IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2013-409-1775
[2018] NZHC 67

BETWEEN	XIAOMING HE Plaintiff
AND	THE EARTHQUAKE COMMISSION First Defendant
AND	OFFSHORE MARKET PLACEMENTS LIMITED Second Defendant

Hearing: On the papers

Appearances: P A Cowey and A J Summerlee for the Plaintiff
B A Scott and G M Scott-Jones for the First Defendant
R M Flinn and A W Moore for Second Defendant

Judgment: 8 February 2018

JUDGMENT OF DUNNINGHAM J

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[1] In a judgment dated 4 September 2017, I dismissed virtually all aspects of the plaintiff's claims against the defendants, the Earthquake Commission (EQC) and the plaintiff's insurers, for the cost to repair damage to his property alleged to have been suffered in the Canterbury earthquakes.[1] I reserved the issue of costs.

[2] EQC and the defendants' insurers (referred to collectively as Offshore Market Placements Limited (OMPL)) have now filed submissions seeking costs.

1 *He v The Earthquake Commission* [2017] NZHC 2136.

[3] EQC claims costs of $290,521.02, being:

(a) $102,643 for schedule costs, with a 50 per cent uplift to $153,964.50; and

(b) $136,556.52 for disbursements.

[4] OMPL claims costs of $245,665.24, being:

(a) $77,293 for schedule costs, with a 50 per cent uplift to $115,939.50; and

(b) $129,725.74 for disbursements.

[5] The plaintiff submits that the appropriate quantum for EQC is $138,143.87, being:

(a) $77,221 for schedule costs, with no uplift; and

(b) $60,922.87 for disbursements.

[6] The plaintiff submits that the appropriate quantum for OMPL is $126,175.93, being:

(a) $66,589 for schedule costs, with no uplift; and

(b) $59,586.93 for disbursements.

Issues

[7] There is no dispute as to the principles which apply to the determination of costs.[2] The matters that the parties disagree on, and which lead to the divergence in the quantum of costs submitted as appropriate, are:

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2 As set out in Part 14 of the HC Rules.

(a) Should the defendants be entitled to costs on a 2C basis, or greater, for some items?

(b) Should there be a 50 per cent uplift of schedule costs?

(c) What steps taken by the defendants can they claim for?

(d) Should the plaintiff cover the entire cost of the defendants' expert witnesses?

(e) Should travel costs for counsel be included?

(f) What disbursements are the defendants entitled to?

(g) Should costs be fixed now or after appeal rights are extinguished?

(h) When is the earlier wasted costs order payable?

I discuss, and rule on, each of these issues in turn.

Should the defendants be entitled to costs on a 2C basis, or a greater time allocation, for some items?

EQC's submissions

[8] EQC submits that, having regard to what happened in this case, neither Band B or C[3] is sufficient to fairly reflect the additional time that was required to prepare for trial and respond to the plaintiff's case. This is especially so given that the plaintiff's evolving case theory, which developed two weeks out from the hearing and continued to evolve during the course of the trial.

[9] However, as one step towards ensuring the costs award reflects a fair proportion of the time reasonably incurred in preparation, EQC seeks a Band C time allocation for the preparation of witness briefs and for the trial preparation. This is to reflect the fact that it was forced to prepare supplementary briefs of evidence in

[3] As described in r 14.5 of the High Court Rules.

response to the plaintiff's "reply" briefs and to respond to the evolving nature of the plaintiff's claim during the trial. EQC also seeks a further allocation beyond the Band C allowance of five days preparation time, to make a total of 10 days.

[10] EQC points out that critical assumptions on which the plaintiff's case was advanced were only revealed in the plaintiff's evidence in reply. EQC's witnesses had to respond to this on the eve of trial, meaning EQC had to prepare two substantive sets of evidence. Furthermore, the plaintiff's evidence evolved during the hearing, with further detail presented during the plaintiff's evidence-in-chief which the defendants had to respond to. This meant that EQC's overall preparation was complicated and substantially lengthened. EQC submits that as this work had to occur on top of the ordinary work that would occur during a trial, it is properly seen as additional trial preparation time.

[11] In reply submissions, EQC rejects the assertion that the additional preparation would have been "largely the work of expert witnesses" and therefore recovered through the expert witnesses disbursements. Instead it emphasises that counsel needed to be heavily involved in the drafting of all the briefs given the complex nature of the evidence. In addition, EQC filed two extensive factual briefs.

OMPL's submissions

[12] OMPL also seeks that costs for preparation of briefs and for trial preparation be awarded on a 2C basis for the same reasons as EQC.

Plaintiff's submissions

[13] The plaintiff submits that the 2B allocation, 2.5 days, is sufficient for the defendants' preparation of briefs and trial preparation. Counsel notes that EQC filed four briefs and three supplementary briefs which would have all largely been the work of the expert witnesses themselves and covered by payment of the expert witness fees as disbursements.

Analysis

[14] Rule 14.5(2)(c) of the High Court Rules states that Band C is appropriate "if a comparatively large amount of time for the particular step is considered reasonable".

[15] In this case, I consider that a Band C categorisation for both the preparation of briefs and for trial preparation by the defendants is appropriate. As I explained in the judgment, the plaintiff only revealed critical assumptions in his evidence in reply, and that evidence evolved further during the substantive hearing.[4] This meant that the defendants had to respond to new evidence on the eve of trial and prepare additional briefs of evidence. The evolving nature of the plaintiff's case also meant that a large amount of time was needed to prepare for this trial when compared to a normal trial when the plaintiff prepares and presents his case in a timely way. I am satisfied that a Band C allocation is warranted for these steps as a consequence.

[16] EQC also seeks a further uplift from the Band C categorisation. Rule 14.6(3)(a) allows the Court to order that a party pay increased costs if:

> the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under Band C

[17] The Court of Appeal recognised in *Holdfast NZ Ltd v Selleys Pty Ltd* that this rule allowed a party to receive a greater time allocation for a particular step if it can show that that the time required would substantially exceed the time allocated under Band C.[5]

[18] EQC's claim for an additional five days preparation time is based on the same reasons as the request for a Band C categorisation. EQC argues that the Band C time allocation for the preparation of briefs of five days is insufficient given the plaintiff's actions and the subsequent extensive preparation that was carried out by counsel whilst also conducting the trial. However, this claim for additional time allocation needs to be considered alongside the application for a 50 per cent uplift for all of the defendants' costs. A number of the matters relied on to support the increased time allocation for

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4 See [46].
5 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [44].

preparation are also reiterated in the application for an uplift. Having considered the submissions on both issues, I consider that EQC's concerns are better met by awarding an uplift on costs and retaining a Band C allocation for the defendants' preparation steps, as I discuss below.

What steps can the defendants' claim for?

Defendants' submissions

[19] Both defendants seek costs for the memoranda they filed regarding their application for wasted costs and the plaintiff's late filing of substantive evidence as reply evidence. EQC says that the wasted costs memoranda were filed because the plaintiff had notified the defendants that he intended to dispense with the services of his then structural engineer after they had filed their initial memoranda. Gendall J ruled that the defendants were entitled to have the costs relating to engaging with the previous structural engineer determined at the end of the substantive hearing, and so the costs of preparing memoranda on this issue are properly claimed for now.

[20] EQC further submits that the memoranda the defendants filed regarding the late filing of the plaintiff's evidence dealt with the practical difficulties caused by the plaintiff filing what was, in reality, his substantive evidence as reply evidence. The first memorandum sought a pre-trial conference, which was granted. The second gave the Court notice that EQC formally sought leave to file supplementary briefs in response to the plaintiff's reply evidence and that it would discuss this with opposing counsel. It was appropriate to keep the Court informed of this matter, and so these costs are properly claimed.

Plaintiff's submissions

[21] The plaintiff considers that the defendants chose to file the two further wasted costs memoranda[6] of their own volition and asserts that the defendants were not successful in the claims they set out in these memoranda. Furthermore, all three were

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[6] In addition to the memoranda filed in accordance with Gendall J's directions made on 7 February 2017.

part of a separate application which has been determined and the plaintiff submits that it is inappropriate for the defendants to try to recover for it again.

[22] The plaintiff also takes issue with two memoranda filed by EQC regarding the late filing of evidence. Counsel submits that these memoranda did not result in any directions being made by the Court so EQC should not be rewarded for taking a superfluous step.

Analysis

[23] I accept that the defendants' memorandum dated 24 February 2017 was filed, as directed, for the sole purpose of the application for wasted costs which was determined by Gendall J on 1 May 2017, and was expressly relied on by him in making that determination. I therefore consider that memorandum was only relevant to that application and is not a step for which costs can be claimed now. However, the further memoranda filed in respect of wasted costs related to issues which Gendall J expressly declined to determine, and he reserved those issues for the trial Judge to consider. I therefore accept they are steps for which costs can be claimed at this stage.

[24] Similarly, I consider the memoranda regarding the late filing of evidence were properly filed for the reasons set out in the defendants' costs memoranda and should form part of the costs claim.

Should there be a 50 per cent uplift on schedule costs?

Defendants' submissions

[25] Both EQC and OMPL seek a 50 per cent uplift on their overall scale costs because they submit that the plaintiff's conduct throughout the proceedings contributed unnecessarily to the time and expense of the proceedings.

[26] The defendants rely on the comments in the substantive judgment that the plaintiff's conduct had procedural and substantive consequences, including contributing to the delay in the matter being heard, the length of the hearing and making the job of the Court more difficult. They say this justifies increased costs.

[27] The defendants submit that the following factors also support their claim:

(a) The plaintiff changed structural engineer six times and the eventual theory relied upon was not mentioned by any expert prior to Mr Gilmore in his reply evidence. The defendants had to substantively engage with and respond to multiple theories which were not pursued at trial.

(b) The plaintiff's evidence evolved throughout the hearing.

(c) The plaintiff's experts took a defensive stance and refused to participate meaningfully when conferencing.

(d) The plaintiff's claim evolved throughout the proceeding, requiring the defendants to work back through the evidence to determine whether the plaintiff's assertions were correct.

(e) The plaintiff was willing to say whatever he considered would increase his prospects of success regardless of the facts. Disproving these claims put the defendants to considerable expense which they should not have had to incur.

(f) The plaintiff threatened the defendants' witness, Mr Loh, before he gave evidence.

(g) The plaintiff interfered with physical evidence by dislodging material from a crack on the property. The need to prove that this occurred added to the costs the defendants had to incur.

[28] Counsel submit that had the plaintiff conducted these proceedings in a forthright and honest manner, normal 2B costs would have been sufficient. His failure to do so put the defendants to considerable additional expense and, in the circumstances, a 50 per cent uplift is appropriate.

[29] In reply submissions, EQC submits that the plaintiff's submissions (set out below) are factually wrong and fail to engage with the full set of reasons for EQC's proposed uplift. The uplift should apply to all the costs as these reasons concern the plaintiff's behaviour throughout the proceeding.

[30] Contrary to the plaintiff's submissions, it was possible for his briefs to identify the precise engineering issues in dispute as the defendants' experts did in their reports. The plaintiff's experts failed to coherently explain in their briefs of evidence the mechanism they said had caused the floors to settle at the property. They had access to the defendants' expert reports but, rather than engaging with and responding to this material, the plaintiff's experts filed evidence that failed to articulate the reasons for their conclusions, let alone respond to the opposing experts' reasons. Furthermore, counsel submits that the plaintiff's experts consistently demonstrated an unwillingness to engage with the defendants' experts.

[31] Counsel submits that there would be no chilling effect on the access to justice by Christchurch litigants if a 50 per cent uplift was awarded. The scale costs assume a proceeding is conducted in a manner that does not unnecessarily inflate costs. The opposite has occurred here so counsel suggest that a 50 per cent uplift is responsible and restrained in the circumstances.

Plaintiff's submissions

[32] The plaintiff submits that there are a number of policy considerations which inform the scale costs regime. These include the need to protect access to justice (which supports limiting a losing party's costs) and the need for predictability in costs orders.

[33] Counsel submits that the burden of proof has not been discharged and the uplift sought by the defendants is excessive and unjustified. Counsel submits that responsibility for the evolving case theory is not entirely the plaintiff's, but a direct consequence of the defendants' conduct prior to the trial in resisting the plaintiff's requests for conferencing.

[34] A blanket uplift of 50 per cent, or indeed any uplift, is inappropriate and would have a direct chilling effect on the access to justice by Christchurch litigants still resolving insurance claims with EQC.

[35] Alternatively, the plaintiff submits that, if the Court is minded to award an uplift, then the defendants' argument largely relates to the conduct of the trial itself so any uplift should only apply to that portion of the defendants' costs.

Analysis

[36] Rule 14.6(3)(b) provides that the court may order a party to pay increased costs if:

> the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> (i) failing to comply with these rules or with a direction of the court; or
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> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
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> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
>
> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding

[37] Rule 14.6(3)(d) also allows for an increased costs order for any other reason "which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious".

[38] The party seeking increased costs carries the onus of persuading the court that their award is justified.[7] An uplift from scale can only be justified to the extent to which the failure to act reasonably contributed to the time or expense of the proceeding.[8]

[39] The Court of Appeal has recognised that any increase above 50 per cent is unlikely, because the daily recovery rate is two-thirds of the daily rate considered reasonable for the particular proceeding.[9]

[40] In regards to the categories set out in r 14.6(3)(b), I consider the plaintiff's conduct did, in part, come within category (iii) of failing to admit facts. I found that he was willing to give evidence that he thought would increase his chances of success, regardless of the true position. In addition, similar to categories (i) and (iv), the plaintiff failed to conduct his case in accordance with the usual practice and the Court's requirements. He failed to present his argument to the defendants until his reply evidence and evidence-in-chief. He changed his experts numerous time and they failed to engage constructively with the defendants' experts in conferencing.

[41] These actions of the plaintiff were not reasonable and they directly affected the time taken to resolve the proceeding, and the defendants' expenses. I consider that they justify an uplift of costs beyond that set out in the schedule by 50 per cent.

[42] In my view, there are no policy concerns which would prevent this award being justified in the circumstances. The plaintiff is correct that the scale costs regime is designed to help protect access to justice by limiting a losing party's costs and to give predictability to costs orders. However, this regime also assumes that the proceeding is conducted constructively, co-operatively and in a manner that does not unnecessarily inflate costs. The fact that there will be some cases where a greater costs award is warranted is clearly indicated by the terms of r 14.6.

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7 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011 at [27].

8 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].

9 *Holdfast NZ Ltd v Selleys Pty Ltd,* above n 5, at [46].

[43] The uplift of 50 per cent here will not have the chilling effect claimed by the plaintiff because litigants who conduct their cases constructively and in good faith have no need to fear an order for increased costs. Rather, cases like the present will serve as a warning that the court will sanction litigants who unreasonably increase the time and cost involved in litigation.

Should the plaintiff cover the entire costs of the defendants' expert witnesses?

Plaintiff's submissions

[44] The plaintiff submits that the regime for expert witness disbursements is "one of contribution",[10] and a contribution of half of the expert witnesses' costs is more than reasonable in the circumstances.

[45] Counsel submits that the sums spent by the defendants on expert witnesses are excessive in the context of a single residential building. Counsel compares them to the plaintiff's over the same period, showing that the defendants' costs were more than twice as much. This gross disparity highlights the unreasonableness of the amounts claimed.

[46] The plaintiff submits that the sums claimed are further enlarged by the fact that the defendants chose to instruct experts from outside of Christchurch. This resulted in travel costs which were superfluous, given the availability of local experts. Allowing the defendants to claim these costs would lead to a chilling effect on the access to justice for other claimants against EQC.

[47] Counsel submits that the Court should either call for a report about the reasonableness of the fees incurred, under r 14.12(5), or limit the plaintiff's contribution to 50 per cent.

Defendants' submissions

[48] The defendants submit that the amount they incurred in expert disbursements is reasonable in light of the extent and quality of the work done, which was ultimately

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10 *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143 at 156.

relied on by the Court. Counsel submits that the disbursements selected by the plaintiff for comparison are not directly comparable for a number of reasons.

[49] Counsel submits that significant additional disbursements were incurred by the need for Dr Johnstone to attend the majority of the trial due to the plaintiff's evolving case. Furthermore, the defendants limited their disbursements by jointly engaging a structural engineering expert and by OMPL relying on EQC's geotechnical expert.

[50] The defendants submit that the travel costs incurred were reasonable given the shortage of earthquake engineers in Christchurch available to do this work, as was noted in *Prattley Enterprises Ltd v Vero Insurance Ltd*.[11]

[51] Finally, the defendants submit that there would be no chilling effect on the access to justice for claimants advancing claims honestly. Counsel notes that the plaintiff has failed to respond to EQC's submission that he added to the cost of EQC's disbursements by advancing untruthful claims in order to maximise his entitlement. Claimants should be discouraged from behaving dishonestly and managing litigation in a way that unreasonably inflates the cost.

Analysis

[52] Rule 14.12(2) allows for a party to claim for the cost of disbursements that are reasonably necessary for the conduct of the proceeding and reasonable in amount. Rule 14.12(3) provides that "a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding".

[53] I am satisfied that the fees the defendants incurred were reasonable in the context of the proceedings. Although the claim concerned only one residential home, the plaintiff complicated the case by changing structural engineers six times and presenting an ever evolving theory of how damage occurred. The defendants' experts had to respond to each theory and engage with each new engineer, greatly increasing the time they spent on the case compared to a case where the plaintiff advances a consistent case.

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[11] *Prattley Enterprises Ltd v Vero Insurance Ltd* [2017] NZHC 1599 at [61].

[54] I also accept that the comparison of the plaintiff's and defendants' expert fees since September 2016 given by the plaintiff does not demonstrate that the defendants' fees are unreasonable. The defendants shared experts and their evidence covered a number of issues that were not covered in any detail by the plaintiff's experts. It was also reasonable for the defendants' experts to attend the hearing throughout the plaintiff's case given the new issues which emerged during the course of the plaintiff's evidence.

[55] I also consider the travel costs included in the experts' fees is reasonable in amount. As noted in *Prattley*, experts in Christchurch are in high demand. Given the location of the defendants in Wellington, it was reasonable for them to choose experts there. The costs incurred as a result of this are not disproportionate in the circumstances of the proceeding. Therefore, the plaintiff should pay the entire cost of the defendants' expert witness fees.

What disbursements are the defendants entitled to?

Plaintiff's submissions

[56] The plaintiff submits that he should not be liable for the travel costs of opposing counsel. EQC instructed a firm which has offices in Christchurch, Wellington and Auckland. Despite having local counsel available, EQC chose to operate this proceeding from Wellington which necessitated travel expenses that could have otherwise been avoided. The plaintiff argues it is not appropriate that he pay this additional cost when there was no justification for instructing out of town counsel.

[57] OMPL also chose not to instruct local counsel, resulting in avoidable travel expense. The plaintiff should not have to bear the cost of OMPL's choice.

[58] The plaintiff also contests the appropriateness of EQC's claim for 10,000 pages of photocopying when the plaintiff prepared all bundles save for the photobooks.

Defendants' submissions

[59] The defendants submit that the availability of local counsel is only the starting point of determining whether travel disbursements are appropriate. The Court must also consider the experience and expertise of local counsel and the location of the client.[12] Counsel submits that this case was complex and the concept of outside counsel is outdated given the small legal market in New Zealand can be considered a national one. Recovery of travel disbursements is accepted unless for some very unusual reason the decision to retain counsel of choice could be seen as being particularly unreasonable.

[60] Both the defendants have their offices in Wellington so they submit it was appropriate for them to instruct counsel based there. Travel costs are therefore a reasonable recovery from the plaintiff.

[61] EQC states that the photocopying claimed for includes its production, by agreement with counsel for the plaintiff, of four sets of photobooks as well as printing its own sets of the agreed bundle (necessary due to errors identified in the plaintiff's version) and bundles of evidence used during the trial.

Analysis

[62] In the past it was considered unnecessary to instruct out of town counsel. However, the present position is that courts will commonly award costs for this. Clifford J held in *Commerce Commission v Bay of Plenty Electricity Ltd* that:[13]

> … in a very small country such as New Zealand, I find the concept of "out of town" counsel — particularly in this commercial area — as being somewhat outdated. Without wishing to raise further market definition issues, I would have thought the market for legal services at this level was a national one. On that basis, the costs of travel and accommodation are disbursements reasonably incurred and payable as such, unless for some very unusual reason the decision to retain counsel of choice could be seen as being particularly unreasonable. An example of such unreasonableness might arise where that decision was itself properly seen as a cost raising exercise.

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12 *Russell v Taxation Review Authority* (2000) 14 PRNZ 515 (HC) at [24]-[25].

13 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 4 December 2008 at [50].

[63] The fact that the defendants are located in Wellington supports the reasonableness of instructing Wellington counsel. As noted in *Russell v Taxation Review Authority*:[14]

> If the client comes from a different region the cost of transporting counsel from that region might well be outweighed by efficiencies gained during the preparatory stage.

[64] Given the complexity of the case and the location of the defendants, I consider it was reasonable for them to instruct Wellington counsel rather than Christchurch counsel. The travel costs claimed are reasonable and the defendants are entitled to have the plaintiff cover them. The photocopying done by EQC has also been justified and is claimable.

When should costs be fixed and paid?

[65] The plaintiff was ordered by Gendall J to pay the defendants' collective costs of $21,525.48 for wasted costs related to two adjournments of the trial. Gendall J stated that costs were payable once "disposal of this proceeding occurs by the conclusion of the substantive hearing of this matter commencing on 12 June 2017, or otherwise".[15]

Plaintiff's submissions

[66] Counsel submits that Gendall J's statement "or otherwise" necessarily contemplates the exercise of appeal rights. The proceeding cannot be said to be disposed of until appeal rights are exhausted. As an appeal has been filed, costs are not yet payable.

[67] The plaintiff also submits that the Court should not fix the costs under the present application either, but wait until after the appeal rights are exhausted. Counsel refers to the Court's approach in *Holden v Architectural Finishes Limited* that:[16]

> It is a potential waste of precious Court time, and indeed of parties' funds, to fix costs on a decision from which an appeal is brought, when that award of costs may be rendered futile by appeal outcome.

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14 *Russell v Taxation Review Authority*, above n 12, at [25].
15 *He v Earthquake Commission* [2017] NZHC 839 at [11].
16 *Holden v Architectural Finishes Ltd*, above n 10, at 152.

Defendants' submissions

[68] In regards to when the costs should be fixed and payable, the defendants submit that it is appropriate to determine this application now, while the facts are fresh in the Court's mind. Counsel notes that if the plaintiff wished to make an application to defer the determination of costs, he should have done so before costs memoranda were filed.

[69] The defendants also submit that they are entitled to recover the costs awarded by Gendall J now. They submit that Gendall J's intention was clear. These costs were payable at the conclusion of the hearing. It would also be inconsistent with natural justice for the plaintiff to be entitled to delay paying costs which have been awarded because of the plaintiff's past conduct. If the Judge intended that the phrase "or otherwise" included appeals, he would have said so. In this content the phrase clearly refers to the disposal of the substantive hearing in some alternative way, such as through settlement.

[70] EQC also notes that it is concerned about the potential for dissipation of assets given the quantum of costs and the uncertainty over where the plaintiff's income is derived. It asks that costs be fixed so that they can be paid promptly, or at least secured as a condition of any stay on enforcement pending appeal.

Analysis

[71] This issue addresses two matters. The first is whether I should defer the determination of costs until the plaintiff's appeal has been determined. However, there is no presumption that a determination of costs should be deferred until an appeal is heard. In the present case, as the defendants note, the parties have gone to the trouble of filing costs submissions and it is appropriate that the determination of costs is not deferred too far into the future. The appropriate mechanism for the plaintiff to seek to defer payment of costs is via an application for stay where the Court can balance the successful parties' right to enforce the costs judgment against the need to preserve the unsuccessful party's position pending appeal.[17]

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[17] *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; *Keung v GBR Trustees Ltd and Ors* [2010] NZCA 396.

[72] The second aspect of this issue is whether the costs ordered by Gendall J on 1 May 2017 were payable at the conclusion of the substantive hearing or whether the word "otherwise" was intended to encapsulate any appeal of the substantive judgment. In my view, the language of the decision of Gendall J is broad and payment of those costs is conditional upon "disposal of this proceeding". It envisages that the proceeding may be disposed of following the substantive hearing of the matter. However, the words "or otherwise", looked at objectively, encompass any other point at which the proceedings are disposed of which could include, as the defendants say, settlement of the proceedings or, as the plaintiff says, after his appeal rights are exhausted.

[73] I do not consider that the proceedings can realistically be described as disposed of until there is a final outcome and no further possibility of appeal. Thus, I consider that the costs judgment of Gendall J is not payable until the plaintiff's appeal is determined or withdrawn.

Conclusion

[74] The defendants have largely succeeded in demonstrating that the costs they claim are are reasonable in the circumstances. Accordingly, EQC is awarded costs of $272,458.02 being:

(a) $90,601 for schedule costs,[18] with a 50 percent uplift to $135,901.50; and

(b) $136,556.52 for disbursements.

[75] OMPL is awarded costs of $244,327.24 being:

(a) $76,401 for schedule costs,[19] with a 50 percent uplift to $114,601.50; and

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[18] Being the costs sought by EQC less the extra five days preparation time sought and the costs for the memorandum related to the wasted costs application before Gendall J.

[19] Being the costs sought by OMPL, less the costs for the memorandum related to the wasted costs application before Gendall J.

(b) $129,725.74 for disbursements.

Solicitors:
ParryField, Christchurch
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DAC Beachcroft New Zealand, Auckland