IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-954
[2019] NZHC 2768

BETWEEN	MANDY JOAN FRASER as Executive of the Estate of Violet Fraser Plaintiff
AND	THE EARTHQUAKE COMMISSION First Defendant (discontinued)
AND	TOWER INSURANCE LIMITED Second Defendant

Hearing: 14 October 2019

Appearances: M J Fraser (self-represented) and J Bernie
T J Mackenzie as Amicus
M C Harris and J M Alexander for Second Defendant

Judgment: 30 October 2019

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 30 October 2019 at 3.00pm

pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
30 October 2019

[1] The plaintiff, Ms Fraser, applied to have this proceeding transferred to the Canterbury Earthquakes Insurance Tribunal ("the Tribunal") pursuant to s 16 of the Canterbury Earthquakes Insurance Tribunal Act 2019 ("the Act").

[2] Counsel for Tower Insurance Ltd ("Tower") advised by memorandum that while the transfer was not opposed, Tower submitted that it was in the interests of justice that the transfer be deferred until after an outstanding application for wasted costs made by Tower had been resolved.

[3] Tower sought that its costs application be resolved prior to transfer lest the fact of transfer meant that its outstanding application for wasted costs could not be resolved.

[4] By the time the transfer application was made, Ms Fraser was self-represented. That led me to appoint Timothy Mackenzie of Christchurch, Barrister, to act as contradictor in relation to the merits of the wasted costs application and to act as amicus in respect of the broader question of whether, following the transfer of a proceeding from this Court to the Tribunal, this Court retained the ability to deal with costs issues relating to steps taken in this Court.

[5] Counsel filed detailed submissions ahead of the hearing and I am grateful for their assistance.

[6] I also record that Ms Fraser attended the hearing on 14 October 2019. She briefly addressed the Court at my invitation towards the end of the hearing and I will refer to the points she made below.

Do grounds exist for a wasted costs order?

[7] Tower made its application for wasted costs some time ago by way of a memorandum dated 9 May 2018.

[8] The application, in general terms, asserted that the plaintiff having changed lawyers, at that stage three times, having abandoned expert reports after they had been served, and after those now disengaged engineers had liaised with experts instructed for the plaintiff, caused wasted costs to Tower.

[9] I asked Mr Mackenzie as contradictor on this issue whether there were any arguments that could be raised on behalf of Ms Fraser as to why liability for a wasted costs order did not exist. Mr Mackenzie advised that he did not think there were any reasonable arguments and I am in agreement with that view.

[10] At this juncture, I mention Ms Fraser's input. One of the grounds upon which she resists the wasted costs order is that she is not responsible for the changes of solicitors and engineers, but rather they are due to having been let down by some of her advisers from time to time.

[11] Mr Mackenzie recognised that such issues do not impact on the party and party costs claim made by Tower. Mr Mackenzie submitted that if Ms Fraser finds herself the subject of a wasted costs order because she in turn was let down by others, then that is a matter between her and those who let her down, it is not a defence to the wasted costs claim.

[12] Again, I agree with Mr Mackenzie's analysis and so I find that Ms Fraser is liable for a wasted costs order in respect of Tower's wasted costs arising from her changing engineers, the impact of that on the joint consultation process and the completion of joint reports. Wasted costs caused through numerous changes of solicitors, including otherwise unnecessary memoranda deferring timetabling steps, also contributed to wasted costs.

Quantum

[13] The wasted costs claim is made up as follows:

		Tower
1.	2B Costs of seven memoranda at the Band B allowance of 0.4 of a day at $2,230 per day being ($2,230 x 0.4) x 7	$6,244.00
2.	Two days of additional wasted costs in unsuccessful attempts to progress the proceeding and arrange the joint expert site visit	$4,660.00
3.	Attending conference on 10 May 2018	$669.00
4.	Experts' costs as per schedule	$6,959.58
	Total	**$18,532.58**

Schedule of disbursements claimed

Invoice date	**Amount claimed***
21.12.17	**$652.70
29.06.18	$750.56
31.07.18	$1,893.20
31.07.18	$1,363.12
31.08.18	$1,100.00
31.10.18	$600.00
30.11.18	$600.00
Total	**$6,959.58**
* Excluding GST ** 50% of total invoice	

[14] Mr Mackenzie has helpfully analysed the components of the claim. Both counsel agree that the fixing of such costs orders are often a matter of impression and judgment.[1]

[15] The approach Mr Mackenzie took to the claim for wasted experts' costs, was also shaped by his view that this Court did retain jurisdiction to deal with costs issues that arose in this Court after transfer. Because I have agreed with Mr Mackenzie's submissions, that has had a corresponding impact on my approach to the wasted costs claim.

[1] *Simpson v Hubbard* [2012] NZHC 3020.

[16] I agree with Mr Mackenzie's view that a claim of 0.4 of a day for each of the seven memoranda that Tower was involved in, often as a result of changes of counsel or of expert, is too high an allowance.

[17] There is force in Mr Mackenzie's submission that of the various memoranda claimed for, most were not drafted by Tower and the dominant theme is a series of simple timetable extensions.

[18] Mr Mackenzie has gone through and analysed each memoranda and suggested an allowance per memorandum.

[19] Adopting the guideline that the matter is one of overall impression and because of the view I take of the second item in the list of wasted costs claimed, I allow 0.2 of a day in respect of the seven memoranda.

[20] I do not allow the claim for two days of additional wasted costs said to be for unsuccessful attempts to progress the proceeding. It is difficult to separate the time spent on advancing the proceeding from the time spent on considering the memoranda which often dealt with timetabling.

[21] Dealing with a request for a timetable extension, even where the memoranda is drafted by the other side, does involve the time of taking instructions and considering the request in the context of the case as a whole. Hence my allowing 0.2 of a day for memoranda where Mr Mackenzie has suggested 0.1. I have allowed the greater time to recognise that such apparently straightforward memoranda do involve more time than simply reading and signing a one page document.

[22] There is an element of "unders and overs" in the approach that I have adopted, but again, as a matter of broad impression, I consider that a fair outcome overall.

[23] Mr Mackenzie did not dispute the attendance at the conference on 10 May 2018 and I am of the same view that it is claimable.

[24] That leaves what is said to be wasted experts' costs. Mr Harris, counsel for Tower, explained how they have been identified. However, I am not prepared to conclude at this time that it is clear that all those attendances were wasted. The reality is that Tower's experts' time spent on considering the property and the different views advanced in respect of the engineering issues relating to that property on behalf of the plaintiff are likely to have some value and relevance to the proceeding. Even with the plaintiff changing engineers and the plaintiff's engineers taking different approaches, the fact that the defendant's expert has had to consider and examine those competing views will be of some assistance to Tower's experts in assessing and testing their own views of the property.

[25] Whether, and to what extent, the defendant's experts' involvement with the different experts to the plaintiff is truly wasted, is something that cannot be determined at this stage. I do not dismiss this aspect of the plaintiff's application, but leave it adjourned given the view I have taken of this Court's ability to deal with costs issues that have arisen in this Court after the proceeding is transferred to the Tribunal.

[26] Accordingly, there is a wasted costs order in favour of Tower against the plaintiff in terms of item 1 of the Schedule at [13] above, save the rate shall be 0.2 of a day and not 0.4. The costs award also includes item 3 of the Schedule. The claim for item 2 is dismissed and for item 4 reserved.

[27] I record Tower undertakes not to take any steps to recover the costs until the outcome of the plaintiff's insurance claim is known and payable, at which time and not until then, the costs will be deducted from the amount ultimately held to be payable to the plaintiff.

High Court costs following transfer

[28] The Tribunal's ability to award costs is set out in s 47 of the Act which provides:

> **47 Costs**
>
> (1) The tribunal may award costs against a party only in accordance with this section.

(2) A costs award may be made against a party whether the party is successful or not (with all or part of the party's claim or response) if the tribunal considers that—

(a) the party caused costs and expenses to be incurred unnecessarily by—

(i) acting in bad faith; or

(ii) making allegations or objections that are without substantial merit; or

(b) the party caused unreasonable delay, including by failing to meet a deadline set by the tribunal without a reasonable excuse for doing so.

(3) A costs award must relate to costs and expenses incurred by the parties only and not to costs and expenses incurred by the tribunal.

(4) If the tribunal does not make an order under this section, the parties must meet their own costs and expenses.

(5) An order for costs may, on registration of a certified copy of the tribunal's decision, be enforced in the District Court as if it were an order of that court.

[29] The Act does not make any specific reference to this Court's jurisdiction in relation to costs for steps in a proceeding prior to transfer.

[30] The issue is potentially one of significance. Many proceedings in this Court eligible for transfer have been underway for some years. The parties may have incurred substantial sums on steps in this Court and/or by way of disbursements on experts. Some proceedings have been transferred when virtually all of the work required to have the case ready for hearing has been undertaken.

[31] Did Parliament intend that all of that "sunk cost" by the parties was to be written off as a result of transfer?

[32] My view is that Parliament did not intend to create such a disincentive to a plaintiff considering transfer to the Tribunal. Under the Act it is only the insured home owner who has the ability to seek transfer. The Tribunal was created in response to what Parliament perceived as being delays in the resolutions of issues between home owners and insurance companies arising from the Canterbury earthquake sequence.

[33] Where the creation of the Tribunal was intended to confer on home owners an option to allow them to advance their claims in a specialist, flexible tribunal, I do not consider Parliament intended to create a significant disincentive to transfer by requiring home owners to abandon claims to costs in this Court.

Discussion and Reasons

[34] In dealing with a costs application, the Court will be exercising its inherent jurisdiction.[2]

[35] Fogarty J in *Chief Executive of the Department of Corrections v Chisnall (No 3)* dealt with a costs issue arising under the Public Safety (Public Protection Orders) Act 2014 ("the PSA"). His Honour in relation to costs explained the jurisdiction in the following way:[3]

> [11] In my view it is sufficient that this Court is exercising a jurisdiction granted to it by statute. The statute confers this jurisdiction to the High Court, a Court of inherent jurisdiction. As a Court of inherent jurisdiction this Court can order parties to litigation before it to pay costs.
>
> [12] In *Halsbury's Laws of England*, the jurisdiction is described as being "inherent and does not depend on any statute".
>
> [13] Similarly, in *The Laws of New Zealand*, the authors say:
>
> > The [High] Court has an overriding discretion, notwithstanding certain specific Rules in the High Court Rules, as to the fixing and payment of costs. the only exception in the exercise of this wide discretion is if there is express provision in any statute to the contrary.
>
> [14] Rule 14.1 provides:
>
> > **14.1 Costs at discretion of court**
> >
> > (1) all matters are at the discretion of the court if they relate to costs –
> >
> > (a) of a proceeding; or
> >
> > (b) incidental to a proceeding; or
> >
> > (c) of a step in a proceeding.

---

2 *McGechan on Procedure* (online loose-leaf ed, Thomson Reuters at [SC12.02(5)(a)(iii)].

3 *Chief Executive of the Department of Corrections v Chisnall* (No 3) [2016] NZHC 1725 (citations omitted).

(2) rules 14.2 to 14.10 are subject to subclause (1).

(3) the provisions of any Act override subclauses (1) and (2).

> [15] I am not sure that r 14.1 was ever intended to preserve the inherent jurisdiction of the Court. It was, however, never necessary for the Rules to preserve the inherent jurisdiction of the Court.

[36] Having set out the above, Fogarty J concluded that it was not necessary to find in the PSA a specific power to impose costs and His Honour concluded that he had an inherent jurisdiction to award costs to the successful party.

[37] The High Court retains its inherent jurisdiction except as limited by statute.[4] Does the Act limit this Court's inherent jurisdiction in respect of costs?

[38] As noted, the Act does not specifically deal with costs in this Court. Rosara Joseph writing in the Canterbury Law Review said in respect of the relationship between the inherent jurisdiction and statute:[5]

> The relationship between inherent jurisdiction and statute was considered by the Supreme Court in *Zaoui v Attorney-General*.[6] It held that the inherent substantive jurisdiction of the High Court to grant bail can only be excluded by clear statutory wording. An exclusion of the inherent jurisdiction will not be inferred where the statute is silent.
>
> It is not clear whether all categories of the inherent jurisdiction can only be excluded by clear statutory words, rather than by mere implication. In *Zaoui*, the Court highlighted the constitutional importance of the jurisdiction to grant bail. It is unclear whether a similar presumption against erosion applies to other categories of the inherent jurisdiction, which may not be of such constitutional importance.
>
> It is arguable that all categories of the High Court's inherent jurisdiction are of constitutional significance. It is likely that the courts will apply a presumption that clear statutory words are required to exclude any of the inherent jurisdiction of the High Court. This is consistent with principles of statutory interpretation which declare that clear words are required to take away an existing jurisdiction or power.[7]

---

4 *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408.

5 Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" [2005] CanterLawRw 10.

6 *Zaoui v Attorney-General* [2004] NZCA 228, [2005] 1 NZLR 577.

7 *Jacobs v Brett* (1875) LR 20 Eq 1, 6 (Jessel MR); *Henderson v Wangapeka Gold-Dredging Co Ltd* [1904] 23 NZLR 833 (SC).

[39] To similar effect is the following from *Constitutional and Administrative Law in New Zealand*:[8]

> Jurisdiction is excluded where Parliament vests exclusive jurisdiction over proceedings in another court. But the statutory intention must be clear. The courts presume that Parliament does not intend to deprive the superior courts of jurisdiction.

[40] The high point for an argument that the Act has impliedly removed the inherent jurisdiction of the High Court as to costs on proceedings transferred to the Tribunal is s 47(4) of the Act, which says the parties must meet their own costs and expenses if the Tribunal does not make an order under s 47. However, I read that in the context of s 47(1) which limits the Tribunal's jurisdiction to award costs to the powers created by s 47. Section 47(1) provides the Tribunal may award costs against a party only in accordance with that section. Accordingly, the limitation in s 47(4) is in respect of the costs order that could have been made by the Tribunal, that is in respect of costs of the parties in the Tribunal and not otherwise.

[41] Had s 47(4) been intended to require parties to meet their own costs and expenses beyond those that could have been awarded by s 47 then I would have expected that to have been made clear.

[42] Mr Harris for Tower submitted:

> An order transferring "the proceedings" to the Tribunal transfers the whole of the proceedings including any part. Once the Court has transferred a proceeding to the Tribunal it has no jurisdiction over the dispute between the parties other than as provided for under the Act. It does not retain a residual discretion, post-transfer, to award costs either immediately post-transfer (as some kind of 'wash-up' of the Court proceeding) or later, after the Tribunal has determined liability.
>
> The position here is distinguishable from that which applies where proceedings in the High Court are discontinued. In those circumstances, the Court retains a power to award costs for pre-discontinuance steps. The distinguishing feature there is that rule 15.21(2) and 15.23 of the High Court Rules expressly reserve the power of the Court to award costs (notwithstanding the discontinuance of the proceedings). Where proceedings are transferred under the Act, however, there is no express power for the Court to award costs. Nor, Tower submits, is there any implied one.

---

8 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 847.

[43] However, consistent with what Fogarty J said in respect of the impact of the High Court Rules at [35] above, rr 15.21, 15.22 and 15.23 referred to by Mr Harris do not create the High Court's ability to deal with costs on a discontinued proceeding. Again, issues as to costs are part of the inherent jurisdiction. Nor do I consider the issue to be whether an express or implied power to award costs must be found in the Act before this Court could deal with costs claims relating to pre-transfer steps. The starting point is that the power to deal with costs exists by virtue of the inherent jurisdiction. The question is whether that power has been removed by a necessary implication as a result of the passing of the Act. In my view it has not.

[44] The next issue is whether the transfer of the proceeding to the Tribunal itself renders this Court functus officio – that being the gravamen of Mr Harris' submission.

[45] As summarised by Walker J in *Maehl v Lenihan*, "functus officio" is an "expression applied to a judge who has given a decision so that his or her authority is exhausted".[9] The rationale for the doctrine is that:

> … for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system.

[46] If the jurisdiction the Court is asked to exercise is to supplement the decision upon which the claim that the Court is functus is based, then the Court will retain jurisdiction.

[47] Fogarty J in *Wilson v Selwyn District Council* had to consider an application for costs where an appellant whose appeal had been allowed had not sought costs in the notice of appeal or asked for costs in the course of argument.[10] Costs were not reserved. The unsuccessful respondent had sealed the judgment without reference to costs.

---

9 *Maehl v Lenihan* [2019] NZHC 1457 at [36], quoting Peter Spiller *Butterworths New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington, 2005).

10 *Wilson v Selwyn District Council* (2004) 17 PRNZ 461 (HC)17 PRNZ 461.

[48] His Honour said:

> [14] In my view the application for costs here is supplemental. I am impressed by the fact that I do not think I could have denied an application for costs by Mr and Mrs Rickerby had the decision gone the other way. Such an application would be supplemental. Hearing an application for costs by either the respondent or the applicant when the main judgment is silent on costs does not amount to varying or altering a judgment already given and thus undermine the principle of the need for finality of litigation. I consider that there ought to be the basic reciprocity of ability of appellants or parties served including respondents to apply for costs.

[49] In this case, one has to ask what is the judgment that would be said to found the claim that this Court was functus. The only order that the Court is asked to make (save for the wasted costs already dealt with) is to transfer this proceeding to the Tribunal. The order of transfer is of course not a judgment on the merits. There is no ruling made on costs in this Court and when the proceeding is concluded in the Tribunal, there will still not have been a ruling on costs in this Court. A party who wishes to seek a ruling in this Court in respect of costs can still do so. The application to this Court for a ruling on costs will bring the issue of costs before this Court for determination.

[50] Hence my conclusion referred to above, that this Court retains jurisdiction to deal with costs issues for steps in this Court in respect of a proceeding that is transferred to the Tribunal. That is of course not to invite applications for costs in this Court before there has been a ruling on the merits in the Tribunal, but if counsel considered an application to be warranted on the facts then an effect of this judgment is that such an application can be made. Practically, of course, it would be more efficient if all costs issues were dealt with at one time.

Orders

[51] Accordingly, the following ***orders*** are made:

(a) There is an order for wasted costs against the plaintiff as set out at [26].

(b) Tower's application for wasted costs represented by its experts' fees is adjourned to be brought back on upon 10 working days' notice by Tower.

(c) This proceeding is transferred to the Canterbury Earthquakes Insurance Tribunal.

Associate Judge Lester

Solicitors:
Gilbert Walker, Auckland

Copy to counsel:
T J Mackenzie, Barrister, Christchurch (Amicus)

M Fraser, Christchurch (self-represented plaintiff)