

Postscript: Body Corporate 90315 v Redican Allwood Limited [2014] NZHC 1824

This is a postscript to our legal update 'High Court holds disclaimer in pre-purchase report effective to exclude liability to third party' dated 15 July 2014. That legal update concerned a recent High Court case, *Body Corporate 90315 v Redican Allwood Limited* [2014] NZHC 1212, in which the High Court found that a leaky building claim against RealSure Limited ("RealSure") for a pre-purchase inspection report should be struck out, because the report was not prepared for the eventual owner of the property, and contained a disclaimer and confidentiality clause which was effective to prevent a third party suing in reliance on the report.

This legal update concerns the High Court's award of costs and disbursements following the judgment. The case is of interest because the judge not only ordered the Wellington City Council ("the Council") to pay RealSure's costs, but also awarded a 30 per cent uplift on the normal level of costs, due to the Council's failure to appreciate the weakness of its claim when this was pointed out by RealSure.

* Stuart Dalzell, Partner and Richard Hutchison, Solicitor discuss.

Background - awarding costs and disbursements

After a judgment is given, the judge has a discretion in awarding costs and disbursements. (In this context 'costs' refers to the expense of hiring a lawyer; 'disbursements' refers to other expenses, for example expert fees or filing fees.)

The judge's discretion is broad but not unfettered and in general costs "follow the event". This means that the judge will normally order the unsuccessful party to pay the costs and/or disbursements of the successful party,

unless there are good reasons to depart from that approach.

Additionally, the quantum of costs is normally determined in accordance with a scale of costs set out in the High Court Rules. But again, the judge can depart from the scale where there is good reason to do so.

This is what Realsure sought here. In particular, RealSure applied for an increase of costs based on a pre-trial letter from RealSure to the Council requesting that the Council withdraw its claim.

A train of enquiry

RealSure's letter outlined the reasons why the Council's claim against RealSure had no prospect of success and should be discontinued.

Importantly, the letter relied on the disclaimer provision and also to another important provision relating to the availability of an additional specialist weathertightness report. As noted above, Realsure's arguments on these points were largely upheld by the High Court at the trial.

Although the Court found that the letter was not altogether convincing, it nevertheless put the Council on notice that the Council's case against RealSure would probably fail. In the words of Stephen Kós J:

"The letter should have set the respondent Council on a train of inquiry. The inevitable destination of that train would have an appreciation that the combination of the confidentiality clause and the disclaimer provisions (particularly that relating to the scope of inspection, and the need for a separate specialist weathertightness report if reliance was to be had on that risk) meant the third

party claim was very unlikely to succeed, and lacked merit."

On that basis, Kós J decided that a 30 per cent uplift of costs was appropriate.

Conclusion

This case is of note generally, because a letter like this, requiring withdrawal of a claim on pain of costs, falls somewhat short of an offer of compromise. Increased and/or indemnity costs are not unknown, but are usually justified on the basis of unreasonable refusal of an offer of compromise, or other (mis)conduct.

Thus, uplifts of costs are more common where there has been a "Calderbank offer" (a without prejudice letter inviting early settlement of a claim). If the offeree declines to settle but fails to achieve a better result at trial, the Court may take an unreasonable refusal to settle into account on costs. The letter here, however, was simply a request to discontinue the claim.

The Judge's decision to increase the costs by 30% is also significant and represents fairly strong encouragement to parties to take a realistic view of their position.

In that regard, the decision underscores the Court's focus (through case management and other means) on having the parties to litigation identify issues and assess the strengths and weaknesses of their claims earlier rather than later.