IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT 0078-2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	ATL Applicants
AND	IAG NEW ZEALAND LIMITED First Respondent
AND	QBE INSURANCE (AUSTRALIA) LIMITED Second Respondent
AND	ABCL - *removed* Third Respondent
AND	FCL Fourth Respondent
AND	PPL - *removed* Fifth Respondent
AND	DESL - *removed* Sixth Respondent

AND	PRL - *removed* Seventh Respondent
AND	MTL - *removed* Eighth Respondent
AND	BRL Ninth Respondent
AND	SWFL - *removed* Tenth Respondent
AND	DJSSL - *removed* Eleventh Respondent

DETERMINATION OF E J FLASZYNSKI ON A QUESTION OF LAW

DATED: 27 May 2022

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[1] The second respondent, QBE, seeks a determination of a question of law.

[2] The question is:

> Does the Tribunal have jurisdiction under s 45(1) of the Canterbury Earthquakes Insurance Tribunal Act 2019 to determine issues as to costs between IAG and QBE under clauses 17.1 and 17.2 of the 2012 Rebuild Solution Management Agreement between IAG New Zealand, Hawkins Management Limited and Hawkins Group Limited?

[3] IAG, as the first respondent and as the assignee of certain rights of the applicants, together with QBE, confirm that the question may be answered in the affirmative that the Tribunal does have jurisdiction to decide issues as to costs between them under the indemnity provisions of the Rebuild Solution Management Agreement. They have both confirmed their agreement that to this question being addressed as a pre-hearing determination which can be done on the papers.

Background

[4] In the aftermath of the Canterbury Earthquake Sequence, IAG and Hawkins Management Limited and Hawkins Group Limited (Hawkins) entered in to the 2012 Rebuild Solution Management Agreement (the RSMA). The RSMA provided the terms on which Hawkins provided project management services to IAG in respect of the repair or rebuild solutions for its policy holders' earthquake damaged properties.

[5] QBE is potentially liable as insurer for the insolvent Hawkins group of companies.

[6] Pursuant to the RSMA homes in Canterbury were repaired. The applicants' home at XXXXX, Christchurch (the Property) being one of them.

[7] A dispute arose regarding the standard of the repair completed at the Property. The applicants filed a claim against IAG. As part of the claim IAG made cross claims against QBE and various contractors (third-party respondents) for the roles these companies played in the repair.

[8] Nine third party respondents were joined in addition to QBE. For a variety of reasons, the claims against seven of these respondents have been discontinued, with only the claims against FCL and BRL currently being pursued.

[9] QBE has filed cross claims against IAG and the remaining two third party respondents.

[10] The claims between IAG and QBE include, inter alia, claims for contractual indemnities and/or contractual guarantees under the terms of the RSMA. Clause 17.1 and 17.2 set out indemnities given by IAG and Hawkins which include indemnities for costs (including reasonably incurred legal costs on a solicitor-client basis).

[11] These contractual claims (as well as cross claims involving the various third party respondents) require determination.

[12] The applicants and IAG have settled all bar one of the alleged claims, the applicants assigning their rights to IAG including the right to pursue damages against the other respondents.

[13] Before these claims can be heard there needs to be clarity and certainty that the Tribunal has the jurisdiction to hear claims for contractual indemnities under the RSMA. And that the Tribunal may determine the cost component of these claims notwithstanding the statutory cost regime set out at s 47 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act).

[14] The parties contend that claims under the RSMA including claims for costs, are contractual claims that fall to be determined under s 45(1) of the Act. That the cost claims are not claims for party-party costs as envisaged by s 47. The parties agree that the Tribunal has the jurisdiction to determine these contractual claims but seeks formal confirmation of this. Hence the question of law has been asked.

Jurisdiction - does the Tribunal have the jurisdiction to answer questions of law?

[15] The Tribunal was set up to determine disputes about insurance claims for physical loss or damage to residential buildings arising from the Canterbury earthquakes. The overriding purpose of the Act is to provide fair, speedy, flexible and cost-effective service for resolving disputes about insurance claims.

[16] Section 45(1) provides that the Tribunal may determine under s 46:

(a) Any liabilities of any party to any other party, and

(b) Any remedies for that liability.

[17] In doing so, the Tribunal may regulate its procedures as it thinks fit subject to the Act, any regulations and any practice note made under the Act.[1]

[1] Canterbury Earthquakes Insurance Tribunal Act 2019, sch 2 pt 1 cl 1.

[18] Section 53(1) anticipates that questions of law **may** (my emphasis) arise during case management processes and gives the Tribunal the power to refer questions of law to the High Court. This section also gives the Tribunal the discretion to choose when it is appropriate to do so, conversely giving the Tribunal the power to answer a question of law as part of its processes.

[19] Section 53(2) requires the Tribunal to give the parties a reasonable opportunity to comment on whether the question should be referred to the High Court.

[20] Both IAG and QBE agree that the Tribunal has jurisdiction to answer a question of law and have confirmed that this question can be answered as a pre-hearing determination by the Tribunal, on the papers.

[21] Pre-hearing determinations are used to address issues that affect the progress of a claim. If a claim can be defended on a jurisdictional basis then this issue should be determined at the earliest opportunity before significant costs of a substantive hearing are incurred.

[22] The hearing of an issue may be dealt with on the papers if the Tribunal consider it is appropriate.[2]

[23] In this case, application was filed, the parties affected were given the opportunity to comment. A joint memorandum was filed setting out the agreed views on the issue to be determined and I have heard directly from both parties on this issue.

[24] It is within my discretion to choose to answer the question and I believe it is far more efficient, speedier, and cost effective for the Tribunal rather than the High Court, to determine this question of law on jurisdiction and to do so as a prehearing determination on the papers. Moreover, this is a common issue across a number of claims in the Tribunal where IAG and QBE are parties. The Tribunal is better positioned to evaluate this broader context than the High Court would be when considering a question of law.

[2] Section 42(4).

The Claims - Are claims under the RSMA eligible to be addressed by the Tribunal?

[25] The claims between IAG and QBE are based on the terms of the RSMA. The terms happen to include indemnity provisions at clauses 17.1 and 17.2 which refer to "costs" and specifically includes "reasonably incurred legal costs on a solicitor-client basis".

[26] A claim for money payable under a contractual indemnity is a claim for damages.[3] Contractual claims for as incurred legal and expert costs, such as clauses 17.1 and 17.2 of the RSMA, are prima facie enforceable contractual obligations. In *Watson & Son Ltd v Active Manuka Honey Association* the Court of Appeal stated that the recovery of legal costs under an indemnity provide an alternative to the costs jurisdiction of the Court.[4] The question is whether the wording of the indemnity clearly shows agreement to an alternative basis for recovery of legal costs than the jurisdiction of the Court or Tribunal. I find that clauses 17.1 and 17.2 show such an agreement.

[27] Section 46 provides that the Tribunal may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with "the general law of NZ".[5]

[28] While s 46(1)(b) goes on to refer to the law of contract as it relates to contracts of insurance, and the Earthquake Commission Act 1993, these qualifications do not derogate from the general nature of this provision.

[29] A contractual claim that one party may have against the other for as incurred legal costs under a clause of a contract, in this case clauses 17.1 and 17.2 of the RSMA, is a claim for an order that a court of competent jurisdiction could made. It falls that this decision can be made by the Tribunal under s 46(1)(b).

[30] Section 47 of the Act provides the Tribunal with jurisdiction to award costs against a party in limited circumstances. This power is discretionary. It would be a misuse of this discretion to put to one side the clearly worded contractual protections clauses 17.1 and 17.2 were intended to provide.

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[3] *Halsburys Law of England* Damages distinguished from a claim to payment of an agreed sum (online ed, vol 29) at [306]; referencing *Cf Total Transport Corpn v Arcadia Petroleum Ltd, The Eurus* [1998] 1 Lloyd's Rep 351, CA.
[4] *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [24 - 25].
[5] Canterbury Earthquakes Insurance Tribunal Act 2019, s 46(1).

[31] Accordingly, the Tribunal has jurisdiction to decide issues of contractual cost claims and is not limited by s 47.

Conclusion

[32] I can answer this question of law as a pre-hearing determination.

[33] The answer to the question is yes, the Tribunal does have the jurisdiction under s 45(1) of the Canterbury Earthquakes Insurance Tribunal Act 2019 to determine issues as to costs between IAG and QBE under clauses 17.1 and 17.2 of the 2012 Rebuild Solution Management Agreement between IAG New Zealand, Hawkins Management Limited and Hawkins Group Limited.

E J Flaszynski
Member
Canterbury Earthquakes Insurance Tribunal