IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0037-2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	C F D, R D G AND D R S (AS TRUSTEES OF THE D G FAMILY TRUST Applicants
AND	IAG NEW ZEALAND LIMITED First Respondent
AND	MAX CONTRACTS LIMITED Second Respondent
AND	MAX EQ LIMITED Third Respondent
AND	ORANGE H MANAGEMENT LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Fourth Respondent
AND	ORANGE H GROUP LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Fifth Respondent

AND QBE INSURANCE (AUSTRALIA) LIMITED
Sixth Respondent

Appearances: A Prebble with C F D and R D G, for the applicants.
O Colette-Moxon and S McIntyre for the first respondent.
R Smedley for the second and third respondents
S Galloway for the sixth respondent.

DECISION # 3 OF C P SOMERVILLE
[Costs award for Stage 1 hearing]

Dated May 2021

Table of Contents

Overview

[1] This decision should serve as a warning that this Tribunal will award costs if it thinks that one party's conduct has caused one or more of the other parties to incur unnecessary costs and expenses.

Background

[2] At the end of my decision dated 22 December 2020, I invited the filing of applications for costs from any party considering themselves entitled to such an award.

[3] The applicant (the Family Trust) has sought costs against the first respondent (IAG) and the second and third respondents (Max Contracts). Max Contracts opposes the Family Trust's application for costs but its application to defer the hearing of the Family Trust's costs claim has been rejected. The sixth respondent's (QBE) application for costs against IAG has been deferred until the Tribunal has determined liability and quantum.

[4] Although IAG complains that it is unfair for the costs between it and the Family Trust to be determined now and the costs between it and the other respondents deferred until later, very different issues are involved. Whether IAG's arguments at the first hearing lacked substantial merit can be determined now that the decision based on those arguments has been issued, but the arguments between IAG and the other respondents will not be canvassed until later and cannot face the same scrutiny until determinations have been made about them.

[5] Moreover, IAG's complaint has more relevance to court proceedings where awards of costs depend on the outcome, rather than costs claims in this Tribunal where costs are dependent upon conduct, can be made in relation to discrete parts of the proceedings, and can be awarded against "successful" parties.

[6] The Family Trust's initial submissions, although comprehensive, lacked detail and failed to address the jurisdictional elements of this Tribunal's costs jurisdiction. To be fair to the parties, one of whom is a litigant in person, I sought further clarification from the Family Trust and allowed the respondents an opportunity to properly respond.

Approach

[7] Because many of the parties to claims in this Tribunal are litigants in person, it is important to undertake an in-depth analysis of the Tribunal's costs jurisdiction and to explore the conduct that might trigger an award for costs. In the discussion that follows, therefore, I intend to:

(a) outline the statutory provision that provides the Tribunal with jurisdiction to award costs;

(b) identify the purpose behind awards of costs made generally by courts and tribunals;

(c) identify the specific purpose behind this Tribunal's jurisdiction to award costs;

(d) define what is meant by the two grounds, "without substantial merit" and "bad faith," two of the three grounds that must be established before this Tribunal can award costs;

(e) outline the grounds upon which the Family Trust claims it is entitled to an award of costs;

(f) examine those grounds;

(g) examine the causal links, if any, between grounds that have been established and costs incurred by the Family Trust;

(h) decide whether to exercise the discretion to award costs; and

(i) determine the quantum of costs, if that is appropriate.

Costs jurisdiction

[8] The Tribunal's costs jurisdiction can be found in s 47 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act), which provides:

> 47 **Costs**
>
> (1) The tribunal may award costs against a party only in accordance with this section.
>
> (2) A costs award may be made against a party whether the party is successful or not (with all or part of the party's claim or response) if the tribunal considers that—
>
> (a) the party caused costs and expenses to be incurred unnecessarily by—
>
> (i) acting in bad faith; or
>
> (ii) making allegations or objections that are without substantial merit; or
>
> (b) the party caused unreasonable delay, including by failing to meet a deadline set by the tribunal without a reasonable excuse for doing so.
>
> (3) A costs award must relate to costs and expenses incurred by the parties only and not to costs and expenses incurred by the tribunal.

(4) If the tribunal does not make an order under this section, the parties must meet their own costs and expenses.

(5) An order for costs may, on registration of a certified copy of the tribunal's decision, be enforced in the District Court as if it were an order of that court.

[9] The Family Trust seeks an award of costs based on allegations that IAG's conduct in relation to the Family Trust's claim amounts to bad faith, and that it and Max Contracts relied on arguments that were without substantial merit. IAG denies acting in bad faith. Both it and Max Contracts deny relying on arguments that were without substantial merit.

[10] Before examining the specifics of these claims, it is necessary to define the meaning of "bad faith" and "without substantial merit" as ascertained from the text of the Act and in light of its purpose.[1]

Purpose of costs awards generally

In courts

[11] Although the general rules on costs that apply in courts have a different starting point and do not apply in this Tribunal, they warrant examination as their application reveals a similarity of purpose.

[12] Those general rules are based on the fundamental principle that costs follow the event.[2] Although rule 14.1 of the High Court Rules 2016 renders costs decisions discretionary, that discretion has never been unfettered and must be exercised judicially. To enable this, it is governed by specific rules designed to ensure that the determination of costs is predictable and expeditious.[3] Parties can assess the likely possibility and risk of cost recovery before embarking on litigation and calculate costs promptly at the end of that litigation to ensure that they are out of pocket for those costs for the minimum time.[4]

[13] Those rules also allow for costs to be either reduced below the prescribed scale or increased above it. Thus, costs may be reduced where the issues are of little significance, the

[1] Interpretation Act 1990, s5.
[2] *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109 at [8].
[3] High Court Rules 2016, r 14.2(1)(g).
[4] *McGechan on Procedure* (online ed. Thomson Reuters) at [HR14.2.01 (7c)]

amount at stake is exceptionally small, the party's conduct of the proceedings has unnecessarily increased costs, or where it has unjustifiably refused settlement offers.[5]

[14] Conversely, costs may be increased where the party required to pay costs has conducted the litigation in a way that has resulted in higher costs to the other party. Indemnity costs may be awarded in exceptional cases to mark the court's disapproval where that party has flagrantly acted improperly in conducting the litigation.[6]

[15] Courts understand that litigation is a very costly exercise. Because clients pay for legal services on an hourly basis, that cost increases as the litigation becomes more complex and prolonged. Courts are aware that costs can outstrip the value of the subject matter in dispute and that litigants need some means of limiting their exposure to the ruinous cost of losing a case. Although a claimant can avoid this risk by abstaining from issuing legal proceedings, those who are sued can only do so by making offers to settle, hence the rules surrounding the making of Calderbank offers.[7]

[16] The courts have also been at pains to point out, as a matter of proportionality, that litigation should not become so expensive as to unreasonably dissuade parties from exercising their rights.[8] To that end, parties have been urged to conduct litigation with proper focus on the issues and tight control on the escalation of costs.[9] The broader public interest is reflected in the encouragement of Calderbank offers from the parties and the promotion of steely responses from the Courts in cases where offers are not made or where the outcome is less than the amount offered.[10] As Lord Wolff MR pointed out, it is important to have a policy "to develop measures which will encourage reasonable and early settlement of proceedings". [11]

[17] Those contemplating involvement in litigation need to appreciate that it comes at a cost, even if they are successful. The cost of losing forces the parties to that litigation to carefully evaluate the merits of their respective cases and seriously contemplate compromising their

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[5] Andrew Beck- Principles of *Civil Procedure (online ed. Thomson Reuters)*, at [13.13.3.2].
[6] *Principles of Civil Procedure* at [13.13.3.1].
[7] *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [56].
[8] *Transmissions & Diesels Ltd v Matheson* [2002] 1 ERNZ 22 (CA) at [28].
[9] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [65].
[10] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].
[11] Sir Harry Woolf *Access to Justice*: *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995)* at ch 24; see also *Moore v McNabb* above n 7 at [58].

dispute. The costs jurisdiction in the general courts, therefore, enables those in dispute to have access to justice but also encourages them to settle short of determination.

In tribunals

[18] Parliament is also aware of the high cost of litigation and the role this can play in dissuading parties from exercising their rights, particularly where those costs are out of proportion to the amount at stake in the dispute or where parties of limited means are seeking to enforce rights against those with practically unlimited means. Tribunals have therefore been set up to bypass the high cost of litigation. Filing/hearing fees, if any, are kept to a minimum, and inquisitorial powers are provided to the tribunal so that parties can attend without needing legal representation.

[19] The costs jurisdiction in these tribunals has a different starting point from the costs jurisdiction in the courts: each party bears their own costs unless those costs have been unnecessarily increased by the conduct of the other party. For example, in the Disputes Tribunal, the discretion to award costs is dependent on findings that a claim is frivolous or vexatious, that it has been lodged by a party who knows that it is not within the jurisdiction of the tribunal, or that one party has unnecessarily prolonged proceedings by engaging in conduct intended to impede the proper resolution of the proceedings.[12]

[20] In other tribunals exercising judicial functions where the claims are substantially larger, such as the Weathertight Homes Tribunal (WHT) and this Tribunal, the discretion to award costs is dependent upon findings of bad faith or that allegations/objections have been made that are without substantial merit.

[21] The High Court has indicated that the purpose of these statutory criteria for awarding costs is to strike a balance between avoiding disincentives to the use of an important resolution service on the one hand and the danger of exposing other participants to unnecessary cost on the other .[13] Without applying any gloss to that legislatively struck balance, the High Court has applied those criteria to award costs intended to compensate one party for the unnecessary costs

[12] Disputes Tribunal Act 1988, s 43.
[13] *Trustees Executors Ltd v Wellington City Council*, HC Welington CIV-2008-485-739, 16 December 2008 at [66]; *Riveroaks Farm Ltd v Holland Beckett, HC Tauranga* CIV-2010-470-584, 16 February 2011 at [8]-[10].

they have incurred as a result of other parties, for example, pursuing arguments that lack substantial merit or refusing reasonable settlement offers.[14]

[22] This demonstrates that, although the costs jurisdiction of these tribunals and that of the general courts have different starting points, they have the same general objective: the provision of access to justice by the discouragement of bad behaviour and the promotion of compromise. Their different starting points are simply different approaches to providing access to justice; each permits recovery for conduct that prolongs litigation. The empowering legislation for tribunals has simply codified the conduct that might trigger awards of costs.

In this Tribunal

[23] Where parties are expected to meet their own costs that, by itself, is an incentive to settle. The nature of the disputes and the provisions of the empowering legislation ensure that the claimants in this Tribunal are always residential homeowners and the respondents are always insurers. Because this is a financial mis-match in all but the exceptional case, this Tribunal must be alert to the possibility, either that insurers might leverage their financial strength by forcing homeowners into litigation they can ill afford, or that impecunious homeowners might leverage settlement offers by exposing insurers to expensive litigation.

[24] In that context, this Tribunal is aware that the Family Trust, which says that it only commenced High Court litigation to protect itself against a limitation defence and did not want to be drawn into the time and cost of High Court proceedings, ended up spending approximately $370,000 in the interlocutory stages of that litigation while the matter was before the High Court.

[25] On the other hand, this Tribunal is also aware that the Family Trust, which is self-representing, has participated in a hearing conducted over 15 days at what is likely to be a fraction of the cost incurred by IAG.

[26] In the light of this background, it is understandable that the legislation empowering the Tribunal provides:

[14] *Trustees Executors Ltd v Wellington City Council* at [67].

(a) the Act's purpose of providing "fair, speedy, flexible, and cost-effective services for resolving disputes" is mentioned in s 3 (purpose), s 20 (managing claims), s 30 (mediation services) and s 37 (managing hearings);

(b) claims may only be bought by policyholders/insured persons;[15]

(c) the Tribunal must encourage parties to work together on matters that are agreed;[16]

(d) the Tribunal must consider using conferences of experts to avoid duplication of advice or evidence on matters that are or are likely to be agreed;[17]

(e) the Tribunal may prevent a party using any expert, including giving evidence, unnecessarily;[18]

(f) parties are ordinarily required to attend the first case management conference in person;[19]

(g) parties to a claim may be represented by another person of their choice whether or not that other person is legally qualified;[20]

(h) the Tribunal may appoint an expert advisor to assist it;[21]

(i) the Tribunal must not admit or permit unnecessary or irrelevant evidence or cross-examination;[22]

(j) the Tribunal may refuse to permit cross-examination of a party or person;[23]

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[15] Section 10
[16] Section 20(2)(a).
[17] Section 20(1)(b).
[18] Section 20(4) and s 37(4)(b).
[19] Section 22(1) and (4).
[20] Schedule 2 cl 3(1).
[21] Section 27(1)(f)
[22] Section 37)2)(b)
[23] Section 37(4).

(k) the Tribunal may consider evidence from another claim heard by it or on appeal that it thinks relevant and applicable to the claim;[24]

(l) the Tribunal, on its own initiative, may seek and receive any evidence and make investigations and inquiries that it considers appropriate;[25]

(m) the Tribunal may decide a claim on the papers when appropriate;[26]

(n) the Tribunal may conduct hearings by remote access facility when appropriate;[27] and

(o) potential appellants must first seek the leave of the High Court.[28]

[27] The High Court, when considering almost identical powers for the WHT against a very similar statutory background, considered that the costs provisions were intended to strike a balance between avoiding disincentives to the use of an important Resolution Service and exposing other participants to unnecessary costs.[29]

[28] That confirms my conclusion at [22] that the Tribunal's costs provisions are intended to ensure access to justice, by discouraging bad behaviour and promoting compromise.

[29] As an examination of the WHT costs decisions and appeals will reveal, costs can be just as easily awarded against applicants as against respondents; it is a wind that blows in both directions. It needs to be understood, however, that claimants representing themselves may not be held to quite the same standard as those who have legal representation when it comes to arguments made without substantial merit.

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[24] Section 39(1)(d)
[25] Section 40(1).
[26] Section 42(4).
[27] Section 42(5).
[28] Section 54(2).
[29] *Trustees Executors v Wellington City Council* above n 7 [66]-[67].

"Without substantial merit"

[30] Because this Tribunal's jurisdiction to award costs in this regard is identical to that of the WHT, the costs decisions of that Tribunal and any appeals from them are relevant when determining this Tribunal's costs jurisdiction.

[31] The following propositions can be drawn from those cases:

(a) "substantial merit" refers to claims that require serious consideration by the Tribunal, and the mere fact that an allegation or argument is not accepted or upheld by the Tribunal will not of itself expose the party concerned to liability for costs;[30]

(b) claims which have substantial merit, even if ultimately rejected, will not attract an order for costs;[31]

(c) the proper enquiry when considering whether a claim or a defence has "substantial merit" is to determine, without recourse to hindsight, what the party and their advisers properly considered the strength of the case to be;[32]

(d) the bar for establishing "substantial merit" should not be set too high as the Tribunal should have the ability to award costs against those making allegations which a party ought reasonably to have known they could not establish;[33] and

(e) only the costs "incurred unnecessarily" as a consequence of a party advancing arguments that lacked substantial merit are to be recovered.[34]

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[30] *Riveroaks Farm Ltd v Holland Beckett,* above n 13 at [9].
[31] *Riveroaks Farm Ltd v Holland Beckett* at [10].
[32] *Riveroaks Farm Ltd v Holland Beckett* at [4] and [45].
[33] *Clearwater Cove Apartments Body Corporate 170989* v *Auckland Council* [2013] NZHC 2824 at [27].
[34] *Clearwater Cove Apartments Body Corporate 170989* v *Auckland Council* at [68]

[32] Moreover, this Tribunal has recently considered whether to award costs where it was alleged that arguments without substantial merit had been advanced.[35] Drawing on the WHT cases, Member Boys commented that: [36]

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

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

[33] I consider that these decisions properly reflect the Act's purpose in providing fair, speedy, flexible, and cost-effective services for resolving insurance disputes arising from the Canterbury earthquakes. I accept, however, that costs should only be awarded under this heading after a careful and full factual enquiry.

Allegations

[34] The Family Trust alleges that IAG caused it to unnecessarily incur costs and expenses by advancing the following arguments without substantial merit:

(a) challenges to the Trust's evidence;

(b) any deficiencies in the foundations were either present before the earthquakes or were due to defective repairs;

(c) any of the arguments supported by Mr McGunnigle's flawed and unreliable evidence;

(d) the hump in the bathroom floor was caused by the deteriorated state of the floor and was decay damage caused by pre-existing workmanship defects;

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[35] *KB and SB v Earthquake Commission* [2020] CEIT 21.
[36] *KB and SB v Earthquake Commission* at [24].

(e) 10 steel windows had not been damaged by the earthquakes;

(f) there were no aesthetic deficiencies with the other steel windows;

(g) there was no plausible evidence of:

(i) any unrepaired earthquake damage remaining to the roof;

(ii) any deficiencies in the method used to repair the roof; and

(iii) damage to the rafters.

IAG's conduct

[35] Although I would normally take each item of the applicant's claim and explore the arguments from both sides in relation to that claim, the differing approaches taken by the parties do not make that an easy process. Instead, in this section of the decision I will use the headings from my December 2020 decision to review each issue and consider whether any of the arguments raised by IAG lacked substantial merit.

[36] Before I do so, however, there are some general issues raised by the parties that first need addressing.

[37] When considering an argument raised by one of the parties, no great weight should be placed on the approach taken by the Tribunal in its decision: that is an exercise in hindsight. Instead, the proper enquiry is to determine what the party and their advisers properly considered the strength of the case to be at the time it was being prepared and advanced.[37] The Tribunal can award costs against a party who ought reasonably to have known that it could not establish the argument in question.[38]

[38] The test is objective rather than subjective: in other words, what ought the party and its advisors have known about the prospects of the argument in question being successful?

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[37] *Riveroaks Farm Ltd Trust v Holland Beckett* above n 13 at [45].
[38] *Clearwater Cove Apartments Body Corporate 170989* v *Auckland Council* above n 33 at [27].

[39] This involves not just asking whether there was an evidential basis for the argument but objectively assessing the credibility and reliability of that evidence. On the other hand, an argument cannot be said to lack substantial merit simply because the expert advancing that argument lacks credibility.

Foundations and floor levels

[40] IAG's final submissions conceded that the house was not relevelled sufficiently during the earthquake repair works but contended that the dislevelment still present was either pre-existing or due to ineffectual relevelling.

[41] IAG knew, or ought to have known, that:

(a) Any floor dislevelment that occurred during construction in 1925 or in the subsequent 40/50 years, was likely to have been addressed when the house was re-piled in the 1960s or 1970s.

(b) It was likely that the earthquakes contributed to the floor dislevelment evident in 2010/2011 because:

(i) the house was likely to have been designed by a builder without the involvement of architects or engineers;

(ii) it was not designed to withstand earthquake forces; and

(iii) the floor was likely to have been relevelled to a satisfactory standard by the re-piling in the 1960s/70s.

(c) Further floor relevelling was required after the repairs because:

(i) the scope of works for the earthquake repairs included floor relevelling; and

(ii) three separate floor level surveys carried out after the repairs demonstrated that the repairs had not relevelled the floor to the policy standard.

(d) It was likely that some of the floor dislevelment related to unrepaired earthquake damage because:

(i) none of the spalled perimeter foundation concrete had been rebuilt; and

(ii) no relevelling had been undertaken to the perimeter foundations or to the floors in the kitchen, around the bottom of the stairs, in the centre of the lounge and bedroom 1, or on the first floor.

[42] Although it was appropriate for IAG to concede that the earthquakes caused some dislevelment in the floors, that the repairs had left them out of level, and that this dislevelment did not meet the policy standard, there was no substantial merit to its argument that all the dislevelment still present was due to either pre-earthquake settlement or ineffectual relevelling. As a simple matter of causation, that cannot have been the case.

[43] To summarise, it was likely that the floor had been left satisfactorily level after the re-piling undertaken in the 1960s/70s, it was apparent from the engineering reports undertaken prior to the repairs in 2014 that the floors had earthquake damage and needed relevelling, IAG knew that the repairs had not achieved relevelling to the policy standard, yet it persisted with arguments it must have known had no reasonable prospect of success.

Bathroom floor

[44] This is a very complex issue, as my analysis in the decision indicates.

[45] The Family Trust alleged that the obvious hump that appeared in the bathroom floor sometime after the completion of the 2014 repairs was caused by re-piling, but the evidence revealed that very little earthquake damage had been identified in the bathroom and that only minimal repairs were undertaken in this area. The real issue was about the source of the leak and the timing. In that regard, it is significant that the Family Trust did not challenge Dr Wakeling's evidence that the rot in some of the under-floor timbers pre-dated the earthquakes.

[46] There was merit in D's assumption, however, that the leak in the shower was either caused by, or exacerbated by, the earthquakes/repair as it had not been apparent in the seven years before the earthquakes or in the two years afterwards. There may have been flaws in this argument, but it had substantial merit.

[47] IAG's defence of this claim was reasonable and proportionate; Mr Colette-Moxon was economical with his questioning, spending less time questioning the witnesses then did D/Mr Prebble or the Tribunal/Mr Crosby.

[48] Each party has been successful in part: IAG has successfully argued that two pine joists in the bathroom floor required replacement prior to the earthquake and that neither the pebble mat nor the corner tile had been damaged by the earthquake; the Family Trust has successfully argued that the damage to the membrane under the shower was caused, at least in part, by the earthquakes.

[49] Conversely, although each party raised arguments that were not accepted by the Tribunal, neither advanced arguments without substantial merit.

Steel windows

[50] For the first part of the hearing, IAG relied on the evidence of its expert witness, Mr McGunnigle, that most of the steel windows had been damaged in the earthquakes. This was conceded by IAG in the joint Schedule of Defects and was the basis of the concession made by IAG's counsel in opening that there were only seven windows in dispute, four of which had not been included in the 17 windows mentioned above.

[51] By the time IAG came to make its closing submissions, 13 steel windows were in contention for differing reasons, and its closing submissions devoted six pages to them.

[52] According to IAG, this dramatic change was entirely due to Mr McGunnigle changing his opinion about the cause of the window damage after hearing, for the first time, that it was likely that the house had been re-piled in the 1960s/70s.

[53] I have taken the following factors into account in deciding that, had IAG and its advisors properly considered the strength of its case, it ought to have concluded that there was no reasonable prospect that its arguments about these 13 steel windows would be successful:

(a) the evidence of D that all but two of the 21 steel windows were fully functional and waterproof prior to the earthquakes;

(b) the May 2017 report from Terra Consulting that nine of the steel windows had functional defects;

(c) Mr McGunnigle's earlier considered view, after conferring with Mr Richardson, that the damage to 15 of the steel windows showed signs of earthquake damage independent of any damage they might have previously suffered because of static settlement;

(d) IAG and its expert advisers (Mr Cook and Mr McGunnigle) ought to have known and accepted that a 90-year-old house resting on concrete piles was likely to have been re-piled at some stage;

(e) If either of those experts had recognised the likelihood of re-piling, they would have mentioned it in their extensive briefs, which neither did; and

(f) Mr McGunnigle did not have the engineering qualifications or experience on which to base his changed opinion about the cause of the window damage.

[54] I find, therefore, that IAG's argument that 7 of the 15 steel windows conceded as damaged by Mr McGunnigle in his second brief had not in fact been damaged in the earthquakes lacked substantial merit.

Roof

[55] The Family Trust claims that IAG significantly extended the hearing time and increased the Family Trust's costs by refusing to endorse the experts' acknowledgement that the damage to the roof caused either by the earthquakes or by a defective repair process warranted the total replacement of the slate tiles.

[56] It is important to recognise, however, that agreements reached by the parties' respective witnesses do not bind the parties, who are free to reject them on reasonable grounds. In the present case, I consider that IAG had reasonable grounds for rejecting the proposed repair suggested by the two experts, but I am unwilling to elaborate on those grounds at this stage in the hearing as they are likely to feature in the next stage of this hearing.

[57] The Family Trust also claims that there was no plausible evidence of any unrepaired earthquake damage remaining to the roof or that the methods used to repair the roof were defective, but this is a clear overstatement of the position. The conclusions I reached in my decision about the damage to the roof demonstrates that there was substantial merit in all but one of the arguments advanced by IAG in connection with the roof. I may not have accepted them, but IAG cannot be criticised for making those arguments. The one exception relates to its argument that repairing damaged slates by using black adhesive met the policy standard for a repair.

[58] I have taken the following factors into account in deciding that, had IAG and its advisors properly considered the strength of its case, it ought to have concluded that there was no reasonable prospect that its arguments about the black adhesive slate tile repair would be successful:

(a) this method of repair is not mentioned, let alone recommended, anywhere in the literature;

(b) Mr McGunnigle, the only expert it produced at the hearing, did not have the qualifications or experience to comment on this method of repairing slate tiles;

(c) IAG had no properly qualified expert supporting this repair method; and

(d) it should have been cautious about accepting Mr McSorley's evidence about this method bearing in mind his lack of expert status and his vested interest.

[59] I therefore find that IAG's argument that using black adhesive to repair damaged slate tiles was an acceptable repair method lacked substantial merit.

Max Contracts' conduct

[60] The Trust alleges that Max Contracts caused it to unnecessarily incur costs and expenses by advancing the following arguments without substantial merit:

(a) none of the slate repairs it undertook amounted to defective building work;

(b) the roof did not need replacing;

(c) the poor colour match between the original and the replacement slates did not amount to defective building work;

(d) there was no defective repair work relating to the internal doors, the external painting, the gate, gate posts, or the path.

[61] Of those four issues, only the first and the last require examination as arguments without substantial merit. The second issue was not relevant to the Stage I hearing and the third issue was arguable.

[62] The first issue includes the argument about the "black adhesive" repair. At [59] I found that this argument lacked substantial merit when advanced by IAG. Max Contracts' reliance upon this argument was similarly flawed, and it ought to have concluded that there was no reasonable prospect that this argument would be successful, bearing in mind that:

(a) this method of repair is not mentioned, let alone recommended, anywhere in the literature;

(b) Mr McSorley was not a slate tile expert, and had a vested interest to protect as a shareholder in Max Contracts;

(c) IAG's witness, Mr McGunnigle, did not have the qualifications or experience to comment on this method of repairing slate tiles; and

(d) Max Contracts had no properly qualified expert supporting this repair method.

[63] I therefore find that Max Contracts' argument that using black adhesive to repair damaged slate tiles was an acceptable repair method lacked substantial merit.

[64] As far as the fourth issue is concerned, I am not prepared to consider this issue in the detail it requires, as it involves considering arguments about a plethora of damage claims where all parties except QBE were equally responsible for causing the others to incur unnecessary expense.

"Bad faith"

[65] A review undertaken by the WHT in *Brodav Ltd v Waters* of the cases in both New Zealand and Australia where courts have considered the meaning of the phrase "bad faith" revealed that its meaning depends on the context in which the alleged conduct has occurred and can include a range of conduct from the dishonest to a disregard of legislative intent.[39] That Tribunal followed the High Court of Australia to conclude that it should look through the eye-glass of the overall statutory framework to arrive at the statutory meaning of the words. I agree.

[66] Moreover, it is unhelpful to pay too much heed to definitions of "bad faith" or "good faith" made in different contexts. "Bad faith" is the antithesis of "good faith;" it is a dichotomy rather than a continuum. Incorporating the adjective "utmost" to describe the duty of good faith owed by parties to an insurance contract does not acknowledge the existence of a continuum. The dichotomy between "good faith" and "bad faith" remains; it is the boundary between the two that is on a continuum. This explains why the categorisation of conduct said to amount to "bad faith" varies depending on the context in which the expression is used and the statutory provisions being interpreted.

[67] However, because "bad faith" is the antithesis of "good faith," the definition of one phrase can assist with the meaning of the other; discussions about "good faith," therefore, can enlighten the search for the meaning of "bad faith."

[68] This Tribunal's background and statutory context, as described at [23] to [29] above, prompted it to prepare behavioural guidelines in keeping with its ethos of providing fair,

[39] WHT TRI-2008-101-59, 31 March 2009 at [18]-[22].

speedy, flexible, and cost-effective services for resolving disputes about insurance claims. A truncated version was incorporated in the Homeowners' Guide to the Canterbury Earthquakes Insurance Tribunal, but the full version from which this was drawn, as set out below, provides a clear description of what the Tribunal considers exemplifies "good faith" conduct.

> The Tribunal expects that at all times the parties and their advocates will:
>
> > Act honestly.
> >
> > Cooperate with the other parties, their advocates, and the Tribunal.
> >
> > Act respectfully towards other parties, their advocates, and the Tribunal.
> >
> > Not engage in conduct which is misleading or deceptive or knowingly encourage or assist any other participant to engage in conduct which is misleading or deceptive.
> >
> > Not make any claim or respond to any claim where a reasonable person would believe that the claim or response to claim is frivolous, vexatious, for a collateral purpose, or does not have merit.
> >
> > Use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, using mediation.
> >
> > Use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute in cases where the dispute is unable to be resolved by agreement.
> >
> > Use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.
> >
> > Use reasonable endeavours to act promptly and to minimise delay.
> >
> > Disclose, at the earliest practicable time, to each of the other relevant parties, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege.

[69] The converse amounts to conduct which the Tribunal considers would constitute "bad faith". Specifically:

(a) acting dishonestly;

(b) failing or refusing to cooperate with the other parties, their advocates, and the Tribunal.

(c) acting disrespectfully towards other parties, their advocates, and the Tribunal.

(d) engaging in conduct which is misleading or deceptive or knowingly encouraging or assisting any other participant to engage in conduct which is misleading or deceptive;

(e) making any claim or responding to any claim where a reasonable person would believe that the claim or response to the claim is frivolous, vexatious, for a collateral purpose, or does not have merit;

(f) failing or refusing to use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, using mediation;

(g) failing or refusing to use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute in cases where the dispute is unable to be resolved by agreement;

(h) failing or refusing to use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute;

(i) failing or refusing to use reasonable endeavours to act promptly and to minimise delay; and

(j) failing or refusing to disclose, at the earliest practicable time, to each of the other relevant parties, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege.

[70] Although the Tribunal, when managing and adjudicating claims, must have regard to the Act's purpose of providing fair, speedy, flexible and cost-effective services, it must also

observe the principles of natural justice.[40] In practice, the Tribunal is unwilling to be unduly restrictive about the way parties conduct their cases, particularly in cases such as this that involve significant sums and which have been transferred to the Tribunal from the High Court, out of concern that this can result in the predetermination of issues in respect of which it does not have full possession of the facts,. It is also aware that such restrictions can generate a perception that the Tribunal is denying a party a fair opportunity to be heard.

[71] The Tribunal is also conscious of the limitations on its ability to sanction misconduct by a party; s 47 (relating to costs) and s 64 (contempt can only be prosecuted) is all that is available. In that context, therefore, it is important that the Tribunal, at least, has the power to compensate one party for unnecessary expense caused by the other's misconduct.

[72] The foregoing analysis lies behind the following propositions drawn from costs decisions of the WHT, appeals to the High Court in that jurisdiction, and Member Boys' recent CEIT decision in *KB and SB v Earthquake Commission*:[41]

(a) "bad faith" is to act unreasonably, or improperly, and knowingly do so;[42]

(b) the meaning of the phrase "bad faith" depends on the context in which the alleged conduct has occurred and can include a range of conduct from the dishonest to a disregard of legislative intent.[43]

(c) a party alleging bad faith must discharge a heavy evidential burden, commensurate with the gravity of the allegations made;[44]

(d) although "bad faith" sets a relatively high bar in terms of misconduct, the phrase should not be given too restrictive a meaning;[45]

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[40] The Act, ss 20 and 37.
[41] [2020] CEIT 21
[42] At [23]; *Mary Moody Family Trust Board (Inc) v Attorney-General* [2015] NZHC 365 at [104].
[43] *Brodav Ltd v Waters, above n 39* at [20].
[44] *Clearwater Cove Apartments Body Corporate 170989 v Auckland Council* above n 33 at [48].
[45] *KB and SB v Earthquake Commission* [2020] CEIT 21 at [22].

(e) "bad faith" may apply to parties who obfuscate or take few or no steps and refuse to participate in the process or settlement negotiations and who in so doing jeopardise the settlement process;[46]

(f) in the CEIT context, "bad faith" may involve attempting to gain an unjustified advantage by taking unreasonable and unnecessary actions, such as pressuring settlement or withdrawal of an action, reneging on promises made, applying unfair pressure to increase a settlement offer, pursuing pedantic lines of argument, ignoring or rejecting reasonable settlement proposals, or withholding agreement as leverage;[47] and

(g) only the costs "incurred unnecessarily" as a consequence of a party acting in bad faith are to be recovered.[48]

Allegations

[73] The Family Trust alleges that IAG caused it to unnecessarily incur costs and expenses by acting in bad faith as follows:

(a) conducting its case to gain an unjustified advantage by unreasonably and unnecessarily:

(i) adopting pedantic lines of argument in relation to procedural matters;

(ii) consistently failing to meet timetable directions;

(iii) seeking to have 80 per cent of D's evidence declared inadmissible at the commencement of the hearing;

(iv) challenging the reliability of the evidence offered by the Family Trust;

(v) emphasising the complexity of the case;

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[46] *Edwardes v Architectural Edge Ltd* [2017] NZWHT Auckland 2 at [24].
[47] *KB and SB v Earthquake Commission* [2020] CEIT 21 at [23].
[48] *Clearwater Cove Apartments Body Corporate 170989* v Auckland Council above n 33 at [68]

(vi) overriding attempts by its experts to establish common ground;

(b) protracting the hearing process unreasonably and unnecessarily by:

(i) failing to identify and recognise areas of agreement or common ground;

(ii) emphasising the complexity of the case;

(iii) being unwilling to reassess issues with an open mind;

(iv) over-riding attempts by its experts to establish common ground; and

(c) failing to focus on the limited number of fundamental matters in dispute.

IAG's conduct

Overview

[74] Because these allegations should be measured against the conduct identified in [69] above, they need to be re-grouped for discussion purposes as follows:

(a) Acting disrespectfully towards other parties, their advocates, and the Tribunal by challenging the reliability of the evidence offered by the Family Trust.

(b) Making any claim or responding to any claim where a reasonable person would believe that the claim or response to claim is frivolous, vexatious, for a collateral purpose, or does not have merit, by:

(i) seeking to have 80 per cent of D's evidence declared inadmissible at the commencement of the hearing; and

(ii) adopting pedantic lines of argument in relation to procedural matters

(c) Failing or refusing to use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, using mediation, and failing or refusing to use reasonable endeavours to resolve such issues as

may be resolved by agreement and to narrow the real issues remaining in dispute in cases where the dispute is unable to be resolved by agreement by:

(i) overriding attempts by its experts to establish common ground;

(ii) failing to identify and recognise areas of agreement or common ground; and

(iii) failing to focus on the limited number of fundamental matters in dispute.

(d) Failing or refusing to use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute, by emphasising the complexity of the case.

(e) Failing or refusing to use reasonable endeavours to act promptly and to minimise delay by consistently failing to meet timetable directions.

Acting disrespectfully

[75] D cannot understand her current treatment by IAG when, before the earthquakes, she had been classified by it as a VIP customer. Their previous relationship of mutual trust and respect is incompatible with how both parties now feel. D is upset that her credibility has been seriously questioned by IAG and she perceives their treatment of her claim exhibits the utmost bad faith. Not only does IAG believe that she wants to hold them to account for shortcomings in a repair process that was not under its control, but their handling of the Family Trust's claim has given her the impression that they believe she is manipulating the situation to receive benefits to which she is not entitled.

[76] Despite the Tribunal's jurisdiction being inquisitorial in nature, however, hearings require it to consider evidence, observe the principles of natural justice, and deliver written decisions with reasons. Because findings of credibility and reliability are pivotal in arriving at conclusions based on conflicting expert evidence, it is important that the evidence submitted to the Tribunal is properly tested, and it appreciates that adversarial processes are an effective

means of testing that evidence. It was perfectly proper, therefore, for IAG to cross-examine the witnesses and make submissions about their credibility and reliability.

[77] In this context, it is notable that D, herself, competently cross-examined IAG's witnesses and based her final submissions on the unreliability of one of them. Just because the Tribunal accepted her credibility/reliability submissions and not those of IAG, does not render IAG's conduct towards the Family Trust's witnesses inappropriate.

Frivolous or vexatious

[78] There was no need for IAG to formally challenge the admissibility of the evidence to be given by D and the other witnesses for the Family Trust. This is not the first time that IAG has appeared before this Tribunal, and it is significant that, at a previous hearing IAG chose not to argue the admissibility submissions it had prepared for the High Court hearing. It merely drew them to the Tribunal's attention and asked it to note that its failure to cross-examine on the issues it had flagged in its Memorandum did not mean that they were uncontested.[49] In the present case, however, IAG maintained its admissibility arguments prepared for the High Court, despite being aware that the hearing was not being undertaken by a court but by a tribunal.

[79] I am not prepared to conclude that IAG intended this evidentiary challenge to unsettle the claimants at the commencement of the hearing, but I do consider that it was frivolous/vexatious, amounted to bad faith conduct, and deferred the start of the evidence by half a day.

[80] The Family Trust has also complained that IAG adopted pedantic lines of argument in relation to procedural matters, pointing to delays encountered in the High Court proceedings, IAG's numerous requests for adjournment in this Tribunal, and difficulties encountered in the preparation of the Schedule of Defects.

[81] I do not consider that these allegations have been proved. In the first place, this Tribunal is not entitled to consider delays encountered in the High Court. Secondly, the only application for an adjournment that was granted related to the practical difficulties caused by the Covid-19

[49] *BRL v Earthquake Corporation* [2019] CEIT 0051

lockdown. That application was properly made; all the earlier applications for adjournments were unsuccessful and cannot have caused delay. Finally, IAG was not being pedantic when it suggested the preparation of a Schedule of Defects or when it criticised the schedule eventually prepared by the Family Trust as lacking the desired clarity. Not that the Family Trust is to be criticised for this as it had no idea what was expected. Instead, the fault lies with IAG for failing to appreciate that might be the situation and preparing the schedule itself.

Uncompromising

[82] Although I was told at the first case management conference that serious attempts had been made in the High Court proceedings to reduce the scale of the dispute by filing a joint memorandum of issues, facilitating two meetings of experts and conducting an attempt at mediation, when this claim was transferred to the Tribunal the parties were still impossibly far apart, with the homeowners estimating that repairs would cost $1,038,000 and IAG suggesting that its liability might be only $15,000. The Family Trust, which had spent $370,000 in the High Court process, opted to have its claim considered in this Tribunal in the belief that its inquisitorial processes would result in a speedy and cost-effective resolution, but it is disappointing that the process has remained adversarial, slow and expensive.

[83] The Family Trust considers that that the Stage I hearing could have been significantly shortened had IAG not overridden attempts by its experts to establish common ground, failed to identify and recognise areas of agreement or common ground, and failed to focus on the limited number of fundamental matters in dispute.

[84] In that regard, I note that:

(a) over eight hours of hearing time was devoted to structural issues, despite the engineers being so close to agreement that, after a Tribunal-directed meeting, they agreed on all sub- floor issues except the spalling on three piles;

(b) six hours of hearing time was devoted to the windows, despite the parties' respective experts having earlier agreed that most of the steel windows had been damaged by the earthquakes;

(c) twenty-five and a half hours of hearing time was devoted to the roof, despite the parties' respective experts having earlier agreed that replacing all the slate roof tiles was the only way of repairing the defective workmanship; and

(d) six hours of hearing time was devoted to the leaks in the bathroom, including a discussion about and IAG hypothesis about leaking plumbing behind the shower which could have been averted by inspection.

Structural issues

[85] IAG's argument that relevelling the area at the foot of the stairs was problematic and should be undertaken on a performance basis to limit flow-on effects to other parts of the house was an issue for the second hearing rather than the first which was only concerned with whether the floor was unlevel. To that extent, therefore, it was unnecessary in the first hearing.

[86] In addition, much of the evidence about the piles was unnecessary, because the engineers, who met at my direction part way through the hearing, agreed upon all issues, except one involving three piles. Had they met prior to the hearing, as they should have done, none of the engineering evidence concerning the sub- floor would have been necessary. It is important to understand that the concessions made by Mr Cook were not made during, or as a result of, cross-examination. Nor were they made as a response to his being made aware, during the hearing, of information not previously known to him.

[87] Moreover, although the engineers submitted a very comprehensive analysis of these issues, IAG said it did not understand the analysis and continued to argue points that had been conceded in that report by its expert witness, Mr Cook. More specifically, IAG's closing submissions contained almost 6 pages of submissions (20 paragraphs) relating to the sub- floor, including two pages about the three piles in dispute.

[88] Although IAG claims that it always acted in reliance upon the evidence of its experts, including Mr Cook, this is an example of it employing arguments that we now know Mr Cook did not support. At the very least, it should have canvassed these arguments with him before the hearing. If it did not, then it was not reasonable for IAG to rely upon them.

[89] I find that IAG acted in bad faith in relation to the floor levels and sub- floor issues by overriding attempts by its engineer to establish common ground, failing to identify and recognise areas of agreement or common ground, and failing to focus on the limited number of fundamental matters in dispute.

Steel windows

[90] Mr McGunnigle's changing evidence about the damage to the steel windows was fully canvassed in the damage decision at [142]-[153] and in this decision at [50]-[54].

[91] The evidence available to IAG before the Stage I hearing indicated that a concession was appropriate for some of the 21 steel windows. Mr McGunnigle considered that 17 should be replaced; IAG's counsel acknowledged in opening that at least 14 showed signs of clear earthquake damage.

[92] By the time IAG closed its case, that acknowledgement had shrunk to 8, possibly 10, windows.

[93] It was disingenuous of IAG to claim, as its counsel did in closing, that Mr McGunnigle did not have actual or apparent authority to make concessions and that his brief was simply a statement of proposed evidence. In the first place, his first duty was to the Tribunal. Secondly, when the only expert evidence tendered by IAG prior to the hearing involved a concession that 17 steel windows required replacement, it should have recognised that this was an area in which it could have found common ground with the Family Trust. By continuing to litigate the issue, it failed to focus on the other more fundamental matters in dispute and deliberately overrode McGunnigle's attempt to establish common ground. It is not acceptable to continue litigating in this Tribunal in the hope that "something might come up".

[94] I find that IAG acted in bad faith in relation to the steel windows by overriding attempts by its expert to establish common ground, failing to identify and recognise areas of agreement or common ground, and failing to focus on the limited number of fundamental matters in dispute.

Roof

[95] IAG's handling of the roof issue is rather different. I have already found that its argument about the "black sealant" method of repair lacked substantial merit, but the issue here is whether it was acting in bad faith when it rejected Mr McGunnigle's concession that the slate tile roof should be replaced.

[96] I have already found that IAG was not acting unreasonably when it rejected this concession, so it can hardly be said that it was acting in bad faith when it did so. I therefore reject this allegation of bad faith made by the Family Trust.

Bathroom

[97] Although the bathroom issue was complex, and none of the arguments advanced by IAG were without merit, the hearing time it consumed was prolonged, first by IAG's failure to carry out a proper investigation of the leak, and secondly by the performance of its expert witness, Mr McGunnigle.

[98] The Family Trust has found itself engaged in a repair process controlled by lawyers where every decision about the extent of the damage and the scope of the repair is determined by a Tribunal Member with legal and judicial experience but no expertise in engineering or building. Instead of this dispute involving a discussion on site between those with the expertise needed to understand the signs of damage and evaluate the various repair methods available, the decisions are based on the opinions of a panel of experts sitting in a court room looking at photographs and videos of the property. Not only are the opinions expressed by the experts dependent on their powers of observation and recall, but they are often based on hypotheses instead of a proper investigation. Witnesses have been asked to look at photographs and draw inferences when a cursory scene examination would probably have produced a definitive answer.

[99] Mr McGunnigle's approach to the leak in the bathroom was at odds with his approach to the leaks in the roof; whereas he tested his hypotheses about the leaks in the roof, he made no attempt to explore his hypothesis that the leaks in the bathroom came from the plumbing fittings behind the shower. Had he carried out the simple inspection I directed mid-way through the hearing, he would never have raised this misleading hypothesis.

[100] Once again, although IAG has claimed that it was entitled to rely on the evidence of its expert, it should have applied the same rigour when examining the evidence of its own experts as it does to those of its opponents. Had it done so it would have appreciated that its expert was vacillating between two hypotheses in a manner that could impact on his credibility.

[101] Although the bathroom issue was unlikely to be resolved by agreement, IAG's failure to carry out a proper investigation and its over-reliance upon Mr McGunnigle, led to an expansion of the issues that prolonged this part of the hearing. In doing so in this Tribunal, it was acting in bad faith.

Proportionality

[102] There is a very real prospect that the cost of defending this claim will significantly exceed the cost of repairs: IAG, for example, attended a telephone conference about who should meet the cost of a further floor level survey represented by a Queen Counsel, two junior counsel, its senior in-house counsel, and a claims management specialist. IAG might consider reviewing its approach, especially bearing in mind that a similar situation occurred in *BRL v Earthquake Comission*[50] where IAG was represented at a nine-day hearing by a Queen's Counsel and two juniors against two self-representing homeowners.

[103] However, although the Family Trust may consider that IAG's approach to the Stage I hearing was disproportionate to the complexity and importance of the issues involved in that hearing, it has not specifically said so. It is not appropriate, therefore, for the Tribunal to embark on an analysis of this topic without receiving specific submissions from IAG. Although the parties could be directed to file such submissions, this would introduce further delay, which is not justified.

Delay

[104] The Family Trust claims that IAG consistently failed to meet timetable directions, but no attempt has been made to establish that the Family Trust incurred unnecessary costs or expenses as a result. In any event, delays in the interlocutory processes of the Tribunal would not have led to an earlier delivery of the Tribunal's decision as final submissions were delayed

[50] [2019] CEIT 51

until after the release of the High Court's decision in *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851.

[105] Accordingly, I do not need to undertake a detailed analysis of the Family Trust's claim for costs under this head.

Summary

[106] In the previous discussion I have found that the Family Trust has established that:

(a) the following arguments without substantial merit were advanced by IAG:

(i) that the dislevelment still evident was due to either pre-earthquake settlement or ineffectual relevelling;

(ii) that 7 of the 15 steel windows conceded as damaged by Mr McGunnigle in his second brief had not in fact been damaged in the earthquakes;

(b) the following argument without substantial merit was advanced by both IAG and Max Contracts:

(i) that using black adhesive to repair damaged slate tiles was an acceptable repair method;

(c) IAG acted in bad faith by:

(i) formally challenging the admissibility of the Family Trust's evidence;

(ii) overriding attempts by its experts to establish common ground, failing to identify and recognise areas of agreement or common ground, and failing to focus on the limited number of fundamental matters in dispute in relation to the floor levels, the sub- floor issues, and the windows; and

(iii) failing to narrow the real issues remaining in dispute in relation to the bathroom.

Effect on expenses

[107] Because the Family Trust has not paid for legal representation, the only relevant expenses relate to their expert advisers. It claims that part of these expenses was incurred unnecessarily by the conduct mentioned in the previous paragraph but it has not nominated any particular amount, leaving the Tribunal to determine this issue for itself. I intend to look at the expenses they incurred in relation to each expert.

Ms Critchley, engineer

[108] The Family Trust engaged Hampton Jones to provide engineering, building surveyor, and quantity surveying services. Two invoices have been rendered while this claim has been in the Tribunal, one on 1 October 2019 for $10,998.31 and the other on 17 December 2020 for $34,438.82. The first invoice has no relevance to this claim for costs as the services were rendered well before they can have been influenced by IAG's conduct of the claim.

[109] The only portion of the second invoice that relates to Ms Critchley is a charge of $11,103.88 for her "Attendance at tribunal, Flights, Taxis, Accommodation."[51]

[110] In the absence of any evidence to the contrary, I will assume that this account incorporated her attendances at the hearing on 24 and 25 September 2020, carrying out a site inspection on 24 September 2020 at my request, attending by telephone on 1 November 2020, and conferring with Mr Cook between those dates. I consider that the inspection and the conferral would have been necessary and should therefore be deducted from this claim for costs but, in the absence of any precise figures, I estimate that this deduction should be $1,725.[52] This leaves the Family Trust paying $9,378.88 to have Ms Critchley give evidence at the hearing.

[111] I consider that Ms Critchley's attendance at the hearing should have been for only half a day in connection with the dispute about the damaged rafters. She should not have been required to attend on 24 September 2020 or by telephone on 1 October 2020. Her flight and taxi costs would have been the same, but her accommodation would have been halved. Her

[51] All figures include GST.
[52] Five hours at $300 per hour plus GST.

preparation and attendance costs would have been reduced by 75 per cent. I estimate, therefore, that IAG's conduct has increased the Family Trust's expenses for engineering services by $6,000.

Mr Richardson, window expert

[112] Mr Richardson rendered two accounts to the Family Trust, one on 29 March 2020 for $680, and the other on 8 October 2020 for $1,540. IAG's conduct was only relevant to the second account but I consider that Mr Richardson would have been required, in any event, to attend the hearing and give evidence about the windows that had always been in dispute. IAG's conduct, therefore, did not increase the amount paid by the Family Trust to Mr Richardson.

Mr Minkley, slate expert

[113] Mr Minkley rendered two accounts to the Family Trust after the claim was transferred to the Tribunal: one on 17 July 2020 for $1,495 and the other on 5 October 2020 for $2,098.75.

[114] I consider that the first account rendered was appropriate but the second was increased by $1,000 as a result of the combined conduct of IAG and Max Contracts in respect of the black adhesive repair.

Mr Brooks, building surveyor

[115] The only relevant account rendered by Hampton Jones was for $34,438.82 rendered on 17 December 2020. As can be seen from the Table attached as Appendix 1, $15,654 of that account related to Mr Brooks' attendances in connection with the hearing.

[116] When submitting the list of topics and witnesses for the "hot tub" sessions, the Family Trust indicated that it did not intend calling Mr Brooks as a witness. It was entitled to make this decision, which would have prevented the Tribunal from having regard to the evidence contained in his affidavit. However, IAG insisted he be called and then commented in its closing submissions that his contribution during the "hot tub" sessions was not helpful and pointed out his lack of investigation and deferral to other witnesses with superior qualifications/experience.

[117] The Tribunal, however, regards Mr Brooks as having been a helpful witness, particularly in relation to the defects in the exterior of the house, the garage, and the grounds. I am in no doubt that his conferral with Mr McGunnigle about these defects significantly reduced the hearing time. I am also grateful to him for the site inspection he undertook with Mr McGunnigle to investigate whether the bathroom leak originated from the plumbing behind the shower.

[118] But I am satisfied that the cost to the Family Trust for his attendance at the hearing was increased unnecessarily by the conduct summarised by me at [106] (a)(i) and (ii), (b)(i), and (c)(ii) and (iii). Looked at in the round, I find that IAG's conduct increased the bill for his time by $5,000.

Mr Martin, builder

[119] Mr Martin rendered two accounts, one dated 30 June 2020 for $2,990, and the other on 9 October 2020 for $11,442.50. The first account related to his reviewing Mr McGunnigle's supplementary brief and the second for his preparation and attendance at the hearings. Because he did not live locally, he charged for flights and accommodation.

[120] His evidence was helpful and important, but IAG's conduct summarised by me at [106] (b)(i) and (c)(ii) and (iii) prolonged his involvement and therefore resulted in unnecessary cost. For example, his attendance from 16 to 18 September 2020 was probably a day longer than necessary. His travel costs would have been the same, but his account for attending the hearing would have otherwise been reduced by a third. As that cost was $6600, I consider that IAG's conduct increased Mr Martin's account by $2,200.

Other experts and expenses

[121] I am not satisfied that IAG's conduct increased the accounts for any of the other experts relied upon by the Family Trust.

[122] Nor am I satisfied that the other expenses incurred by the Family Trust have been meaningfully increased.

[123] It should be noted, in this context, that the Family Trust did not incur any unnecessary cost or expense arising from IAG's admissibility challenge.

Exercise of discretion

[124] When exercising the discretion to award costs, there is an obligation to act judicially, not only by determining what is reasonable and just to the parties, but also by taking into account the public interest in the fair and expeditious resolution of disputes.[53]

[125] IAG complains that it would be unfair if it were to be singled out for an award of costs when:

(a) all three respondents who participated in the hearing had a similar interest in identifying the defects in the building and determining their cause; and

(b) IAG's more prominent role during the hearing was simply the result of it being named ahead of the other respondents in the intituling.

[126] It is certainly correct that those three respondents shared a similar interest in some of the issues being explored in the Stage I hearing. Although QBE adduced no evidence at this hearing, and Max Contracts had only one witness, their respective counsel clearly relied on the evidence adduced by IAG and frequently indicated that their cross-examination and submissions would have been more extensive had it not been for the thoroughness with which IAG explored the issues. However, there is no evidence that the other respondents endorsed IAG's acting in bad faith or pursuing arguments without substantial merit. Moreover, although the respondents shared an interest in classifying defects as being pre-existing, their interests conflicted on all other issues.

[127] Accordingly, I consider that it is fair for IAG alone to be held accountable for its conduct of the hearing.

[128] As far as the public interest in the fair and expeditious resolution of disputes is concerned, particularly in this Tribunal that is directed by Parliament to provide "fair, speedy,

[53] *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 (CA) at 625.

flexible and cost-effective services for resolving disputes," I consider that an award of costs in respect of the Stage I hearing is desirable to ensure access to justice in this Tribunal, by discouraging bad behaviour and promoting compromise.[54]

Quantum

[129] Although parties to claims before this Tribunal must bear their own costs, I have found that the Family Trust should receive an award of costs to offset the expenses unnecessarily incurred by the way IAG and Max Contracts conducted their respective cases.

[130] I have calculated those increased costs as follows:

Critchley	6,000
Minkley	1,000
Brooks	5,000
Martin	2,200
Total	**14,200**

[131] In line with the process followed in the High Court, where a successful party is entitled to be reimbursed in full for their witnesses' fees and expenses, it is appropriate to consider whether the services covered by the award of costs in this claim were reasonably necessary, reasonable in amount, and not disproportionate in the circumstances of the proceeding.[55]

[132] Because of the way I have approached the claim for costs, this involves examining the reasonableness of the full amounts claimed by all the witnesses.

Critchley	11,104
Richardson	1,540
Minkley	3,594
Brooks	15,654
Martin	11,443
Newberry	6,825
Total	**50,160**

[133] I consider that the expenses involved in this claim for costs were reasonably necessary and, except for Mr Martin, reasonable in amount. Bearing in mind that the disparity between the Family Trust's claim and what is being offered by IAG is more than $1 million, I find that

[54] See [22] and [28] above.
[55] *McGechan on Procedure*, above n 4 at [HR14.12.01(1)].

the amounts being charged by the witnesses is not disproportionate in the circumstances of this claim.

[134] Although Mr Martin was included in the "hot tub" sessions on 16 – 18 September 2020, he did so as a witness of fact and not as an expert. Moreover, his account is out of line with the others. Although his hourly rate of $150 compares well with Mr Brooks' rate of $225, he appears to have charged 44 hours for those attendances whereas Mr Brooks charged for 24 hours. Mr Martin also attended the hearing by telephone on 23 September 2020. If I allow a total of 28 hours for those two attendances, then a reasonable charge for his attendances would have been $4,830 including GST. A reasonable allowance for the over-charge caused by IAG's conduct is therefore $1610.

[135] The costs due to the Family Trust, therefore, are $13,610, calculated as follows:

Ms Critchley	6,000
Mr Minkley	1,000
Mr Brooks	5,000
Mr Martin	1,610
Total	**13,610**

[136] That is roughly 27 per cent of the expenses charged to the Family Trust by its witnesses for preparing and attending the hearing. I consider that properly reflects the gravity of IAG's conduct in relation to the hearing, bearing in mind that the unnecessary increase in hearing time meant that there were occasions when witnesses were inconvenienced by consideration of issues that did not involve them.

[137] Because the additional cost relating to Mr Minkley's attendance related to an argument advanced jointly by IAG and Max Contracts, I see no reason why this cost should not be shared equally between them.

Conclusion

[138] Accordingly, under section 47 of the Act, I award the Family Trust costs of $13,160 against IAG and $500 against Max Contracts.

C P Somerville
Chair
Canterbury Earthquakes Insurance Tribunal

Appendix 1

Brooks' Expenses

Date	Explanation	Charge
15.9.20	Crib notes and evidence prep for tribunal.	776
16.9.20	Attendance at Tribunal, additional site inspection requested by the chair and researching, admin.	3,105
17.9.20	Attendance at Tribunal, researching, admin.	2,070
18.9.20	Attendance at Tribunal, researching, admin.	2,070
21.9.20	Follow-ups from tribunal, reviewed info, reports and photos for next hearing date. Jenny call and update.	259
22.9.20	Lawyer/client comms.	129
23.9.20	Comms re cross exam notes. Jenny equipment for further inspection and access to office.	259
28.9.20	Cross exam notes for lawyer.	388
29.9.20	Cross examination notes and comms with client and lawyer.	259
30.9.20	Steel windows issue. Jenny catch up. Comms with Kate/lawyer re-windows and fencing evidence.	259
1.10.20	Attendance at Tribunal.	1,294
2.10.20	Attendance at court, Tribunal, research, prep and follow-up discussions.	2,070
3.11.20	Prep for additional hearing.	129
4.11.20	Attendance at Tribunal.	1,811
5.11.20	Attendance at Tribunal.	776
		15,654