IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0021-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	K B AND S B Applicants
AND	EARTHQUAKE COMMISSION Respondent

Appearances: On the papers

DECISION OF C D BOYS
12 October 2020

BACKGROUND

[1] K and S B own the house at xxxx , Upper Riccarton. The house sits on a backlot and is accessed by an approximately 45m long asphalt driveway. While the driveway itself was not damaged in the Canterbury earthquake sequence, the drain pipes which sit beneath it were.

[2] EQC has accepted liability for the damage to the drains, which require replacement. To access the drains a strip trench must be cut in the asphalt and basecourse. The strip will go the length of the driveway. The cutting, excavation, and replacement of the asphalt strip, and relaying the base course are enabling works; works to undamaged property which are necessary to repair damaged property.

[3] A dispute arose about what is necessary to remediate the driveway. The driveway asphalt was not new when the earthquakes occurred, although it appears to be in reasonable condition for its age. The B s and their advocate, Mr W, believe that relaying just the strip of asphalt above the strip trench will result in a weaker area where the new and old asphalt join. They say this will not meet the requirements of the Earthquake Commission Act 1993 (the Act). They believe that the entire driveway must be re-laid, otherwise they will be left with a driveway with a reduced lifespan.

[4] EQC say that the strip repair will meet the requirements of the Act, and that Mr W agreed to the strip repair on behalf of the B s, who are bound by his agreement.

[5] On 9 July 2020, the parties attended a case management conference where the issues were discussed. In that minute I recorded that the issues were: whether there had been a full and final settlement by both parties reached in the discussion between Mr W and EQC's representatives, and what the extent of EQCs liabilities were under the Act when enabling works cause increased risk of damage to undamaged property?

[6] Since the case management conference, the parties negotiated between themselves, on a without prejudice save as to cost basis. The outcome being an offer by EQC to pay the costs of relaying the entire driveway and an offer to cover any unforeseen eventualities which may arise during the repair process. This offer has been rejected by the B s as the offer was made on a full and final basis and does not cover their costs in bringing this application.

[7] On 20 August 2020, Mr W, emailed the case manager indicating that the applicants wished to return to the Tribunal to adjudicate the dispute.

[8] As a consequence, on 21 August 2020, EQC filed a memorandum seeking:

(a) an award of costs to be paid, under s 47 of the Canterbury Insurance Tribunal Act 2020 (the CEIT Act) on the basis of bad faith; and

(b) for this application to be discontinued; as EQC's agreement to pay the full amount of the claim has resolved the underlying issue at dispute in this case, in effect an application for the application to be dismissed.

[9] On 1 September 2020, the Bs made their own cross application for costs incurred, due to; bad faith and unsubstantiated allegations being raised by EQC in defence of the claim.

[10] I must now consider these applications.

DISMISSING THE SUBSTANTIVE CLAIM

[11] Ms Clark, for EQC, has submitted that, as EQC has agreed to pay the applicants the estimated cost to relay the entire driveway (the settlement offer), the substantive matters are resolved. There is no evidence before me regarding how the settlement offer was calculated, or arguments regarding whether the amount offered fulfils EQC's statutory liabilities.

[12] The CEIT Act makes no specific mention of powers to dismiss or strike out claims. However, s 46 gives the Tribunal the power to make any order that a court of competent jurisdiction can in relation to a claim, and in accordance with the general laws of New Zealand. I am guided by the approach taken in the courts and tribunals in this regard. High Court Rules 2016, r 15.1(1)(a) allows the Court to dismiss claims that have no prospect of success. This could occur where the claim itself is so defective that it could never succeed or where there is no tenable evidence to support a claim. It could also occur if a settlement were to resolve the substance of a dispute.[1]

[13] I have some difficulties in considering this matter because:

[1] For instance, a claim for breach of contract where no contract existed.

(a) the negotiations between the parties were carried out on a without prejudice save as to costs basis and are inadmissible, so I cannot consider the settlement discussions; and

(b) as I cannot consider the settlement discussions, I have limited evidence before me to allow me to consider whether the settlement offer was sufficient to resolve the underlying dispute

[14] Without prejudice communications are an important part of negotiations. A without prejudice statement is one made without the intention that it will affect the legal rights of the person making it. The usual rule is that without prejudice statements are inadmissible as evidence. This is to protect parties from being bound by compromises made purely in an effort to settle a dispute. The concept has developed over a number of years and has been recognised as offering protection which a Court should be very slow to lift, unless there are good reasons for doing so.[2]

[15] Section 57 of the Evidence Act 2006, codifies the common law rule around settlement discussions generally, and protects against the disclosure of settlement discussions. For the purposes of this decision I will refer to both protections as being without prejudice. Although I am not bound by the requirements of the Evidence Act, the without prejudice rule is a very important one. In *Sheppard Industries Ltd v Specialized Bicycle Components Inc* the Court of Appeal discussed the exceptions when evidence of without prejudice communications may be admissible.[3] Of these exceptions, three require consideration:

(a) when parties have mutually waived the protection of the without prejudice rule;

(b) when discussions are without prejudice save as to costs; and

(c) when without prejudice discussions are evidence of whether a binding agreement has actually been reached.

[2] *Morgan v Whanganui College Board of Trustees* [2014] 3 NZLR 713.
[3] *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346 at [24].

[16] Both parties have submitted material which is covered by the without prejudice rule, specifically the unsigned settlement agreement drafted by EQC. I consider that, by their conduct, the parties have mutually waived the protection for this document and the agreement is admissible. However, the settlement agreement on its own, does not contain evidence allowing me to consider the adequacy of the proposed repair. While the Tribunal can act inquisitorially with wider powers than a Court, it would be a breach of the rules of natural justice for me to reach a decision binding on the parties without evidence to support that decision. Therefore, I am unable to reach a decision on this issue and cannot dismiss the claim.

COSTS

[17] Both parties have sought costs. The jurisdiction to award costs in the CEIT Act is limited to s 47.

[18] Section 47(2) states:

> (2) a costs award may be made against the party whether the party is successful or not (or part of the parties claim or response) if the tribunal considers that-
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> (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 reasonable excuse for doing so.

[19] The wording of the section shows that there must be a causal relationship between the alleged actions and the costs incurred. The words "costs and expenses" show that the outlay could be for more than legal costs, it could for instance include: travel costs, expert disbursements, or other out of pocket expenses. Section 47 requires that the costs were incurred un-necessarily. If the specific costs would have been incurred in any event, an order would not be justified.

[20] The wording of s 47 of the CEIT Act, was taken from s 91 of the Weathertight Homes Resolution Services Act 2006. Whilst s 47 has not been the subject of other decisions issued

by this Tribunal to date, I am able to look at the approach used by the Weathertight Homes Tribunal (WHT) for some guidance.

Bad Faith

[21] Section 47(2)(a)(i) allows costs to be awarded when incurred due to "bad faith" actions. In *Edwardes v Architectural Edge Ltd,* member KD Kilgour, sitting as an Adjudicator in the WHT, considered the issue of costs for alleged bad faith, concluding that:[4]

> In terms of public policy, "bad faith" as used in s 91 of the Act could apply to parties who are obfuscate or take few or no steps and refuse to participate in the process or settlement negotiations (often in the hope of escaping any liability), and who in so doing jeopardise the settlement process.

[22] The phrase "bad faith" has a broad meaning and is used in a number of contexts. In administrative law it refers to illegality or improper motive. In company law it is used to refer to the actions of an officer of the company which are prejudicial to the interests of shareholders. In mortgagee sale cases, it refers to actions outside of a mortgagee's primary purpose of realising its secured debt. In *Mary Moody Family Trust Board v Attorney General* Mander J said that "bad faith" is to act unreasonably, or improperly, and knowingly doing so.[5] I keep in mind the WHT approach that the phrase should be not given too restrictive a meaning, otherwise the section would have little effect, at the same time the words themselves set a relatively high bar in terms of misconduct.[6]

[23] Keeping in mind that the purpose of the CEIT Act is to provide fair, speedy, flexible, and cost-effective dispute resolution, I consider that "bad faith" in this context involves unreasonable and unnecessary actions, undertaken to gain an unjustified advantage in an application before the Tribunal. This could involve steps taken to: pressure settlement, or withdrawal, of an application, going back on promises made, unfair pressure to increase a settlement offer, pursuing pedantic lines of argument, ignoring or rejecting reasonable settlement proposals, or withholding agreement as leverage.

Allegations Without Merit

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[4] *Edwardes v Architectural Edge Ltd* [2017] NZWHT Auckland 2 at [24].
[5] *Mary Moody Family Trust Board (Inc) v Attorney-General* [2015] NZHC 365 at [104].
[6] *Brodav Ltd v Waters* & Ors TRI-2008-101-000059 & 66 [11] - [22].

[24] Section 47(2)(a)(ii) of the CEIT Act allows costs incurred, due to the making of allegations or objections that are without substantial merit, to be recouped. The words "without substantial merit" refer to defective allegations, or objections unsupported by evidence, or which are logically flawed. The defects must be such that there is no prospect that the allegations, or objections, will advance the point they are made to support. In this Tribunal a large number of parties are self-represented or have lay advocates. Therefore, this section cannot be applied in a rigid or legalistic way, otherwise well intended but legally problematic allegations could be caught. Unlike costs incurred due to bad faith, there is no need for a subjective element, no question of why a party has raised an allegation.

Decision on EQC's application for costs

[25] EQC alleges that the B s' rejection of its settlement offer was made in bad faith, because the rejection prevented the speedy resolution of the claim. EQC draws an analogy with the actions of the roofer in *Brodav.*[7] In that case, a negligent roofer ignored repeated attempts by the applicant to settle his liability. The settlement offers were found to be reasonable in the context. The roofers' conduct was found to be in bad faith. EQC says its offer was reasonable and was one which any reasonable applicant would accept as resolving the issues central to the application.

[26] There are two factual issues which distinguish *Brodav* from this case.

(a) In *Brodav*, the settlement offers were found to be reasonable. In other words, acceptance would have resolved the roofer's liabilities. To evaluate whether EQC's offer would have resolved its liabilities in this case requires me to assess the merits of both the application and the reasonableness of the settlement offer. As discussed above, I cannot make this assessment.

(b) At a factual level in *Brodav,* there were a number of approaches made to the roofer, but these were all ignored. In this case, both parties engaged in negotiations, and some progress was made. However, settlement was not reached. The level of poor behaviour which led to the finding of bad faith in *Brodav* has not been exhibited here.

[7] *Brodav Ltd v Waters* & Ors, above n 6.

[27] I can consider some of the communications between the parties in their negotiations. The without prejudice save as to costs formulation allows the details of negotiations to be admissible, purely for the calculation or adjustment of costs, when the final judgment award is less than the settlement offered. The rule is codified in the High Court Rules regarding the calculation of scale costs.[8] The issue in this Tribunal is that the costs jurisdiction is very different to that in the Courts. The failure to accept an offer made under without prejudice save as to costs terms would also require an element of bad faith to have any effect. While the fact that the negotiations were without prejudice save as to costs allows me to consider the negotiations when considering the costs applications, it does not extend to the merits of the application.

[28] Therefore, I cannot make the order sought by EQC. As the quantum of the costs incurred by EQC has not been provided I would be unable to make such an order, in any event.

Decision on the Bs' application for costs

[29] The Bs make a claim for costs against EQC, submitting that EQC has made allegations which are without substantial merit, and that it acted in bad faith. Their position is that the defence raised by EQC; that the Bs are bound by Mr W's alleged agreement to the strip repair ("the defence"), is without substantial merit. The bad faith argument appears to rest on the same facts.

[30] I am able to consider the evidence of events around the defence. While the discussions fall within the protection of s 57 of the Evidence Act, an exception from *Sheppard* applies; the discussions are evidence of whether agreement was reached. The correspondence before and after the alleged agreement show that the issue of whether the strip repair was satisfactory was, at best, reserved. While Mr W had the apparent authority, to negotiate for the Bs, there was in fact no agreement. But, in these circumstances, was raising the affirmative defence of bad faith based on allegations without merit?

[31] The key evidence is:

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[8] *Calderbank v Calderbank* [1975] 3 All ER 333 and; High Court Rules 2016, r 14.11.

(a) an email from Mr W to EQC dated 29 January 2020, stating that the Bs were open to the proposed strip repair "with a caveat … that… EQC will need to assume the long term risk [of failure]";

(b) a file note drafted by EQC employee G C recording that at the site meeting of 10 February 2020; "[i]t was agreed that for practicality reinstatement of a strip approximately 1m wide for the length of the drive would be most suitable… I discussed this with the homeowner K and he was amenable to this option"; and

(c) the letter dated 13 February 2020 from EQC to the Bs, accompanying the payment of funds, which makes no mention of the settlement being full and final, and which sets out a procedure if the settlement is inadequate or disputed.

[32] Payments made by EQC are payments made for liabilities which arise under the Act. I note that it has not been EQC's policy, outside of litigated settlements, to make payments of claims conditional on being full and final. However, there is nothing in the Act which prevents EQC from settling on this basis if an applicant agrees to it. A person may waive, or contract out of, their rights under statute, provided that; the statute in question does not prevent waiver or contracting out, and that the contracting out or waiver will not defeat the public policy behind the statute.[9]

[33] The defence that EQC raised was legally possible, and while I have found that it was not made out on the evidence, it did have some support from Mr C's file note. It was, at the least, an arguable defence. There was no bad faith in raising this defence, and the alleged facts on which it was based were not unsubstantiated.

[34] I find that neither party has made out that an award of costs is justified. I note that the parties were close to reaching agreement when the negotiations broke down. I strongly encourage them to revisit the positions they had both reached, and to make the attempt to settle this matter again.

[9] Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at [34-35].

C D Boys
Member
Canterbury Earthquakes Insurance Tribunal