EQC would change its position. It is apparent that these reports were passed on to an EQC engineer for his appraisal in February 2013. It was not until April 2014 that EQC acknowledged that the plaintiffs' claim was over cap. That tends to support the plaintiffs' position that at the time it issued proceedings the provision of their engineers' reports would make little difference to the position being taken by EQC.

Why wasn't the plaintiffs' claim settled before April 2014?

[42] The position taken by EQC in its defence of the proceeding was initially that it had assessed all of the claims as being under cap but that it was in the process of carrying out further engineering assessment of the property. Subsequently in its amended statement of defence of November 2013, EQC confirmed that the earlier under cap apportionment figures were accurate, but they may be subject to change upon receipt of additional information. It is therefore apparent that the information already provided by the plaintiffs in the form of their engineers' reports had made no difference to EQC's stance. The decision made by the plaintiffs' to commence proceedings back in January of that year was not premature.

[43] EQC emphasises that the plaintiffs' claim relied upon proving that it had failed to settle their insurance claim "as soon as reasonably practicable" and this needs to be considered in the context of the 700,000 plus claims that EQC must respond to as a result of the Canterbury earthquakes. EQC is entitled to point to the

scale of its task in the face of the unprecedented event of the February 2011 earthquake. I accept that is an overarching consideration which ought not to be forgotten. The realities of attending to the volume of claims which must be managed and EQC's obligation to be even-handed and fair in the resources it allocates to settle these claims is acknowledged. That does not necessarily however absolve EQC's responsibility in the circumstances of a particular case. While regard must be had to the operational environment in which EQC is required to discharge its obligations the circumstances of each individual case must be assessed on its merits in terms of whether EQC has settled the claim as soon as reasonably practicable.

[44] A paucity of information has been provided by EQC as to why it took until April 2014, some 15 months after the commencement of the proceeding for it to recognize that its previous stance was incorrect and that the claim was over cap. Further, no particulars have been provided for the reason for its change of stance from the position taken in its pleading of November 2013 when EQC confirmed that the claim was under cap. By that time, on the information available to me, it had received the plaintiffs' engineering reports, survey advice from a Mr Adrian Cowie, and engineering advice from Spencer Holmes Limited in October 2013. The parties' engineers had prepared a schedule of agreed and disagreed matters in July of that year. Mr Stiven in his affidavit states that EQC had considered the expert material provided by the plaintiffs and that neither it nor its experts had been persuaded that the assessment of damage to the building immediately prior to the proceedings filed was wrong in any meaningful way. Mr Stiven then deposes:

> The expert advice obtained identified a small amount of additional earthquake damage beyond its initial assessments but also reaffirmed EQC's understand [sic] that the foundations had pre-existing damage.
>
> Once EQC had completed its own engineering review, and had engaged with the plaintiffs and experts in terms of the Court's directions EQC calculated the amount of earthquake damage and apportioned the damage across the three relevant Canterbury earthquakes.

[45] Mr Stiven then proceeds to list the amounts calculated which places the claim in respect of the February 2011 earthquake over cap. By that time however the parties were preparing for trial. Until that point the communications from EQC, which is not denied, was that the matter would need to go to trial and that it would

not presently be moving from its position that the damage was under cap. For the purposes of this costs argument EQC has not provided an explanation nor pointed to the particular advice it received which made it change its mind. I accept that there is a difference between what the plaintiffs were claiming EQC was liable to pay and that acknowledged by EQC in April 2014 and finally accepted by the plaintiffs. The reality however was that until EQC recognised that the damage was over cap the insurance claims could not be settled. EQC was aware of that. It is not clear to me on the state of the available information why EQC could not, at a much earlier point in time have come to the conclusion it did in April 2014.

[46] The plaintiffs have sought to place some emphasis on what they consider to be the failure on the part of EQC to actively engage in the mediation of 29 April 2014 and which ultimately produced a settlement of the proceeding as between the plaintiffs and IAG. I do not accept that critique. EQC advised of its position in its communication of 22 April 2014 suggesting that in light of its revised position it did not consider it necessary for it to attend. Of itself that is perhaps an acknowledgment on EQC's part that the nub of the proceeding as it related to it, turned on the question of whether the claim was under or over cap, not on the size of EQC's liability. Be that as it may, EQC further advised that if the parties considered there would be some benefit in it attending they were to be advised accordingly. There is no evidence that either the plaintiffs or IAG required its attendance after receiving EQC's advice.

Did EQC's settlement of the claim represent vindication of the plaintiffs' decision to issue proceedings?

[47] The parties take contrary views as to their respective motives and attitude to the litigation. The plaintiffs contend that but for the taking of the proceedings EQC would have continued to resist the plaintiffs' arguments that their claims were over cap and that it was only as a result of forcing EQC to confront the issue in Court that it achieved EQC's acknowledgment that the damage was over cap. EQC's position is that by initiating these proceedings, the plaintiffs acted in an unnecessarily precipitate manner and effectively "queue jumped". EQC's position is that the plaintiffs' claim was always under review and subject to revisement depending on

the expert advice received by EQC and this is what ultimately happened. The commencement of the litigation was irrelevant to the conclusion ultimately reached.

[48] I have reached the conclusion that the letter from EQC of 22 April 2014 is confirmation of the reasonableness of the plaintiffs' action not only in bringing the proceeding but in continuing with its prosecution. I have already acknowledged that in terms of quantum, the plaintiffs accepted a lower level of liability on the part of EQC than was pleaded. It must be recognised however that once EQC acknowledged that the claim was over cap the extent of that liability was by some margin of secondary importance. While I accept the obligation on EQC to accurately determine its liability by way of rigorous process, the change in its position which the April correspondence represented was significant and came after years of firmly holding a contrary view.

Decision

[49] EQC submits that the plaintiffs were not successful in their claim against it. EQC relies upon the proposition that it was not in breach of its obligations and that as pleaded by the plaintiffs its claim has neither been tested nor determined. In my view however the litigation was based on an allegation that EQC was liable for a claim that exceeded the cap and was in breach of the Act in not within a reasonable time having made such an assessment. Essentially I have concluded that while the plaintiff did not obtain satisfaction from the defendant of the sum claimed, the plaintiffs substantially succeeded when EQC accepted that the damage to the property was over cap thereby triggering IAG's obligation to settle the claim under the terms of its insurance policy.

[50] As the presumption contained in r 15.23 has in the particular circumstances of this case been rebutted, it would be neither just nor equitable for the discontinuing plaintiffs to pay EQC costs. Ordinarily it may be the case that, a plaintiff who has discontinued a proceeding and who has rebutted the presumption under r 15.23 should be rewarded with costs lying where they fall. That is the alternative submission made by EQC in this case. I am satisfied however that such a response would be inadequate in the circumstances.

[51] I am satisfied that the plaintiff should receive an award of costs. I base that conclusion largely on the way this matter has unfolded and the vindication of the plaintiffs' position which was ultimately acknowledged by EQC. The plaintiffs' position was known to EQC prior to the commencement of the proceeding. Court action was not taken until the plaintiffs could reasonably and fairly assume that the prospect of EQC revising its position was at best minimal.

[52] The plaintiffs have sought scale costs on a 2B basis. With the exception of some minor adjustments, the calculation of these scale costs as annexed in a schedule to the plaintiff's memorandum, is accepted by EQC as unobjectionable. EQC however submit that they should not be liable for more than 50% of those costs in order to reflect the fact there were two defendants involved in the proceeding and the essential factual issues in dispute were common to both. I accept the general rule that the liability of two or more parties ordered to pay costs is joint and several unless the Court otherwise directs.[6]

[53] The plaintiffs and IAG settled as a result of mediation. I have not been provided with information from the plaintiffs regarding the detail of the agreement reached between EQC and IAG. In particular I have been provided with no detail in relation to any contribution to costs that IAG may have paid beyond a memorandum received from IAG which advises that the settlement included costs. IAG did not seek to be heard further in relation to the issue of costs which is limited to a dispute between the plaintiffs and EQC.

[54] EQC has advised of its understanding that in the settlement figure reached between the plaintiffs and IAG a contribution in acknowledgment of costs was made. EQC submits that the claimed costs are "shared costs" which should appropriately be divided between the defendants.[7] It cautions against double recovery and submits there is no principled basis upon which responsibility for the entirety of the plaintiffs costs and disbursements should rest solely with EQC.

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6 High Court Rules, r 14.14.

7 *McGechan on Procedure*, above n 3, at HR 14.14.01(2), citing *Narayan v Arranmore Developments Ltd* [2011] NZCA 681.

[55] I have considered the merits of the plaintiffs' argument regarding an award of costs in the circumstances of its discontinuance of the proceeding against EQC, the lack of information concerning the arrangement entered into with IAG regarding the apportionment of costs, and the application of the ordinary rules. As a result I accept that any award of costs and disbursements should be no more than half of the sum accepted by EQC as reasonable.

[56] Accordingly, I order that EQC pay to the plaintiffs 50% of the costs and disbursements set out in the schedule to the plaintiffs' memorandum of 4 June 2014. An adjustment is to be made regarding the number of appearances at case management conferences, there having, it is submitted by EQC, been four rather than the five claimed. A deduction of $597 is required to be made from the plaintiffs' schedule of costs. EQC is also entitled to costs of $1194 plus disbursements of $110 for its pleading in response to the plaintiffs' amended statement of claim.[8] I would have anticipated further memorandum from the plaintiffs should those adjustments have been contested. If that assumption is incorrect it is the Court's expectation that counsel will confer in relation to such matters of detail rather than require the issue to be referred back to the Court.

Solicitors:
Lane Neave, Christchurch
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Young Hunter, Auckland

[8] High Court Rules, Sch 3, item 9.