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

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

**CIV-2018-409-000233**
**[2019] NZHC 1902**

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| BETWEEN | LEWIS QUINN KITCHEN AND SHARYN JANE KITCHEN<br>Plaintiffs |
| AND | AA INSURANCE LIMITED<br>Defendant |

Hearing: 26 July 2019 (by way of telephone conference)

Appearances: T J Brown for Plaintiffs
C M Brick for Defendant

Judgment: 6 August 2019

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**JUDGMENT OF GENDALL J**

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This judgment was delivered by me on 6 August 2019 at 4:15 p.m. pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: 6 August 2019

## Introduction

[1] The plaintiffs have applied to transfer these proceedings to the Canterbury Earthquakes Insurance Tribunal (the Tribunal). The defendant, AA Insurance Limited (AA) opposes the application on the general grounds that it is not in the interests of justice to transfer the proceedings.

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

[3] Section 16 of the Act relevantly provides:

> **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] Pursuant to this s 16 of the Act the Court may order a transfer of proceedings to the Tribunal only if the proceedings meet the eligibility criteria and the Court believes that it is in the interests of justice.

[5] In opposing the application, the defendant AA does so on the specific basis that it is not in the interests of justice to transfer the proceeding because:

(a) a 10 day trial has already been set down commencing 2 December 2019;

(b) substantial delay would likely result from the transfer;

(c) further delays would likely add to costs; and

(d) the dispute in this proceeding is complex and novel.

**Canterbury Earthquakes Insurance Tribunal Act 2019**

[6] The Act and a similar application by plaintiffs to transfer a proceeding from this Court to the Tribunal has been the subject of consideration in this Court by Associate Judge Lester and a decision he gave in a judgment dated 1 August 2019.[1]

[7] In that judgment, Associate Judge Lester at paras [7] – [15] outlined certain background to the Act in the Tribunal process which is usefully repeated here:

> **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 [sic] 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. It can adopt an inquisitorial process pursuant to s 40 of the Act. It can appoint expert advisers and if the Tribunal considers it appropriate can refer questions of law to this Court.

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1 Busby v IAG NZ Ltd [2019] NZHC 1852.

> [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.
>
> [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.
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> (citations omitted)

## Counsel's arguments

[8] I turn first to the initial requirement that, for these proceedings to be transferred to the Tribunal, they must first meet the eligibility criteria set out in s 9 of the Act. Section 9 provides:

> **9 Eligibility criteria to bring claim before tribunal**
>
> (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; and
>
> (b) must seek resolution of liability, or remedies, or both; and
>
> (c) must be within the jurisdiction of the tribunal to make an order under section 46.
>
> (2) Subsection (1)(c) does not require the chairperson (under section 13) or a Judge (under section 16(2)(a) or (4)(a))—
>
> (a) to form a view on any question of law; or
>
> (b) to assess the likelihood of success of the claim or any defence to it.

[9] Addressing this issue, it is clear that this proceeding involves an insurance claim dispute between the plaintiffs as policyholders and AA as the insurer in terms of s 8 of the Act. This dispute relates to the plaintiffs' insurance claim for the physical loss or damage to their home arising from the Canterbury earthquake sequence.

Resolution of the liability of AA under the policy and the remedies that should follow is sought in this proceeding. Before me, both parties effectively accepted that the eligibility criteria for the plaintiffs' claim here under s 9 of the Act had been met.

[10] It is clear too that AA as the other party to the plaintiffs' proceeding in this Court, in terms of s 16(2)(b) of the Act, has been given a reasonable opportunity to comment on this application. This is evidenced, first, by the detailed memorandum dated 17 July 2019 counsel for AA has filed in opposition to this application and, secondly, her appearance and submissions provided at the telephone conference hearing of this matter before me on 26 July 2019.

[11] The remaining consideration for this Court therefore is the requirement under s 16(2)(c) of the Act that the Court must "believe that the transfer is in the interests of justice".

[12] On this aspect, the plaintiffs submit that the transfer of this proceeding to the Tribunal is in the interests of justice for reasons which include:

(a) On 19 April 2018 when this proceeding was filed in this Court, the Tribunal did not exist. Had it existed, the plaintiffs say they would have brought this claim in the Tribunal and not in this Court.

(b) An economic disparity exists between the plaintiffs and AA. The plaintiffs say AA is able to use this economic disparity to its strategic advantage in the proceedings before this Court, but this disparity would be reduced with a transfer to the Tribunal for reasons which include:

    (i) The purpose of the Act is to provide a fair, speedy, flexible and cost-effective service for resolving disputes in relation to insurance claims.

    (ii) Given that the Act provides for a more flexible and informal process, it provides the plaintiffs with the ability to be engaged

in and take on a more direct role in the proceeding than they would be able to do in the High Court.

(iii) The Act provides for alternative dispute resolution in the form of mediation (which may be directed compulsorily) at the cost of the Tribunal as opposed to the parties. The Tribunal also has an inquisitorial function and can appoint its own expert at its cost to facilitate an expert conference under s 27(1) of the Act.

(iv) There are no hearing fees payable under the Act.

(v) Costs may only be awarded in very limited circumstances under s 47 of the Act. In this regard the plaintiffs say they are shortly due to pay significant sums for both the scheduling fee and hearing fees in this Court which would be avoided with a transfer to the Tribunal. (The hearing fees total $32,000 and the scheduling fee $1,600.)

(vi) Any delay that might be caused as a result of a transfer of this proceeding to the Tribunal would not be prejudicial, given that the proceeding relates to claims arising from earthquake events that occurred as long ago as 4 September 2010.

[13] Turning now to AA's arguments in opposition to the present application, these are set out in counsel's submissions as follows:

> 3. It would not be in the interests of justice to transfer the proceedings to the Tribunal because:
>
> 3.1 A trial has already been set down for December 2019.
>
> 3.2 Substantial delay would likely result from the transfer.
>
> 3.3 Further delays would likely add to costs.
>
> 3.4 The dispute is complex and novel.

[14] Ms Brick for AA notes, first, that this Court has already set the proceeding down for a two week trial in December 2019 and directed a pre-trial timetable. The

Court allocated that trial date when in March 2019 it rejected an application by the plaintiffs for a separate question hearing, it is said in recognition of the need for this proceeding to be concluded promptly. AA contends the proceeding is therefore already on track for a speedy resolution with experts arranged for the 2 December 2019 trial date. Ms Brick argues that it would be contrary to the interests of justice to lose this opportunity to have the dispute resolved by this Court in the timeframe already made possible by the Court's allocation of what has been described as "an early trial date".

[15] On the delay question, Ms Brick suggests that, if these proceedings were to be transferred to the Tribunal, it is likely there would be substantial delays in resolving the dispute between the parties. She maintains the Tribunal would need to head back to a case management stage and would need time to conduct its inquisitorial functions such as appointing any expert advisor and convening an experts' conference. She contrasts this with the situation she says will prevail if the proceedings stay with the High Court where all preliminaries have been completed and the next steps are simply service of the parties' briefs of evidence and preparations for trial in December 2019. AA suggests that working towards this allocated trial date is the speediest option for resolution here and would achieve the purpose of the Act.

[16] Turning now to issues as to costs, AA contends that the delays that will be caused by transferring this proceeding to the Tribunal may ultimately increase costs for both parties. This, Ms Brick says, is because further expert and legal costs will be incurred by returning back to the case management stage before the Tribunal. All this AA suggests might also outweigh any saving of costs to the plaintiffs from not being required to pay the Court's setting down or hearing fees for the upcoming trial. The most cost-effective method of resolving this dispute, according to AA, will be to proceed with the trial in December 2019.

[17] AA's last argument here is that transferring the proceeding to the Tribunal would also not be in the interests of justice because the present claim is a complex and novel one. As to this, AA contends that the Act envisages complex or novel claims and questions of law may be more appropriately decided by a Court because:

(a) Section 28 states that the Tribunal may order that a claim be transferred to the Court if "the claim presents undue complexity" or "the claim is a novel claim": and

(b) Section 53 provides that if a question of law arises, the Tribunal may "refer the question to the High Court for its opinion" and "may delay the hearing until it receives the Court's opinion."

[18] On all of this, Ms Brick maintains that a complex and novel aspect arises in the present claim here relating to what is said to be inundation hazards in the general area of the plaintiffs' property. This issue seems to relate to whether obtaining a waiver of clause B2 of the Building Code in respect of replacement cladding for the plaintiffs' house complies with the terms of the policy. This, she says, is a mixed question of fact and law. The relevant policy term provides that AA may, at its option, replace an old item with a new item or "rebuild or repair the property as new (including the additional costs necessary to comply with statutes, regulations and local government bylaws)."

[19] This issue, according to AA, does not involve simply identifying the physical damage to the cladding and an appropriate remedial strategy. Ms Brick contends that there needs to be an assessment of whether additional costs of lifting the house to mitigate the consequences of what is claimed as an inundation hazard in the area are "necessary" to comply with the law. AA's position (which the plaintiffs dispute) is that these costs are not necessary because the local authority is willing to grant a waiver and consequently there is no legal impediment to reinstatement of the earthquake damage in the manner AA suggests.

[20] This matter has already been the subject of an application by the plaintiffs for a separate question hearing on the issue before this Court, an application which was rejected. As a result, Ms Brick contends for AA that there would be significant evidence required to determine this issue and this must suggest it is complex and novel.

[21] It is for all these reasons that AA argues, therefore, that transferring the present proceeding to the Tribunal would not be in the interests of justice.

**Analysis and my decision**

[22] The overriding issue in this application is whether transferring this proceeding to the Tribunal in terms of s 16(2)(c) is in the interests of justice. To determine whether that is the case involves an examination of whether the transfer will meet the purposes of the Act as set out in s 3 and whether there are any other factors that might arise in this particular case.

[23] Section 3 of the Act states:

> **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.

[24] Although AA has attempted to suggest that a transfer to the Tribunal will of itself result in substantial delay, extra costs and result in the scheduled December 2019 trial date in this Court being lost, I do not accept that this is necessarily the case here.

[25] As to the question of delay, I accept that invariably there may be some short delay with a transfer of a proceeding like this from the High Court to the Tribunal. In this particular case, however, I note that experts for the parties who have been engaged have not as yet engaged in any conferral process. Once that occurs and especially if the Tribunal is to engage its own expert, there would be no duplication relating to any conferral process.

[26] If a transfer is to be ordered here, the Tribunal would then hold a first case management conference. At that point, it is clear the Tribunal would have regard to the significant steps already taken in the High Court in this proceeding.

[27] As has already been noted, this proceeding has been set down for trial in this Court in December which is some four months away. Briefs of evidence, as I understand the position, are still to be exchanged and arrangements for the trial such as flights and accommodation for experts and the like are still outstanding.

[28] There can be no doubt that the provisions of the Act provide for significant flexibility in process and otherwise. I accept too that the Tribunal and its professional members will keep in mind at all times the purpose of the Act. These are to provide "fair, speedy, flexible and cost effective services for resolving" the remaining Canterbury insurance claims, the majority of which have been outstanding at this point for many years.

[29] Notwithstanding that there may be some short initial delays arising with a transfer of this proceeding from this Court to the Tribunal, as I see it, Parliament clearly intended that, notwithstanding this, transfers would occur in situations such as the present, because otherwise the insertion of s 16 into the Act would be redundant.

[30] On the issue of cost effectiveness, in my view there can be no doubt here that transfer to the Tribunal would not increase the costs of the parties but, in fact, the reverse is likely to be the case. I say this for a number of reasons including:

(a) As this proceeding has been set down in this Court for a 10 day trial, as noted above, this means the plaintiffs would incur $32,000 in hearing fees and $1,600 for the scheduling fee. These fees would be avoided with a transfer to the Tribunal.

(b) I accept the Tribunal here would have regard to steps already taken in this Court and would not unnecessarily duplicate matters. Any expert evidence obtained by the parties would be able to be utilised in the Tribunal process and would not be wasted. As I understand the position, expert briefs of evidence are not required in the Tribunal and the expert concerned would need only to file an affidavit attaching their technical report, thus reducing costs. The ability of the Tribunal to appoint its own expert at no cost to the parties is also noted.

(c) The Act also provides for a more flexible and informal process to be adopted in resolving the parties' dispute which may well have a cost saving element.

(d) The Tribunal, too, has the ability to direct the parties to mediation and to appoint a mediator through the Ministry of Business Innovation and Employment at no cost to the parties.

(e) Lastly, the Tribunal also has an inquisitorial function and can appoint its own expert at its own cost, as I note above, to facilitate an expert conference under s 27(1) of the Act. This could have significant advantages here.

[31] Lastly, I turn to address the AA's assertion that the transfer of this proceeding to the Tribunal would not be in the interests of justice because the claim is a complex and novel one.

[32] On this, as I have outlined above, s 28 of the Act provides that the Tribunal "may" order that a claim be transferred to the Court where it "presents undue complexity" or the claim "is a novel claim". I accept that neither limb necessarily applies here. The issue as to whether obtaining a waiver of cl B2 of the Building Code in respect of replacement cladding complies with the policy terms is not, in my view, inherently a novel or complex one.

[33] Further, the power under s 28 is a discretionary one to be exercised by the Tribunal. It is for the Tribunal itself to determine whether or not the claim presents undue complexity or is a novel one and, if so, whether it is more appropriate for the Court to decide the claim. It is not, as I see it, for this Court to pre-judge the application of s 28.

[34] Section 53 of the Act, as I have noted, provides that if a question of law arises "during any case management process under this Act or at the hearing of a claim" the Tribunal "may…refer the question to the High Court for its opinion" and "may delay the hearing until it receives the Court's opinion". Clearly, a referral under s 53 is made by the Tribunal and not the parties, although the Tribunal must give the parties a reasonable opportunity to comment on whether the question should be referred to the High Court before doing so.

[35] Again, the Tribunal's power under s 53 is a discretionary one. While this Court previously rejected an application by the plaintiffs for a separate question hearing, the reason for this was because the Court considered it would need to hear evidence on certain factual matters relating to this. The Tribunal has the ability to determine those factual matters (including in the present case whether the cladding needs to be replaced, the effects of lifting the dwelling etc) and, if it deems it is necessary, the Tribunal can then refer a question of law arising to this Court under s 53 for its opinion.

[36] Finally, it is useful to repeat here certain additional comments made by Associate Judge Lester in his earlier *Busby* decision noted at [7] above (in relation to the situation that prevailed in that case) at paras [40] and [46]:[2]

> [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 be Tribunal and created a mechanism to deal with such issues.
>
> …
>
> [46] The concrete benefits transfer will bring in terms of the Tribunal's flexible procedures, its ability to instruct independent experts, the absence of 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. [Referring a question of law to the High Court.] 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.

[37] The situation in the present case is not dissimilar in many respects to that faced by Associate Judge Lester in *Busby.* I agree with and adopt those comments which are also appropriate here.

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2 *Busby v AA Insurance Ltd,* above n 1.

[38] It follows that for all the reasons I have outlined above, I do not accept the submissions advanced before me by AA as to why transfer here would not be in the interests of justice or otherwise would not be appropriate.

**Result**

[39] Accordingly, I am satisfied in terms of the Act, that transfer of this proceeding to the Tribunal is in the interests of justice and in terms of s 16(4) of the Act I order that this proceeding be transferred to the Tribunal.

**Costs**

[40] No submissions were advanced before me from counsel on the issue of costs. They are reserved. My preliminary view is that, given the present application has been one of the first made under the Act which presented entirely new legislation in this area for the parties, it is appropriate that no order for costs should be made and costs here should lie where they fall.

[41] If the parties or either of them disagree, then they may file sequentially submissions on costs (not more than three pages in length) which are to be referred to me for decision.

.....
**Gendall J**

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