IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-00012/2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	N M and M M as trustees of the C M TRUST Applicants
AND	EARTHQUAKE COMMISSION First Respondent (Claim Withdrawn)
AND	TOWER INSURANCE LIMITED Second Respondent

Date: 29 March 2021

Appearances: On the papers

DECISION OF P R COGSWELL ON PARAGRAPHS [16.1] TO [16.3(a)] OF THE APPLICANTS' MEMORANDUM OF 14 APRIL 2020

29 March 2021

Introduction

[1] The parties are agreed that I am to determine three identified issues on the papers, ahead of a full hearing of other issues that will remain for substantive resolution. The parties have previously concurred and agreed that the issues are the issues referred to in the memorandum filed by the Applicants dated 14 April 2020.

[2] It was agreed that the identified issues were to be determined on the exchange of evidence and submissions filed. The parties have now filed evidence and submissions on the identified issues.

[3] The issues are:

(a) Resolving the uplift from the policy cap to the market value cap – called the "16.1 issue";

(b) Resolving Tower Insurance Limited's (Tower) entitlement to EQC payment credits under the policy - called the "16.2 issue"; and

(c) Determining the costs incurred by the Applicants displacing Tower's denial of liability - called the "16.3(a) issue".

[4] This Decision determines those issues.

Background

[5] The parties referred policy interpretation issues to the High Court using the case stated procedure provided for by section 53 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (Act)[1] .

[6] The Court considered the following issues:

(a) The policy contains a warranty that the "maximum sum insured is $455,000" (the $455,000 Cap). Is the $455,000 Cap (less EQC payments) an overall cap on the amount that [the Applicants] can recover under the policy or does it apply as a cap per earthquake event?

(b) The policy limits the present day value recovery under the policy to "the market value of the property less the value of the land as an unoccupied site" (the Market Value Cap). Is the Market Value Cap (less EQC payments) an overall

[1] M v Tower Insurance Limited [2020] NZHC 136

cap on the amount that the Trust can recover under the policy, or does it apply as a cap per earthquake event?

(c) Or, does the policy apply in some other way other than as set out in (a) or (b)?

[7] The High Court held that the questions before it were answered as follows:

(a) Is the $455,000 Cap (less EQC payments) an overall cap on the amount that the Trust can recover under the policy, or does it apply as a cap per earthquake event?

The Court held that the $455,000 amount is an overall cap on the amount [the Applicants] can claim within one policy period. It also held that there remained a residual but unlikely possibility that a further payment could be made in the second policy period to take the total payments (less EQC payments) up to $580,000.

(b) Is the Market Value Cap (less EQC payments) an overall cap on the amount that the Trust can recover under the policy, or does it apply as a cap per earthquake event?

The Court held that the market value was not a cap per earthquake event. It held that in the unlikely event discussed above, that the losses incurred in the first period of insurance did not reduce the market value of the house to zero, and a further claim for damage was made following the June 2011 earthquake, then the market value would operate as an overall cap on the amount that the Trust could recover from the insurer.

Issue 16.1 - Uplift from the policy cap to the market value cap

[8] The Applicants set out their views on the relevant background to the events before the Tribunal as follows:

(a) Event one occurred on 4 September 2010 and caused extensive damage to the Applicant's home. Expert advice obtained estimated the repair of the chimneys

of the home alone to be circa $596,000[2] [3]. There was also other damage to the home[4]. Tower did not undertake any thorough investigation of the damage at this stage.

(b) The damage occasioned to the home from event one resulted in the policy cap of $455,000 being exceeded.

(c) EQC made the maximum payment to the Applicants for damage arising from event one in the amount of $115,000.

(d) This resulted in the net available amount under the policy of $339,850 (being the difference between the policy cap of $455,000 and the EQC payment of $115,000), less an excess of $150.

(e) Event two occurred on 22 February 2011 and again caused serious damage to the home[5]. Some of that damage was different damage to that from event one. However, the policy cap had already been exceeded by that point and, occurring within the same policy period (6 May 2010 to 5 May 2011) then, in terms of the High Court's findings, the policy did not respond to this event.

(f) EQC made a payment to the Applicants of the maximum amount payable of $115,000 for damage from event two.

(g) Event three occurred on 13 June 2011 and was in a new policy period. The Applicants say that this event caused damage as well[6]. They concede that the High Court's ruling means that the maximum policy response available for this new event in the new policy period can only be the difference between the market value cap of $580,000 and the liability created by any prior policy response(s). That prior response was liability to the policy cap of $455,000. The difference between market value cap and policy cap is $125,000.

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[2] Affidavit of N M sworn 25 May 2020, exhibit "NM12"
[3] All figures are inclusive of GST unless indicated otherwise
[4] Affidavit of N M sworn 25 May 2020, paragraph [11], reports of Joseph and Associates Limited and Babbage Consultants Limited
[5] Affidavit of N M sworn 25 May 2020, paragraph [20], reports of Joseph and Associates Limited and Babbage Consultants Limited
[6] Affidavit of N M sworn 25 May 2020, paragraphs [22] and [23], reports of Joseph and Associates Limited and Babbage Consultants Limited

(h) EQC made a further payment to the Applicants for event three damage, again at the maximum amount payable of $115,000. The Applicants concede that they must give credit for that sum in their further claim for the difference between the market value cap and the policy cap. That results, they say, in a further liability from Tower Insurance Limited (Tower) to them of $10,000 less the excess of $150, being $9,850.

[9] Taking a purposive approach to the interpretation of the insurance policy and taking account of the High Court's judgment on the case stated, the Applicants' reasonable expectation of Towers' response to the Canterbury Earthquake Sequence (CES) was, therefore, that Tower would pay:

(a) Up to the policy cap of $455,000 total in any one policy period, less any amount(s) recovered for natural disaster damage; but

(b) No more than $580,000 in total from the CES if the damage to the home was such that Tower had an obligation to pay the market value cap. That is, the total payments received under the policy during both policy periods could not exceed the undamaged market value of the house of $580,000.

[10] The Applicants' position on Tower's response to event three is that the Tribunal is not required to determine the exact amount of damage to their home arising from event three, but rather that it needs to determine, on the balance of probabilities that there was sufficient damage to the home to reach or exceed the market value cap of $580,000 from the present policy cap of $455,000. That is, that there was a further $125,000 of damage.

[11] That is easily found. Tower's own correspondence concedes this[7]. EQC's Dwelling Reserve Apportionment Report (DRAR) also noted that event three contributed 59% of the overall damage to the home[8].

[12] Taken overall the evidence establishes that the damage to the Applicants' home exceeds the market value cap, entitling the Applicants to recover that amount from Tower.

[7] Affidavit of N M sworn 25 May 2020, exhibit "NM11"
[8] Affidavit of N M sworn 25 May 2020, exhibit "NM10"

[13] The Applicants calculate the amount payable to them as follows:

Description	Amount	Balance
Event One (policy cap)	455,000	
Less policy excess	(150)	
Less EQC payment	(115,000)	
		$339,850
Event Two (policy response)	Nil	
Less policy excess	Nil	
Less EQC payment	Nil	
		0
Event Three (net market value cap)	125,000	
Less policy excess	150	
Less EQC payment	115,000	
		9.850
Total Policy Obligation		**$349,700**

[14] This amount is notably short of the current estimate of cost to remediate the Applicants' home of circa $3.4 million provided by Joseph and Associates Limited (Joseph). That amount is not relevant, as the policy terms dictate the response required by Tower. The amounts recoverable are capped at $455,000 and $580,000. Notwithstanding, it does underscore the unenviable position the Applicants find themselves in as a result of the CES. They were underinsured.

[15] Tower agrees with the principal approach to the key issues, namely:

(a) That the policy cap is $455,000;

(b) That the market value is $580,000;

(c) That the total payments to the Applicants for all events could not exceed the market value cap of $580,000.

[16] However, Tower's position is that it now seeks to raise an evidential issue as to the scope of remedial works, the cost of that work and depreciation of the remedial works. It contends that the Tribunal must now undertake a full hearing of the evidence as to scope and cost of repairs.

[17] That position is not accepted. There are two reasons for that.

[18] First, the parties were content for the Tribunal to deal with issue 16.1 on the papers. Tower agreed to this approach knowing what the Applicants' evidence was.

[19] Accordingly, Tower had all necessary evidence before it at the time that it agreed to Issue 16.1 being determined on the papers. It had sufficient time to commission its own evidence had it wished to do so.

[20] Tribunal will not now review its decision to determine the issues on the papers. It would appear from the evidence before the Tribunal that Tower's investigation of the damage to the home was less thorough than that of the Applicants. I note here that Tower's assessor made a "guesstimate" as to the damage arising from event one[9]. Tower obtained expert advice from Engineering Design Consultants Limited (EDC), but that advice too was incomplete. It did not obtain evidence from a building surveyor to respond to the Joseph reports.

[21] Nor can it, or should it, be allowed now to obtain further evidence to support its arguments. That would defeat the purpose of the Act in providing "fair, speedy, flexible, and cost-effective" resolution of earthquake claims. The Applicants have waited since 2010 to have their claims resolved. They should not have to now embark on a full hearing of the Issue 16.1 matter. The interests of justice do not require the Tribunal to set aside the "on the papers" determination in this case.

[22] Secondly, on the balance of probabilities, having considered the evidence filed in support of the claims, the Tribunal concludes that the damage occasioned to the home from event one was up to or in excess of the policy cap of $455,000. The Tribunal must rely on the

[9] Affidavit of N M sworn 25 May 2020, exhibit "NM9"

evidence before it and the only detailed evidence of damage and the costs to remediate that damage is from Joseph.

[23] Tower focusses on an argument that the Applicants' expert's approach to chimney replacement is incorrect. It overlooks that there was other damage to the Applicants' home separate from the chimney destruction which must be attended to as well. That damage includes cracking to wall and ceiling linings, damage to the slate roof, damage to foundations and plumbing failure[10]. The Joseph report sets out the extensive damage.

[24] Even adopting Tower's view that the works to the chimneys should be $363,903, it must follow that the policy cap amount of $455,000 would be breached by the totality of the damage arising from event one. That is amply supported by the evidence from Joseph and Babbage Consultants Limited (Babbage).

[25] That evidence demonstrates large scale damage to numerous building elements in the home. The Joseph report of 26 November 2018[11] at Appendix B sets out what is required to remediate the damage caused (noting that this includes damage from event three as well).

[26] The Babbage report of 26 November 2015[12] specifically noted damage to the chimneys but also recommended the following work - roof and slate repairs, ceiling and wall linings replacement, stone column reconstruction including steel posts and replacement of floor piles (more than 12).

[27] It follows from this that the Tribunal concludes that on the available evidence the Applicants' home did suffer damage of $455,000 or more in event one. The evidence provided by the Applicants from Joseph and Babbage makes it clear that the damage was extensive and would cost up to or beyond $455,000 to repair. There was no policy response to event two, as the policy cap was reached in event one and event two occurred in the same policy period, hence, no response was available.

[10] Affidavit of N M sworn 25 May 2020, paragraph [11]
[11] Affidavit of N M sworn 25 May 2020, exhibit NM15
[12] Affidavit of N M sworn 25 May 2020, exhibit NM13

[28] Tower submits that the costs of repair must be depreciated at a rate of 60% or 69%. It commissioned two opinions from Whittle Knight and Boatwood[13] and Telfer Young[14].

[29] The Whittle Knight and Boatwood report stated that the market value of the home was $398,250 at a depreciation rate of 69%. Telfer Young's assessed the market value of the home was $580,000 at a depreciation rate of 60%.

[30] The evidence presented to the High Court on the case stated in the agreed statement of facts recorded market value or present day value (per the policy definition) at $580,000. In this Decision, Telfer Young's depreciation rate is adopted, as it is in accordance with the agreed market value figure it determined and was presented to the High Court as the agreed value.

[31] The definition of "Present day value" in the policy is:

> **"Present Day Value** means the cost at the time of the loss or damage of rebuilding, replacing or repairing your house to a condition no better than new and up to the same area as shown in the **certificate of insurance**, plus any decks undeveloped basements, carports and detached domestic outbuildings, *less an appropriate allowance for depreciation* and deferred maintenance, but limited to the market value of the property less the value of the land as an unoccupied site." (emphasis added)

[32] The policy does not prescribe how depreciation is to be calculated.

[33] Tower says that a depreciation rate must be applied to the repair work, as the policy does not give the Applicants new-for-old but rather old-for-old. Tower seeks to apply a depreciated rate to repairs of either 60 or 69%. It does not explain why it seeks only to apply the depreciation rate to just the chimney repairs, as opposed to the overall repairs required to remediate the Applicants' home. It should do so.

[34] The Applicants have responded to this new argument in their response submissions. The Applicants' expert (Joseph) considers depreciation in its assessment of the costs of repair.

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[13] Affidavit of GA Fraser sworn 24 June 2020, exhibit GF9
[14] Affidavit of GA Fraser sworn 24 June 2020, exhibit GF17

[35] The Joseph report deals with depreciation at pages 7-8 and Appendices C, D and E. It considers but does not allow depreciation for the repair work. Tower criticise Joseph's approach on the grounds that no depreciation is allowed for. Mr Fraser deposes to Joseph fundamentally misunderstanding the position[15], but does not expand on why that is, nor do Tower's submissions.

[36] The position regarding depreciation suffers from a difficulty. Taken overall, the estimated repair costs for all work required to remedy this home is circa $3.4 million. Even applying Tower's 60% to those costs exceeds the market value cap. As *Prattley Enterprises Limited v Vero Insurance Limited*[16] makes clear, an insured is entitled to be fully indemnified, but never more than fully indemnified, for its loss.

[37] Applying the Telfer Young depreciation rate of 60% to the Joseph repair approach (there being no other evidence available to the Tribunal) still results in an amount that exceeds the total amount of indemnity available to the Applicants of $580,000. Tower's approach focusses solely on the chimney repairs, not the overall repairs required.

[38] The Joseph repair costs total $3,484,532. The EQC DRAR records that the damage for event three was 59% of the overall damage. Applying those proportions to the total repair estimates gives the following breakdown:

(a) Total of event one and event two damage – 41% of $3,484,532 = $1,428,658; and

(b) Event three damage – 59% of $3,484,532 = $2,055,873.

[39] Applying Towers' depreciation rates to both amounts gives:

(a) Total of event one and event two damage as proportion of total damage = $1,428,658 x 60% depreciation = $857,194;

(b) Total of event three damage as proportion of total damage = $2,055,873 x 60% depreciation = $1,233,542.

[15] Affidavit of GA Fraser sworn 24 June 2020, paragraph 39
[16] [2017] 1 NZLR 352 (SC)

[40] Both approaches give a sum, even adopting a 60% depreciation rate, in excess of the market value cap. It is appropriate to treat event one and two cumulatively when considering the repair costs, as no substantive repair work was undertaken between events one and two[17].

[41] Having considered the evidence provided by the Applicants as to damage, it must follow that at least by the time of event three, there was sufficient damage, even applying Tower's depreciation rate, to reach the limit of indemnity, in this case, the market value cap of $580,000.

[42] Tower also says that the damage arising from the June 2011 event (event three) was only exacerbation and no new insured loss arose. It says therefore that there is no policy response to the event. That submission is not accepted. Different damage occurred in the June 2011 loss[18].

[43] Had Tower moved to effect payment under the policy to enable the Applicants to repair the home in the period between event two and event three, that argument would not be available to Tower.

[44] Whether in the context of the catastrophic damage caused by the CES and the enormous number of homes damaged, the position that the repairs could have been undertaken in that short period of time is realistic is not the issue. The principle holds true. That is that "exacerbation" would not have been a response had the home been repaired in the time between policy periods.

[45] The home would have suffered new damage if it had been repaired. That did not occur because Tower was in dispute with the Applicants.

[46] The fact that Tower had not resolved the issues of policy response with the Applicants so that the Applicants could carry out the required repairs in that period cannot be a ground to support its argument that event three was only exacerbation because the repairs were not done. That would wrongly reward the continuation of a dispute preventing the Applicants' entitlements under the policy. As a matter of public policy, that cannot be permitted.

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[17] Prattley at [36]
[18] Affidavit of N M sworn 25 May 2020, paragraph [22]

[47] Further, the damage to the home in event three was not exacerbation. It represented new damage on the evidence before the Tribunal[19].

[48] Tower then contends that the home had no market value in June 2011 when event three occurred. It infers that the home had no residual market value by February 2011. It does not explain why, if that was the case, why the market value cap was not available to the Applicants in the previous policy period of May 2010 to May 2011.

[49] If the property had no residual market value by February 2011 or even in September 2010, then the result of that is that the Applicants must have been entitled to the sum of $580,000 in that policy period. All that finding would do is move the maximum sum payable to the initial policy period in issue.

[50] That would mean that the payment due to the Applicants would look like this:

Description	**Amount**	**Balance**
Events One and Two (market value cap)	580,000	
Less policy excess	(150)	
Less EQC payments	(230,000)	
		$349,850
Event Three (market value cap already paid)	Nil	
Less policy excess	Nil	
Less EQC payment	Nil	
		0
Total Policy Obligation		**$349,700**

[51] This analysis shows that apportioning the market value cap to the first policy period results in a liability to the Applicants of the same amount.

[19] Affidavit of N M sworn 25 May 2020, paragraph [22]

[52] It does not follow, therefore, that the time when the damage to the property was such that it reached the market value cap has any effect on the Applicant's entitlement to recover that sum, net of recoveries from EQC.

[53] There is an artificiality in Towers' approach to apportioning damage to events in the way it seeks to. It has no independent evidence of its own, instead wanting to focus on just the chimney damage estimate and applying a substantial depreciation amount to that amount.

[54] Based on the evidence provided by the Applicants from Joseph and Babbage, there is evidence that the home reached its market value cap by event two at the latest. While it is not possible to determine with any precision what amount of further damage occurred in event three, the Joseph evidence sets out repair costs of circa $3.4 million to repair the Applicants' home. If the Tribunal was required to, it could apply Towers' deprecation rates and still derive a depreciation repair cost of more than the market value cap on either events one and two cumulatively or event three.

[55] The Applicants have formulated their case on the basis that the market value cap was reached by event three, entitling them to a further sum of $125,000 ($580,000 less $455,000).

[56] To refer to the High Court's judgment, the Court made it clear that any further payment could only be made in the second policy period if the house had some residual market value at the commencement of that second policy period, and the loss of market value of the house in that period exceeded the payment received from EQC in respect of that damage.

[57] The evidence establishes on the balance of probabilities that in its totality, the Applicants' home reached the "market value cap" either as a result of the cumulative effect of events one and two or as a result of the further damage arising from event three. Either outcome results in the market value cap being payable. In terms of the tables set out above, there is no difference in when that status was reached.

[58] Tower suggests that this is the case in its submissions[20]. It submits that there is no evidence of further damage from the June 2011 event (event three) but this is incorrect. Mr M's affidavit provides an evidential basis for a finding that further damage occurred in event three.

[20] Tower submissions paragraph [11]

[59] To conclude, the Tribunal finds that the Applicants are entitled to the relief they seek on Issue 16.1. Subject to the determination of Issue 16.2, they would be entitled to the sum of $349,700.00.

Issue 16.2 - Tower's entitlement to EQC payment credits under the policy

[60] This issue is whether Tower is entitled to credit EQC payments received by the Applicants against any amount due to the Applicants from Tower when the policy did not respond to the relevant event. Or to put it another way, do the Applicants have to give credit to Tower for the EQC cap payment received by them for damage arising from event two when Tower's policy did not respond?

[61] It is not in contention that two of the three EQC payments should be credited and the Applicants have provided for that.

[62] The Applicants oppose having to give credit to Tower for the second EQC cap payment paid for event two in circumstances where Tower's policy did not respond to that event.

[63] They say that the relevant provision in the policy provides that:

> **"NATURAL DISASTER DAMAGE**
> This policy is extended to include natural disaster damage. [Tower] will pay the difference between the amount paid under EQCover and the sum insured shown in the certificate of insurance."

[64] Tower made no payment at all for event two as the policy cap was reached as a result of event one. Hence, there is no "difference" between the sum insured and any EQC payment.

[65] The Applicants say that where the policy makes no response to event two, the receipt of payment of the further EQC payment would create a debt from the Applicants to Tower.

[66] The question is whether, notwithstanding that Tower makes no payment at all for event two, it is nonetheless entitled to deduct from any overall liability to the Applicants the further $115,000 received from EQC.

[67] The Applicants must give credit to Tower for that EQC payment. That is because of the principle that the Applicants may not be "more than" fully indemnified[21].

[68] The Applicants may recover up to but not beyond the limit of the amount Tower is required to pay, being $580,000 which is the market value cap.

[69] Permitting the Applicants to not take account of the third EQC payment (in fact, the second chronologically) would mean that the Applicants would recover $695,000.

[70] The Applicants and Tower agreed that the maximum sum payable on a total loss was the market value of the improvements, which the parties agree is $580,000.

[71] As Tower puts it, what the Applicants have lost is the undamaged market value of the house before the Canterbury Earthquake Sequence, $580,000. This is described as the "measure of indemnity" and the Court contemplated the Applicants receiving payments up to $580,000.

[72] The Applicants have recovered the sum of $345,000 from EQC. They must give credit for that to Tower. Doing so is in accordance with the approach of the policy. It is not a matter of unjust enrichment or a derogation from the Earthquake Commission Act 1993, but rather the consequence of the operation of the policy.

[73] The parties agreed that the Applicants would be indemnified up to the market value of $580,000. There is no failure of consideration, as the policy is providing the cover it was agreed to provide, but the Applicants must give credit for the further EQC payment or they will recover more than the market value cap.

[74] The only way that this issue could be looked at was if the Applicants case was that Tower was obliged to pay the market value cap as a result of the damage cumulatively occasioned by events one and two, occurring in the same policy period. At that point, the $580,000 would have been due from Tower, net of the two EQC payments.

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[21] Castellain v Preston (183) 11 QBD 380 (CA) at 386 quoted in Prattley v Vero Insurance [2017] 1 NZLR 352 (SC)

[75] When event three occurred, Tower had no exposure as the market value cap had already been reached. EQC's further payment for event three would not have been taken account of.

[76] But, the Applicants have not run their case this way. They are clear that the policy cap was reached at the end of the first policy period and that they are entitled to the difference of $125,000 in the second policy period less the EQC payment made.

[77] The effect of the finding that the Applicants must account for the third EQC payment is to reduce the amount payable to the Applicants by Tower from $349,700.00 to $234,700. I find that Tower is liable to pay to the Applicants the sum of $234,700. Tower is directed to pay that sum to the Applicants within 5 working days of the date of this Decision.

[78] The Applicants also raise the issue of whether, from the second relevant policy period onward, they should have continued to pay premia to Tower. They say that, where the market value cap was reached and could not be exceeded, to do so was a failure of consideration as Tower did not or should not have offered them insurance from that point onwards.

[79] They seek a return of the premia paid.

[80] This claim was not raised by the Issue 16.1 or Issue 16.2 matters being considered on the papers. The Tribunal does not make any finding on that issue and will instead allow the Applicants to raise that in the substantive hearing.

Issue 16.3(a) - the costs incurred by the Applicants displacing Tower's denial of liability

[81] The Applicants seek recovery of certain professional fees incurred by them in advancing their claims against Tower. They have incurred those costs in the face of Tower's denial of any liability to them.

[82] This Decision holds that, contrary to its claimed position, Tower is liable to pay the Applicants the sum of $234,700.

[83] The issue, however, is whether Tower is obliged to pay sums to the Applicants for professional fees incurred without its authority.

[84] The Applicants say that it is not the exercise of a discretion that leads to the liability, but rather whether Tower authorised such fees being incurred. It follows that the Applicants must seek permission from Tower to incur such fees and that, once such a request is received, Tower must consider that request in terms of its duty of utmost good faith to the Applicants.

[85] While it is correct that a failure to pay a sum due is a breach of the contract of insurance, such a failure must be considered in terms of the obligations both parties assumed under the contract of insurance. Relevantly here, Tower's liability to such fees is limited to those it authorised.

[86] There is no evidence here that the Applicants sought approval from Tower prior to engaging Babbage and Joseph. In terms of the policy, that is the end of the matter.

[87] It is not a matter of the insurer paying late or denying liability, which is the focus of the Applicants' submissions on this issue, but rather whether the policy terms were complied with.

[88] In addition to this, Tower makes the point that the fees incurred are not within the ambit of recoverable costs under the policy. They are said to be only those costs incurred – with prior authority – "in respect of the rebuilding or repairs" [of the Applicants' home].

[89] The costs incurred in disputing liability are not within the ambit of the clause, it says. They are either in the nature of advice given to a party in circumstances where litigation was in contemplation (that is, litigation advice) or advice for the purposes of making or advancing a claim. They are not in relation to the costs in respect of rebuilding or repair of the home, as would for example architects, building consent, engineering fees and the like incurred in undertaking repairs.

[90] It follows from this that the Applicants' claim to recover their costs for Babbage and Joseph fails.

[91] That is not the end of the matter regarding these costs, however. There is a possibility that these costs could properly form damages for breach of Tower's obligation to indemnify the Applicants under the policies of insurance. The Tribunal has found that Tower has an obligation to pay the Applicants. Previously, Tower had denied liability at all.

[92] It may be possible for the Applicants to argue that Towers' wrongful denial of liability led the Applicants to incurring those costs and that they only did so because of Tower's wrongful breach of contract. Such costs may have been in the reasonable expectation of the parties at the time they entered into the policy of insurance. If so, such amounts are recoverable as damages.

[93] I intend to deal with the Applicants' claim to damages equal to their professional fees for breach of the insurance contract in the context of the substantive determination of the remaining issues.

[94] Issues relating to interest and general damages must also be dealt with in the substantive hearing. I note that section 48 of the Act enables the award of interest to be made. I will hear the parties on whether and if so from when interest should accrue at the substantive hearing.

Orders

[95] Tower is to pay to the Applicants the sum of $234,700. It is to do that within 5 working days.

[96] The Applicants' claim for professional fees due under the policy fails.

[97] I reserve for later determination in the substantive hearing the Applicants' claims:

(a) For recovery, as damages for breach of the insurance contract, the professional fees incurred by the Applicants in advancing their claims;

(b) Interest on the sum of $234,700;

(c) General damages.

[98] I direct the case manager to schedule a case management conference to timetable the substantive issues to a full hearing.

P R Cogswell

Member

Canterbury Earthquakes Insurance Tribunal