IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2016-009-002724
[2017] NZDC 22965

BETWEEN	CLAIMS RESOLUTION SERVICE LIMITED Plaintiff
AND	MICHAEL ROY DOWSETT Defendant

Hearing:	26 April 2017
Appearances:	J Moss for the Plaintiff A Riches for the Defendant
Judgment:	10 October 2017

RESERVE JUDGMENT OF JUDGE J A FARISH

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[1] The plaintiff "CRS" incurred $37,115.08 of costs on behalf of Mr Dowsett in insurance litigation. Following Mr Dowsett's payment of his costs of $11,500 the shortfall to CRS was $25,615.08.

[2] EQC agreed to pay a contribution of costs in the amount of $27,090.36. The plaintiff claims that they are entitled to the shortfall of $25,615.08.

[3] Mr Dowsett argues that he is entitled to retain the full contribution of costs from EQC and that his overall costs far exceed that amount and that there is no unjust enrichment. The true cost to Mr Dowsett in pursuing litigation was in the sum of $51,863.25.

Background

[4] The plaintiff is an insurance advocacy and funding service operating in Christchurch. The defendant had a policy of insurance for his earthquake-damaged property with AA Insurance Limited. This property was damaged in the Canterbury earthquake sequence commencing on 4 September 2010. The defendant made a claim both with AA Insurance together with claims to the Earthquake Commission (EQC).

[5] On 6 February 2013 the parties entered into a written agreement whereby the plaintiff would supply insurance advocacy and funding services in respect of the defendant's insurance claims. The parties agreed at clause 7 that:

> "CRS takes on the prosecution of the claim on a no-win/no-claim basis for 10 percent of the final settlement plus all costs including legal, quantity surveyor, independent reports and assessment costs. Costs are limited to a maximum of $10,000. Any costs above this amount are borne by CRS. If an offer has already been made by the insurer costs and fees shall not exceed the difference gained."

[6] There is no dispute that pursuant to the terms of the Service Agreement that between 6 February 2013 and 26 June 2015 the plaintiff conducted advocacy and funding services for the defendant. These services included instructing solicitors to issue proceedings against both AA and EQC and resulted in a successful settlement of both the EQC claim and the AA claim.

[7] On 2 April 2015 EQC agreed to settle the defendant's claim in the sum of $129,417. On 15 April 2015 the plaintiff issued an invoice to the defendant pursuant to clause 7 of the Service Agreement in the amount of $12,941.70. This was duly paid by the defendant.

[8] On 26 June 2015 by way of settlement agreement AA settled the proceedings on the following terms:

(a) AA to pay the defendant the total of $225,000 including GST if any, and

(b) that each party would bear their own costs in relation to the agreement incurred to date in relation to the claim on proceedings.

[9] On 29 June the plaintiff issued an invoice to the defendant for the sum of $38,921.55 which included the following amounts:

(a) Disbursements incurred by the plaintiff and Grant Shand.

(b) 10% commission on the AA settlement as per clause 7 of the agreement.

(c) 10% commission on a further EQC settlement.

(d) $10,000 plus GST for costs as per clause 7 of the Service Agreement.

This invoice was duly paid by the defendant on 6 July 2015.

[10] Subsequent to the settlement proceedings on 24 June EQC through its solicitors agreed to pay 50% of the defendant's costs (on a 2B basis), this being a total payment of $27,090.36 (the EQC costs). The EQC sum was paid to Grant Shand solicitors on 22 July 2015. Following that, the defendant instructed his solicitors to have the money paid via its lawyer into his lawyer's trust account.

[11] By letter dated 13 July 2016 the plaintiff, via its lawyer, made demand on the defendant for the EQC cost sum. The defendant has refused to pay the EQC sum on the grounds that:

(a) He has no liability to account for this amount under the terms of the Service Agreement.

(b) Secondly, that he is not unjustly enriched by the payment by EQC as a contribution to his costs.

(c) Thirdly, that the plaintiff has no right of subrogation in terms of the Service Agreement entered into.

[12] There is no dispute the plaintiff in prosecuting and advising the defendant incurred costs in the amount of $37,115.09.[1]

Summary judgment

[13] These proceedings commenced by way of summary judgment. The summary judgment proceedings are well settled and conveniently summarised in the Court of Appeal decisions in *Krukziener v Hanover Finance Ltd*[2] and *Cockburn v CS Development 2 Ltd*[3]:

> The question on a summary judgment application is whether the defendant has no defence to the claim: That is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 (1986)(1) PRNZ 183 CA at p. 3; p. 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* [1997] 11 PRNZ 66 CA). The Court will not normally resolve material conflicts of evidence or assess credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbably: *Eng Mee Jon v Letchumanan* [1980] AC 331 [1979] 3 WLR 373 (PC) at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it.

[14] The fundamental premise which is at the heart of every summary judgment is that the plaintiff bears the onus of providing evidence that leaves the Court without any real doubt or uncertainty. It is only then when that onus has been satisfied that the defendant has to raise an evidentiary dispute or other reason to show why the Court should not award summary judgment.

[15] The issue in this case is whether Mr Dowsett is entitled to retain a sum of money that was paid by EQC towards Mr Dowsett's costs in related litigation in circumstances where those costs were not incurred by Mr Dowsett but incurred on his behalf by CRS.

Plaintiff's Position

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[1] Particulars, amended statement of claim dated 19 April 2017.
[2] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307, (2008) 19 PRNZ 162.
[3] *Cockburn v CS Development 2 Ltd* [2010] NZCA 373; (2010) 24 NZTC 24,431.

[16] The plaintiff's position is that clause 7 of the Service Agreement clearly sets out the respective financial obligations of both the plaintiff and the defendant. The plaintiff paid a commission, that is, a service fee for CRS to advocate and incur costs on the defendant's behalf. In addition the defendant agreed to pay a contribution of $10,000 by way of contribution to costs plus GST. The plaintiff's position is that Mr Dowsett's defence has confused the issue of commission and costs. The plaintiff's position is that Mr Dowsett has only incurred costs of $10,000 plus GST. The commission portion of his payment to the plaintiff is completely separate from any costs issue. The plaintiff's position is that this is clearly set out in clause 7 of the Service Agreement. The plaintiff also points to a number of other matters.

[17] Under the High Court rules 14.2(a) there is a general principle that the unsuccessful party should pay the costs of the successful party. Rule 14.2(f) states that an award of costs should not exceed the costs incurred by the parties claiming costs. There is a clear fundamental principle that a litigant cannot get more costs than they have incurred.

[18] The plaintiff says that, therefore, Mr Dowsett could never obtain more than the amount he incurred which was $11,500 as per clause 7 of the Service Agreement. Put simply, CRS say that they are entitled to recoup the sum which Mr Dowsett is now unjustly enriched by.

[19] The plaintiff claims that by retaining the EQC costs sum Mr Dowsett has enriched himself at the expense of CRS. Mr Dowsett has incurred costs of just $11,500 yet has taken the sum of $27,090.36 paid by EQC for costs. The plaintiff says that the enrichment is plainly unjust because CRS (on behalf of the defendant) is out-of-pocket to the sum of $25,615.08.

[20] The plaintiff also claims that the principles of recoupment apply in this case, particularly where a person who by funding the litigation has substituted itself into the position of the plaintiff during the litigation by incurring the costs of that proceeding. The successful litigant would be entitled to the proceeds of that litigation but the funder is entitled to recoup its costs of the litigation from any payment by the other

party to the litigation as well as take any private contractual sum agreed to in return for the funding.

[21] The costs paid by EQC (on a 2B basis) were intended to be paid towards the costs of the litigation and not to indemnify the defendant for any private contractual sums that he had agreed to pay for the funding itself.

[22] The plaintiff claims that the principles of subrogation tie in with the idea of recoupment. Concepts of subrogation are inherent in relation to contracts of indemnity, most often found in insurance laws.[4]

[23] The plaintiff claims that the agreement entered into between CRS and Mr Dowsett was essentially a contract of indemnity, whereby CRS assumed the risk of the litigation in exchange for monetary compensation at the end of the process. The benefit of course to Mr Dowsett was that he reaped the benefits of having expert advocacy costs paid for and having the assurance that he would not be liable for those costs if his claim was not successful.

Defendant's Position

[24] Mr Dowsett says that the interpretation of the Service Agreement is plain on its wording and that he is liable to pay only 10% of the final settlement reached for him plus costs which were limited to a maximum of $10,000 (plus GST). Mr Dowsett has made a total payment of $51,863.25, $11,500 of that is his contribution towards costs. The remaining balance of $40,363.25 was 10% of both the AA and EQC final settlement. Mr Dowsett claims that on the plain reading of clause 7 of the Service Agreement he is obliged to pay only $37,438.70 being 10% of his total settlement plus $10,000 in legal fees being a total of $47,438.70.

[25] Mr Dowsett claims that he has overpaid the plaintiff the sum of $4424.55.

[26] The defendant claims that in the present case not only does he have an arguable defence but he submits that there is no arguable cause of action disclosed on the

[4] *Randal v Cockran* (1748) 1 Ves Sen 98, *Mason v Sainsbury* (1782) 3 Dougl 61

pleadings. The defendant does not dispute the premise contained in High Court Rule 14.2(f), namely, "Award of costs should not exceed the costs incurred by the party claiming costs."

[27] The defendant denies that he has been unjustly enriched by the costs award from EQC. The defendant points out that he has been put to the expense of $51,863.25, that EQC agreed to pay a contribution of $27,090.37 which equated to, broadly, half of his total expenses incurred in pursuing his claim. By using the plaintiff's services it has cost him in the end a total of $24,772.88. Equally, the defendant claims that the plaintiff has not suffered any loss or been left out-of-pocket. The defendant points out that the plaintiff has been paid the total amount of $51,863.25 and whereas they have only incurred costs of $37,115.08. The defendant claims that the plaintiff has been left with a surplus of funds of $14,748.17. Therefore, there is no unjust enrichment.

[28] In addition the defendant points out that although the plaintiff asserts unjust enrichment, however, they have ignored the fact that unjust enrichment of itself is not a standalone cause of action. Unjust enrichment is merely an element to be established in a cause of action such as money had and received or a breach of fiduciary duty or some other equitable relief.

[29] The defendant also disputes that the Service Agreement entered into between the parties was a contract of indemnity.

[30] The defendant in summary states that clause 7 is clearly worded and is not ambiguous in any way. It provided that the plaintiff would contract to provide services to the defendant where it would be paid on the basis of 10% of any insurance settlement obtained plus costs limited to 10% above $10,000 plus GST. The plaintiff acknowledged that it would bear responsibility for any costs incurred in excess of this amount. The defendant, therefore, claims that he is only contractually obliged to pay 10% of the settlement sum being $37,438.70 plus the $10,000 (plus GST) being a total of $47,438.70. The defendant says that he has paid all sums which he is contractually required to pay.

[31] Although acknowledging that EQC has made a contribution towards his costs this figure is approximately 50% of the actual costs incurred by the defendant from the prosecution of his claim.

Discussion

[32] The plaintiff's business is to cover the costs of litigation for those who cannot afford those costs upfront. In return for the risks the plaintiff undertakes they are entitled to be paid a commission. The commission reflects the return to the funder for taking on the risk of the funding of the litigation because if the litigation is not successful the funder will not be repaid the costs it has paid on behalf of the client. The commission also reflects the advantages to a claimant in that they have access to various experts and are dealing with people who are used to taking on insurance claims.

[33] In the present case the plaintiff had made it possible for Mr Dowsett to properly and successfully prosecute his insurance claims in the High Court both against EQC and AA.

[34] I agree with the plaintiff's position that the CRS Service Agreement clearly differentiated between the liability to Mr Dowsett for the 10% commission of his final insurance settlement amount and a capped sum for costs (including legal, quantity surveyor, independent reports and assessment costs.)

[35] If I was to accept the defendant's position it would be to confuse his contractual liability to pay commission to the funder being the return for the risks the funder has undertaken with the legal and disbursement costs involved in the litigation. Mr Dowsett, himself, did not incur any out-of-pocket expenses until the end when his contribution towards those costs was capped in the sum of $11,500. The purpose of the EQC costs payment was to indemnify Mr Dowsett for the legal costs and disbursements incurred on his behalf in pursuing the litigation, that is, the legal costs, the filing costs and the experts costs. It was not to indemnify him for his contribution to the private contractual funding commission which he had entered into between CRS and Mr Dowsett. This distinction between both commission and costs is reflected in

the judgment of Davidson J in *Zygadlo v EQC and Southern Response Earthquake Services Ltd*[5]

[36] On the clear wording of clause 7 I am satisfied that Mr Dowsett cannot retain possession of the sum of $25,615.08 as these are costs that he did not incur. These costs were incurred on his behalf by CRS in the prosecution of his claim against both EQC and AA.

[37] I am satisfied that there is no arguable defence to the claim and summary judgment is entered in favour of the plaintiff in the sum of $25,615.08 plus interest from the date that Mr Dowsett received the EQC payment from Mr Shand being 4 August 2015. I also award costs on a 2B basis plus disbursements as fixed by the registrar.

J Farish
District Court Judge

Signed at pm on 10 October 2017.

[5] *Zygadlo v EQC and Southern Response Earthquake Services Ltd* [2016] NZHC 1600