

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

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

**CIV-2017-409-662
[2019] NZHC 2270**

BETWEEN	CATHERINE FRANCES DEWES, ROBERT DENTON GREEN and DIANA ROSEMARY SHAND as trustees of the Dewes Green Family Trust Plaintiffs
AND	IAG NEW ZEALAND LIMITED First Defendant
AND	MAX CONTRACTS LIMITED Second Defendant
AND	MAX EQ LIMITED Third Defendant
AND	ORANGE H MANAGEMENT LIMITED (formerly Hawkins Management Limited) (In Receivership and in Liquidation) First Third Party
AND	ORANGE H GROUP LIMITED (formerly Hawkins Management Limited) (In Receivership and in Liquidation) Second Third Party
AND	MAX CONTRACTS LIMITED Third Third Party
AND	QBE INSURANCE (AUSTRALIA) LIMITED Fourth Third Party

Hearing: 5 September 2019
By Telephone Conference

Counsel: B Frowein for Plaintiffs
O Collette-Moxon for First Defendant
R Smedley for Second and Third Defendants and
Third Third Party
No appearance for First Third Party and Second Third Party

D McLellan QC and S Galloway for Fourth Third Party

Judgment: 11 September 2019

JUDGMENT OF ASSOCIATE JUDGE LESTER
(in respect of Plaintiffs' application to transfer proceeding to Canterbury
Earthquake Insurance Tribunal)

This judgment was delivered by me on 11 September 2019 at 11.00 am
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

.....

[1] The plaintiffs have applied to transfer these proceedings to the Canterbury Earthquakes Insurance Tribunal (“the Tribunal”), pursuant to s 16 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (“the Act”).

[2] The first defendant, IAG New Zealand Ltd (“IAG”) does not oppose the transfer.

[3] The plaintiffs’ proceeding relates to the defective repair of their home, including damage that was not repaired at all, or only partly repaired. The second and third defendants carried out the allegedly defective work. IAG, who was the plaintiffs’ insurer, engaged Hawkins Construction (the first and second third parties) to project manage the repair work. With the Hawkins companies being in receivership and in liquidation, IAG has also claimed against their insurer, QBE Insurance (Australia) Ltd (QBE), the fourth third party, under the Law Reform Act 1936.

[4] Section 16 of the Act governs the transfer of proceedings from a court to the Tribunal. It is common ground given the consent of all parties to the transfer of the plaintiffs’ claim to the Tribunal that the claim satisfies s 16(1) of the Act.

[5] Section 16(2) of the Act provides:

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 ...); 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.

[emphasis added]

[6] QBE’s position is that it does not object to the plaintiffs’ claim against IAG being transferred to the Tribunal but submits that it is appropriate that IAG’s third party claim against QBE be dealt with in the second hearing in this Court as contemplated by the direction that there be a split hearing.

[7] All parties have in the course of the earlier case management of the proceeding agreed that IAG's third party claim against QBE would be determined after the determination of the plaintiffs' issues against IAG in a separate hearing.

Jurisdiction to transfer “part” of the present proceeding

[8] QBE submitted that the claim by IAG against QBE is not a dispute between a policyholder¹ and an insurer about an insurance claim, that being the touchstone as to whether a proceeding meets the eligibility criteria for the Tribunal.² Mr McLellan QC submitted that the litigation as it stands in this Court consists of two proceedings albeit managed under the one Court reference number. The first is the plaintiff's claim against the defendants, and the second is the third party proceedings brought by IAG against the third parties. In support of this submission, reference was made to *McGechan on Procedure* which says:³

Third party proceedings can have a life of their own, independent of the main proceeding between the plaintiff and defendant. Thus, if the defendant had sought contribution or indemnity by the third party and the plaintiff's claim against the defendant fails, the third party proceeding will die with the main proceeding, as there will be nothing left in respect of which the defendant could seek indemnity. However, a claim against a third party for contribution can continue despite the settlement of the proceeding between plaintiff and defendant. In this regard, r 15.25 provides that, where a plaintiff discontinues a proceeding in which a defendant has issued a third party notice, the discontinuance does not affect the continuation of the proceeding in relation to the third party notice.

[9] Accordingly, based on the proposition that the present proceeding involves two separate proceedings, one which is eligible for transfer and one which is not, QBE says there is no jurisdiction to transfer the present proceeding in its entirety.

[10] IAG submits that the proceeding to be transferred is the proceeding as it is currently configured, that is the plaintiff's claim against the defendants and the first defendant's claim against the third parties. The plaintiffs say that where the Act contemplates the transfer of “court proceedings” it is referring to a proceeding in its

¹ IAG brought its claim under the Law Reform Act 1936. It does not hold a contract of insurance with QBE so is not a policyholder under s 5 of the Canterbury Earthquakes Insurance Tribunal Act.

² Canterbury Earthquakes Insurance Tribunal Act, s 8.

³ *McGechan on Procedure* (online loose-leaf ed, Thomson Reuters) at [HR4.4.10].

ordinary sense as incorporating all aspects of the claims, cross-claims and any third party claim rather than only parts of a claim.

Discussion

[11] I raised with Mr McLellan that s 16(2) permits proceedings to be transferred even if the proceeding includes additional parties to those referred to in s 8. I suggested to him that this indicated that Parliament intended that an entire proceeding however constituted could be transferred provided the plaintiff's claim qualified.

[12] Mr McLellan's response was that the reference to "additional parties" in s 16(2)(a) should be read as "additional defendants in the plaintiff's proceeding" and not third parties.

[13] I do not accept that the scope of s 16(2)(a) was intended to be as narrow as Mr McLellan submits. Had Parliament intended that s 16(2) would only permit the transfer of proceedings with additional defendants as opposed to additional parties then it would have used the term "defendants" rather than the general term "parties".

[14] High Court Rule 4.7(1) provides:

A third, fourth, or subsequent party is a party to the proceeding from the time a notice is served on that party.

[15] Accordingly, whether or not Mr McLellan's argument that third party claims are separate proceedings is correct, a third party is a party to "the proceeding" which in context means the proceeding to which they have been added.

[16] Nor am I convinced that Parliament intended to refer to proceedings in s 16 in the nuanced way submitted by Mr McLellan. The ordinary meaning of proceedings contemplates all claims, cross-claims and third party claims brought by the parties.

[17] Accordingly, I find s 16 confers on the Court the jurisdiction to transfer the proceeding in its entirety including claims made against third and other parties.

[18] I note s 27(1)(d) of the Act, referring to the Tribunal deciding “whether parties need to be joined or removed” is at least consistent with all parties to a Court proceeding being subject to an order of transfer to the Tribunal. Once the proceeding is in the Tribunal the “removal” of a party caught up in a transfer is a matter for the Tribunal.

[19] I do not read s 16(1) as creating a jurisdiction to transfer part of a proceeding only. Even if I considered there was such a jurisdiction I would not have ordered that the claim by IAG against the third parties remain in this Court. I would have declined to make that direction for the following reasons.

[20] Counsel for IAG says that splitting the hearing would cause:

... needless duplication, unnecessary additional time and expense, and the stark possibility of inconsistent findings.

I agree.

[21] The Tribunal is given wide-ranging case management powers.⁴ Those powers are wide enough for the Tribunal to direct a separate or staged hearing of issues between the plaintiffs and the defendants and the third parties and such may well be the most efficient and cost-effective approach.

[22] The touchstone for whether a proceeding should be transferred is whether the transfer is in the interests of justice. The plaintiffs’ memorandum submits the following:

Had the Tribunal existed as an option for the plaintiffs in 2016, they have advised they would have opted for this route instead of resorting to legal proceedings. The investigative powers vested in the [Tribunal]’s processes and its non-adversarial process, are much more conducive to a quicker, cheaper, less stressful, just and independent resolution to the dispute. It would also enable the plaintiffs to represent themselves in parts of the claim relating to articulating the history of the condition of the house, the defective and incomplete repairs, and their treatment by all parties

[23] Again, both IAG and QBE consent to the plaintiffs’ claim being transferred and that consent is understandable given the plaintiffs’ memorandum.

⁴ Canterbury Earthquakes Insurance Tribunal Act, ss 24, 26 and 27.

[24] IAG made the claim that if the third party claim was to remain in this Court there would be the risk of inconsistent findings between the Tribunal and the High Court. Mr McLellan sought to meet this by confirming that his client would be bound by the findings in the Tribunal in relation to the damage to the plaintiff's property.

[25] Whether a finding in the Tribunal would as a matter of law bind a non-party is something I need not determine. However, having QBE in the Tribunal has practical benefits including in relation to any attempt by the Tribunal's efforts to get the parties involved in alternative dispute resolution.

[26] No compelling reason is advanced as to why the issues as between IAG and QBE would have to be in this Court. Indeed, given they arise from the plaintiffs' claim which all accept is suitable to go to the Tribunal, there would have to be some particular quality about the issues raised by the third party claims to override the interests of justice that all agree favour the plaintiffs' claim going to the Tribunal. I have not overlooked Mr McLellan's submission that his clients would suffer a significant prejudice in transfer, that being the loss of the ability to claim costs in relation to costs incurred in the Tribunal because of the limitations on the Tribunal granting costs created by s 47 of the Act.

[27] However, I accept the submission made by Mr Gedye for IAG to the effect that the restricted right to claim costs is not a qualifying prejudice for the purposes of s 16 as it is a factor common to all parties whose proceeding is transferred to the Tribunal. The restricted ability to claim costs is in one sense a prejudice to a party in the Tribunal – or on the other hand there is the corresponding protection for adverse costs. The restriction on the ability to claim costs is one of the characteristics of the Tribunal. I do not consider that the rules relating to costs in the Tribunal of themselves take a transfer to the Tribunal outside the interests of justice for the purposes of s16(2). I do not accept the only non-jurisdictional reason raised by QBE for resisting transfer to the Tribunal.

[28] *I direct* that this proceeding is transferred to the Tribunal. Costs of the transfer application are reserved. I have not overlooked that Mr McLellan foreshadowed the possibility that his client may request the Tribunal to exercise its power under s 53 of the Act to refer questions of law arising in the third party claim against QBE to this Court for determination. The Tribunal can deal with any such application if made but that a proceeding may raise potentially complex legal issues is not of itself grounds not to transfer a case to the Tribunal.⁵

Associate Judge Lester

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⁵ *Busby v IAG New Zealand Ltd* [2019] NZHC 1852.