IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-XXXX-XXX

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	TRUSTEES OF THE DGF TRUST Applicant
AND	IAG First Respondent
AND	MCL Second Respondent
AND	MEL Third Respondent
AND	OHM (xxxxxxxxxxxxxxxx) Fourth Respondent
AND	OHG (xxxxxxxxxxxxxxxx) Fifth Respondent
AND	QBE Sixth Respondent

Date: 8 July 2020

Appearances: AP for the Applicant
SM and OCM (CO as representative) for the First Respondent
RS (DM as representative) for the Second and Third Respondents
No appearance by or for the Fourth and Fifth Respondents
SG for the Sixth Respondent

DECISION No 1 OF C P SOMERVILLE

Introduction

[1] The Tribunal was set up as a result of wide spread dissatisfaction with litigation conducted under the auspices of the High Court. It was expensive and protracted. Litigants were unevenly matched, with homeowners, facing large bills for experts and lawyers, opposed by insurers dealing with far wider issues than just one particular case involving those homeowners. There was always more at stake for insurers than there ever was for homeowners. To make matters worse, costs automatically followed the event, so that homeowners found themselves being forced to settle because of the risks they ran in conducting expensive and time consuming litigation.

[2] It is not a surprise that the Tribunal was set up to provide fair, speedy, flexible and cost effective services for resolving disputes about insurance claims. Part of being a cost effective process was the thought that homeowners might be able to appear before the Tribunal without necessarily incurring the expense of engaging counsel. Insurers themselves could have taken that option, but chose to continue instructing the same lawyers they had used in High Court. Those lawyers, in turn, have continued to adopt the same practices they had pursued in that forum.

Submissions

[3] This is not the first occasion when a complicated case before the Tribunal has begun with an application to deal with admissibility issues. That is not surprising because of the amount of money at stake and the complexity of the issues, but it is also to be expected because often a litigant in person will include material in an affidavit that should not properly be there. They do not appreciate the difference between submissions and evidence. They do not understand that the purpose of an affidavit is to put facts before the Court. Instead they tend to incorporate in their affidavits arguments in support of their claim. This makes it difficult for opposing counsel because then there are matters in affidavits that could be accepted by the Court and might, therefore, require cross-examination.

[4] Had the litigant in person appreciated the difference between submissions and evidence, they could just as easily have incorporated their submissions in a document entitled, "Submissions" and filed an affidavit dealing only with the evidence, leaving final submissions to provide their comments about the evidence of others.

[5] KD's evidence in her affidavit and in her brief does incorporate matters of submission. Both the lawyers and I can recognise submissions and distinguish them from evidence. I do not expect counsel to cross-examine on anything that resembles argument. It is not for counsel to engage in an argument with a witness. It is for counsel to test the facts presented by that witness. Bearing in mind, however, the need for this Tribunal to provide a fair process for both homeowners and insurers, such irregularities are to be expected and can be easily accommodated.

[6] I am certainly not rejecting paragraphs in affidavits simply because they are submissions. They should not be there, but the deponents do not know that. I do, and I will make allowances.

Relevance

[7] I am prevented by s 37 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act) from admitting or permitting unnecessary or irrelevant evidence. Parliament must have thought that it was necessary to tell the Tribunal to truncate what would otherwise be the normal course of litigation conducted in the courts.

[8] This issue has presented itself squarely before me today because this hearing is divided into stages. Clearly the evidence required for a second or third stage is not material to the issues being debated in the first stage but that does not make them irrelevant or unnecessary. They are relevant and necessary to the proceedings, but not necessary or relevant to the present stage of those proceedings.

[9] I am not going to strike out those paragraphs as unnecessary or irrelevant, because they are necessary and relevant to the proceedings, but not at this stage. If I were to do that, I would be forcing litigants to file a series of affidavits appropriate for each stage of the process. It is far more useful for me to have all of the evidence in one place, but I do not expect counsel to cross-examine on any evidence that is not relevant to this particular stage. SM has very carefully gone through the evidence and marked the pieces of evidence that he challenges. I do not expect him to cross-examine on any of those passages that he has marked as either being submissions or irrelevant.

Hearsay evidence

[10] The real challenge comes when we look at the admissibility of hearsay evidence. SM has referred to provisions in the Evidence Act 2006 which, strictly speaking, do not apply to a Tribunal because the Evidence Act only applies to courts. RS has referred to High Court authority ruling that the Weathertight Homes Tribunal is not bound by the Evidence Act. This Tribunal and its legislation were modelled on the Weathertight Homes Tribunal, so you would imagine that the same applies to this Tribunal.

[11] The matter is not quite as black and white as that, though. This Tribunal is required to observe the principles of natural justice. It is important that all parties to claims before it are treated fairly and justly. The rules of evidence are there for a reason: it is important that the evidence in court proceedings is relevant and reliable. That is just as much the case in this Tribunal.

[12] The more detailed provisions of the Evidence Act comprise a set of standardised rules to ensure that courts are consistent in their treatment of the evidence on questions of reliability. It is not surprising that SM is able to draw my attention to cases where tribunals have decided that the Evidence Act should be used as a guide to what is reliable. I will be doing the same, but I have a discretion to admit evidence that might otherwise be inadmissible, giving whatever weight I think is appropriate to that evidence. It is not helpful, however, if submissions are made at the beginning of a case about matters of reliability. I do not want to decide, as a matter of principle, that anything that is hearsay is inadmissible. That is a black and white standard. I am permitted to have a grey standard.

[13] Although it is true that litigants can subpoena who they like, as indeed can the Tribunal, there is a huge cost burden involved in doing so. The homeowners in this case are already bearing a significant burden by calling experts in respect of a number of technical matters. They will need to pay for those people to prepare reports, prepare affidavits, and attend the Tribunal. This is not a small expense for a homeowner, especially those who have already participated in the High Court process and already incurred significant fees.

[14] There is a need, in a fair and just process, for a balance between the interests of the homeowners and the insurers. It is my role to maintain that balance.

[15] SM has very carefully gone through the evidence and marked the pieces of evidence that he challenges. I do not expect him to cross-examine on any of those passages that he has marked as either being submissions or irrelevant.

[16] Nor do I expect homeowners to incur unnecessary expense in calling every possible person who might have been involved with repairs or technical investigations over 10 years. That would be unfair and unjust.

[17] Similarly though, it would be unfair to the insurer if I were to allow reports tabled in a bundle of documents to automatically assume authority they may not deserve. The insurer cannot cross-examine the persons who wrote those reports, which makes them inherently unreliable. But that is a matter that will depend on the opinion being expressed and whether it logically follows from other matters considered by the report writer. It is a question of what weight to give it.

[18] Moreover, some of these reports are not necessarily being produced to demonstrate the accuracy of what's contained in them, but to support a history of how the claim has been managed, how those repairs were undertaken and why. Those reports, therefore, are relevant in that context and may be quite reliable.

[19] I don't want to make a blanket decision now that says all those reports are inadmissible, I will say now that they are admissible, but I am not willing to rule in advance how much weight I will give them. That is a matter to be dealt with case by case, as it's raised, and I expect counsel to raise this issue and challenge the evidence in submissions.

Conclusion

[20] One of the challenges when dealing with litigants in person, is to make certain that the process is sufficiently user friendly for them to feel that they are receiving justice. If questions of admissibility are taken on technical grounds relating to sections in the Evidence Act, they are never going to feel that is fair, because they do not have the basis for understanding the rules and how they are being applied.

[21] On the other hand, the insurer needs to understand how much weight is being given to evidence that would otherwise have been declared inadmissible in the High Court. It is not fair

that an insurer faces a decision based on a report it was unable to challenge. I can assure the insurer that although I will look at the report, I will also consider their submissions. I will give reasons if I think that the evidence has any weight, so that if the matter were to go on appeal, that issue can be considered. It needs to be transparent. If it is not, that is neither fair nor just.

[22] So today, I am not declaring that any clauses in the briefs or affidavits of the witnesses are inadmissible, I am allowing them to be given in evidence. I will allow the documents in the common bundle to remain in the common bundle, but everyone is on notice that if they wish to rely on a document, the maker of which has not been called to give evidence, they will be expected to make submissions on the weight that shall be given to it.

C P Somerville
Chair
Canterbury Earthquakes Insurance Tribunal