

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2017-409-000116
[2018] NZHC 2403**

BETWEEN

WILLIAM FRANCIS GINIVAN AND
CAMERON DAVID BAILEY IN THEIR
CAPACITY AS TRUSTEES OF THE GIFT
TRUST
First Plaintiffs

WILLIAM FRANCIS GINIVAN AND
DIANE SHIRLEY CARSON
Second Plaintiffs

AND

SOUTHERN RESPONSE EARTHQUAKE
SERVICES LIMITED
Defendant

Hearing: 6 August 2018
Memorandum of Counsel for Plaintiffs – 10 August 2018
Memorandum of Counsel for Defendant – 15 August 2018

Appearances: G A Cooper for First and Second Plaintiffs
M A Powell for Defendant

Judgment: 12 September 2018

JUDGMENT OF GENDALL J

Introduction

[1] This is an interlocutory application relating to proceedings brought essentially by the first plaintiffs, the trustees of the Gift Trust (the trustees) against the defendant (Southern Response). The application seeks orders in relation to the operation of an AMI Premier House Cover Policy (the policy) which the trustees hold over a residential property they own at 24 Thornington Road, Cashmere, Christchurch (the property).

[2] The rights and obligations under the policy previously owed by AMI Insurance Ltd (AMI) have been assumed by the defendant (Southern Response).

[3] At the material times, the second plaintiffs resided at the house on the property as their family home. The house sustained substantial earthquake damage in the Christchurch earthquake sequence beginning in 2010. The property it appears is situated on TC3 land and is in a designated flood zone. The parties have agreed the house is not economic to repair. The trustees, however, have elected to rebuild the house on the property.

[4] In the present application, the trustees seek orders from the Court requiring Southern Response to approve and provide funding for expert engagement expenses for the rebuild of the house in accordance with the terms of the policy. In the alternative, the trustees seek an order for an interim payment by Southern Response of a global figure to be held in trust on account of invoices rendered by experts engaged by the trustees. The trustees complain that this has arisen because Southern Response's mechanisms for approving the expenses to be incurred with their chosen experts are cumbersome and slow. The trustees say they are not working. They are unhappy with the position Southern Response has taken, which they say is a refusal to approve and pay for the experts that the trustees have put forward.

[5] Southern Response disputes this and maintains it is complying with its obligation under the policy. It says this obligation is simply one to reasonably consider a request from the trustees to approve and pay for nominated experts and, having done this, to either approve or decline the request in full or in part. Southern Response says that if the trustees do not agree with the position it takes as insurer, the onus is on the trustees to show that this position is in breach of the policy. Southern Response takes the position, too, that this is not a matter that can be resolved in the context of an interlocutory application such as this. It maintains this is something that can only be resolved by the Court in the context of the underlying proceeding here and after hearing from witnesses.

Background facts

[6] A range of background facts here are generally agreed between the parties. These matters are:

- (a) The house on the property is a substantial architect-designed house built in the early 1970s. At the time, the design and plans for the house were completed by Mr W T Royal, a registered architect and principal of Warren and Mahoney Architects.
- (b) The house sustained significant earthquake damage in the Christchurch earthquake sequence. At the time, as I have noted, it was owned by the trustees and occupied by the second plaintiffs as their family home. The damage was such that it is accepted the house is not economic to repair.
- (c) The policy provides that if the house is damaged beyond economic repair Southern Response will pay cover based on one of four options at the election of the trustees.
- (d) The trustees have elected to rebuild the house on the same site. This is in accordance with Option 1(c)(i) of the policy (which I outline at [10] below).
- (e) As a result of this election, Southern Response is obliged to pay the full replacement cost of rebuilding the house to an as new standard once a rebuild contract is entered into and subject to that cost being reasonable. The rebuild is to use current building materials and construction methods up to a floor area for the house of 300 square metres.
- (f) In advancing the insurance claim to rebuild the house, it is acknowledged that expert engagement will be necessary.
- (g) Clause 1(d) of the “Claims” section of the policy (also outlined at [10] below) provides that the trustees must get Southern Response’s approval before arranging for any repairs or incurring any expense in

respect of any claim. This includes the expenses of any experts engaged. Subject to this, the policy under a section headed “Professional fees” entitles the trustees to relief for “the reasonable cost of any architects’ or surveyors’ fees to repair or rebuild the house” incurred in connection with their insurance claim.

- (h) It follows from the policy in this case, therefore, that Southern Response are only to pay what are generally accepted to be appropriate experts’ costs incurred by the trustees on a rebuild which are “reasonable” and have been first approved by Southern Response.

[7] To date, it seems that a large number of repeated discussions over these issues have taken place between the trustees, the second plaintiffs, Southern Response and their respective counsel. Little resolution of the matters in question has occurred, however. This is unfortunate, to say the least, given that the present disputed issues before the Court relate merely to the early planning stages of the house rebuild.

[8] Given these matters, significant delay has occurred. The reasons for this are the subject of claims and counterclaims between the parties. Little can be achieved at this point, in my view, by any rehearsal of those arguments. They are not relevant to the issues presently before the Court.

[9] Suffice to say that some progress needs to be made here in the interests of all parties. This is in order that planning for the rebuild of this house can move forward expeditiously and without further delays, delays that ordinarily would be accompanied by a likelihood of steadily increasing rebuild costs. That cannot be in the best interests of either party here.

The policy

[10] For completeness, it is useful at this point to set out in full those provisions of the policy which are relevant here:

What is covered by this policy?

Cover for your [the trustees’]house

Your house is covered for any unforeseen and sudden physical loss or damage that is not excluded by this policy.

There are some circumstances when you are not covered – please refer to “What is not covered by this policy” on page 5 and the Policy Schedule.

1. What we [Southern Response] will pay:
 - (a) We will pay to repair or rebuild your house to an “as new” condition up to the floor area stated in the Policy Schedule (300 square metres).
 - (b) We will use building materials and construction methods in common use at the time of repair or rebuilding.
 - (c) If your house is damaged beyond economic repair you can choose any one of the following options:
 - (i) **To rebuild on the same site.** We will pay the full replacement cost of rebuilding your house.
 - (ii) **To rebuild on another site.** We will pay the full replacement cost of rebuilding your house on another site you choose. This cost must not be greater than rebuilding your house on its present site.
 - (iii) **To buy another house.** We will pay the cost of buying another cost, including necessary legal and associated fees. This cost must not be greater than rebuilding your house on the present site.
 - (iv) **A cash payment.** We will pay the market value of your house at the time of the loss.
 - (d) If your house is damaged and can be repaired, we can choose to either:
 - (i) Repair your house to an “as new” condition, or
 - (ii) Pay you the cash equivalent of the cost of repairs.

...

Cover for additional costs

We will pay for the following additional costs:

1. Professional fees
 - (a) We will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild your house. These expenses must be approved by us before they are incurred.

...

Claims

1. If you need to make a claim:

These are your responsibilities when making a claim. If you do not fulfil these responsibilities we can decide not to accept a claim.

...

- (d) You must get our permission before you arrange for any repairs or incur any expense in respect of any claim.

2. Your Rights

- (a) You are entitled to:
 - (i) Have your claim acknowledged and dealt with in a professional and efficient manner, and
 - (ii) Receive a fair settlement of your claim as quickly as circumstances allow, and
 - (iii) Receive a clear explanation why any claim has not been met, and
 - (iv) Have free access to our formal complaints procedure..., and
 - (v) Have free access to an independent review by the Insurance and Savings Ombudsman.

...

The trustees' and the second plaintiffs' position

[11] The trustees in this application effectively seek orders that Southern Response approve and pay any request by the trustees for a range of existing experts it names

and for future experts the trustees propose to engage, who may not as yet have been selected. The trustees say they are concerned, that on the basis of past performance by Southern Response, their requests are going to continue to be subject to delay and what they describe as “the pedantic scrutiny of Southern Response.” They are concerned they will have no certainty as to whether or not the expert costs will be covered and when any agreed payments might be made. This, it is said, will delay the design and construction process for all. An ancillary purpose of the present interlocutory application appears to be a wish to establish a mechanism for the future to avoid what the trustees say are further delays in Southern Response approving these cost estimates/quotes given by experts necessarily engaged by the trustees for the rebuild. The trustees complain that an impasse has been reached in this case at this early stage before plans for the new house are even started. This, it is alleged, is exemplified in one significant example.

[12] This relates to the architects proposed by the trustees for the rebuild of the house, Warren and Mahoney. It seems that a broad fee proposal or estimate was given to the trustees by Warren and Mahoney in February 2018 and provided to Southern Response for approval on 19 March 2018. This fee proposal, as I understand it, indicated that Warren and Mahoney would charge around \$195,000 for plans and related architectural works for the rebuild of the house. Southern Response did not approve these fees on the basis that they regarded them as “unreasonable”. At the time, it appears Southern Response had obtained a detailed fee proposal for this work from a third party, Eco Workshop, who are architectural designers. This amounted to some \$114,000. The trustees address this with two complaints. The first is that Eco Workshop are not registered architects, nor do they employ architects. The second is that the policy itself under the “Professional Fees” section states specifically that Southern Response agrees to pay “the reasonable cost of any architects’...fees to repair or rebuild your house”, and the expression “architect” must mean a registered architect. No resolution of this issue has been achieved and it is now nearly six months since the original fee proposal was put to Southern Response.

[13] The trustees say they have contended throughout that the cost of Warren and Mahoney’s engagement is reasonable and should be approved, given that:

- (a) Warren and Mahoney were the same firm of architects who designed the original house on the property.
- (b) Warren and Mahoney have supplied a detailed proposal to the trustees and are willing to be engaged.
- (c) Warren and Mahoney hold the requisite level of expertise for the engagement.
- (d) It is the trustees as owners of the property who must work with the expert and assume the risk of using that expert. Southern Response does not have a relationship with the expert and is merely the party making payment. The trustees say they are satisfied with Warren and Mahoney's reputation, reliability and general workmanship here.
- (e) No evidence is put forward by Southern Response that Warren and Mahoney's proposal is not a genuine one.

[14] The trustees say that their stance here is one that is consistent with the mutual duty on all insurers and insureds of utmost good faith accompanying all insurance contracts. They say Southern Response, as insurer, is obliged to approve genuine costs for experts sought under the policy, and they have not done this here.

[15] In addition to that major issue relating to the Warren and Mahoney architects' fees, further issues have arisen, the trustees say, over the fees of other experts they wish to engage. To date, these other experts include geotechnical engineers, structural, mechanical and electrical engineers, and quantity surveyors. In my view, however, for reasons I outline below, the Court here is not required to consider the detail of these claims.

[16] Instead, I note that in their present application, the trustees seek the Court's assistance to hold Southern Response to the clear wording of the policy. They maintain too that a proper process is needed here to overcome further delays. The trustees contend that the current way in which Southern Response is refusing approval

of the fees of the qualified experts they propose is oppressive and contrary to the provisions of the policy. Overall, the trustees seek orders requiring Southern Response to approve the trustees' reasonable cost claims for experts without restriction within 10 working days of requests being made by the trustees.

Southern Response's position

[17] Southern Response says that the position advanced by the trustees here fails to address the real dispute between the parties on this issue. This is the question as to what is to happen where there is genuine disagreement between the parties as to the "reasonable cost" for experts which the trustees seek to incur and Southern Response, therefore, declines to give approval to incur that particular cost.

[18] Southern Response says that its obligation is simply to reasonably consider any experts' costs request from the trustees and to either approve or decline the request in full or in part. If the trustees do not agree with Southern Response's position, the onus, it says, is on the trustees to show that this position is incorrect and that Southern Response is in breach of the policy. Southern Response suggests that cannot be done in an interlocutory application. Rather, it will need to be resolved by the Court in the context of the underlying proceeding and after hearing from witnesses.

[19] Notwithstanding all of this, Southern Response has suggested here, in what it describes as a pragmatic way to resolve the situation before the Court, certain proposed orders it says the Court should make. I will address this suggestion below.

Analysis

[20] The starting point in this matter is the policy itself which largely governs issues between these parties. Given that the trustees are entitled to elect to rebuild the house and have chosen to do so themselves, under the policy Southern Response is required to pay the costs of rebuilding the house to an "as new" condition up to a floor area of 300 square metres.

[21] So far as professional fees are concerned, the policy provides that Southern Response agrees to pay "the reasonable cost of any architects' and surveyors'

fees to repair or rebuild the house”, provided the expenses are approved before they are incurred. Although this provision refers only to “any architects’ and surveyors’ fees”, in my view, given the overall thrust of the policy and other provisions requiring Southern Response to pay full rebuild costs, the provision would cover all experts’ and professional fees incurred in the rebuild.

[22] In interpreting the policy provisions, Southern Response is required to pay “the reasonable cost” of professional fees to repair or rebuild the house. I turn first to the obligation that these costs must be “reasonable”. The word “reasonable” is defined in the *Concise Oxford English Dictionary*¹ as “fair and sensible” and in *Black’s Law Dictionary*² as “fair, proper, or moderate under the circumstances; sensible.”

[23] With these matters in mind, I find that what are reasonable costs are determined by what is objectively fair. This requires considering the general market rates for equivalent charges, bearing in mind all the circumstances prevailing in the Christchurch building industry at the time. Clearly some evidence from qualified and independent professionals such as quantity surveyors would assist in making what needs to be a proper and fair calculation.

[24] An ancillary issue arises here. This is the question as to whether the trustees’ choice of the professionals they wish to engage for the rebuild (such as the builder, the architect, engineers, quantity surveyors etc) must be approved by Southern Response. In my view, the answer to that question is no. The policy provides that, if the house is damaged beyond economic repair it is the trustees as the insured who can choose the option to rebuild on the same site, with Southern Response then paying the full replacement cost of such rebuild. With this rebuilding option chosen, I am satisfied that the trustees must also have the option to choose their own builder, architect and experts, providing of course that they properly fit those descriptions and they are competent to rebuild the house in compliance with current building legislation and rules at the time. Approval of the fees charged by those professionals as “reasonable” before Southern Response is required to meet this cost is another matter, however.

¹ *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford 2004).

² *Black’s Law Dictionary* (10th ed, West Group, St Paul, MN 2014).

[25] So far as the architectural fees here are concerned, the house was originally built to a plan completed by a principal of Warren and Mahoney. Given the house was built to a unique architectural design with, no doubt, a high standard of specifications and finishing, the involvement of a registered architect for the rebuild, as I see it here, must be appropriate. That unique architectural design must, in my view, form a key component of the character and value of this house.

[26] As I have noted earlier, the real issue in this case relates to the policy requirement that Southern Response is to pay only “reasonable” professional fees of the architects and other experts engaged by the trustees. This must mean that if the costs of the trustees’ chosen experts are not objectively “reasonable”, being fair and proper, then Southern Response can be required to pay under the policy only what is the “reasonable” professional fee for that expert that should have been incurred. This is an important safeguard for Southern Response as insurer under the policy. A process for submission and approval or rejection of these “reasonable” costs with a defined time-frame is clearly desirable in the interests of both parties here.

[27] If, when submitted, only a portion of an expert’s charges would be seen as “reasonable” then the trustees at their option could continue to use the services of that expert but on the basis that they themselves paid the additional fee above what was regarded as reasonable.

[28] The caveat on all of this is the additional requirement in the policy that the experts’ expenses must first be approved by Southern Response before they are incurred.

[29] Objectively, as I have noted above, these matters do not seem to be entirely unreasonable given that Southern Response is required to pick up the cost of these experts’ fees.

[30] The proper process, therefore, is for the trustees to advise Southern Response that they have chosen to use a particular expert (such as Warren and Mahoney as their architects) and to provide for approval a quote or estimate of the experts’ costs involved before work begins. It seems, in this case, that this has occurred.

[31] If, as has happened here, Southern Response considers the experts' fees are not "reasonable", and this is disputed by the trustees, then that unresolved issue, absent agreement of the parties, is something that must be resolved elsewhere, for example by application to the Court.

[32] This will, of course, slow down the rebuild process. The overarching obligation of the parties under this insurance contract, however, is to act in good faith, fairly and reasonably to each other under general insurer/insured obligations. All these preliminaries, therefore, should occur with reasonable speed.

[33] In the present case, it seems that matters relating to what are really the early stages of the trustees' rebuild of the house have regrettably reached some form of impasse. A process to resolve this impasse relating to the charges of these particular experts, as well as the charges of any future experts necessarily engaged by the trustees on the rebuild, is required here.

[34] As an aside, the trustees in their interlocutory application also seek orders in the alternative directing Southern Response to make a \$100,000 lump sum payment³ on account of future experts' costs. In other cases where such matters have been before this Court (generally in instances where cash settlements are sought) issues such as these have come to be considered later at the substantive trial of the relevant proceeding.

[35] On all these aspects, including the trustees' requests for specific fee approval, it is true that in other decisions of this Court, including *Myall v Tower Insurance Ltd*⁴ and *Kilduff & Anor v Tower Insurance Ltd*,⁵ specific amounts for experts' fees have been awarded. In cases such as these, however, there was invariably independent quantity surveying evidence to support the amounts claimed before orders were made. In the present case, no independent quantity surveying evidence has been provided to address the amounts in dispute. For the Court to properly determine whether the suggested experts' fees, in particular, the Warren and Mahoney estimate, are

³ Although the trustees' application referred to this \$100,000 lump sum payment, before me counsel for the trustees sought in the alternative an increased lump sum payment of \$225,000.

⁴ *Myall v Tower Insurance Ltd* [2017] NZHC 251.

⁵ *Kilduff & Anor v Tower Insurance Ltd* [2018] NZHC 704.

“reasonable” in terms of the policy, some independent quantity surveying evidence is required as a minimum.

[36] Therefore, I am simply not in a position at this stage to make an order against Southern Response requiring it to approve and make payment of particular expert fees on the basis submitted by the trustees.

[37] The wording of the provision in the policy under the heading “Professional Fees”, in my view, is clear and straightforward. The provision is designed, as I have said, to provide a protection to Southern Response by requiring it only to pay reasonable costs for experts engaged by the trustees and with the requirement that those costs be approved in advance.

[38] Southern Response says that, by way of contrast, the trustees here are seeking orders from the Court that Southern Response must approve the experts’ costs that the trustees propose to incur, irrespective of any assessment Southern Response may properly make that those costs are unreasonable. In addition, and in any event, Southern Response complains that this is without the trustees being required to provide sufficient information to allow for Southern Response’s assessment to be carried out. If this is indeed the case, then what is sought at this point by the trustees is not appropriate.

[39] Instead, what is required to assist the parties is that orders of this Court should provide a pragmatic way to resolve the real preliminary issue between them.

[40] With this in mind, I note that Southern Response has proposed that the Court may deal with the trustees’ application by making certain orders to address the impasse between the parties. That suggestion, with certain refinements, has merit. I propose, therefore, to deal with the trustees’ present application by making orders relating to the process to be adopted by the parties henceforth for engagement of experts and approval of their fees for the house rebuild. This is in effect an interim judgment on the trustees’ present application. Once additional independent supporting evidence as to the reasonableness of the professional fees in question is provided, leave is reserved

for the parties to approach the Court again for rulings on any actual fees to be incurred that remain in dispute.

[41] The orders I now make are as follows:

- (a) Southern Response is to review and respond to any request by the trustees for the approval of the “reasonable” fees of an expert within 10 working days of the date that request is made.
- (b) The response by Southern Response is to consist of one of the following options:
 - (i) If Southern Response reasonably requires further information in order to determine whether to approve the fee proposal, it will request that the trustees provide further clarification and, in particular, it will refer directly to the specific points upon which clarification or further detail is required.
 - (ii) If Southern Response determines that the fees in question are reasonable, Southern Response is to pay those fees within 10 working days of the provision by the trustees of the relevant invoice and payment details.
 - (iii) If Southern Response does not find the fees in question to be reasonable, Southern Response is to advise the trustees of its decision, including its full reasons for the decision, and it will pay what it considers to be a reasonable fee for the relevant work within 10 working days of the provision by the trustees of the relevant payment details.
- (c) In the situation where Southern Response does not pay the full amount of an experts’ fees as sought on the basis that it does not consider them to be reasonable in all the circumstances, the trustees may seek at trial

that Southern Response pay the balance of the expert costs together with any interest or other costs which the Court at trial may award.

- (d) In any event, leave is reserved to either party in the event of disagreement, on 48 hours' notice, to seek the help of the Court to resolve any quantum or other issues that arise on actual professional or experts' fees to be incurred here.

[42] Timing of these matters is, of course, important, particularly bearing in mind that the trustees need to engage experts without delay. The orders outlined above endeavour to address this timing issue. If, however, timing issues can be better addressed, leave is reserved for the parties to approach the Court further for any amended orders which better address the timing question that may be suggested.

Conclusion

[43] For all the reasons I have outlined above, the orders made at para [41] above are confirmed.

[44] Before me, the trustees also sought an order that Southern Response pay the sum of \$15,260 for the geotechnical report prepared by Soil and Rock. Southern Response has confirmed that it will make payment of part of this claim, being \$11,385 on the basis that invoices/quotes for this amount of Soil and Rock's costs have been provided. An order for payment of this \$11,385 is now made.

[45] Southern Response say, however, that it objects to payment of the remaining \$3,875 claimed at this point as it says the trustees have not provided any evidence by way of invoices or quotes that these costs have actually been incurred. Leave is reserved, however, for the parties to return to the Court with respect to this \$3,875 balance if further evidence on that matter is to hand.

Post-script

[46] By way of post-script, I note that in submissions before me counsel for the trustees, as an alternative, sought a lump sum payment from Southern Response of

\$225,000 for all experts' costs (representing 15 per cent of \$1.5 million which was a nominal build cost for the house) from which its experts could be paid, subject to final adjustment when the house build project was completed. It need hardly be said that this proposal is not something for which any provision is made in the policy. If the parties, however, agree by way of a pragmatic solution for a lump sum payment arrangement such as this under the current circumstances then that, of course, is a matter for them.

Costs

[47] As to costs, no real submissions were advanced before me on this issue. Counsel are urged to liaise with a view to settling the issue of costs here. In the event that counsel are unable to resolve the costs question between themselves, then they may file memoranda (not to exceed five pages) sequentially which are to be referred to me and I will decide the question of costs based upon the material then before the Court.

.....
Gendall J

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