IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-00012/2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	N C M and M M as Trustees of the C M TRUST Applicants
AND	EARTHQUAKE COMMISSION First Respondent (Claim Withdrawn)
AND	TOWER INSURANCE LIMITED Second Respondent

Date: 14 May 2021

Appearances: On the papers

DECISION OF P R COGSWELL ON FURTHER DISCOVERY APPLICATION

Introduction

[1] The Applicants seek further discovery from the second respondent, Tower Insurance Limited (Tower).

[2] Section 3 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (CEIT Act) states that the Tribunal's purpose is to provide "fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims…arising from the Canterbury earthquakes."

[3] The parties are directed under the Tribunal Practice Notes to cooperate in advancing these claims to resolution.

[4] Section 40 of the CEIT Act empowers the Tribunal to act in an inquisitorial way when determining claims. That wide power is subject to a requirement to observe natural justice.

[5] Part of this statutorily established approach to the determination of claims is the need to ensure that claims are progressed expeditiously and cooperatively without unnecessary delay caused by interlocutory applications.

[6] That said, the full and proper disclosure of documents that are relevant to the issues between the parties is a fundamental step in the preparation for hearing of claims.

[7] Section 15(2)(c) of the CEIT Act requires a respondent to include with its response sufficient information and supporting documentation to fairly inform the other parties and the Tribunal of the substance of the response.

[8] The Tribunal may, under cl 13, sch 2 of the CEIT Act, make an order for discovery against a party in proceedings.

[9] The Tribunal's Practice Note expands on this power as follows[1]:

> "If one party believes on reasonable grounds that another party has, in their possession or control, documents that are relevant to the claim but which were not filed in support of that party's case at the time they filed their application/response, and which are adverse to that party's case or supportive of their own case, they may seek an order from the Tribunal requiring that the other party file a list of all documents that it has in its possession or control that are relevant to the claim, and permit the inspection of those documents by the first party."

[1] Practice Note "Documents to be used at the hearing", page 5

[10] It follows from this that the Tribunal has the necessary power to order discovery of documents if it appears that a party has yet to, or has failed to, fully disclose all documents in its possession or control that are relevant to the claim.

The Documents sought

[11] The Applicants seek further discovery of specified documents from Tower. They have taken care to particularise those documents they seek. They say that such documents are or may be relevant to issues before the Tribunal because they relate to their claim that Tower wrongly declined their requests to take steps to protect the dwelling from the weather and that loss and damage has arisen from that wrongful refusal. The steps allegedly required are referred to as the "make safe" repairs.

[12] The grounds for Tower's decision to refuse to carry out the make safe repairs was set out in an email between Tower and Stream dated 4 April 2014. Tower took the view that the Applicants had been fully indemnified by the cash settlement received from EQC which was for an amount that exceeded Tower's depreciated cost of repairs and so Tower had no liability to them[2]. The make safe repairs requested were not undertaken.

[13] The Applicants go on to allege that Tower has now changed its position from that set out above to a denial of liability beyond two amounts, either $455,000 (maximum sum insured) or at most, $580,000 (market value of the house).

[14] This change in position, they say, gives them a claim against Tower for recovery of the losses arising from the ongoing damage suffered to their home as a result of the make safe repairs not having been undertaken.

[15] The proper amount payable by Tower to the Applicants under the policy was determined in the Tribunal's Decision of 29 March 2021.

[16] The further documents sought by the Applicants fall into two types or categories of document:

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[2] Beyond a sum of $65.45 – TOW.CLA.002.150

(a) Internal documentation and/or communications, and any advice received or given, relating to Tower's decision to decline to approve any further make safe repairs on 4 April 2014 (called, the "Tower make safe decision documents"); and

(b) A legal opinion and related documents, which is referred to in a Tower internal email dated 31 May 2012 addressing how to calculate entitlements under the contract of insurance, which resulted in the Applicants' claim for make safe repairs being declined (called, the "legal opinion documents").

[17] The disclosure of the two categories of documents is addressed below.

Tower make safe decision documents

[18] The Applicants expand on this request at paragraph [20] of their memorandum seeking further discovery. They argue that the following documents, by reference to documents already discovered by Tower, must exist and should be discovered:

(a) Notes and other records of or relating to calls between the Applicants and Tower before 4 April 2014 – paragraph [20](a);

(b) Internal records recording discussions amongst Tower personnel that concluded that further make safe repairs were the responsibility of the Applicants – paragraph [20](b);

(c) Further documents created by Ms Rudolph relating to the decision expressed in her 4 April 2014 email – paragraph [20](c);

(d) Internal correspondence, such as approvals or reviews of draft correspondence to be sent to the Applicants, leading to Ms Rudolph's email of 4 April 2014 – paragraph [20](d).

[19] Effectively the Applicants seek any documentation created by Tower's personnel around the time that Tower communicated its decision to the Applicants in April 2014 that it refused to carry out or pay for make safe repairs.

[20] For its part, Tower acknowledges that the Tribunal may make orders of the type sought by the applicants.

[21] Tower also acknowledges that the documents set out at [18](a) – (d) above are relevant and, if obtainable, discoverable.

[22] However, Tower also says that it has already discharged the obligation to fully look for and discover all relevant documents within its power, possession and control. The steps taken to locate the documents in the accepted categories are outlined in detail by its counsel.

[23] The Applicants raise two points in response to that position. First, they say that they have identified through Tower's own discovery the existence of further documents that must exist as a natural corollary of the existence of those already discovered documents. Second, they say that discovery is an ongoing process that requires Tower to revisit the search and to adopt broader search criteria, which they set out in their memoranda.

Decision on discovery of Tower make safe decision documents

[24] The existence of documents that suggest that there must be other documents related to them that should be discovered is not the issue before the Tribunal. Tower admits that the documents set out in [16](a) to (d) above are discoverable. However, Tower says that it cannot find such documents.

[25] On the basis of the information provided by counsel, Tower's search for the Tower make safe decision documents appears to have been thorough and considered.

[26] However, given the further information outlined in the Applicants' memorandum at [20](a) to (d) it may be that further documents come to light, if broader search parameters are adopted. Discovery must be proportionate. Ordering Tower to conduct discovery again is proportionate to this claim.

[27] I direct Tower to conduct a further search using such further search terms as it considers appropriate, having regard to the further search criteria set out in the Applicants' reply memorandum at [3](a) to (c) and its existing search criteria.

[28] Tower is to advise the Tribunal by 28 May 2021 the results of that further search, outlining the steps taken and the search terms used, by way of a letter from counsel. If further documents are found, they are to be discovered to the Tribunal and the Applicants by 28 May 2021.

Legal opinion documents

[29] The Applicants seek disclosure of a legal opinion referred to in an internal email between Tower and Stream dated 31 May 2012. The applicants assert that Tower waived privilege in the legal opinion and documents related to the legal opinion under s 65 of the Evidence Act 2006 (Evidence Act) when it included that email in its discovery.

[30] The email says:

> "I have the answer for you. The entitlement under the policy is capped at the market value. We are entitled to settle on the PDV on repairs if this is less than the MV. The PDV is calculated by deducting the depreciation rate off the total cost of repairs (labour and materials. We will no longer be only applying the depreciation rate to materials only. I will circulate something out about the legal opinion that we received but in the interim I thought I should get this to you so you can respond to the customer."

[31] This email:

(a) Is not contemporaneous with the Tower email of 4 April 2014 refusing to effect make safe repairs;

(b) Is an internal email that was not sent to the applicants in either May 2012 or April 2014 in the context of Tower's refusal to effect make safe repairs;

(c) Does not state what the conclusion of the legal opinion was or otherwise refer to a significant part of the legal opinion; and

(d) Was not sent to the Applicants with reference to the content of the legal opinion with the intention that the Applicants be persuaded by Tower's approach in the absence of disclosure of the legal opinion.

[32] Tower argues that the email does not meet the threshold under s 65 of the Evidence Act waiving the privilege attaching to the legal opinion. It says that related documents remain protected by privilege as well.

[33] The Tribunal is not bound by the Evidence Act, although it must comply with the principles of natural justice. The law in relation to matters of evidence will be persuasive.

[34] The Tribunal's Homeowners' Guide to the Canterbury Earthquakes Insurance Tribunal sets out its approach to discovery, including that it recognises and protects privileged material as follows:

> "[Parties must] disclose, at the earliest practicable time, to each of the other relevant parties, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege."

[35] Williams J in *Carter v Coroner's Court at Wellington* held that disclosing the conclusion of an opinion on a central issue in discovery, amounted to a waiver, as it referred to a "significant part of the opinion."[3]

[36] As Dobson J said in *Shuttle Petroleum Distribution Ltd v Chevron New Zealand*:[4]

> "Although the extent of reliance needs to be assessed in each case, if it is significant, it is unfair to allow that party to withhold the balance of that legal advice."

[37] However, the Court of Appeal has said a simple reference to having obtained legal advice will not amount to a waiver.[5]

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[3] [2015] NZHC 1467, [2016] 2 NZLR 133 at [23].
[4] HC CIV-2002-485-826, 5 September 2008 at [62].
[5] *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 at [27].

[38] Whether "a significant part" of privileged information has been disclosed will have to be determined on the material which has been disclosed.[6]

[39] Each inquiry is fact specific to the particular circumstances of each case.

[40] The email at issue in this claim does not constitute the voluntary disclosure of a significant part of the legal opinion inconsistent with the protection afforded by the Evidence Act and the general law. It was never sent to the Applicants during the time when the debate regarding make safe repairs was taking place. That debate necessarily incorporated Tower's view on the extent of its liability to the Applicants and that view was potentially informed by the legal advice that it had received. But that is not the point.

[41] The email did not, by reference to a legal opinion which was not disclosed, seek to persuade the Applicants that its position was to be preferred. It was an internal communication informing Tower employees as to the approach to be adopted in interpreting policy clauses.

[42] In that regard, it is similar to the communication referred to by Tower in the *Opthalmological Society* and *Minister of Education* cases of communication simply stating that its position was supported by legal advice.

[43] The present case is one step removed from those cases in that the communication was not made to the Applicants at all. It was an internal communication. The Applicants took no step in reliance on any advice in that email, as they did not know about its existence until discovery.

[44] The position adopted by the Applicants that the email disclosed both the fact of legal advice together with the conclusion reached in that advice on a central issue is not accepted. The Applicants never saw that email until discovery. That is a key distinguishing factor against there being a waiver, expressly or impliedly.

[45] The correctness of the stance Tower took about its liability to the Applicants is a legal question to be determined by the Tribunal. Whether its legal opinion was correct or incorrect is not material to that enquiry.

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[6] *Bete Fog Nozzle Inc v Delavan Ltd* (2008) 19 PRNZ 439 at [23].

[46] For the same reasons as set out above, the related documents, including TOW.CLA.002.365, are privileged and there is no waiver.

Decision on legal opinion documents

[47] Tower did not waive privilege in the legal opinion referred to in the internal email of 31 May 2012 when it included that email in its discovery.

[48] Tower is not required to disclose the legal opinion or the related email referred to in the applicants' application[7]. The privilege applying to those documents prevails.

P R Cogswell
Member
Canterbury Earthquakes Insurance Tribunal

[7] TOW.CLA.002.061 and TOW.CLA.002.365