IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-0036-2019

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| IN THE MATTER OF | CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019 |
| BETWEEN | L L and N M<br>Applicants |
| AND | EARTHQUAKE COMMISSION<br>First Respondent |
| AND | TOWER INSURANCE LIMITED<br>Second Respondent |

Date: Hearing 8 July 2021, Decision 27 August 2021.

Appearances: L L and N M, the applicants
E Light counsel for the first respondent
No appearance for or by the second respondent

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RESERVED DECISION OF C D BOYS

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## INTRODUCTION

[1] This decision is about whether the applicants, Ms L and Mr M, claimed emergency repair costs from the EQC which they knew were false or exaggerated. In short, the EQC alleges fraud.

[2] Fraud is a tricky issue. It raises questions about the evidence required to prove a criminal allegation in a civil setting. In insurance law the issue has been considered several times and there is good authority on how the issue should be dealt with and why. Insurance fraud cases deal with contractual relationships revolving around the contract between the insurer and the insured claimant. However, the relationship between the EQC and claimants is different from that between an insurer and the same claimant. It is grounded in legislation, the Earthquake Commission Act 1993 (the Act), not contract. The relationship is obligatory, the EQC does not choose who it insures, nor can an insured

owner of residential property opt out of the EQC cover. I am not aware of the issue of fraud against the EQC coming before any Court or Tribunal previously. This means that I must consider whether the insurance fraud cases are compatible with the Act and apply those cases only as far as the Act allows.

[3] I have been mindful of the fact that Ms L and Mr M are self-represented, or lay, litigants. They are not represented by a lawyer. Fraud is a technically complicated issue, and the evidentiary problems it presents are challenging. During the hearing I was mindful of this and made use of the Tribunal's inquisitorial powers to test the EQC's evidence and arguments.

[4] As is practice in this Tribunal, the issue of whether the EQC has a defence against Ms L and Mr M's application is being considered as a preliminary issue. If a respondent has a defence, such as fraud, which if made out will dispose of the application, then an early ruling on that defence meets the requirements for this Tribunal to deliver "*fair, speedy, flexible and cost effective services for resolving disputes*".[1]

[5] This application has already been the subject of a determination by Member Cogswell that Ms L and Mr M were bound by an agreement to re-pay EQC the money they received for emergency repairs. I am considering a different set of issues afresh. I have not been influenced in my determination of the issues by Member Cogswell's conclusions.

[6] As discussed below, I find that Ms L and Mr M intentionally provided false information about emergency repairs to EQC and, as a result, received payments they were not entitled to. The EQC's decision to decline the claims was correct and acts as a defence against Ms L and Mr M's claims for damage from the earthquakes on 22 February 2011 and 23 December 2011.

## Background

[7] Mr M purchased the house at XXXXX (the house) in or around 2003. In 2010 and 2011, the house was his residence. Mr M has been a property manager for some 40 years. He also worked as a civil engineer for 20 years, and as a real estate agent for 13 years. He and Ms L now run their property management business together. His role in the business is doing maintenance work.

[8] Ms L grew up in Hong Kong. She came to New Zealand, briefly in 1994, when her daughter was born. She then returned to Hong Kong, where she worked for 15 years for her father's structural engineering business in various management and administrative roles. She completed an MBA during this time. Her father's business was the supply and fabrication of steel components for high rise construction. Her roles within the business included aspects of quantity estimation, contract

[1] Canterbury Earthquakes Insurance Tribunal Act 2019, s 3.

management, managing sub-contractors, invoicing and credit control, and preparing certification documents. She returned to New Zealand in 2010. On her return she entered property management and began building up a business.

[9] Shortly after returning to New Zealand, Ms L met Mr M through property management. She moved into the house in December 2011, although she was staying regularly from late 2010. It appears that he became involved with Ms L's property management business around this time. They later married. The house was insured from 21 September 2011, in the names of A M and N M.

[10] The house was apparently damaged in the 4 September 2010 Darfield earthquake, the 22 February 2011 Port Hills earthquake, and the 23 December 2011 earthquake. Claims were made to the EQC for these three events. Ms L and Mr M now say it was also damaged in the 26 December 2010, and 13 June 2011 earthquakes. The extent of the damage is not part of this decision. As the cover with Tower did not begin until 21 September 2010, there was no EQC cover in place when the Darfield earthquake struck. The EQC's liability for natural disaster is triggered by the property in question being covered by a "contract of fire insurance".[2] Therefore, EQC has no liability for damage from the Darfield earthquake.

[11] Emergency repair costs were claimed by Ms L and Mr M. The EQC set up an emergency repair programme born of necessity in the face of hundreds of thousands of damage claims resulting from the Canterbury Earthquake Sequence (CES) events. The number of claims challenged the capacity of the entire Australasian insurance industry. The EQC had to grow from an organisation of approximately 20-30 staff in September 2010, to over 2,000 a year later. The experience of Ms L and Mr M, in not having their damage assessed until months after the quakes was common. To deal with this, the EQC adopted a policy of allowing homeowners to perform emergency repairs to deal with safety or weathertightness issues and to stop problems becoming worse.

[12] The emergency repairs allegedly carried out by Ms L and Mr M were for damage to: glazing, a blocked toilet, a leaking tap, water damage to ceiling linings, roofing, a leaking hot water cylinder, cracked gib, a sliding door, a broken stove, and a broken range hood. In all, 17 invoices for emergency repairs were submitted to the EQC. These related to work allegedly done in September, October, November, and December 2011, and February and March 2012. Thirteen invoices were from XXXXX, a company Ms L and Mr M were shareholders and directors of, and four were from XXXXX, a company which Ms L's late mother was the sole shareholder and director of, and which Ms L managed.

[2] See s18(1) Earthquake Commission Act 1993

[13] All up the invoices totalled $12,878.85. All but two were paid. In total Ms L and Mr M received $11,535.65. At some stage in 2012, EQC became aware of the relationship between XXXXX, Ms L, and Mr M.

[14] On 13 September 2012, an assessor, and an investigator employed by EQC visited the house. The assessor formed the view that some of the invoiced work had not been carried out.

[15] On 25 September 2012, Ms L and Mr M were interviewed by Karen McMullon, an investigator, with Roger Duncan and John Fowler, both EQC estimators, present. During the interview it was explained that Mr M, and other contractors did the repair work, and Ms L created the invoices. Ms L said she thought it was justified to add administration fees as the invoicing was being done through the companies, and that delivery charges were included despite a number of the items involved being materials which Mr M kept for repairing rental properties. Some discrepancies were put down to mistakes, or language and cultural differences. Ms L offered to revise and re-issue the invoices.

[16] On 4 October 2012, Ms L was re-interviewed by Ms McMullon. Mr Duncan and Mr Fowler were present, as was John Gordon, a builder who had done some of the work on the house. Mr M was not present. Ms L submitted revised invoices, with the administration fees and unfinished work removed. She admitted that some amounts were still exaggerated, and that there were claims for costs which were not earthquake damage. Ms L offered to withdraw some invoices and advised that in Hong Kong business was done differently.

[17] On 1 and 2 November 2012, Doug Stevens, an electrician, and Dennis Jones, a plumber, both of whom did work for Ms L and Mr M were interviewed by Ms McMullon and Mr Duncan. Ms L and Mr M were not present.

[18] On 26 September 2013, Alan Clark, the EQC's Claim Review Manager, wrote to Ms L and Mr M, declining the claims and seeking recovery of the monies paid. The letter alleged fraud, namely the use of false documents to obtain an unlawful benefit.

[19] On 10 June 2015, through her then solicitor, Ms L agreed to repay the amounts sought, although this was based on no admission of wrongdoing or culpability. The money was later repaid.

[20] On 11 September 2019, Ms L and Mr M applied to this Tribunal, claiming $778,251.35 for rebuilding the house (the application).

**EQC's case**

[21] The EQC say that Ms L and Mr M falsely issued the invoices for emergency repairs, either claiming costs for work which had not been done or exaggerating the costs of work which had been done. Ms Light submitted that during the interviews the applicants withheld information, avoided lines of questioning, and suggested that the EQC should adjust the invoices or reduce the amounts claimed. It is alleged that Mr M and Ms L evaded questions regarding the contractors they claimed did the work. In the second interview Ms L provided contractors details which included people who could not be contacted, and a plumber who later denied doing any work at the house.

[22] The EQC says that while some isolated concerns could be attributed to mistakes, the information available to the EQC leads to a conclusion that fraud was committed. During the interviews, Ms L and Mr M frequently told the EQC that they would amend the invoices as needed to fix the "mistakes". Ms Light submitted that the fact that invoices were later altered, in material respects, suggests that the invoices were never true reflections of costs actually incurred and, in fact, the suggestion that the invoices be altered at all supports the inference that the invoices were not real.

### Ms L and Mr M's case

[23] Ms L argues that the invoices were for damage which required urgent attention, and she subsequently claimed for this damage as accurately and honestly as she could under the circumstances. She argues that the EQC have no proof of fraudulent behaviour, evidenced by the fact that criminal charges were not brought for the alleged fraud. She says that the issues identified by EQC are mistakes caused by cultural and language misunderstanding and amplified by the personal pressure she was under due to the earthquakes, including personal stress due to a family member's ill-health and later death, and problems with her business.

[24] Ms L and Mr M have withdrawn ten invoices, but still seek reimbursement for seven. The invoices are discussed in detail below.

## THE FRAUD DEFENCE

[25] In the general law of insurance, a claim is fraudulent where it is "*false in some material aspect"*.[3] Fraud has particular significance in insurance as when a claim is made there is a disparity in

[3] *Taylor v Asteron* [2020] NZCA 354 at [109].

the information available to the parties; the insured holds all the information about the claim and has control over which information they provide. While insurers have tools and resources to investigate losses, the system necessarily requires honesty from the claimant. The development of the law of fraud in insurance is an aspect of the duty of utmost good faith, which has developed due to the risk sharing relationship between an insured and insurer.

[26] A finding of fraud requires a court or tribunal to make a judgment under the civil standard of proof; the balance of probabilities. The "balance of probabilities" means what is alleged is more likely than not to have occurred. However, fraud is also a criminal issue, and criminal matters are judged to a higher standard of proof; they need to be proved beyond all reasonable doubt. There was historically much debate on the approach to be taken. This was resolved in the case of *Z v Dental Complaints Assessment Committee* where Blanchard J for the majority found:[4]

> The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[27] This means that to find fraud I need only be satisfied that it is more likely than not that there was fraud, however, the evidence needs to be strong. For instance, if the evidence is circumstantial, any inferences must strongly point towards there being a single likely explanation for the events.[5]

[28] In *Taylor v Asteron,* the Court of Appeal considered the remedies available if fraud is found. The Court considered fraudulent claims cases and found that:[6]

(a) the rule against fraud is a term requiring honesty in connection with claims, implied by law into insurance contracts;

(b) dishonestly making a claim materially false in some aspect allows the entire claim to be declined;

(c) the insurer may prospectively cancel the policy under s 42 of the Contract and Commercial Law Act 2017 (the CCLA); and

(d) the cancellation and declinature do not affect other claims made earlier.

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[4] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [102].
[5] See *Angus v ACE Insurance Limited* [2014] NZHC 258 as an example.
[6] *Taylor v Asteron*, above n 3.

[29] However, as stated above, the relationship between the EQC and claimants is different from that between an insurer and the same claimant. It is grounded in legislation, not contract. EQC relies on cl 3, of sch 3 of the Act:

> The Commission may decline (or meet part only of) a claim made under any insurance of any property under this Act where—
>
> *…(f) the claim is in any respect fraudulent …*

[30] The use of the word "may" in cl 3 gives the EQC the discretion to decline or part pay a claim where there is fraud. A review of discretionary powers involves the consideration of whether the use of the discretion was unreasonable.[7] This could lead to a view that a minor act of fraud, for instance so called "bolstering" fraud where false evidence is used as proof for an otherwise valid claim, does not reasonably justify declining a claim.[8] However, for reasons discussed below in paragraph [99], I need not consider that here.

[31] Clause 3 goes no further than granting the discretion to not pay a "claim". I note that "claim" is not defined by the Act. It may be argued that each request for payment is a "claim", for the purposes of cl 3. However, this reading goes against the use of the word "claim" in a general insurance context, where a single claim, encapsulates all damage from each damage causing event. The scheme of the Act at cl 7 of Sch 3 reflects this usage. Clause 7 is re-produced in the Appendix.

[32] In the case of *AMP & Ors v The Earthquake and War Damage Commission,* the Court of Appeal found that insurance principles applied to the interpretation of the Act insofar as the application produces a workable result in accord with the purposes of the legislation and the general law of insurance.[9] In *Earthquake Commission v Insurance Council* the full bench of the High Court affirmed that the relationship between EQC and claimants is an arrangement of insurance.[10] However, these cases were concerned with the calculation of levies, and the enforcement of the EQC's obligations, not fraud.

[33] I read the statements in *AMP* and the *Insurance Council* cases as establishing that insurance law concepts of fraud may be applied to the issue of whether fraud has occurred in EQC cases. The issue then is whether the insurance law remedy for fraud, of cancelling the insurance is available to the EQC. The wording of cl 3 of the Act does not impose an obligation on a claimant, it grants a power to the EQC. The power to cancel an insurance contract, referred to in the *Taylor* case*,* is based on the insured party's duty of good faith, and on the CCLA. However, the Act contains no corresponding duty of good faith and the CCLA does not apply.

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[7] See *Schelde Marinebouw BV v Attorney-General* [2005] NZAR 356.
[8] See *GRE Insurance Ltd v Ormsby* (1982) 2 ANZ Insurance Cases 60-472.
[9] *A.M.P. Fire and General Insurance Co. (N.Z.) Ltd*; and *Ors. v. The Earthquake and War Damage Commission* (1983) 2 ANZ Insurance Cases 60-529.
[10] *Earthquake Commission v Insurance Council* [2014] NZHC 3138 at [171].

[34] The EQC's powers to cancel insurance are limited to those set out in cl 4 of Sch 3 of the Act and relate to when a claim is paid. But where the damaged property is not reinstated or replaced, no power to cancel in the face of fraud is granted to the EQC. Section 18 of the Act means that if Ms L and Mr M can find an insurer, the EQC is bound to insure them. Clause 4 and s 18 are re-produced in the Appendix.

## THE EVIDENCE

[35] At the hearing I heard from Ms L and Mr M, who gave their evidence simultaneously, and from John West, an EQC loss adjuster. Mr West has worked at EQC since 2018, and his evidence referred to the EQC's records and his knowledge of EQC processes. Mr West advised that none of the EQC staff involved in the file in 2012 and 2013 still work for the EQC. Both parties also supplied documentary evidence, which included copies of the invoices submitted to the EQC and transcripts of the recorded interviews carried out by Ms McMullon.

### Mr West

[36] Ms L and Mr M made objections to Mr West's evidence as he had no first-hand knowledge of the events which occurred in 2011 and 2012. In effect they argue that his evidence should be given little weight as it is hearsay.

[37] As the staff involved in those dealings are not available, the EQC's records from 2011-2012 are, of course, hearsay. Chair Somerville dealt with this issue in *DGF Trust v IAG*.[11] The Chair observed that, while the Tribunal is not bound by the Evidence Act 2006, it is required to observe the principles of natural justice. The events in question occurred nearly a decade ago and subsequently staff have moved on as the EQC no longer needs to employ the large staff it did when dealing with the huge volume of claims in the immediate aftermath of the CES events. If EQC's records are excluded due to the unavailability of the staff who created those records, the EQC will be unable to defend many claims against it. This would be manifestly unjust.

[38] Consequently, I use s 19 of the Evidence Act as a guide to how this matter can be approached. Section 19(a) allows hearsay statements contained in a business record to be admissible if the author is unavailable. However, when considering Mr West's evidence, I was mindful of any statements he made which strayed beyond his reading of those records, and knowledge of EQC policies and practices.

[11] *DGF Trust v IAG (New Zealand) Ltd* [2019] NZCEIT 37.

[39] However, I note that Ms L and Mr M did not challenge the accuracy of the records of the first and second interviews in which they were participants. I find that the EQC records of these interviews are reliable. I also found that, in giving his oral evidence Mr West largely stayed on topic and did not venture into areas outside of his observations of the records and his knowledge of EQC practices. At one stage I cautioned him for straying into advocacy, but once reminded of his role, this was not repeated.

**Ms L and Mr M**

[40] The principal points of the evidence given by Ms L and Mr M are that:

(a) the emergency works were for health and safety reasons;

(b) they cannot now recall much that happened in 2011-2012;

(c) language and cultural issues meant Ms L did not appreciate that invoicing for incomplete work was wrong;

(d) Mr M did the work, or arranged for it to be done, and Ms L prepared the invoices, however, they did not communicate in detail about what was done and when;

(e) Ms L felt badgered, threatened, scared, and intimidated during the interviews, and that language difficulties and tiredness meant she made concessions during the interviews that she now retracts;

(f) Ms L said that she felt the administration and delivery charges were justified as this was standard practise in her property management business;

(g) the electrician and plumber who were interviewed by the EQC were lying; and

(h) EQC should have checked the invoices before paying them.

[41] Ms L's and Mr M's evidence is discussed in detail below.

[42] Ms L and Mr M alleged that Mr Stevens, the electrician, and Mr Jones, the plumber, lied about the work they did at the property and the amounts charged. These tradesmen were not before me. Therefore, Ms L, Mr M, and the Tribunal have no ability to challenge and test the allegations made by

Mr Stevens and Mr Jones. This means that I must afford no weight to the evidence of Mr Steven's and Mr Jones' statements.

## ANALYSIS

The elements of fraud, taken from the cases of *Blanshard v National Mutual* and *Gate v Sun Alliance* are:[12]

(a) the claimant makes a misrepresentation, a statement, which read objectively and in context gives a false impression;[13]

(b) the misrepresentation is made in support of or is relevant to the claim;

(c) the misrepresentation is made deliberately, that is the claimant either knows the statement is incorrect, or is deliberately reckless about the truth or falsity of the statement; and

(d) the statement must not be *de minimis*; it must have real significance to an aspect of the claim.

[43] I need to apply these elements to the facts of this case to decide whether Ms L and Mr M made fraudulent claims. I make general observations about the invoices, then consider each individually, in terms of the accuracy of the representations made. I then consider whether the conduct in total was deliberate, and then I consider the significance of the misrepresentations.

### The invoices generally

[44] Ms L created the invoices. They are in the form of professional services invoices with an itemised breakdown of each cost component and include GST. Each invoice includes a description of the work done, the month in which the work was completed (although not the exact date) and the relevant EQC claim number. Every invoice includes a $30 administration fee and states the cause of damage as "Earthquake". Each invoice contains a reference to a landlord, either "N M", or "John McNeold".[14] This second name is not a typo but the name used on those footnoted invoices. Most invoices are from Ms L and Mr M's company; XXXXXX , or from XXXXX , the company owned by

[12] *Blanshard v National Mutual Life Association of Australia Limited* (2004) 13 ANZ Insurance Cases 61-621; and *Gate & Anor v Sun Alliance Insurance Ltd* [1995] LRLR 385.
[13] This may include the omission of material information.
[14] (N M : invoices 2011048, 2011047, 2011063, 2011067, 2011106, 2011153, and 2011172, below) and (John McNeold: invoices 2011065, 2011091, 2011092, 2011095, 2011104, 2011104, 2011105, 2011107, 2011108, and 2011126, below.)

Ms L's mother, which Ms L managed.[15] The work the invoices represent is, by implication, emergency work; work which was urgent for health or weathertightness reasons.

[45] Each invoice was presented as evidence that the costs of emergency works had been incurred by the landlord of the property, whether Mr M, or "John McNeold". Each invoice gives a misleading impression that the work has been arranged and carried out by a third-party property management company using either contractor or employed labour. However, Mr M had not incurred; any management fees, the majority of the labour costs claimed, any delivery fees, or the majority of the materials and consumable costs claimed. The invoices all include GST when in fact no services were paid for. The impressions created by the appearance and presentation of each invoice is false.

[46] Ms L said the naming of the landlord as "John McNeold" on invoices was an error and an example of her poor English. However, by November 2011 when the first invoice was created, she had been romantically involved with Mr M for some 18 months, had been named as an insured party on the policy for 14 months, and had been in business with him for nine months. The invoices have been created using an automatic electronic format, the majority of which automatically populate fields, and Ms L made statements which support this being the case. The error is not simply a misspelling of the last name, it also involves the use of a different first name. I note that throughout the interviews and hearing, Ms L referred to Mr M as N. I find it odd that Ms L would make such an error regarding someone with whom she was in an intimate relationship with. The misnaming creates an impression in those invoices that the work was for a landlord called John McNeold, which is false.

### *2011048 - Broken glass in the kitchen - $520.95 - 23/9/2011*

[47] The invoice includes $150 plus GST for opaque glass. However, Ms L and Mr M admitted during the first interview that the glass in kitchen is clear. Mr Gordon supplied and cut the glass; however, he did not fit the glass. No details of who fitted the glass were initially provided to the EQC. During the first interview it was claimed by Ms L that a builder called "Marco" did the glazing. During the hearing Ms L admitted that Mr M did the glazing. During the second interview Mr Gordon said he only charges $20–$30 per pane. The Expelair fan was also replaced, despite Mr M admitting that there was nothing wrong with old fan, and Ms L accepted that it was not reasonable to charge for the new fan or the work related to installing the fan. Ms L and Mr M have revived their claim for these costs.

[48] The invoice creates impressions that $150 plus GST was spent on the supply of the glass when it was in fact $20-$30, and that the Expelair required replacement due to earthquake damage, when it was in fact undamaged. These are misrepresentations.

[15] (XXXXXX: invoices 2011048 to 2011015, 2011107, and 2011108, below) and ( XXXXX : invoices 2011106, 2011126, and 2011153, below.)

### *2011047 – Broken glass in windows - $601.45 – 23/9/2011*

[49] The invoice includes $360 plus GST for two panes of glass. The issues with who did the work, and Mr Gordon's cost of supplying the glass are as at [47] above. The invoice includes $28 plus GST for sealant, despite an admission that no sealant was used. The claim for this invoice has been abandoned.

[50] The invoice creates impressions that that $360 plus GST was paid for the supply of the glass when it was in fact $40-$60, and that the cost of sealant was paid, when in fact none was used. These are misrepresentations.

### *2011063 - Replaced blocked/broken toilet - $1,072.95 – 23/9/2011*

[51] The invoice records the date of the work as "February", which I take to mean February 2011. However, during the second interview Ms L admitted that when the invoice was created the replacement toilet had not been installed. Mr M confirmed this during the hearing and said the invoice was an error as he had told Ms L he had bought the toilet and she took that to mean that he had installed it. Mr M's comment contradicts Ms L's statement in the first interview when she advised that the replacement toilet was a second-hand fixture which Mr M already had in storage. Both statements are at odds with Ms L's comments in the second interview when she said she was with Mr M when he bought the toilet. During the first interview Mr M stated variously that the toilet had and had not been replaced. He also stated that he had many toilet pans in storage which raises the question of why another needed to be purchased. Ms L and Mr M have revived their claim for these costs.

[52] The invoice creates an impression that a toilet was purchased from CRC Building Recyclers[16] to replace a toilet cracked by the earthquakes and had been installed. However, the toilet had not been replaced, and I find it more probable than not that no toilet was purchased. These are misrepresentations.

### *2011067 - Replace water damaged gib - $1,224.75- 30/9/2011*

[53] The invoice includes the full retail cost of eight sheets of Gib board. At the first interview Ms L conceded this was a mistake as four were purchased, but only two sheets were used. It was stated in the second interview that the gib was second hand and that twenty sheets of salvaged Gib were purchased off Trademe. The invoice included gib-stopping, painting and skirting work that had not been done at the date of the invoice. The date of the work is recorded as "September" which I take to mean September 2011. The claim for this invoice has been abandoned.

[16] EQC's investigator's notes are that CRC closed in 2009, but no additional evidence of this was provided.

[54] The invoice creates impressions that; water damage had affected a significant area requiring eight sheets of gib, that the costs of new replacement gib had been paid, and that the gib had been replaced, stopped and painted when the invoice was produced. In fact, the work appears to have required no more than two sheets of salvaged, second hand gib, and the work remained incomplete in September 2012. These are misrepresentations.

***2011065 - Broken sliding door - $2,828.50 – 23/11/2011***

[55] The invoice includes the cost of buying and replacing a replacement sliding door. The EQC's inspections showed that door had not been replaced in September 2012. Mr M said that he purchased the door off an unknown person, however, Ms L later said that it was purchased from CRC.[17] In the first interview Mr M admitted that he had not replaced the door as he was unable to get the damaged unit out. However, this was contradicted by Ms L who insisted at the second interview that the door was replaced "immediately" after the earthquakes, due to weathertightness. Her statement also contradicts the date of work on the invoice which is recorded as "October" which I take to mean October 2011. Ms L offered to withdraw the invoice. The invoice includes $850 plus GST for the door, $180.00 plus GST for a lock and for two days labour. Ms L and Mr M have revived their claim for these costs.

[56] The invoice creates the impression that the replacement door was purchased to replace a door damaged by the earthquakes and had been installed. However, the door had still not been replaced in September 2012. This was a misrepresentation.

***2011091 - Repairs to a leaking window frame - $777.40 - 30/11/2011***

[57] The invoice includes five hours of labour at $45 plus GST an hour, as well as travel costs for three trips. It was said that Mr M did this work. The invoice states the cause of the damage as "Earthquake". However, Mr Gordon said that the damage to this window was water damage from condensation, not earthquake damage, which Ms L put down as a mistake due to language difficulties. Ms L and Mr M have revived their claim for these costs.

[58] The invoice states that the window was damaged by an earthquake when it was in fact water damaged. This was a misrepresentation.

***2011092 – Replace water damaged Gib - $1,242.00 ceilings 30/11/2011***

[17] As above, n 16.

[59] This invoice is for similar work to that invoice 201106, at paragraph [53] above and is in the same location. The invoice includes; the costs of ten linear metres of framing, and five sheets of gib. During the first interview Ms L said that there were two instances of damage from two earthquake events, the second of which must have been the 23 December 2011 earthquake, which allegedly caused the hot-water cylinder to leak. However, in the second interview she contradicted this statement saying that the two invoices were for the same work, which was finished over several months, but when challenged at the excessive cost, retracted this. She then asked to withdraw the invoice. The date of work is recorded as "November" which I take to mean November 2011. The claim for this invoice has been abandoned.

[60] The invoice creates the impression that; water damage had affected a significant area requiring five sheets of gib and replacement of framing, that the costs of new replacement gib had been paid, and that the gib had been replaced, stopped and painted when the invoice was produced. In fact, no work was done, and the damage, if any, was the same damage claimed for in invoice 201106. Moreover, if Ms L's comment in the first interview about the date of damage is correct, the work occurred before the earthquake alleged to have caused damage. These are misrepresentations.

***2011095 - Broken glass window - $742.90 – 10/1/2012***

[61] The invoice includes $400 plus GST for three panes of glass, and three hours of labour which Mr Gordon cut the glass and Mr M did the glazing. The costs of glass from Mr Gordon was $20-$30 per pane. The claim for this invoice has been abandoned

[62] The invoice creates the impression that $400 plus GST was paid for three panes of glass when in fact the cost of the glass was no more than $90. This is a misrepresentation.

***2011096 – Broken glass – rear door - $412.85 – 10/1/2012***

[63] The invoice includes $90 plus GST for opaque glass and $90 plus GST for a cat door. Mr Gordon cut the glass and Mr M did the glazing. The cost of the glass appears to be reasonable, although it is unclear how the cat door was earthquake damaged. The claim for this invoice has been abandoned.

[64] The invoice creates the impression that the costs of labour and delivery were paid, when in fact Mr M did the work. This is a misrepresentation.

***2011104 - Roof ridge repairs - $336.95 – 20/1/2012***

[65] The invoice includes: two hours labour, charges for delivery, trailer hire and disposal fees. However, in the first interview Mr M referred to a third party doing emergency repairs to the roof; to "they" doing the roof repairs, and "that joker", he also said he did not know who it was who had done the work. However, Ms L said that Mr M did the repairs assisted by friends who were at the house for a Christmas barbeque. The date of work is recorded as "December" which I take to mean December 2011. The claim for this invoice has been abandoned.

[66] The invoice creates the impression that the costs of labour and delivery were paid when in fact Mr M did the work. This is a misrepresentation.

***2011105 - Hot water cylinder leak and overflow - $253.00 – 20/1/2012***

[67] The invoice includes three metres of copper piping which was already in Mr M's garage, and delivery. Mr M says he carried out the work with help of a project manager friend, at a party on 26 December 2011. The date of work is recorded as "December". The claim for this invoice has been abandoned.

[68] The invoice creates the impression that the costs of labour, delivery and parts were paid, when no costs were incurred. This is a misrepresentation.

***2011106 Fix up wall cracks in living/bedroom - $867.10 – 20/1/2012***

[69] The invoice includes eight hours labour over two days for a relatively small job. Ms L revised the invoice to show three hours labour. It is claimed that this work was done to prevent dust from affecting boarders after the 23 December 2011 earthquake event. In the second interview, Ms L said that a builder called Marco had done the work. The claim for this invoice has been abandoned.

[70] The invoice included eight hours labour when, as admitted by Ms L, if any work was done it involved substantially less time. This is a misrepresentation.

***2011107 - Adjust sliding door - $428.95 – 20/1/2012***

[71] The invoice includes five hours labour, although this was revised down by Ms L at the second interview. This work was for a different sliding door from that referred to at [55] and [56]. It includes delivery charges although Mr M did the work. The claim for this invoice has been abandoned.

[72] The invoice included five hours labour when, as admitted by Ms L, if any work was done it involved less time. The invoice creates the impression that the cost of labour and delivery were paid, when no costs were incurred. These are misrepresentations.

***2011108 - Roof tiles – $308.20 – 20/1/2012***

[73] The invoice includes three hours labour and a delivery charge. Ms L advised at the second interview that the work was the plastering of roof ridges carried out by Mr M. The date of work is recorded as "December". The claim for this invoice has been abandoned.

[74] The invoice creates the impression that the cost of labour and delivery were paid when no costs were incurred. This is a misrepresentation.

***2011126 - Leaking water tap - $724.50 – 17/2/2012***

[75] The invoice includes $260.00 plus GST for a replacement basin mixer, delivery and four hours labour, and the costs of replacing waste pipes and a gully trap, neither of which need replacement when a tap is leaking. During the second interview Ms L admitted the work was not earthquake related, however, during the hearing she said it was damaged by the earthquakes. She said the work was completed by Mr M using second hand salvaged items he had in the garage. The date of work is recorded as "December". Ms L and Mr M have revived their claim for these costs.

[76] The invoice creates the impression that the costs of purchasing and installing a new tap, labour and delivery were paid, when in fact no costs were incurred. It creates the impression that the replacement tap was purchased at full retail cost when it was used and already on hand. It creates the impression that the tap and pipes were earthquake damaged when the tap was dripping, and it was later admitted that it was not earthquake damaged. These are misrepresentations.

***2011153 - Replace broken stove – $1,060.30 – 16/3/2012***

[77] The invoice includes GST on top of the GST inclusive price paid for the new stove. It includes trailer and delivery costs. During the first interview, Ms L said the stove needed replacement as an element and the oven were not working. Ms L and Mr M removed and disposed of the old stove. The new stove was purchased from Bunnings and was installed by Mr Stevens the electrician. It is unclear how the stove was damaged by the earthquakes. Ms L and Mr M have revived their claim for these costs.

[78] The invoice creates the impression that delivery costs were incurred when they were not, and that additional GST was owing. These are misrepresentations.

### *2011172 - Replace broken rangehood - $476.10 – 13/4/2012*

[79] The invoice includes GST on top of the GST inclusive price paid for the new stove. It includes delivery costs, however, as the new rangehood was purchased from Bunnings at the same time as the stove, the delivery cost is double claimed. It is unclear how the rangehood was damaged by the earthquakes, or who installed it. GST was claimed on top of the GST inclusive cost from Bunnings. Ms L and Mr M have revived their claim for these costs.

[80] The invoice creates the impression that delivery costs were incurred when they were not, and that additional GST was owing. These are misrepresentations

### *The interviews*

[81] As well as the invoices, I find that Mr M and Ms L made misrepresentations during the interviews. I have mentioned some in my discussion of the invoices, however, there are too many to list comprehensively. The accounts of what work had or had not been done, and who had done it have changed so frequently that it is now impossible to know what the true account of the emergency works is. Given the evasiveness displayed by Ms L and Mr M in the interviews and during the hearing, which I discuss below, it is legitimate to infer that all the invoices are tainted.

### *Were the misrepresentations relevant to or made in support of the claims?*

[82] The misrepresentations made in the invoices were made with the effect of recovering costs allegedly incurred for repairing earthquake damage. The misrepresentations made during the interviews were made to justify, clarify or support the amounts claimed in the invoices. Both types of misrepresentation were made to support the claims for payment from the EQC for alleged earthquake damage.

[83] I find that misrepresentations were made in support of claims for damage allegedly sustained during the Darfield, Port Hills and 23 December 2011 earthquakes.

## Were the misrepresentations deliberate?

[84] For fraud to be established the misrepresentations need to be either deliberate or made with deliberate recklessness. Recklessness is when a person takes actions which they reasonably know they should not, but they do so anyway. This mental element is necessary to differentiate between honest misrepresentations and those made with an intention to deceive. An honest misrepresentation is when someone says something that is demonstrably false but which they believe to be true.

[85] It is argued by Ms L and Mr M that the misrepresentations are errors. However, I am struck by the extent of the misrepresentations; I have found that all the costs claimed are inflated or falsified in some way, even in those instances where it appears that there may legitimately have been earthquake damage. This includes:

(a) costs incurred "marked up" by up to 600%;

(b) the addition of GST where no services have been paid for;

(c) bogus delivery and consumable charges;

(d) claims for the full retail price of materials and items which were second-hand, salvaged, or already on hand;

(e) claims for Mr M's time as if he were an unnamed contractor;

(f) claims for work not started or incomplete nearly a year after the invoices were issued; and

(g) administration fees.

[86] When questioned about the misrepresentations Mr M claimed that he could not remember much of the work that was claimed. When challenged about the claims for work which had not been done, he claimed that he told Ms L that he had purchased the items to do the work, but she misunderstood, and had produced an invoice for the item's purchase and installation. I do not find either of these explanations persuasive.

[87] Mr M's repeated claims that he was unable to remember much of the work are undermined by his detailed recollections when making points which suited him and his detailed recall of events which occurred prior to the earthquakes. He is a civil engineer, has worked for the Christchurch City Council

and worked as a real estate agent. He is an experienced landlord. He is neither inexperienced nor naïve. During the hearing he was often un-necessarily aggressive in his responses. From reading the EQC interview transcripts, I note that Mr M was also unnecessarily aggressive in his responses in those interviews in 2012. At one point, under cross-examination he threatened to leave the Tribunal hearing. I find his behaviour was used to avoid answering questions. Given his performance as a witness, I do not accept that he was intimidated in any way when interviewed by the EQC's representatives. Mr M's responses during the first interview showed that he was aware that costs had been claimed for work which had not been done.

[88] Ms L claimed language and cultural differences as reasons why the invoices were inflated. She claims that in Hong Kong it is common practise for invoiced costs to be negotiated and adjusted. She claims that the concessions made during the interviews were pressured out of her through intimidatory tactics, and tiredness, or occurred due to language difficulties. I note that Ms L did not ask for a translator for the hearing or case management conference. It did not occur to me to offer to get an interpreter as, from my observations, Ms L speaks and understands English well.

[89] Ms L is an intelligent and sophisticated woman, who worked in an executive capacity in her father's construction business. She was involved in projects which included the building of a hospital and various skyscrapers. She holds an MBA. Her property management business involves managing around 100 residential properties. The property management business was founded in 2010 and was growing rapidly in 2011 and 2012. She has had several appearances in the Tenancy Tribunal.

[90] Ms L made numerous references to errors being made due to language difficulties. It is plausible that her English has improved since then. However, the transcript of the interviews shows she had a good level of English in October 2012. She quite clearly understood what was asked of her and was easily able to make herself understood. Moreover, she was in a relationship and in business with Mr M, a native English speaker, who could have assisted her with any difficulties. I am not persuaded that her alleged language difficulties were at a level where her understanding of the issues, or ability to accurately communicate with Mr M, would have been affected. I find it difficult to believe that Ms L mis-understood Mr M to a point where she believed he had installed the toilet and sliding door, when he says he had only told her he had purchased them. At the times this work was alleged to have been done, she was either living or regularly spending time at the house and was named as an insured party on the policy.

[91] During the interviews Ms L was accompanied either by Mr M or Mr Gordon. The transcripts of the interviews record conversations which are business like, and I note instances of light-hearted small talk during breaks. Nothing in the transcript shows that there was any undue pressure placed on

Ms L, or Mr M. Certainly, no threats were made. Ms L even said that she found Ms McMullon, who is from the UK, easier to understand than most New Zealanders.

[92] Given her business experience in Hong Kong and New Zealand, her obvious intelligence and the way she handled robust cross-examination from Ms Light in the Tribunal, I am not persuaded that Ms L was intimidated or badgered into making concessions, and there is no evidence of this in the transcripts. As to being tired, I note that each interview was approximately two hours long with breaks. Ms L and Mr M were on the stand for a similar length of time during the hearing without showing any signs of fatigue. In the second interview Ms L stated that in Hong Kong she worked 12-hour days nearly every day of the week. Furthermore, the concessions were made relatively early in each of the interviews. I do not accept that tiredness was a factor in the concessions made.

[93] I am mindful of cultural differences. There is recent appellate commentary on this issue in New Zealand. In *Zheng v Deng,* the Court of Appeal instructed caution when dealing with litigants whose cultural and linguistic conceptions of "normal "or "appropriate" ways of doing business, differ from the conceptions underlying the New Zealand legal system.[18] The Court cited with approval Ruiping Ye's "*Chinese in New Zealand: Contract, Property and Litigation.*"[19] Dr. Ruipeng describes Chinese business relationships as relying more on interpersonal relationships than on formal legalities, however, she also refers to the importance of fairness in business relationships.

[94] The conduct exhibited by Ms L included; invoicing $180 plus GST for a pane of glass which was obtained from Mr Gordon for $20-$30, and invoicing for work which was not completed nine months after the invoice dates. This conduct was obviously unfair to the EQC. I am not persuaded that this would be acceptable business behaviour in Hong Kong, or elsewhere. Moreover, the policy in place was also in Mr M's name. He has extensive experience in business in New Zealand and knew, or should have known, that the misrepresentations were objectively dishonest, and not a legitimate bargaining strategy.

[95] Ms L and Mr M were both evasive under questioning. The glazing is a good example. In the first interview they both refused to advise who had done the glazing work. In the second interview names were given, and Ms L advised that these people were on temporary visas and had returned overseas. At the hearing it was admitted that Mr M had done the glazing but, as he was on a benefit, he was concerned that his ex-wife would advise WINZ that he was working. There are numerous other examples, including differing accounts of who did the roofing, and the timing of when the toilet, sliding door, and hallway work was done. Generally, when pushed, Ms L would claim intimidation, language

[18] *Lu Zheng v Donglin Deng* [2020] NZCA 614 at [89]; or at least, the Pakeha parts of it.
[19] Ruiping Ye *Chinese in New Zealand: Contract, Property and Litigation* (online, looseleaf ed, (2019) 25 CLJP/JDCP) at [141].

difficulties or cultural differences. Mr M would claim not to remember, or that he had told Ms L the true situation, but she misunderstood him. I also note that Mr M advised that he and Ms L were in financial hardship following the earthquakes due to lost rents, and problems with financing properties

[96] I am not impressed at the reliability of Mr M's and Ms L's evidence. Their accounts are nakedly self-serving rather than honest. Their credibility is undermined by the way that, during their interviews by the EQC and during the hearing, they both treated statements about the nature and extent of the damage and the repairs as negotiable, varying their accounts to suit their best bargaining position.

[97] This is not a situation where there is a handful of inaccurate statements due to misunderstandings or errors, rather there are numerous, persistent, and significant misrepresentations. I find that the misrepresentations Ms L made in the invoices were intentionally made. I find that Mr M was intentionally reckless as to the accuracy of the invoices. I find that, subsequently, both Mr M and Ms L made intentional or, alternatively; intentionally reckless, misrepresentations during the interviews. I also note that their financial difficulties provided motivation to make false claims.

## Were the misrepresentations *de minimis?*

[98] The *de minimus* requirement is intended to ensure that misrepresentations about insignificant matters are not penalised. The misrepresentation must have real significance to the claim. Ms L and Mr M received $11,535.65 as a result of their misrepresentations. How much of this was for legitimate work, if any, cannot now be calculated. Their dishonesty means that the EQC is unable to rely upon their accounts of the damage and is unable to ascertain what was earthquake damage and what was not. The number of and nature of the misrepresentations is such that they cannot be put down to mistake. In this case, the misrepresentations had a real and significant effect on the EQC's liabilities, and ability to assess the claims.

[99] Given the intentional inflation of the amounts claimed, the uncertainty as to whether work was done, and whether the invoices related to actual earthquake damage, it cannot be argued that this was "bolstering" fraud, as the misrepresentations go to increasing the amount of money to be obtained, rather than proving that a loss had occurred. Ms L and Mr M obtained money they were not entitled to receive. The misrepresentations were not *de minimis.*

## Outcome

[100] Mr M and Ms L committed fraud. I find that the EQC's decision to decline the claims for fraud was reasonably reached. While this largely disposes of Ms L and Mr M's application, as discussed above in paragraphs [28] to [34], the EQC cannot cancel the disaster insurance held by Ms L and Mr M.

[101] However, the EQC can rely on the fact that the fraud was committed to refuse to pay for the damage which occurred on 22 February and 23 December 2011. Mr M and Ms L now allege that there was also damage from events on 26 December 2010 and 13 June 2011. I understand no claims were made for these events until 11 September 2019, when Ms L made the application to this Tribunal. Any claims for damage on dates other than 4 September 2010, 22 February 2011 and 26 December 2011, are not affected by this decision.

Christopher Boys
Member
Canterbury Earthquakes Insurance Tribunal

## Appendix

**Section 18 of the Act**

***18 Residential buildings***

*(1) Subject to any regulations made under this Act and to Schedule 3, where a person enters into a contract of fire insurance with an insurance company in respect of any residential building situated in New Zealand, the residential building shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage for its replacement value to the amount (exclusive of goods and services tax) which is the least of—*

*(a) if the contract of fire insurance specifies a replacement sum insured for which the building is insured against fire under that contract, the amount of that sum insured:*

*(b) if the contract of fire insurance does not specify such a replacement sum insured but does specify an amount to which the building is to be insured under this Act, that amount:*

*(c) the amount arrived at by multiplying the number of dwellings in the building (being the number determined in accordance with subsection (3)) by $100,000 or such higher amount as may be fixed from time to time for the purposes of this paragraph by regulations made under this Act.*

*(2) An amount specified for the purposes of subsection (1)(b) shall not be less than the amount calculated by multiplying $2,500, or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building. Where a contract specifies a lesser amount, the amount specified is deemed to be the amount calculated by multiplying $2,500, or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building.*

*(3) For the purposes of subsection (1)(c), a residential building is deemed to comprise 1 dwelling unless the existence of a higher number of dwellings in the building is disclosed to the insurance company at the time that the contract of fire insurance is entered into.*

**Clause 4 of Schedule 1**

***4 Cancellation of insurance in certain circumstances***

*(1) Where—*

*(a) the Commission settles a claim in respect of any property by payment of the full amount to which that property is insured under this Act; and*

*(b) the property in respect of which the claim is settled is neither replaced nor reinstated to the satisfaction of the Commission—the Commission may cancel the*

*insurance under this Act by giving written notice to the insured person of such cancellation.*

*(2) Subject to subclause (3), every cancellation under subclause (1) shall remain in force notwithstanding—*

*(a) the subsequent renewal of the contract of fire insurance relating to the property, or (if the property is residential land) to the building situated on the land, as the case may be; or*

*(b) the subsequent issue of a new contract of fire insurance covering that property or building; or*

*(c)a subsequent change in the person in whom is vested any insurable interest in that property or building.*

*(3)Where the Commission has cancelled any insurance under subclause (1) in respect of any property, the Commission may reinstate the insurance if—*

*(a)it receives written application for the reinstatement by any person affected by the cancellation; and*

*(b)it considers that the cancellation should no longer apply.*

**Clause 7 of Schedule 1**

***7 Reporting of claims***

*(1) On the occurrence of any natural disaster damage to any property insured under this Act, the insured person shall at his or her own expense—*

*(a) within the time allowed by subclause (2) give notice thereof, either orally or in writing, to the Commission; and*

*(b) as soon as practicable deliver to the Commission—*

*(i) a claim in writing for the natural disaster damage, including, in particular, such account as is reasonably practicable of all property lost or damaged, and of the respective amounts claimed in respect of each such item of property, having regard to their value at the time of the natural disaster damage; and*

*(ii) particulars in writing of all other insurances covering that property (if any).*