IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL [2019] CEIT 0013

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	E and E Applicants
AND	IAG NEW ZEALAND LIMITED First Respondent
AND	I (now in liquidation) Second Respondent
AND	QBE INSURANCE (AUSTRALIA) LTD Third Respondent

Date: 22 November 2019

Appearances: Mr J for Applicants
Mr G and Mr S, with Mr N for First Respondent
Mr A for Third Respondent

DECISION OF C P SOMERVILLE

DATED 18 December 2019

Case stated

[1] The respondent (**IAG**) has filed an application for referral of a question of law. That application, which took the form of a memorandum of counsel, outlined the question of law for which it sought referral and attached a draft case stated. The application was served on the

other parties but only the applicants and the third respondent (**QBE**) sought to be heard in opposition to the application.

[2] IAG proposed that the following question of law be referred to the High Court:

> Does an insurer's policy obligation to pay the cost of repairing the house to the policy standard, as and when incurred by the insured, include an obligation to also pay for the reasonable cost subsequently required to remedy defective repair work?

Background

[3] E & E are the owners of a house at XXXX which, between May 2010 and May 2011, was insured against earthquake damage under a State Home Comprehensive Policy (**policy**) which provided:

> If you have a loss that is covered by this policy and you repair or rebuild the home, we'll pay the costs of repairing or rebuilding the home to a condition as similar as possible to when it was new, using current materials and methods.

[4] Their house was damaged during the earthquakes of 4 September 2010 and 22 February 2011, particularly the latter event, and on 28 February 2011 they lodged a claim for earthquake damage with IAG. This claim was subsequently accepted.

[5] In due course, E & E entered into a building contract with the second respondent (**I**) to repair the earthquake damage to their house. The original contract price was for $240,753.65. After a number of variations to the contract, the final contract price was increased to $347,464.07.

[6] The repair work undertaken by I and its subcontractors was project managed by H (now in liquidation). Throughout the period during which the work was being undertaken, H was insured by QBE under a professional indemnity policy, as well as a general liability policy.

[7] When the repair work was completed, IAG paid I the full contract price of $347,464.07.

[8] E & E were unhappy with the repair work and commissioned several investigative reports from which they concluded that:

(a) the repairs were inadequately and incorrectly scoped;

(b) the work undertaken was largely undocumented;

(c) the scope of works did not address all the earthquake damage; and

(d) the house had been left damaged and non-weathertight, causing it to progressively deteriorate and devalue.

[9] E & E now believe that it will cost $1,161,770 to bring the house up to the policy standard by repairing all the damage and rectifying the defective repairs. They consider that this cost should be borne by IAG under the terms of the policy.

[10] IAG has suggested that E & E should, instead, pursue those responsible for the defective repairs but E & E are concerned because:

(a) they have no paperwork upon which they could rely as they were not involved in organising those repairs;

(b) for the same reason, they have no first-hand knowledge about who undertook the repairs or how the work was undertaken;

(c) some of the organisations (H and I) that have the relevant documents and first-hand knowledge of the events surrounding the repairs are in liquidation;

(d) the cost of remediating the repairs is significant and possibly well beyond the means of those who can be held liable for the defective workmanship.

Causes of action

[11] The primary cause of action for E & E in their claim against IAG rests on the assertion that IAG's obligations under the policy are not discharged until their house has been repaired to the policy standard. If there are defects in the workmanship or design of the work, then E & E contend that the policy standard has not been achieved.

[12] E & E have secondary causes of action, both in contract and in tort, against the designers of the repair works and those that undertook them.

[13] There is also the possibility of claims being made by E & E against IAG for breach of its duty of utmost good faith and under the Fair Trading Act 1986 for deceptive or misleading conduct.

Evaluation

Elements

[14] Section 53 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act) enables any question of law arising during any case management process or at the hearing of a claim to be referred by the Tribunal to the High Court for its opinion.

[15] Although no guidance is given as to how this discretion is to be exercised, I consider that the following factors are relevant:

(a) the question being referred must be a question of law that arises in the proceedings;

(b) that question must require determination in those proceedings;

(c) the answer provided by the High Court will determine one of the issues in the proceedings; and

(d) regard should be had to the purpose of the Act, namely, to provide fair, speedy, flexible, and cost-effective services.

Question of law

[16] The question submitted by IAG for referral to the High Court is one of contractual interpretation which has been traditionally treated as a question of law.

[17] Because the insurance contract in question was in standard form and was not negotiated, the factual matrix relevant to the question of interpretation is extremely small. I accept the submission from IAG that events occurring after the agreement was signed have no relevance to the meaning of the words in the policy.

[18] Some of the necessary facts (the terms of the policy, the lodging of a claim and the existence of the building contract) are not disputed. Other facts, such as whether the repair work was defective and how much that repair work might cost to remediate, are currently mere allegations yet to be determined, but they are capable of proof and are relevant to the case stated because they demonstrate why IAG's question needs determination in the proceedings.

Does the question require determination?

[19] The question IAG seeks to have referred to the High Court addresses the primary cause of action raised against it by E & E.

[20] Although the issue appears to be of universal application, the only relevant authority is *University of Newcastle v GIO General Ltd*,[1], 1995 decision of the New South Wales Supreme Court, in which Rolf J held that, as a matter of proper interpretation of the payment promise in the policy before him, the cost of reinstatement included the cost of remedying the defective workmanship of a contractor engaged by the insured.

[21] IAG does not consider that this decision is correct and wants the issue re-argued in the High Court. The relevance of this issue in these proceedings combined with IAG's determination to confront and overturned the 1995 ruling in *University of Newcastle v GIO General Ltd* has resulted in this issue becoming a roadblock, both in these proceedings and in others. I consider that it requires urgent determination in the High Court.

Consistent with the purpose of the Act

[22] If the High Court provides a positive answer to the question, then the issue between E & E and IAG becomes a question of simply determining whether their property has been repaired to the policy standard. There will be no need to decide whether shortcomings in the repair process were due to inadequacies in the scope of works or to poor workmanship. IAG will bear the risk that the negligent contractors may not have the means to pay for rectification.

[23] That simple question could be determined quite swiftly, leading to an early start to the remediation process. The issues between IAG and the contractors would not adversely affect E

[1] *University of Newcastle v GIO General Ltd* (1995) 8 ANZ Ins Cas 61-281.

& E; any involvement they might have is unlikely to require the assistance of counsel or of expert witnesses.

[24] A positive answer from the High Court, therefore, will lead to a speedier and more cost-effective outcome for E & E.

[25] A negative answer from the High Court would remove the primary cause of action in these proceedings and leave only the secondary issues. This will not necessarily shorten the hearing time, unfortunately, as the breach of good faith and Fair Trading Act arguments with IAG will involve extensive discovery and significant evidence. Moreover, an adverse finding against IAG on either of those issues is likely to lead to an appeal or series of appeals.

[26] On the other hand, the toxic nature of those secondary issues could lead to settlement at mediation or a settlement conference, thereby eliminating the cost and delay of an appeal.

[27] Whatever the answer from the High Court, therefore, I consider that many cases with similar issues, whether in the High Court, this Tribunal, or being negotiated by the GCCRS, will be able to proceed to early settlement.

[28] Of equal importance, is the benefit that a ruling from the High Court on this issue will provide to those currently negotiating with their insurers about earthquake repairs as it will determine who bears the risk of those repairs being defective.

[29] The case stated is likely, therefore, to be of major benefit to many of the homeowners whose claims are currently being managed by the Tribunal, the High Court, and the GCCRS.

Alternatives

Refuse the application

[30] If this application by IAG is declined, then this case will proceed as scheduled. It might settle because of the toxicity of the secondary issues, but otherwise any determination by this Tribunal is likely to be appealed at least once. Of course, if the determination is not appealed, it will have a precedent effect in this Tribunal and be helpful for the GCCRS, but be of limited

value to the High Court. I acknowledge that the case stated decision might be appealed, but that would be a speedier process than an appeal against the Tribunal's ultimate determination.

[31] One of those High Court proceedings involving similar issues might go to hearing and provide the ruling sought by IAG, but this would certainly be a slower process than using the case stated procedure requested by IAG.

Declaratory judgment

[32] IAG could initiate an application for a declaratory judgment on the issue but it has probably already ruled out this option bearing in mind that it has taken no steps in the last few years to do so.

[33] In any event, applying for a declaratory judgment would likely involve the Court adopting the same expensive and slow process used for the EQC declaratory judgment. It is not hard to see why IAG has opted to use the Tribunal's case stated process.

E & E's concerns

[34] I acknowledge that E & E want their house repaired as soon as possible. They are likely to be frustrated by the course these proceedings are taking and worried that the case stated application could prolong the process. They might also be worried about the likely delays if the High Court decision on the case stated were to be appealed.

[35] However, the High Court has already allocated XXXX 2020 for hearing s 53 referrals from this Tribunal. If the High Court can use that hearing time for this case stated,[2] then its answer is likely to be received about the same time that discovery is completed. The Tribunal will then be able to use that answer to shape the case, increasing the chances of settlement and reducing the chances of an appeal.

[36] I also acknowledge that E & E have already spent a large sum on pursuing their claim and are keen to reduce further expenditure, both on experts and lawyers, to a minimum. Mr J has informed the Tribunal that they are not willing to meet any additional cost of employing counsel in the High Court, but I would hope that the High Court would appoint an experienced

[2] Fortunately, there are no competing s 53 referrals.

practitioner as *amicus curiae* to ensure a proper debate. It is important to note that IAG is willing to support such an appointment and will not be seeking costs.

[37] I am satisfied that a positive answer from the High Court would produce significant gains for E & E in terms of delay and expense. Even a negative answer would provide small benefits for them in both those areas. They will therefore benefit whatever the answer.

Conclusion

[38] The purpose of the case stated process is to obtain rulings on important questions of law blocking settlement. I am satisfied that granting this application will provide important benefits, not only for E & E, but for many other homeowners.

[39] This application is granted.

The question

[40] Although Mr J argued that the question submitted by IAG was ambiguous, too simplistic, and did not address the central issue of estoppel he did not suggest any amendments. I accept that it does not address the issue of estoppel, but that argument would not be necessary if the question is answered in the positive. I do not accept that the question is either ambiguous or too simplistic, but I do consider that it needs slight amendment by removing some surplus verbiage.

[41] The question to be referred under s 53 of the Act to the High Court is as follows:

> Does an insurer's policy obligation to pay the cost of repairing the house to the policy standard, as and when incurred by the insured, include an obligation to pay for the reasonable cost required to remedy defective repair work?

C P Somerville
Chair
Canterbury Earthquakes Insurance Tribunal