IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-464
[2019] NZHC 1852

BETWEEN	PAUL JAMES BUSBY and MARGARET LETITIA BUSBY AS TRUSTEES OF THE BUSBY TRUST Plaintiffs
AND	IAG NEW ZEALAND LIMITED Defendant

Hearing:	26 July 2019 (On the papers and by way of telephone conference)
Counsel:	D J C Russ and J A Maslin-Caradus for the Plaintiffs C M Laband, S R Hudson and I J Thain for the Defendant
Judgment:	1 August 2019

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 1 August 2019 at 3pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
1 August 2019

[1] The plaintiffs have applied for this proceeding to be transferred to the Canterbury Earthquakes Insurance Tribunal ("the Tribunal").

[2] The application is made pursuant to s 16 of the Canterbury Earthquakes Insurance Tribunal Act 2019 ("the Act").

[3] The relevant parts of s 16 of the Act provide:

> **16 Claim brought by transfer of proceedings from court**
>
> (1) If a person who is a policyholder or an insured person (or both) is a plaintiff in court proceedings relating to an insurance claim in dispute, a Judge may, on the application of that person or on the Judge's own motion, order that the proceedings be transferred to the tribunal.
>
> (2) An order to transfer proceedings may be made under subsection (1) only if –
>
> (a) the proceedings meet the eligibility criteria for a claim under section 9 (however, the proceedings may also include additional parties to those referred to in section 8, but may not include a class action – *see* clause 6(2) of Schedule 2); and
>
> (b) the other party or parties to the proceedings have been given a reasonable opportunity to comment; and
>
> (c) the Judge making the order believes that the transfer is in the interests of justice.

[4] The defendant, IAG New Zealand Ltd ("IAG"), opposes the application on two related grounds.

[5] The first ground is that an aspect of the plaintiffs' claim is not an eligible claim as required by s 16(2)(a) of the Act.

[6] IAG's second ground is that the determination of whether the issue said by IAG not to be eligible to be transferred involves novel and complex legal issues not previously dealt with by this Court and that complexity favours the proceeding not being transferred.

Canterbury Earthquakes Insurance Tribunal Act 2019

[7] The Act was passed in response to what Parliament perceived as being delays in the resolution of issues between homeowners and insurance companies arising from the Canterbury earthquake sequence.

[8] Under s 5 of the Act, the Tribunal's jurisdiction to deal with insurance claims is limited to claims arising from earthquakes that occurred between 4 September 2010 and subsequent earthquakes and aftershocks until the close of 31 December 2011. Accordingly, by the time the Act was passed on 31 May 2019 it was nearly eight and a half years since the last possible earthquake that could be dealt with by the Tribunal.

[9] The passage of time since the Canterbury earthquake sequence covered by the Act and Parliament's intention to deal with the perceived delays are reflected in the purpose of the Act.

[10] Section 3 of the Act provides:

> **3 Purpose**
>
> The purpose of this Act is to provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes.

[11] The Act confers on the Tribunal significant and flexible powers. It has the power to direct that the parties attend mediation.[1] It can adopt an inquisitorial process pursuant to s 40 of the Act. It can appoint expert advisers[2] and if the Tribunal considers it appropriate can refer questions of law to this Court.[3]

[12] A significant aspect of the Tribunal's processes is that the costs of mediation, the obtaining of expert reports, the obtaining of legal opinions from this Court and indeed the Tribunal hearings, are not met by the parties.

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1 Section 24(1)(g).
2 Section 24(1)(f).
3 Section 53.

[13] There are rights of appeal from the Tribunal. In the first instance, the right of appeal under s 54 is to this Court but requires the leave of this Court.

[14] Accordingly, in relation to those affected by the Canterbury earthquake sequence, an appeal from the Tribunal will be to the High Court at Christchurch rather than to the Court of Appeal at Wellington which would have been the case had their claim been determined in this Court.

[15] If the need for an appeal eventuates, that will represent a further saving to an insured and to insurance companies who are represented by counsel based in Christchurch.

Submissions in support of transfer

[16] The plaintiffs explain that they did not wish to issue these proceedings. They sought that IAG agree to a "standstill" agreement in relation to limitation, which was declined, and which the plaintiffs say left them with no option but to issue these proceedings.

[17] The plaintiffs say that since 2014 they (and IAG) have obtained various expert reports about the damage and what repairs are needed.

[18] At a telephone conference held on 26 July 2019 to consider counsels' submissions, the plaintiffs' counsel said the plaintiffs were in effect worn out by the cost and delay of what has occurred to date and the prospect of the Court process ahead.

[19] Mr Busby in his affidavit in support said:

> We are heartened by the establishment of the [Tribunal]. We are heartened by the ability of the [Tribunal] to appoint an impartial and independent engineering expert to consider the evidence to date and potentially be a "circuit breaker." We are heartened by the mediation service offered through [the Tribunal]. We are heartened by the lower cost of the [Tribunal] processes.

[20] The plaintiffs say the claim is an eligible claim and that the transfer of this proceeding, which reflects some five years of issues between the parties, is the very type of claim for which the Tribunal was established.

The grounds of opposition

[21] I have summarised these already. It is necessary to describe the damage said to give rise to the eligibility issue.

[22] It seems to be common ground that the property suffered both differential settlement and global settlement. It is not in issue that the differential settlement was damage caused by the Canterbury earthquake sequence to which the IAG insurance policy will respond, although there are issues about the extent of the damage, the repair strategy and the costs of that strategy.

[23] The real issue is whether the global settlement that the property has suffered is damage covered by the policy.

[24] IAG's argument is that its policy does not apply to damage to land. IAG's position is that one of the heads of damage contained in the statement of claim is that the property has suffered "global settlement of 100mm". IAG says that such global settlement is a result of damage to the land and not to the building and is therefore not covered by the policy. IAG relies on *Earthquake Commission v Insurance Council of New Zealand Inc* in support of its submission that where there has been global settlement and that global settlement has not damaged the building (in contrast to the differential settlement that IAG admits has caused damage to the building), then the global settlement is damage to the land.[4]

[25] Section 9 of the Act dealing with eligibility provides:

> (1) The eligibility criteria to bring a claim before the tribunal are that the claim –
>
> (a) must arise from a dispute between the parties under section 8;
> …

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[4] *Earthquake Commission v Insurance Council of New Zealand Inc* [2014] NZHC 3138, [2015] 2 NZLR 381 at [87].

[26] Section 8(1) of the Act provides:

> This Act applies to disputes between policyholders and insurers about insurance claims for physical loss or damage arising from the Canterbury earthquakes to a residential building or residential property.

[27] Thus, IAG's argument is that damage to land is not "physical loss or damage … to a residential building or residential property" for the purposes of the Act.

Plaintiffs' response

[28] The plaintiffs' response is that they do not accept IAG's arguments and argue that *Rout v Southern Response Earthquake Services Ltd* applies in these circumstances.[5]

[29] The plaintiffs say the authority relied on by IAG, *Earthquake Commission v Insurance Council of New Zealand Inc*, only applies where:[6]

> … there has been no change to the physical state or integrity of the structure or materials that comprise the body of the house erected on the land including its foundations …

[30] The plaintiffs say that in this case there has been actual physical damage to the house and foundation and therefore that is within the principles set out by this Court in *Rout*.[7]

Discussion

[31] Whether the foundation has suffered damage through global settlement to which the insurance policy must respond is one of the ultimate issues between the parties. IAG's submission on jurisdiction/eligibility assumes that its argument is correct. IAG says this aspect of the claim is not eligible to go to the Tribunal as it is IAG's position that the policy does not respond.

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5 *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262.
6 *Earthquake Commission v Insurance Council of New Zealand Inc*, above n 4, at [87].
7 *Rout v Southern Response Earthquake Services Ltd*, above n 5.

[32] Under s 8(1) the Tribunal has jurisdiction over:

> … disputes between policyholders and insurers about insurance claims for physical loss or damage …

[33] That is the type of issue that exists between the parties here. They have a dispute about the insurance claim made by the plaintiffs as to whether it relates to physical loss to which the policy will respond. If IAG succeeds on this point, then the dispute in that regard will have been determined in its favour and that aspect of the loss will not be covered by the policy. That issue can only be resolved once a hearing process has been concluded.

[34] Whether the policy will respond or not is not a jurisdictional issue but an aspect of IAG's defence to the plaintiffs' claim.

[35] For the same reason, I do not accept IAG's submission that if this case is transferred, the Tribunal would have to immediately determine whether it had jurisdiction. An order of this Court transferring the claim is a finding that the Tribunal has jurisdiction. The Tribunal will then be seized of the dispute which it will resolve.

Complexity

[36] IAG submits that if the plaintiffs intend to argue that *Earthquake Commission v Insurance Council of New Zealand Inc* is distinguishable, that argument will involve a novel point of law not previously dealt with by this Court. Further, the submission is that the point is not only novel but also complex and as such it should remain in this Court.

[37] IAG's counsel foreshadows difficulties arising from the Tribunal's power under s 53 of the Act:

> **53 Questions of law may be referred to High Court**
>
> (1) If a question of law arises during any case management process under this Act or at the hearing of a claim, the tribunal—
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> (a) may (if a member is acting as the tribunal, with the written approval of the chairperson) refer the question to the High Court for its opinion; and

(b) may delay the hearing until it receives the court's opinion.

(2) The tribunal must give the parties a reasonable opportunity to comment on whether the question should be referred to the High Court.

(3) The High Court must give the tribunal its opinion on the question, following which the tribunal must continue the hearing of the claim in accordance with the opinion.

[38] IAG's submission is that it considers that the eligibility issue will **require** referral.

[39] I do not accept this. I agree with the submission made for the plaintiffs that it is up to the Tribunal whether it will refer a matter to this Court.

[40] The reality is earthquake cases that have not been resolved by this stage may well involve complex factual, expert or legal issues. The disputes that remain outstanding are the cases which Parliament intended to give policyholders the ability to seek that their dispute be dealt with in the Tribunal. That a case may be legally complex or factually involved is not of itself a reason not to transfer a case when complexity is likely to be a factor as to why resolution was not reached years ago. That Parliament passed s 53 as a means to resolve involved or complex legal issues of itself is consistent with such cases being able to be transferred to the Tribunal. Parliament anticipated that complex legal issues may arise in cases transferred to the Tribunal and created a mechanism to deal with such issues.

[41] Mr Thain for IAG, raised the possibility that there could be an application for judicial review of the decision of the Tribunal to seek to refer a question of law to this Court under s 53 of the Act. He also anticipated potential difficulties in formulating the question to be referred to this Court, particularly if it was factually dependant. Such theoretical possibilities in my view are not relevant to the application.

Discussion

[42] The issue in this application is whether a transfer to the Tribunal is in the interests of justice.[8] In any view, determining whether that is the case involves an

[8] Section 16(2)(c).

examination of whether the transfer will meet the purpose of the Act as set out in s 3 and whether there are any other factors that arise in this particular case.

[43] IAG does not suggest that a transfer to the Tribunal will of itself result in delay, a lack of fairnesss or flexibility or extra costs, they being the factors referred to in s 3. IAG's concern is the possibility of what IAG characterises as the complex legal issue about global land settlement may result in the Tribunal referring that issue to this Court. Indeed, the submission is made that:

> Resolution of that issue will almost inevitably involve [the High Court] and if the matter were first transferred to the Tribunal there is the real prospect that it would go back and forth between the two before a final determination of the claim was reached.

[44] Such a submission in my opinion gives insufficient credit to the Tribunal. It assumes that it is inevitable that the question identified by IAG will be referred to this Court and that it will be referred in a form that will not be capable of a clear and precise answer. Again, such a hypothetical submission in my view does not assist in determining the present application. Section 53(3) contemplates that a hearing may be left part heard while the referral is responded to as the section refers to the Tribunal continuing the hearing in accordance with this Court's opinion on the referral.

[45] It follows that I do not accept the submissions made by IAG as to why transfer would not be in the interests of justice.

[46] The concrete benefits transfer will bring in terms of the Tribunal's flexible procedures, its ability to instruct independent experts, the absence of no hearing fees (which in lengthy High Court hearings can add tens of thousands of dollars) and its ability to closely manage cases, outweigh when considering the interests of justice, the possibility that the Tribunal may use the power in s 53. Indeed, the possible use by the Tribunal of s 53 is inherent when any case is transferred. In my view, that the Tribunal may use a power conferred on it by Parliament is not a promising start to an argument that transfer is contrary to the interests of justice.

[47] Accordingly, in terms of s 16(2)(c) of the Act I am satisfied transfer of this proceeding to the Tribunal is in the interests of justice and I ***direct*** that the file be transferred to the Tribunal.

Costs

[48] Counsel did not make submissions on costs. While the application for transfer has been granted, my preliminary view is that as this was one of the first opposed transfers that it is appropriate that costs lie where they fall. If the plaintiffs do not agree, submissions may be filed (not more than three pages in length) within five working days of the date of this judgment. The defendant may reply (not more than three pages in length) within five working days thereafter.

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Associate Judge Lester

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