IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-803
[2019] NZHC 2439

BETWEEN	BIRCHS ROAD LIMITED Plaintiff
AND	EARTHQUAKE COMMISSION First Defendant
AND	IAG NEW ZEALAND LIMITED Second Defendant

Hearing:	23 September 2019 (By way of telephone conference)
Appearances:	A Cowie and K Krawcyzk (as directors of the Plaintiff) E M Light for First Defendant R Raymond QC, C Jamieson and M Gall for Second Defendant
Judgment:	26 September 2019

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 26 September 2019 at 2.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date: 26 September 2019

The application

[1] The plaintiff, through one of its directors, Mr Adrian Cowie, has applied to transfer these proceedings to the Canterbury Earthquakes Insurance Tribunal (the Tribunal) under s 16 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act).

Representation of the plaintiff

[2] While ordinarily, a company can not be represented in the courts except by a lawyer, Mr Cowie had already dispensed with his lawyer's services, and filed a change of address for service, before he made this application.

[3] In the exercise of my discretion, and taking into account the grounds of the plaintiff's application, I allowed Mr Cowie and his wife (the other director) to appear on behalf of the company for the purpose of advancing the application.

The statutory requirements for transfer applications

[4] Pursuant to s 16(2) of the Act, the Court may order a transfer of proceedings only if the proceedings:

(a) meet the eligibility criteria; and

(b) the Court believes that it is in the interests of justice.

The plaintiff's application

[5] In this case, there is no dispute that the plaintiff meets the eligibility criteria. The plaintiff submits that the transfer is also in the interests of justice. In support of that assertion, the plaintiff's director, Mr Cowie, says that:

(a) He intends to "self-represent Birches Road Ltd ... from this point forward".

(b) The Tribunal is a "better forum for self-representation than the High Court".

(c) Parliament has made a "specific forum available to hear claims of this nature", being the Tribunal.

(d) Three years have been spent in the High Court process "at much effort and expense, with the prospect of much greater expense occurring if the proceeding stays in the High Court process".

(e) The Tribunal's processes are likely to result "in a more cost effective and significantly less stressful resolution".

[6] The application also makes various complaints about the history of the matter, including the positions the defendants have adopted in terms of whether the claim should be placed over cap and the merits of the proposed remediation strategy. I do not consider these are relevant to the application for transfer. They are matters to be addressed in the substantive determination.

[7] In accordance with the High Court's 2019 Practice Note on the procedure for such applications, both EQC and IAG filed memoranda in response to the plaintiff's application.

IAG's response

[8] IAG originally opposed the application. It pointed out that the proceeding was set down for trial commencing on 21 October 2019 after a "lengthy history". That history is outlined in a supporting affidavit which details the slow progress of the proceedings, including delays in the plaintiff providing a properly particularised claim; delays in providing initial disclosure and expert reports; and, difficulties with the discovery process which are still being resolved. There were also difficulties in progressing joint expert conferral, with the plaintiff resisting participation in expert conferral, resulting, eventually, in a direction by Associate Judge Osborne that conferral occur without delay. There were also delays caused by difficulties in obtaining access to the property for inspections. This background was provided to explain IAG's concern about the further delay which would be occasioned if the proceedings were transferred to the Tribunal when, by the time of the telephone conference, the parties were only four weeks away from the scheduled hearing, and where the substantive briefs of evidence had been exchanged.

[9] The second ground on which IAG originally opposed the transfer was the uncertainty as to whether there could be recovery of costs incurred in the High Court process to date. The memorandum pointed out that the Act was silent on the question of costs incurred prior to transfer. IAG has incurred costs in dealing with the proceedings in the High Court and, in IAG's submission, much of that cost had been incurred directly as a consequence of the manner in which Mr Cowie had conducted the proceeding.

[10] IAG's memorandum pointed out that the question of costs on a transfer to a Tribunal and the interests of justice had been considered in the Weathertight Homes Resolution Service's jurisdiction where, in *Girvan v Briggs*, the Court concluded that the inability of the Tribunal to make an adequate award of costs in favour of the successful party must outweigh other factors, such as the chance that the Tribunal would deal with the matter sooner than the High Court.[1] Similarly, in *Body Corporate 204464 v Waitakere City Council*, the Court considered and declined an application by a defendant for a transfer to the Weathertight Homes Resolution Service.[2] The Court considered the various factors bearing on the assessment of the interests of justice and held:[3]

> The significant restriction on the ability to recover costs has important ramifications for the plaintiffs who have incurred substantial costs to date and, if successful at trial in this Court, could expect to recover a significant proportion of their actual costs. This was seen as a decisive factor weighing against transfer in *Phillips v Petrou* and *Girvan v Briggs*.[4]

[11] Finally, IAG did not consider that "self-representation by Mr Cowie, and the Tribunal being a 'better forum' for self-representation", met the interests of justice test.

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1 *Girvan v Briggs* (2009) 19 PRNZ 230.
2 *Body Corporate 204464 v Waitakere City Council* HC Auckland CRI-2008-404-7428, 1 December 2010.
3 At [25].
4 *Phillips v Petrou* HC Auckland CIV-2007-404-1771, 5 October 2007 at [39]; *Girvan v Briggs*, above n 1, at [11].

EQC's response

[12] EQC filed a memorandum opposing the application for transfer, relying on the bases of IAG's opposition to the application for transfer. EQC, in particular, noted that the inability to recover costs in the Tribunal (except in limited circumstances) was of concern. If the plaintiff's claim was unsuccessful in the High Court, EQC would have had the ability to recover the costs it incurred to 26 August 2019 when I excused it from participating in the trial, a right which could be lost if the matter was transferred to the Tribunal.

[13] In summary, therefore, the competing interests were:

(a) The plaintiff's desire to minimise any further costs in the litigation, including by allowing its directors to appear as representatives of the plaintiff instead of counsel.

(b) The defendants' concerns that virtually all steps had been taken to participate in a High Court hearing in four weeks' time, risking both further delay and an inability to claim costs for that preparation, in the event the defendants were successful.

The telephone conference

[14] However, by the time of the telephone conference, IAG's position had altered. Mr Raymond QC advised that IAG would take a "neutral stance", neither consenting nor opposing the application if the plaintiff's representatives would undertake to the Court that they would sign a joint memorandum for the Tribunal that the proceedings were ready for hearing and able to be set down for adjudication in the Tribunal. Mr Raymond explained that would give a clear framework to progress the matter promptly in the Tribunal and was a "procedural safeguard".

[15] Mr Raymond also noted that the costs issue remained live and, as yet, the High Court had not determined how costs which had been incurred to the point of transfer could be dealt with. That issue is to be considered in another case, *Fraser v Earthquake Commissioner and Tower Insurance Ltd*, where cost issues arising on that

application for transfer and more generally are to be considered in a hearing on 14 October 2019.[5] One day has been allocated for hearing the matter and counsel has been appointed to assist the Court. Mr Raymond sought that costs be reserved pending the outcome of the decision in *Fraser*, which would allow either party to make an application for costs incurred to date should the outcome in *Fraser* suggest that there is jurisdiction to do so.

[16] Ms Light for EQC supported the approach that Mr Raymond suggested.

[17] I was addressed by both Mr Cowie and Ms Krawcyzk who confirmed that, as requested, they undertook to sign a joint memorandum for the Tribunal confirming that the proceedings were ready for hearing and able to be set down for adjudication in the Tribunal without delay.

[18] They did, however, note that they had not yet served their evidence in reply. Thus the only proviso to that undertaking was that they be given the time to file that further evidence (whether in the form of briefs or in affidavit form). Mr Cowie advised that, having spoken to registry staff for the Tribunal, a case management conference would be likely to be convened in mid-November. He agreed that the plaintiff's reply evidence would be filed 15 working days before that conference.

[19] Finally, he requested that costs lie where they fall in respect of steps taken in relation to the application for transfer. That was not objected to by the defendants.

Discussion

[20] I had significant concerns about whether the application for transfer was in the interests of justice in the particular circumstances of this case. The primary ground on which the plaintiff sought transfer was because there was the ability, in the Tribunal, to represent the plaintiff through its directors rather than through counsel, which was not available in the High Court. However, there was no evidence as to the ability of the plaintiff to incur the further cost of being represented through the hearing, which, with the excusal of EQC, was estimated by the defendants to only require eight days

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5 *Fraser v Earthquake Commissioner & Tower Insurance Ltd* HC Christchurch CIV-2016-409-954.

instead of the 14 days allocated. In my view, the vast majority of the legal costs had already been incurred in the three years that have elapsed since filing the claim, and a desire to save costs when on the brink of a trial was not a compelling reason for transfer unless the plaintiff was genuinely impecunious.

[21] Balanced against that was the real risk to the speedy resolution of the proceedings. The parties would be trading the certainty of a hearing proceeding in October, where the substantive evidence had been exchanged and expert conferral had been completed, for an unknown period of delay following the transfer of the claim to the Tribunal. This is unlike the cases where applications for transfer have been considered to date, where none appear to have been so close to hearing.

[22] I also consider the inability of the Tribunal to award costs to the successful party in the usual course of events takes on much more prominence in a case like this, where the parties have completed virtually every step of the preparation for a High Court hearing. In other words, the more preparation that has been done, and the closer the matter is to hearing, the more weight should be given to the loss of ability to claim costs in determining where the interests of justice lie.

[23] It may well be that costs for the steps taken to date are still able to be claimed in certain circumstances. I have not heard submissions on that nor am I determining that. That will be considered in the case of *Fraser* I have referred to.

[24] In the circumstances, I consider it appropriate to reserve costs pending the outcome of the decision in *Fraser*, so that, to the extent (if any) this Court determines that such costs are claimable, the relevant party in these proceedings can make an application for costs.

[25] Despite my concerns as articulated above, given the undertakings which the directors of the plaintiff were prepared to give in terms of expediting the adjudication of this matter in the Tribunal, I am satisfied that it is in the interests of justice to transfer the proceedings as sought.

[26] Accordingly, I order:

(a) The proceedings are to be transferred to the Tribunal.

(b) Costs on the application to transfer are to lie where they fall.

(c) Costs are otherwise reserved until after the High Court's decision in *Fraser* issues.

(d) If that decision determines costs (whether wasted costs or simply costs in the proceedings) are appropriately claimed notwithstanding transfer to the Tribunal, any party that seeks to claim costs should advise the Court by way of memorandum within 10 working days of the release of that decision.

(e) A telephone conference will then be commenced to determine when and how the application for costs should be dealt with, including, possibly, after the proceedings are finally disposed of in the Tribunal.

[27] A copy of this decision is to be provided to the Tribunal so it is aware of the commitments made by the plaintiff's directors to expediate adjudication in the Tribunal and which were relied on by me to determine that it was in the interests of justice to transfer the application.

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