IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000344
[2018] NZHC 2021

BETWEEN	ELIZABETH MARY KILDUFF AND VERITAS (2012) LIMITED Plaintiffs
AND	TOWER INSURANCE LIMITED Defendant

Hearing: (Determined on the papers)

Counsel: C R Johnstone, H Bowering-Scott and E Walton for Plaintiffs
M C Smith and S S McMullan for Defendant

Judgment: 9 August 2018

JUDGMENT OF GENDALL J
As to Costs

Introduction

[1] The parties have made applications for costs based upon their respective claims of success in this litigation.

[2] The proceeding was the subject of a five day hearing in early November 2017. This was followed by further written submission in November and December 2017. After the initial judgment was released on 17 April 2018 (the substantive judgment), further memoranda were filed to deal first with alleged errors in that judgment and secondly, to address a number of issues which had been reserved. A further judgment was released on 30 May 2018 on those matters (the subsequent judgment).

Background

[3] The factual background of this proceeding is set out in full in the substantive judgment. It is useful therefore only to briefly highlight a few relevant facts for this determination, which I now do.

[4] The defendant (Tower) insured the plaintiffs' property, which was substantially damaged in the 2010 and 2011 Christchurch earthquake sequence. The plaintiffs initiated these proceedings in May 2016 because they considered that Tower was not adequately assessing the damage to the property.

[5] In their initial statement of claim, the plaintiffs pleaded that the earthquake damage to their house was "objectively beyond feasible and economic repair" and sought a money judgment by way of declaration for the rebuild cost. That rebuild cost was later quantified at $1,952,891 (a figure which included EQC payments that had been received). Tower considered, however, that the house was repairable. The dispute about whether the house was repairable was the principal focus of disagreement between the parties until about mid-2017 when the plaintiffs conceded that the house was repairable.

[6] The dispute after that point, and the issues that went to trial, related to the scope of the repair required, the appropriate costing of the repair, and a claim by the plaintiffs for general damages. During this stage of proceedings, I am now told that the parties exchanged Calderbank offer (a confidential without prejudice written settlement offer save as to costs) correspondence.

[7] A little under three months before trial, on 15 August 2017, following the plaintiffs' concession that the house was repairable, Tower made a Calderbank settlement offer of $650,000. The plaintiffs rejected this on 18 August 2017 with no counter offer made. Only about five working days before trial, on 27 October 2017, following completion of the quantity surveyors' conferral, Tower made a new Calderbank offer of $734,000. The plaintiffs rejected this offer on 30 October 2017 but said they would accept a settlement offer at $1,025, 000. Tower refused this counter offer and a few days later the claim went to trial.

The plaintiffs' application

[8] The plaintiffs now claim costs and disbursements on the basis that they say they have been the successful parties before the Court. They seek scale costs totalling $120,274. This is calculated they say on the basis that, while category 2B is appropriate for most steps in the proceedings, category 2C costs should be awarded in respect of witness statements, hearing preparation and the preparation of written submissions. The plaintiffs submit that the complexity of the trial, which involved technical and detailed evidence, justifies the application of band C for those later aspects.

[9] The plaintiffs contend that there is nothing that justifies a reduction of those costs on the basis of their conduct and arguments. They maintain that their refusal to accept the relatively late Calderbank offers made by Tower was entirely reasonable in all the circumstances, and should not impact on the costs award because these offers did not match or exceed the judgment amount, once all factors are taken into account.

[10] The plaintiffs also seek disbursements totalling $122,515.20.

Tower's application

[11] In response, Tower also itself claims costs suggesting, that rather than the plaintiffs, it is Tower that has been the successful party in the proceedings. It seeks these costs on a category 2B scale basis, with various uplifts to account for what it says is the plaintiffs' refusal to accept Tower's Calderbank offers. The initial costs sought are $78,719. Tower also seeks disbursements of $82,360.46.

[12] Tower then seeks uplifts on these costs under r 14.6 High Court Rules, first, amounting to 25 per cent from the date the plaintiffs rejected its first Calderbank offer (18 August 2017) and, secondly, amounting to 50 per cent from the date it rejected the second offer (30 October 2017). Tower contends that this compares with the 25 per cent uplift awarded to the insurer in *Jarden v Lumley General Insurance (NZ) Ltd)* and the 50 per cent uplift in *He v EQC and Offshore Market Placements Ltd*.[1]

---

1 *Jarden v Lumley General Insurance (NZ) Ltd)* [2018] NZCA 6; *He v EQC and Offshore Market Placements Ltd* [2018] NZHC 67.

Which party was successful?

[13] The fundamental principle encapsulated in r 14.2(1)(a) High Court Rules is that an award of costs should follow the event. However, here the parties contest who was successful. A common-sense approach is to be taken in identifying which party succeeded.[2] It requires consideration of which party won the principal contests of law and fact, as well as a realistic appraisal of the end results.[3] The Court should not focus on who initiated what step and the extent to which that step succeeded or failed.[4] Moreover, the fact that a plaintiff did not achieve all of what it claimed does not negate a costs order.[5]

[14] The plaintiffs claim that they are the successful party in this proceeding. On this they point to my statement in the subsequent judgment that it is the plaintiffs who have "largely succeeded".[6] I reiterate this comment here. I accept that the plaintiffs have achieved a judgment that is significantly greater than the settlement options presented by Tower before proceedings were issued in 2016. While at trial the plaintiffs' claim for general damages failed, this was only by a reasonably fine margin. I find that head of claim was fairly pursued and did not unreasonably extend the length of the trial.

[15] On the other hand, Tower resisted the plaintiffs' claim for a money judgment and it was not until 2017 that the plaintiffs conceded that the house was repairable. Tower also largely endeavoured to defend its repair costings, although it lost on certain areas including issues regarding the scope of works required.

[16] Although at one level it might be said that both parties had some measure of success, on balance I am satisfied that overall here it is the plaintiffs who were substantially successful. I reach this conclusion bearing in mind that the starting point in any costs consideration, as the Court of Appeal has confirmed, is that partial success or "success on more limited terms is still success."[7]

---

2 *Young v Tower Insurance* [2017] NZHC 482 at [11] – [13].
3 *Lawrence v Glynbrook 2001 Ltd* [2015] NZHC 1005 at [8].
4 *Lawrence v Glynbrook 2001 Ltd*, above n 3, at [8].
5 *Driessen v EQC* [2016] NZHC 1048.
6 At [34].
7 *Weaver v Auckland Council* [2017] NZCA 330 at [26]; and see *McGechan on Procedure*, Thomson Brookers loose-leaf at HR 14.2.01(1)(b).

[17] There are also no exceptional circumstances in this case to justify any initial departure from the standard principle that costs should follow the event and my finding that it is the plaintiffs who have succeeded here. However, that is not the end of matters before me. This issue of costs might be further complicated in this case by the parties' exchange of Calderbank offers prior to trial which I now turn to address.

What is the effect of the Calderbank offers?

[18] Before me, counsel for the plaintiffs has suggested that Tower's arguments in relation to the Calderbank offers should only come into play if the Court is persuaded that it is Tower who has had substantial success before the Court and is entitled to costs. Counsel has endeavoured to argue that if (as has occurred here) the Court upholds the plaintiffs' case then the Calderbank offers made by the defendant in this proceeding are of no consequence for present purposes and should be ignored. I disagree however. In my view, this argument advanced for the plaintiffs does not represent the true position. In this regard, I note the comments in *McGechan on Procedure* at para HR14.11.01 as follows:

> **HR14.11.01 Summary**
>
> (1) As any effect on costs of a r 14.10 offer is at the court's discretion, it does not afford automatic protection from costs in the event of a lower recovery, nor necessarily result in exposure to full costs if a higher sum is recovered. An offer more favourable than the ultimate recovery must be considered…However, it is not the sole consideration; all relevant circumstances must be considered...
>
> (2) Subject to those points, r 14.11 secures to the maker of a r 14.10 offer, which has a higher dollar value or is more beneficial for the recipient than a judgment subsequently obtained, a "presumptive entitlement" to costs from the time of the offer…

[19] In any event, and with these matters in mind, I turn now to consider what are the effects of Tower's Calderbank offers made here.

[20] As noted above, r 14.11(1) High Court Rules provides that the effect (if any) that the making of a Calderbank offer has on the question of costs is at the discretion of the court. Nonetheless, the general rule is that if a party makes a Calderbank offer that exceeds or would be more beneficial to the opposing party than the eventual judgment, that party is entitled to costs from the date the offer is rejected.

[21] Tower suggests that the policy rationale for the Calderbank rule is engaged here. It offered what it says were reasonable compromise settlements in a dispute where there were risks on both sides and the amount at stake was said to be relatively modest.

[22] Tower also claims now that the settlement offers it made of $650,000 and $734,000, are greater than the value of the judgment obtained by the plaintiffs. In response, the plaintiffs contend that the offers in fact were not greater, once costs and interest are taken into account.

[23] I turn now to the judgment obtained in this proceeding by the plaintiffs. The initial adjusted sum awarded to them under this declaratory judgment was $628,516. This represented the aggregate build cost for repairs to their house less EQC payments received by the plaintiffs.

[24] In addition to this amount, under the judgments the plaintiffs are entitled to receive interest on this net repair cost at the rate of five per cent per annum from 14 December 2017 to the actual date of payment. This interest amount from 14 December 2017 to (say) 14 August 2018, being some eight months totals approximately $20,950. Further, the plaintiffs are entitled to experts' fees for Mr Sturman of $1939.

[25] Lastly, the plaintiffs, as I have noted at paras [8] and [10] above, on top of these amounts now seek costs of $120,274 and disbursements of $122,515.20. These amounts together total $242,789.20. As appears later in this judgment (at [35] following) however, the quantum of costs I will determine that is to be awarded to the plaintiffs in fact will be a lesser figure – $81,249. (The total costs and disbursements figure to be awarded to the plaintiffs is therefore the lesser figure of $203,764.20).

[26] It is the plaintiffs' argument that, in making a comparison between Tower's Calderbank offers and the judgment ultimately received by the plaintiffs, first, my discretion under rr 14.10 and 14.11 of the High Court Rules is a broad one and, secondly, it should encompass <u>total</u> figures including costs and disbursements. The plaintiffs say this given what they contend is the overriding principle that all relevant

circumstances here are to be considered.[8] Counsel for the plaintiffs contends that the judgment figure for comparison should properly take into account these amounts for interest and costs - *Tudhope v McEwan* (2003) *Ltd*,[9] and I agree.

[27] Here (given particularly that I intend to award a significant amount for costs and disbursements to the successful plaintiffs – slightly adjusted as I note above), the plaintiffs will benefit from my judgment for the following amounts:

(a)	Net building cost award	$628,516.00
(b)	Interest up to 14.8.18	$20,950.00
(c)	Experts' fees – Mr Sturman	$1,939.00
(d)	Adjusted scale costs	$81,249.00
(e)	Disbursements	$122,515.20
		$855,169.20

[28] This total aggregate judgment sum of $855,169.20 is greater than both the August 2017 Calderbank offer of $650,000 and the October 2017 Calderbank offer of $734,000 from Tower.

[29] As these offers are less than the benefit received by the plaintiffs from my judgment, r 14.11 does not apply and the Calderbank offers are of no effect here.

[30] I conclude therefore that the plaintiffs are entitled to all their reasonable costs and disbursements on this proceeding. I turn now to quantum issues.

Quantum

[31] Counsel for the plaintiffs has set out in a schedule attached to his initial costs submission, a calculation of the costs and disbursements sought here. As I note at [8] above, the plaintiffs seek total scale costs of $120,274. This, as I have said, is on a category 2B basis for most steps in this proceeding, with costs calculated on a category 2C basis sought in respect of witness statements, hearing preparation and the

---

8 *Health Waikato Ltd v Van Der Sluis* [1997] 10 PRNZ 514 (CA) at [522].
9 *Tudhope v McEwan* (2003) *Limited* [2010] NZCA 166 (CA).

preparation of written submissions. On this aspect, counsel for the defendant disputes that category 2C costs are appropriate for any step in this proceeding. He suggests that all costs should be awarded simply on a category 2B basis.

[32] I disagree, however. This case had a long and tortuous history and involved at the conclusion what I consider to be a comparatively large amount of time for those particular steps for which 2C costs are sought (witness statements, hearing preparation and preparation of written submissions). I am of the view that category 2C costs as sought by the plaintiffs for those later steps in this case which in part involved a reasonable degree of complexity is reasonable and appropriate here. In my view that aspect of this case is not dissimilar to the situation that prevailed in *Young and Anor v Tower Insurance Ltd*[10] where category 2C costs were awarded to the plaintiffs.

[33] One other point advanced by counsel for the defendant relating to quantum issues, however, does need to be addressed. This is his query regarding items 34 and 35 of the Memorandum as to Costs filed by counsel for the plaintiffs. In this the plaintiffs seek by way of costs:

Item	**Description**	**Allocation**	**Cost**
34	Appearance for principal counsel	20	$44,600.00
35	Appearance for subsequent counsel (reduced)	5	$11,150.00

[34] Counsel for the defendant is correct when he contends these entries appear to contain a clear typographical or calculation error. The trial in this case took five days, being one week and not four weeks, and I agree that the plaintiffs have erred with these Item 34 and 35 claims which are overstated.

[35] The "Appearance for principal counsel" under item 34 therefore should have an allocation of five days and presumably a total cost of $11,150.00. Similarly, the "Appearance for subsequent counsel" should have an allocation of 2.5 days and presumably a cost of $5,575.

---

[10] *Young and Anor v Tower Insurance Ltd* [2017] NZHC 482.

[36] With an appropriate amendment for these amounts, the reduction from scale costs claimed by the plaintiffs amounts to $39,025. When this is deducted from the total originally claimed of $120,274, the new reduced costs claim amounts to $81,249.

[37] This appears to represent a major quantum objection advanced by Tower on the plaintiffs' costs claim. (Counsel for Tower did suggest too that any costs award to the plaintiffs here should be significantly reduced under r 14.7 High Court Rules. I disagree however. I am not satisfied that in the overall situation prevailing in this case any costs reduction under r 14.7 is justified.) Finally, and in the exercise of my discretion in all the circumstances here, I am satisfied that the plaintiff's remaining $81,249 claim is reasonable and, together with their disbursements claim of $122,515.20 (to which no objection appears to be taken by Tower) orders for payment of these amounts should follow.

[38] That said, as the successful party in this proceeding, the plaintiffs are entitled to an award of costs totalling $81,249 and disbursements totalling $122,515.20.

Result

[39] For the reasons outlined above, the plaintiffs have largely succeeded in their costs and disbursements claim against Tower in this proceeding.

[40] An order in this proceeding is now made that Tower is to pay to the plaintiffs, costs totalling $81,249 and disbursements totalling $122,515.20.

.....
Gendall J

Solicitors:
Wynn Williams, Christchurch
G Walker, Auckland

Copy to Richard Johnstone, Barrister, Christchurch