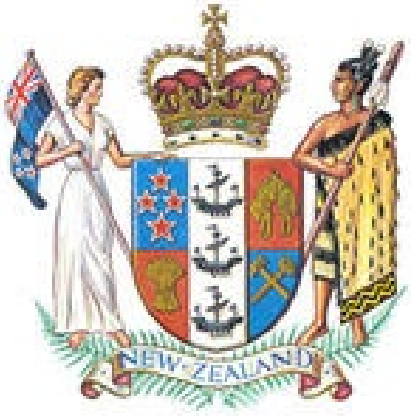


Annual Report of the

CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

For the 12 months ended 30 June 2023

In accordance with the provisions of section 23(3) of Schedule 2 of the Canterbury Earthquakes Insurance Tribunal Act 2019

Canterbury Earthquakes Insurance Tribunal

Introduction

[1] The Canterbury Earthquakes Insurance Tribunal (the Tribunal) was established on 10 June 2019, under s 55 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act). This Fourth Annual Report, required by Schedule 2, s 23(3), covers the period from 1 July 2022 to 30 June 2023.

[2] The Tribunal's purpose is to provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes. The Tribunal has now had four years' experience handling and resolving claims and has developed robust processes to resolve these, often difficult, disputes.

[3] The Tribunal's jurisdiction is limited, applications can only be considered if:

(a) the applicant was an owner of the property at the time it was damaged by any of the earthquakes experienced in Canterbury between 4 September 2010 and 31 December 2011 (the Sequence);

(b) at the time the property was damaged:

(i) it was insured in the name of the applicant; and

(ii) it was used as a residence (if the claim is against an insurance company) or 50% of the property was used as either a residence or a rest home (if the claim is against Toka Tū Ake Earthquake Commission (TTA EQC)

(c) one of the parties is either TTA EQC or an insurance company; and

(d) there is a dispute between the applicant and an insurance company TTA EQC about a claim relating to that damage.

[4] Provided the above criteria are met, there are no limitations on the other related parties that can be joined as respondents, or on the monetary jurisdiction of the Tribunal. Disputes about defective repairs require that builders, project managers, and other construction consultants, whose work is alleged to be negligent, are brought before the Tribunal. This has led to the Tribunal dealing with applications involving ten or more parties, and with disputes valued in excess of $2 million.

[5] The Tribunal cannot deal with applications which:

(a) solely relate to earthquake damage which occurred after 31 December 2011;

(b) relate to earthquakes outside of Canterbury, unless there is a claim stemming from the Sequence; or

(c) relate to properties that have been "on-sold" (purchased by an applicant after the property suffered earthquake damage during the Sequence).

Tribunal personnel and caseload

[6] The stable number of new applications and the resolution of others has meant consistent caseloads and the current number of members is expected to be sufficient to comfortably deal with case numbers.

[7] The Tribunal had 13 new applications in the 2022/2023 year, of which 12 were accepted. The thirteenth related to an on-sold property and was, therefore, out of jurisdiction. It is expected that similar numbers will continue into the 2023/2024 year. The trend over the last three years has been for the majority of applications to involve a combination of disputed earthquake damage and allegations of defective repair work. This is reflected in the 2022-2023 applications, of which eight were for defective and/or under-scoped repairs, three were for original unrepaired damage, and one was about a legal disagreement relating to EQC liability for land damage.

[8] The disputes heard in the Tribunal are complex and take time to reach a point where they can be heard. This allows the parties time to negotiate settlement, either informally or

through Tribunal chaired settlement conferences. In the 2022/2023 year three applications received in 2019 or 2020 were subjects to final hearings which have resolved those disputes.

Tribunal practices

[9] Given the broad nature of the applications; some of which are of lower value but of high personal significance, and others with a high monetary value, or which involve technical and legal complexity, the Tribunal uses flexible processes. A significant number of applicants are self-represented or represented by lay-advocates.

[10] Before the Tribunal was established the historically high numbers of litigated matters, the small pool of expert witnesses, and small pool of defendants (including those same 7 insurers referred to in Table 1) led to experts and lawyers driving the process at the expense of homeowners and insurers. To offset this the Tribunal has actively developed inquisitorial processes which allow the Tribunal member to be proactive in the management and investigation of applications and to lead the testing of evidence during hearings. Close case management means the assigned member is familiar with the issues. The Tribunal's revised practice-notes and guidelines issued in 2022 appear to be working well in assisting the parties.

Case management

[11] The Tribunal puts a particular emphasis on the first case management conference which allows homeowners to come face-to-face with a key decision-maker from their insurer in a neutral environment. For this reason, the Tribunal has returned to its practice of requiring that all parties attend first case management conferences in person. Covid-19 restrictions led to conferences being conducted by video which lessened their effectiveness.

[12] Often with self-represented homeowners the allegations made in applications are not written in an easily comprehensible way. The first case management conference allows the issues to be discussed and clarified by the presiding Tribunal member in a way which defines the path forward. This process also enables a better understanding between the parties. Successive case management conferences are generally conducted by teleconference.

[13] The case management process is proving effective. Approximately one in seven applications settles at, or soon after, the first case management conference, and approximately half of applications settle at, or soon after, first or successive case management conferences.

Tribunal experts

[14] The Tribunal regularly appoints experts to assist it. Generally, it is not economic to seek detailed reports, but these experts have been very helpful in resolving technical issues at facilitated conferences of experts and during hearings by answering questions and engaging in debate with the parties' experts. Practices have developed where the Tribunal's experts do not generally provide evidence during hearings but instead assist the Tribunal in testing the expert witnesses' evidence. During the year under review the Tribunal spent $114,335.53 on specialist experts.

Mediation and settlement conferences

[15] Alternative Dispute Resolution is a valuable tool in resolving disputes. It allows the parties to control the outcome of the dispute and is usually more cost-effective than proceeding to hearing. For the last two years the Tribunal has conducted its own settlement conferences, presided over by Tribunal members. This process has proved particularly effective, as the Tribunal members are familiar with the disputes and are experts in the jurisdiction. Unlike commercial mediators, Tribunal members are able to robustly test the parties' and their advocates' positions, without fear of losing future business.

[16] No applications were referred to funded mediation through MBIE in the current year, compared with four for the preceding year. This has come about because parties have opted instead for settlement conferences conducted by the Tribunal.

[17] During the current year the Tribunal has held six settlement conferences, at which four applications settled during the conference, one settled shortly after, and the remaining application has not settled and will proceed to a hearing.

[18] The Tribunal has introduced a process where an expert's conference is convened before settlement conferences and hearings to reduce the issues in dispute. This has proved highly

effective in narrowing and defining disputes and has led to several matters settling without the need for further input from the Tribunal.

Hearings

[19] The Tribunal has developed flexible practices for hearings, to cope with varying complexity of matters, and to deal with the challenges which formal hearings present to self-represented litigants. The Tribunal's practice is to identify issues which can be heard separately as early as possible, avoiding the need for a long and expensive hearing at the end of the process. This practice has worked effectively, allowing matters to resolve earlier as key issues are resolved more quickly.

[20] The Tribunal has adopted concurrent expert evidence practices (so-called "hot-tubbing") where witnesses with a common area of expertise provide evidence as a group. This leads to discussion of the issues between the experts, and the experts test each other's evidence more effectively than lawyers and/or the Tribunal member can. The Tribunal also restricts cross-examination and has instituted less formal witness statements which reduce the need for experts to produce long expensive and discursive briefs of evidence.

Annual update

[21] Section 23(3) of Schedule 1 of the Act requires the following information be provided in the Annual Report of the Tribunal:

- number of applications filed, including those referred from another jurisdiction;
- number of applications accepted;
- number of applications filed against each insurer and the Earthquake Commission;
- the way applications were settled, and at which stage they were settled;
- the timeliness with which applications have been completed;
- the outcome of applications;
- the number of applications still to be resolved at the end of the reporting year.

Numbers of applications filed, referred, and accepted

[22] Although applications can only be brought to the Tribunal by homeowners, appropriate cases can be referred to the Tribunal by the High Court, the District Court, and the Disputes

Tribunal. The High Court has transferred 46 matters, none during the current year. The District Court has transferred two matters, neither during the current year. None have been referred by the Disputes Tribunal. The Tribunal has referred no matters to either the High Court or the District Court under s 28 of the Act.

[23] Homeowners typically choose to bring their disputes to the Tribunal because:

(a) the process is less adversarial than a court proceeding and is easier to negotiate without a lawyer;

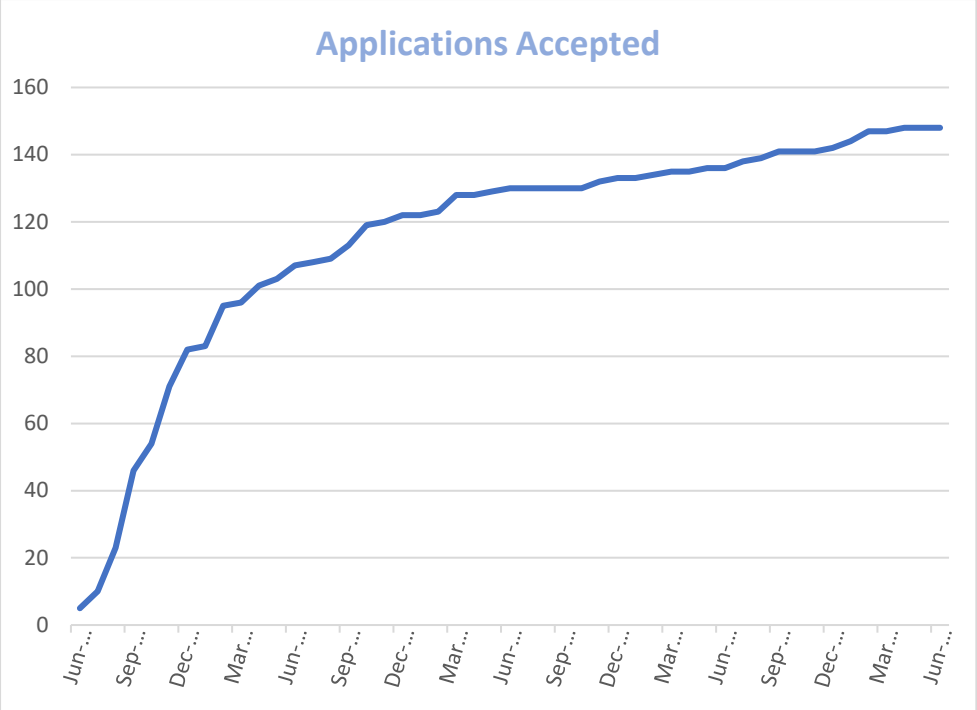
(b) they have exhausted negotiation and discussion as mechanisms for resolving their dispute;

(c) the Tribunal has no filing or hearing fees; and

(d) they do not face an award of costs against them if their application is unsuccessful.

[24] As of 30 June 2023, 159 applications had been lodged with the Tribunal, of which 148 were accepted, with the remainder outside of jurisdictional. A graph showing when the applications were lodged with the Tribunal is set out below. Homeowners filed 13 applications during the current year, 12 of which were accepted.

Graph 1: Applications accepted since 1 June 2019



Insurers

[25] The applications brought to the Tribunal have involved seven separate insurers (IAG is an umbrella entity which owns State Insurance, Lumley General Insurance, NZI and Lantern Insurance within its stable of brands, and AAI is a joint venture between the Automobile Association and Vero). QBE is not included in the figures as its only role is as the liability insurer of an insolvent project management company involved in defective repairs.

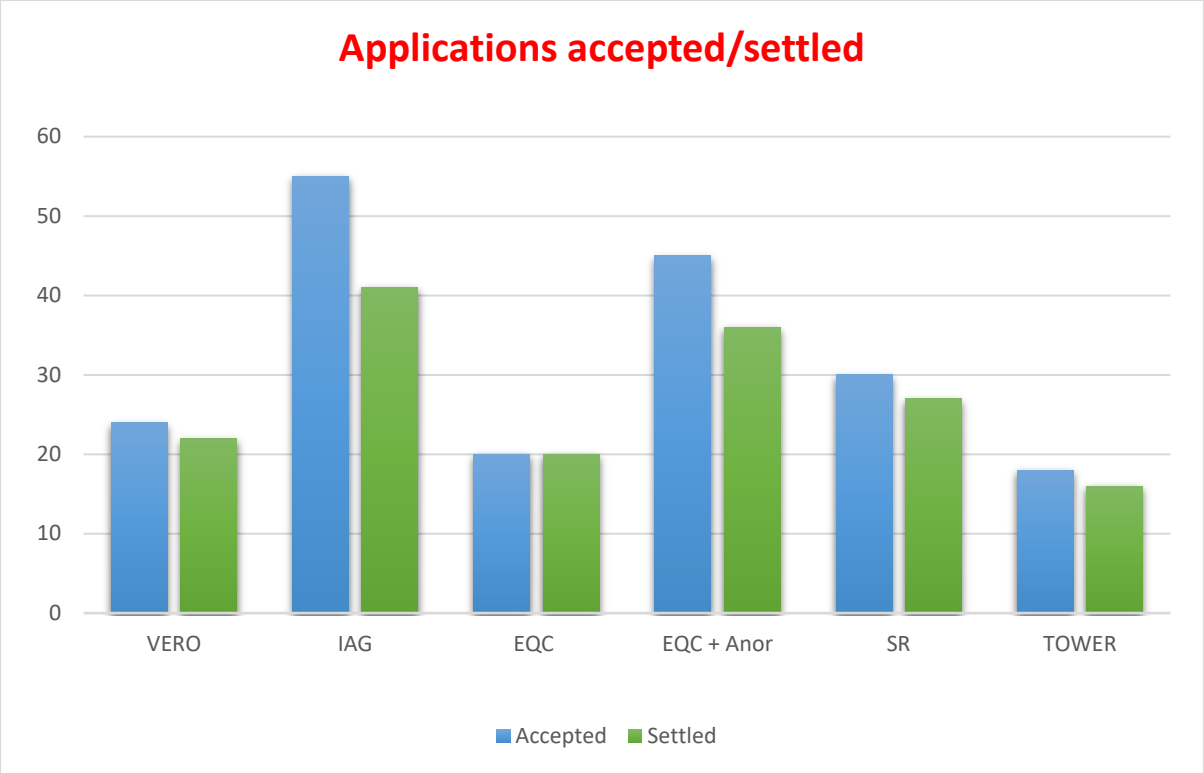
[26] Some homeowners have disputes with both TTA EQC and their insurer, so both are joined as respondents to the claim. Sometimes TTA EQC is later removed as a party because the application against it is resolved earlier than against the insurers. On other occasions, TTA EQC remains a party until the dispute with the insurer has been resolved.

[27] Set out below is a list of those companies and the number of applications in which each is involved. The numbers in this list exceed the number of open claims because some applications involve multiple insurers.

Table 1: Applications by insurer as at 30 June 2022

	Accepted	Settled	Current	
VERO	24	22	2	92%

IAG	55	41	14	75%
TTA EQC	20	20	0	100%
TTA EQC + Anor	45	36	9	80%
SR	30	27	3	90%
TOWER	18	16	2	89%
MAS	5	4	1	80%
WESTPAC	1	1	0	100%
	198	167	31	84%



Resolution

[28] In the 2022/2023 year the Tribunal resolved 13 applications, leaving 22 applications open. Of these:

(a) ten had been resolved but remained open at the request of the parties until the completion of agreed repairs, or finalisation of settlement details;

(b) one had been stayed by the parties;

(c) two were set down for hearings;

(d) two had been scheduled for settlement conferences;

(e) one had been appealed to the High Court; and

(f) six were in progress either awaiting evidence to be obtained by the parties, were scheduled for expert facilitation, or were scheduled for case management.

[29] Considering the applications by year, the Tribunal has closed or resolved all applications received in 2019 and 2020. Three applications filed in 2021 remain open, two of which are set down for hearings, and the third of which has been stayed. Six applications filed in 2022 remain open, two of which have settled but await confirmation, three are in case management and one is on hold. There are five open 2023 applications, all of which are in active case management, as evidence is being obtained or distributed.

[30] The table and graphs below show the stage at which applications were closed and the average age of each at closure. The age of the applications settled at a settlement conference is distorted because this process was not instituted until near the end of the first 13 months of the Tribunal's operation and involved the oldest claims at that point.

[31] Table 2: applications resolved by stage since inception

Stage at resolution	**Total**	**Avg Days**
Settled privately before Tribunal action	**8**	88
Settled at or after First CMC	**16**	190
Settled at or after further CMC	**62**	464
Settled at or after mediation	**7**	233
Settled at or after settlement conference	**24**	489
Decision issued & claim closed	**9**	555
	126	**337**

Graph 1: Claims resolved by stage since inception

Rulings

[32] Forty-two Tribunal rulings are now recorded on its website. Two of those have been appealed. The first, relating to the Tribunal's costs jurisdiction, was partially upheld in a decision issued in December 2022. The second, a substantive appeal of orders made against an insurer, was heard in June 2023, and judgment was issued on 13 July 2023. The High Court denied leave to appeal, upholding the Tribunal's substantive decision. No suppression orders have been made so far, but every endeavour is made to anonymise the identity of claimants to protect their privacy.

[33] The Tribunal's rulings are useful to those resolving disputes outside the Tribunal and the feedback is that this function is highly valued by those providers. Set out below is a list of the issues addressed by the Tribunal over the last year:

Limitations periods under the Consumer Guarantees Act

[34] A homeowner bought an application under Consumer Guarantees Act 1993 (CGA). It was argued that the insurer's duty to provide claims resolution services with reasonable care and skill had been breached when it oversaw defective repairs. The insurer argued that any claim under the CGA needed to be brought within a reasonable period of time, based on Court of Appeal authority. Consideration of what is a reasonable period of time must include the statutory periods set out in the Limitation Act 2010. If the insurer was correct no CGA claim could be brought as the alleged defective repair work was carried out more than six years before the homeowner applied to the Tribunal.

[35] The Tribunal found that the eight-year delay between the discovery of the defects and filing the application was not reasonable. Therefore, the CGA claim was struck out. However, the homeowner still had an argument for breach of contract, as the insurer's policy obligation was to return the property to in as new state, and defective repairs could not fulfil this obligation.

Costs

[36] An insurer declined a homeowner's claim for earthquake repairs on the basis that the homeowner had failed to disclose material information about the home's condition when they entered into the policy. The Tribunal found the insurer had to pay the homeowner's claim for repair costs. The homeowner applied for costs, alleging bad faith against the insurer. The Tribunal found that hindsight cannot be applied when considering whether a line of argument is made in bad faith or lacks substantial merit. Simply because an otherwise valid argument is not made out on the evidence does not mean it is made in bad faith or lacks merit.

Assessment of cost to repair

[37] A dispute had earlier been subject to a hearing about the extent of damage caused by the Earthquakes and defective repairs of that damage. In its decision, the Tribunal had issued instructions on the changes to be made to the scope of work to remediate the home. The parties were unable to agree on the cost of the works. The Tribunal appointed a Quantity Surveyor to chair a conferral meeting and report on the differences. The parties then submitted on the

Quantity Surveyor's report. One party provided new evidence, which had not been provided or discussed during the conferral, with its submissions on costs.

[38] The Tribunal ruled that witness evidence delivered solely in counsel's written submissions was not admissible, but the written statements of those same witnesses were. The Tribunal expressed concerns that fresh evidence was being submitted after the lengthy conferral process but acknowledged the legislation placed limits on the Tribunals ability to refuse to admit late evidence.

[39] Objections were raised about the cladding system specified for the remediation. However, the objecting party had chosen not to present its own remedial strategy at the hearing and was barred from raising objections to a cladding solution which it had not challenged in the initial hearing. The initial hearing lasted 6 days and involved 13 expert witnesses, 9 of whom had cladding expertise, however, no issues about the cladding system were raised before those witnesses.

[40] During the expert's conferral one of the parties' witnesses made concessions. However, the party ignored those concessions in its submissions. The Tribunal found that parties are not bound by concessions made by their experts, but to look past an expert's concessions would require persuasive, evidence backed arguments which were lacking.

Recall powers

[41] A party applied for recall of a decision, based on alleged mistakes and alleged incorrect assumptions. The mistakes alleged were more than mere slips and went to substantive findings in the decision. The application was opposed on the basis that the Tribunal did not have the express power to recall a decision.

[42] The Tribunal reviewed the legislation and case law. It was noted that there was a difference between the High Court's inherent jurisdiction to regulate itself, and the inherent powers of inferior Courts and Tribunals which can give effect to powers granted in legislation. The Tribunal found that the decision was a final determination of the dispute between the parties. Once the decision was signed, and circulated to the parties, it was perfected. At that point the Tribunal's jurisdiction and powers were exhausted. The only remaining jurisdiction

which survived the perfection of a decision was to correct minor errors as expressly provided by s49(2) of the Act. It was not possible to discern any broader powers, express or implied, which survive the finality of the decision. The application was dismissed.

Assessing proposed repair costs

[43] A homeowner and his insurer disagreed about proposed repair strategies and the cost of those strategies. Amongst other things the Tribunal found that quantity surveyors are well placed to provide a proper and fair calculation.

[44] The Tribunal also found that, despite an exclusion in the policy for damage caused by vermin, the insurer was liable for damage caused by rats. This was because the rats had entered the property by way of a gap in wall linings left by one of the insurer's contractors.

Procedure

[45] The Tribunal has made a number of procedural rulings, including:

(a) A party wished to claim for "stigma" in its application. "Stigma" is a concept applied in leaky building cases where the fact that a building has suffered water ingress issues affects its market value for future sales, even after repairs are carried out. As a primary question on the evidence required for stigma to be established, the Tribunal observed that the insurance policy paid to renew the property to a "as when new" condition. This meant that any earthquake damage would become irrelevant to the condition of the property once repairs to the policy standard were carried out.

(b) An engineering firm was joined as a party to an application involving defective repairs. A director of the firm, himself a Chartered Professional Engineer, wished to attend the expert conferral. Leave was granted but was conditional on the director's only input being answering questions put to him by the independent experts. His behaviour on site caused concern for the Tribunal's independent expert, who sought assistance from the Tribunal Member. A decision was issued in which it was clarified that a director's duties under the

Companies Act 1993 are owed to the company. Those duties are irreconcilable with the independence required to be an expert witness in litigation. The Tribunal's expert was facilitating the conference on behalf of the Tribunal, and therefore had the discretion to exclude any person from contributing to the conferral process.

(c) A repairer who was a respondent in an application with alleged defective works, requested that it was removed from the application. The insurer opposed as it wanted to recover against the repairers. The Tribunal allowed the removal application, on the basis that preliminary evidence showed that it was unlikely that the repairer would be liable. The Tribunal commented that the powers to join and remove parties in the Act were broad and did not appear to have any temporal limits. This meant there were no limitations on a removed party being re-joined should fresh evidence of liability come to light.

(d) During a settlement conference, involving an insurer and several repairers, the parties agreed on a settlement figure. However, the financial circumstances of two of the repairers were such that they could not make full payment of their shares of the agreed settlement. The insurer agreed to pay the full settlement figure and asked the Tribunal to record the substantive settlement as an order of the Tribunal. Recording the settlement in this way means that non-payment would allow for the insurer to use the District Court enforcement procedure, without having to make a separate application in the High Court for breach of the settlement agreement.

Cantabrians are moving on

[46] Below are a few case summaries and testimonials to show how the Tribunal is helping Cantabrians to move on.

B v EQC

B's house was repaired by EQC, however, the repair methodology did not address floor level and voiding issues. EQC acknowledged the problems with its repair methodology, and accepted that considerable works were required to remedy the situation. B had lost faith in

EQCs ability and trustworthiness. Through a series of meetings and expert conferrals the tribunal mediated between the parties, and lead to the parties agreeing to an independent project manager who could resolve issues between the parties if any arose during the repairs. This enabled the parties to regain trust. The work required to remediate the house has been agreed and is to begin soon.

E and E v IAG

Mr and Mrs E's house was repaired in 2014 and 2015. The repairs were extensive and included work done to approximately 70% of the home's cladding, including replacing all brick clad sections and repairs to most stucco clad sections. Some years later when Mr and Mrs E wished to sell the house, the presale inspection showed a number of defects. When the matter came before the Tribunal it was noted that there were no records to show whether stucco areas had been reclad, patched, over-rendered, or simply painted. What was apparent was that all stucco areas had re-cracked within 3 years of the work being completed. The brickwork was also found to be defective almost in its entirety. Defects included: blocked weep-holes, loose bricks, failure to address gaps at cladding and window junctions, insufficient cavity spacing, detritus in the brickwork cavity, failure to re-install structural elements, and failures to replace or repair building paper. During the hearing it became apparent that the home's bracing had been compromised but was not repaired.

The earthquake damage issues were complicated by the fact that the house was likely to have suffered from water ingress before the earthquakes. However, based on the expert evidence it was likely that this only affected single area of the home, and so was separable from the defective repairs. The Tribunal considered the matter and found IAG liable to replace the stucco cladding in most areas, to replace the brickwork cladding in its entirety, and to replace a number of bracing elements. The Tribunal also found that the extent of the cladding repairs meant that a new building consent should have sought. After a second hearing to consider quantum the Tribunal found IAG was liable to pay the homeowners $1,341,782.61 (GST exclusive) to enable them to repair their house.

T v MIS and Ors

Ms T's house was repaired in 2014-2015, it appears there were a number of problems with the scoping of the repair work, which meant that the floor re-levelling targets were not achieved. When the work was done there were a number of issues with the subfloor foundation works, including piles not properly packed notching bearers and other problems. The tribunal joined the repairers whose work was allegedly defective, and at a settlement conference and amount was agreed which will allow Ms T to remediate her house.

J and J v IAG and Ors

Mr and Mrs J's home was repaired, with the work including replacement of part of the floor slab. Other sections of the slab were grout injected to address voiding. During the earthquake the land beneath and surrounding the house suffered changes to drainage patterns, and this led to water permeating the floor slab at times. During the expert conferral process an alternative repair methodology was suggested by IAG's expert but was not accepted by the homeowner. At a preliminary hearing it was found that the grout repair was defective as it failed to deliver a floor slab which meet the building code requirements regarding water ingress. However, IAG's repair methodology was found to be likely to address the water ingress. By dealing with this issue the parties were able to reach an agreed settlement on other disputed aspects of the application.

Testimonials

"I just want to thank you for your intervention on my behalf in the planned repair of my home.

I have just been sent a copy of the new Scope of Works to repair my home.

It is almost identical to the original one with addition of ready lawn, a handrail at backdoor and specific mention of 'straighten framing' in each room.

The HUGE difference is that the original eqc quote for repair was $319,000. This is what EQC were offering me as a cash settlement.
The new quote is for $800,000!

The biggest difference is the cost of floor leveling [sic] *has gone from $56,000 to $323,000 which is more than eqc were offering me in total.*

I am even asking my project manager if we should actually be looking at a rebuild now.

But this email is to express my heartfelt thanks. It seems to me that you have saved me nearly $500,000 , which I don't have, and enormous stress".

C D Boys

Chair - Canterbury Earthquakes Insurance Tribunal