IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0074-2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	RM, ND and DD Applicants
AND	EARTHQUAKE COMMISSION (EQC) First Respondent
AND	VERO INSURANCE NEW ZEALAND LIMITED Second Respondent

COSTS DECISION

26 January 2023

On the papers

Introduction

[1] At the conclusion of the substantive decision in this claim, any party seeking costs was invited to do so by way of memoranda.

[2] The applicants, the trustees of the HT (the Trust), seek costs against the second respondent Vero Insurance New Zealand Limited (Vero).

[3] All issues relating to the Earthquake Commission's role in this claim have been resolved between the parties by agreement.

Approach to costs

[4] The Trust seeks costs on the basis that Vero caused costs and expenses to be incurred unnecessarily by raising matters that were without substantial merit. There is no allegation that Vero acted in bad faith.

[5] The overriding approach to costs in the Tribunal is that, subject to the exceptions set out in s 47 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act), the parties bear their own costs[1]. It differs from the approach in the Courts where there is a presumption that costs reflect success in the litigation.

[6] The exceptions set out in the Act at s 47 are narrow. This is because the granting of costs is a departure from the usual approach.

[7] An application for costs on the grounds in this application requires the Tribunal to:

(a) consider whether a party raised allegations that were without substantial merit; and

(b) if so, did those unmeritorious allegations cause costs and expenses to be incurred unnecessarily; and

(c) if so, should the Tribunal, in exercising its discretion, award costs and in what amount.

[8] The Tribunal has a broad discretion as to the amount of costs it awards. This can include costs on a standard Court scale basis or by way of increased or indemnity costs. At the end of the day, it is a matter of discretion to be exercised by the Tribunal acting judicially.

[9] In the Canterbury Earthquakes Insurance Tribunal, the leading authority on the Tribunal's approach to costs is that set out in *CFD, RDG and DRS (as trustees of the DG Family Trust) v IAG New Zealand Ltd & Ors.*[2]

[1] See also s 91 of the Weathertight Homes Resolution Services Act 2006 and s 56 of the Construction Contracts Act 2002.
[2] [2019] CEIT-2019-0037, May 2021 [Costs decision].

[10] That decision was appealed to the High Court which released its appeal decision on 20 December 2022.[3]

[11] As is relevant to this decision, the High Court in the *IAG v D* appeal upheld the Tribunal's decision on the issue of arguments raised without substantial merit and granted an appeal against the Tribunal findings that the insurer had acted in bad faith. Hence, the Tribunal's approach in *CFD, RDG and DRS v IAG* to the costs issue in this decision remains relevant and applicable.

Without substantial merit

[12] In the *CFD, RDG and DRS v IAG* costs decision, on the issue of allegations made without substantial merit, the following propositions are noted:

(a) "substantial merit" refers to claims that require serious consideration by the Tribunal, and the mere fact that an allegation or argument is not accepted or upheld by the Tribunal will not in itself expose the party concerned to liability for costs;

(b) claims which have substantial merit, even if ultimately rejected, will not attract an order for costs;

(c) the proper inquiry when considering whether a claim or a defence has "substantial merit" is to determine, without recourse to hindsight, what the party and their advisers properly considered the strength of the case to be;

(d) the bar for establishing "substantial merit" should not be set too high as the Tribunal should have the ability to award costs against those making allegations which a party ought reasonably to have known they could not establish; and

(e) only the costs "incurred unnecessarily" as a consequence of a party advancing arguments that lack substantial merit are to be recovered.

[3] *IAG New Zealand Ltd v D (as Trustees of the DG Family Trust)* [2022] NZHC 3555.

[13] Further refining those issues, the Tribunal in *KB and SB v Earthquake Commission* describe the issue thus:[4]

(a) "without substantial merit" involves establishing that the defects in the allegations or objections made are such that there is no prospect that the allegations or objections will advance the point they are made to support, either because they are unsupported by evidence or they are logically flawed; and

(b) although there is a subjective element in considering "bad faith", the test for "without substantial merit" is objective.

The allegations in issue

[14] Vero's position was that it was entitled to decline the claim as it was a term of the policy that all statements made by the trust in support of the policy or any claim made under it be complete and correct in all respects. Vero argued that it was entitled to decline the claim or avoid the policy for breach of the "statements exclusion" in the policy.

[15] The correctness of statements and fraud exclusion in the policy states:

> The proposal, application or declaration form is the basis of this contract. All statements made by you or on your behalf on any of these forms or otherwise in support of this policy must be complete and correct in all respects. If any claim under this policy is supported by any incorrect information or statement all benefits will be forfeited.

[16] Vero said that, should the Tribunal find that the Trust made statements that breached this condition of the policy and/or the general overarching duty of good faith and honesty the Trust owed to Vero, it was entitled to decline the Trust's claim in full.

[17] Vero relied on three statements made by the trust to entitle it to decline the claim.

[18] Those statements were:

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[4] [2020] CEIT 2020-0021.

(a) statements made in the High Court statement of claim which included claims for weathertightness defects arising as a result of the earthquakes;[5]

(b) statements made by Mr D in his affidavit filed in support of this claim in which he stated that the property was in good condition and that there was no dampness or any other indications of moisture ingress or damage; and

(c) the contents of a schedule setting out repair costs undertaken by the trust to the home in an unrelated earlier proceeding. That proceeding is referred to as the "Orongomai proceeding". The schedule is referred to in this case as the "Orongomai schedule" and set out various costs incurred by the Trust, some of which Vero contend evidence Mr D's knowledge that the property suffered from weathertightness uses.

[19] In particular, the statements the Trust allegedly made that entitle Vero to decline the claim were:

(a) claims in the statement of claim filed in the High Court that water damage arose following the CES, with an "implication" therefore that no such damage existed beforehand;

(b) Mr D's evidence given to the Tribunal to the effect that he was not aware of existing water entry and problems at the house; and

(c) the Orongomai schedule entries referring to leak work undertaken.

[20] Vero said that those statements either individually or collectively were wrong and knowingly so. And that in advancing a position that the property was not subject to weathertightness issues, the Trust breached the statements exclusion or the duty of good faith and that it was entitled to decline the claim in full.

[5] The High Court proceedings were transferred to the Tribunal in 2019.

Discussion

[21] The substantive decision dismissed Vero's arguments that it was entitled to rely on the statements exclusion or good faith provisions in the policy to decline the claim. The reasons for that are set out in paragraphs [115]–[159] of the decision.

[22] In summary, the Tribunal held:

(a) The allegations in the statement of claim were a matter of pleading, not evidence. They were not a statement made that is caught by the statements exclusion. A party is free to raise any allegation in a pleading, it is for the Court or Tribunal to accept or reject that allegation, once it has heard evidence on the allegations made. To interpolate, no statement in the statement of claim had any contractual significance.

(b) Statements made by Mr D in his affidavit in support of his Tribunal claim were simply statements of his opinion. Mr D gave evidence that he regularly undertook maintenance to the house and that oftentimes this was at the instruction of his wife. His opinion was not a warranty that the house did not suffer from latent defects. It was not a guarantee to Vero that the house had no construction defects or departures from the consented building plans. It was a statement as to his opinion of the state of the house before the CES.

(c) It was arguable whether the Orongomai schedule was a statement at all, much less one made to support the policy being formed or a claim made under it. Vero sought to demonstrate through Mr D and Mr Coombs that the five relevant entries in their totality show that the house was a leaky home. This is a large, complex house, requiring completion following purchase. Five isolated entries, some of which are ambiguous, did not put the Trust on notice that the house had material, systemic, defects.

[23] The Tribunal did not need to determine whether the *Star Sea* or *Versloot* cases assisted the Trust or Vero, because it found that the statements were not made in "support of [the] policy" or to support a "claim under [the] policy". The statements

did not result in Vero taking any action to either grant a policy of insurance or to consider and decline to make any payment under the claim. There was no causal nexus between the three "statements" and any action Vero took. There was no sufficient materiality in the statements that enabled Vero to decline the claim.

[24] Nothing stated in either the statement of claim, the evidence of Mr D or the Orongomai schedule informed Vero's decision to decline the claim. Its decision was always that no amount over the EQC cap was payable. Later, it decided policy exclusions applied.

[25] Accordingly, the Tribunal did not accept that Vero was entitled to decline cover under the policy as a result of the three statements it sought to rely on.

Were the statements without substantial merit?

[26] The Trust seeks costs against Vero on the grounds that it was put to unnecessary expense in having to defend those allegations in this claim.

[27] The Tribunal considers that the allegations that the statement of claim and Mr D's affidavit represented actionable statements entitling declinature were allegations raised that were without substantial merit. The same cannot be said of the Orongomai schedule.

[28] The Orongomai schedule was only discovered by Vero during the course of the hearing. It was discovered after Mr Coombes, a builder engaged by Mr D, and Mr D himself had given evidence.

[29] Both were recalled to address the Orongomai schedule. That was because it was possible that the Orongomai schedule had the effect that Vero contended, namely, that it represented an incorrect statement made in support of the policy or a claim under it.

[30] Ultimately, the Orongomai schedule was not held to give Vero grounds to decline.

[31] However, by reference to the approach to costs arising from allegations made without substantial merit, the Tribunal does not consider that the allegations potentially raised by the contents of the Orongomai schedule were raised without substantial merit. They were a legitimate line of enquiry adopted by Vero which

needed to be explored at the hearing, albeit ultimately unsuccessfully from Vero's point of view.

[32] The Orongomai schedule could have had relevance to the exclusion on the basis that the policy was annually renewable and the contemporaneous knowledge at the time of renewal that the property was suffering from weathertightness problems should have been disclosed. It could have led to a line of enquiry that may have entitled Vero to cancel had it been shown that there was actual wrongdoing at the time of renewal or when the claim was made.

[33] To refer to the *CFD, RDG and DRS v IAG* costs decision; the arguments about the Orongomai schedule, whilst ultimately rejected, should not attract an order for costs. The cross-examination of the witnesses on that issue may have provided Vero with grounds to decline. Hindsight cannot now be applied to that decision.

Were costs unnecessarily caused?

[34] The recall of the witnesses addressed both the statement of claim and affidavit statement defences and also the contents of the Orongomai schedule.

[35] Both categories of defence addressed issues relating to the Trust's knowledge of alleged weathertightness defects at the property.[6]

[36] The discovery of the Orongomai schedule raised issues which were properly to be considered as part of the overall factual matrix of this claim.

[37] It was open to Vero to explore that issue at the hearing. The fact that it was unsuccessful does not make the raising of that allegation one that was without substantial merit.

[38] The costs of dealing with the matters in the Orongomai schedule cannot be separated from the costs incurred in the associated consideration of the statements exclusion arguments relating to the statement of claim and affidavit evidence.

[6] That is, the pleading and affidavit statements on the one hand and the Orongomai schedule on the other.

[39] Rather, it was the consideration of the Orongomai schedule that led to the recall of the witnesses and the additional hearing time incurred as a result of that. As previously stated, that was a legitimate line of enquiry for Vero to explore.

[40] The Tribunal considers that Vero's challenge to the Trust's claim based on the Orongomai schedule was a proper line of enquiry and that it did not cause costs to be unnecessarily caused.

Decision

[41] While the Tribunal considers that the pleading and affidavit statement defences were raised without substantial merit, the Orongomai schedule challenge was legitimate.

[42] It is not possible to isolate with any certainty the costs related just to the pleadings and affidavit defences.

[43] Taking all these considerations into account, the Tribunal declines to award costs to the Trust.

[44] In the ordinary way, the parties are to bear their own costs in the Tribunal.

DATED: this 26th day of January 2023

P R Cogswell
Tribunal Member