IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-0036-2019

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

Date: Application – 29 September 2021
Submissions – 13, 20, 27, and 29 October 2021

Appearances: On the papers

DECISION OF C D BOYS

30 November 2021

INTRODUCTION

[1] This decision is about whether the Earthquake Commission (EQC) and Tower Insurance Limited (Tower) may be removed from this claim due to an application under s 11 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act) bringing the matter to an end.

[2] On 27 August 2021, the Tribunal found that EQC's decision to decline claims for damage from the earthquakes of 22 February 2011 and 23 December 2011 was correctly made. EQC made the allegations of fraud as it believed that Ms L and Mr M made intentionally false

statements in support of exaggerated or fabricated claims for emergency repairs. After hearing evidence from Ms L, Mr M and EQC, the Tribunal found that EQC was justified in its view (the Fraud decision). The full background to this matter is set out in the Fraud decision which is publicly available online.

[3] In the claim currently before the Tribunal, Ms L and Mr M also alleged that damage had resulted from the earthquakes of 4 September, 26 December 2010, and 13 June 2011 in addition to those of 22 February and 23 December 2011 which were declined by EQC.

[4] The Earthquake Commission Act 1993 (the EC Act) provides powers to decline a claim for fraud. These powers are specific to an individual claim and the event which led to it and so only affect the claims for damage from 22 February and 23 December 2011. EQC and Tower have potential liabilities for the other events. EQC and Tower say that the claims for damage from the earthquakes of 4 September, 26 December 2010 and 13 June 2011 are untenable and ask to be removed as parties.

[5] In summary, EQC's and Tower's applications to be removed as parties to the claims are granted. There was no policy coverage in respect of the claim arising out of the earthquake of 4 September 2010. The claims arising from the earthquakes of 26 December 2010 and 13 June 2011 were not made against EQC within the time set by the EC Act. The claims made against Tower are reliant on EQC's underlying liabilities being exhausted before Tower's policy cover begins. The loss of rent claimed is not covered in the policy as it was not a chosen cover. As a result of the removal of EQC and Tower the claim made by Ms L and Mr M is at an end.

Background

[6] On 21 September 2010, Tower began insuring Mr M and Ms L's house at XXXX XXXX (the House) under a "Provider House Policy Maxi Protection" (the Policy).

[7] The house was apparently damaged in the earthquakes of 4 September 2010, 2 February 2011, and 23 December 2011. In 2010 and 2011 claims for $12,878.85 were made to the EQC for emergency repairs to damage from these events. In total EQC paid $11,353.65. On 26 September 2013, EQC informed Ms L and Mr M that it had declined the claims for damage from earthquakes of the 22 February 2011 and 23 December 2011 because it believed their claims for emergency repair works were false. This belief was formed due to an audit and

investigations made after EQC had reimbursed Ms L and Mr M the claimed repair costs. In June 2015, Mr M and Ms L agreed they would repay the emergency works payments to EQC.

[8] On 11 September 2019, Ms L and Mr M filed an application in this Tribunal against EQC seeking re-payment of the alleged repair costs and $642,418.29 for alleged earthquake damage.

[9] In addition to the three claims previously lodged with EQC, the Tribunal application form alleged that the house was also damaged in the earthquakes of 26 December 2010 and 13 June 2011. These claims were made by ticking boxes for those two events on the form. No further detail about the damage done by these earthquakes was provided.

[10] On 25 June 2020, Member Cogswell directed that Tower was joined to the Tribunal claim on the basis that the homeowners' claim was for amounts in excess of the cap. Tower was served with the application on 29 June 2020.

[11] Until it was served, Tower was unaware that there was a claim for earthquake damage over EQC's legislative cap. It had previously only corresponded with Ms L and Mr M about damage to their driveways, fences, paths and paving, which were not covered under the EC Act.

[12] Subsequently, it was discovered that Tower's policy coverage did not begin until 21 September 2010. Therefore, there was no EQC cover in place when the 4 September 2010 earthquake struck. EQC's liability for natural disaster is triggered by the property in question being covered by a "contract of fire insurance".[1] Therefore, EQC had no liability for damage from the 4 September earthquake.

[13] In respect of the claims for damage from the earthquakes of 22 February and 23 December 2011, the Tribunal found that EQC was entitled to decline these claims because of fraud.

[14] This leaves the claims for damage claimed as a result of the earthquakes of 26 December 2010 and 13 June 2011 before the Tribunal (the Remaining Claims).

[1] See Earthquake Commission Act 1993, s 18(1).

[15] EQC has now requested that it is removed from the claims for damage from the Remaining Claims and that the application against it is discontinued.

[16] The parties have now all had the opportunity to make submissions about this request and also whether Tower has any remaining liability if EQC is removed.

Submissions on removal

[17] All parties submitted in writing on EQC's application to be removed. EQC's application is that the Remaining Claims were made outside the time limit for making claims and are barred. Under the EC Act claims must be made within 3 months of the date of the event that caused damage. Claims for damage allegedly arising from the Remaining Claims were not made against EQC until 11 September 2019. This is well outside time in which both the claims should have been made under the EC Act.

[18] Tower does not oppose the removal of EQC. It also argues that the claims are outside the 6 years time frames in which claims must be made under the Limitation Act 1950 (the 1950 Act) and the Limitation Act 2010 (the 2010 Act).

[19] Tower says that, if the Tribunal finds that EQC should be removed, it should also be removed because:

(a) Tower's liability for natural disaster damage relies on the EQC's payments exhausting the statutory cap, which cannot occur if EQC has no liability;

(b) even if Tower is found to have some liability, the claims are time barred by the 1950 Act and the 2010 Act respectively;

(c) there is no credible evidence to show that either the earthquakes of 26 December 2010, or 13 June 2011, caused additional damage to the house; and

(d) the repair costs for all damage from the Canterbury Earthquake Sequence (CES) in aggregate does not exceed EQC's statutory cap, therefore Tower has no liability.

[20] In response Ms L and Mr M, submitted that:

(a) attribution of damage across the events is difficult given the lack of assessment at the time of the earthquakes, with some damage still not assessed;

(b) they understood that a separate claim for the 26 December 2010 earthquake was not necessary as the 4 September 2010 earthquake damage had not been assessed;

(c) they did not make a claim for the 13 June 2011 earthquake, as they were waiting on EQC to assess damage from the 22 February 2011 earthquake. When the assessment did occur, no report was provided;

(d) EQC's decision to decline claims for fraud on 26 November 2013 prevented claims for the damage from the 26 December 2010 and 13 June 2011 earthquakes being made as they say EQC actively obstructed further claims from being made;

(e) they were never told of the time bars in the 1950 and 2010 Acts, or of any time periods for making claims, and EQC never corrected their misunderstandings about making claims;

(f) they could not afford to litigate the claims and were waiting for this Tribunal to be established, and the decision of 30 August 2021 confirmed that they had other rights they could pursue; and

(g) because of the above factors they seek to rely on the late knowledge date set out at s 14 of the 2010 Act, which allows a further period of 2 years from when an unknown right is discovered.

[21] Without wishing to simplify the submissions made, I need to consider four issues:

(a) what powers the Tribunal has to remove parties when the removal will effectively act to strike out the application;

(b) the effect of the limitation defences provided under the 1950 Act and the 2010 Act;

(c) the effect of making claims outside the time frames in cl7 sch3 EC Act; and

(d) the effect that EQC's removal has on Tower's liabilities.

Powers to remove parties or strike out claims

[22] Section 11 the Act grants this Tribunal the power to join or remove parties to an application:

> **11 Additional parties and removal of parties**
>
> (1) If the tribunal considers it necessary for the fair and speedy resolution of a claim, it may order that—
>
> …
>
> (b) a party be removed.
>
> …
>
> (3) If a claim involves more than 2 parties and a party or parties are removed from it, the claim may continue in the tribunal only if—
>
> (a) at least 1 person who is a policyholder or an insured person (or both) remains as a claimant and at least 1 insurer or the EQC remains as a respondent; or
>
> (b) at least 1 person who is a policyholder or an insured person (or both) remains as a respondent and at least 1 insurer or the EQC remains as the claimant.

[23] If both Tower and EQC are removed, the claim cannot continue as there is no party left to respond to the allegations. Section 42(4) allows the Tribunal to exercise its removal power on the papers, provided the parties are given a reasonable opportunity to comment. Section 11 uses the word "may" indicating that the power is discretionary, and so must be reasonable on the facts.

[24] Clause 10 of sch 2 of the Act also grants this Tribunal a separate power to strike out a claim, in full or in part, if the claim: discloses no reasonable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of process. This power is narrower than the broader discretionary removal power in s 11 of the Act, the section under which EQC has made its request.

[25] The use of removal powers by this Tribunal has not been the subject of any previous decisions. There is some analogy between the removal power in s 11 and the power of the

Weathertight Homes Tribunal (the WHT) to remove parties under s 112 of the Weathertight Homes Resolution Services Act 2006 (the WHRS Act):

> **112 Removal of party from proceedings**
>
> (1) The tribunal may, on the application of any party or on its own initiative, order that a person be struck out as a party to adjudication proceedings if the tribunal considers it fair and appropriate in all the circumstances to do so.
>
> (2) This section is subject to section 57(2) [which requires the tribunal to comply with the principles of natural justice].

[26] There are other similarities between the powers of this Tribunal and the WHT to remove parties. Both Tribunals:

(a) are required to manage proceedings in a manner that promotes speedy, flexible and cost-effective resolution;[2]

(b) have inquisitorial powers;[3] and

(c) have separate strike out powers.[4]

[27] The WHT's powers have been considered in a number of High Court decisions. Reading the cases cited there is a tension between the power to remove and the power to strike out.[5] A view was taken in cases such as *Fenton v Building Code Consultant* that the Tribunal power to remove cannot exceed the strike out power as set out in the High Court Rules.[6] In *Yun & Phon v Waitakere* this position was not followed.[7] Ellis J considered that to limit the powers to remove would mean reading down to words used in the WHRS Act when Parliament clearly intended the powers to remove to be wider than under the strike out provisions.

[28] In *Saffiotti v Jim Stephens Architects* Katz J agreed with Ellis J's conclusion on the breadth of the removal powers but cautioned:[8]

> Section 112 should not be seen as providing carte blanche to strike out parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak. Often in litigation claims which appear weak at an early stage may gain momentum

[2] CEIT Act, ss 3 and 20; and WHRS Act, ss 3 and 57.
[3] CEIT Act, ss 40 and 56; and WHRS Act, s 73(1)(a).
[4] CEIT Act, cl 110, sch 2; and WHRS Act, s109A.
[5] CEIT Act, s 11; WHRS Act, s 112; and CEIT Act, cl 110, sch 2.
[6] *Fenton v Building Code Consultants Ltd* [2010] BCL 254; BC201060783.
[7] *Yun v Waitakere City Council HC Auckland* [2011] NZHC 1422011.
[8] *Saffiotti v Jim Stephens Architects Ltd* [2012] NZHC 2519 at [44].

> at trial, whereas other claims which appeared strong at the outset are later revealed to be fatally flawed.

[29] When comparing the jurisdiction of this Tribunal with that of the WHT, considering the similarities of the legislation in isolation does not give the whole picture. For reasons discussed below, the WHT cases are directly relevant to this matter. This is because the applications for removal in this instance come at a later stage in the proceedings, and there is reliable evidence available to me. However, should an application for removal, or strike out come earlier in the process, the practice in this Tribunal differs in a key aspect from the WHT. The WHT procedure begins with an assessor's report under ss 41 and 42 of the WHRS Act. This report is the key to the WHT's jurisdiction, and compiles the defects, relevant dates and likely liable parties. It provides the WHT member with key information to consider a strike out or removal application. In this Tribunal there is no such report. Therefore, care must be taken when seeking analogies between the jurisdictions.

[30] Having reviewed the authorities, I conclude the following:

(a) When removal of a party or parties has the effect of striking out a claim the key question is whether the claim is tenable in fact and in law. A cautious approach must be taken, as the removal will dispose of a claim without holding a hearing.

(b) While the power to remove is analogous with r 15.1 of the High Court Rules; governing strikeout, the inquiry under s 11 of the Act is broader. This reflects the Tribunal's inquisitorial role, and that it is not a pleadings-based forum. This Tribunal is entitled to consider all evidential material before it and is not bound to assume that factual allegations made before it can be proved. However, care must be taken before assuming a fact cannot be proven, as apparently weak evidence can prove to be decisive during a hearing.

The Limitation Act 1950 and The Limitation Act 2010

[31] Tower contends that EQC's liability is also barred by the effect of the 1950 Act and the 2010 Act, as more than six years has passed since the damage occurred. The 1950 Act applies

to the claim for damage from the earthquake of 26 December 2010, whereas the earthquake of 13 June 2011 occurred after the 2010 Act came in to force on 1 January 2011.

[32] The 1950 Act operates on the basis that time starts running when a cause of action has accrued, and the claimant has 6 years in which to bring a claim in Court. Accrual occurs when every fact required to show a cause of action is in existence. In the case of a claim under a contract of insurance, the cause of action would be an alleged breach of contract.

[33] The position under the 2010 Act is that time runs for 6 years from an act or omission giving rise to a qualifying claim to a Court (or Tribunal). The position of an insurance claim, which is a call for unliquidated damages on the happening of a contingency, does not fit well within the scheme of the 2010 Act. The best interpretation is that a breach of contract is required. The issue is yet to receive any substantial judicial direction. Post the CES events, Tower has taken a view that time does not begin to run until the policy is breached either by a claim being denied, or inadequately settled.[9]

[34] Tower has argued where no claim has been made, the "orthodox view" referred to by Paulen AJ in *Inicio v Tower* should prevail.[10] This is the doctrine applied in English and some Australian cases that, as an indemnity policy is a promise to hold harmless, the insurer is in breach of contract as soon as the insured event, alleged earthquake damage in this instance, occurs. This position has been criticised by a number of UK and Australian authors and Judges and, importantly, by Neil Campbell (as he then was) in *An Insured's Remedies for Breach.*[11] Mr Campbell's criticism is that characterising the promise to indemnify as one to "hold harmless" does not accurately reflect the shared intention behind the typical policy wording. Rather, as is the case in the policy, the promise is to make right damage by repair or replacement.[12]

[35] Further to this analysis, the "hold harmless" doctrine is a legal fiction which runs contrary to principle and reality. The key principle underlying any indemnity policy is that the insurer promises to make right the damage or loss. The key clause in any insurance policy is the "insuring clause", the central promise which defines the policy's purpose. In the Tower

[9] Tower Insurance "February 2017 update: Confirmation of Tower's position regarding the Limitation Act 2010" Tower <www.tower.co.nz/limitation-act-statement>.
[10] *Inicio v Tower* [2020] NZHC 90 at [29].
[11] See *Scott v Sovereign* [2011] NZCA 214 at [38]; and Neil Campbell *An Insured's Remedies for Breach* (1999) 5 NZBLQ 51.
[12] Campbell at [2.2].

policy the insuring clause is "your house is insured for … sudden and unforeseen accidental physical loss or damage". There are no words which suggest that Tower will "hold harmless" and prevent that damage or loss from occurring. To impose an impossible obligation on a party to a contract without clear words showing that was the intention of the parties is against settled principles of contract law. I see no grounds which justify such a term being implied.

Time frames for reporting claims - EQC Act

[36] Clause 7 of schedule 3 of the EC Act:

> **7 Reporting of claims**
>
> (1) On the occurrence of any natural disaster damage to any property insured under this Act, the insured person shall at his or her own expense—
>
> (a) within 30 days (or such longer time as may be prescribed by regulations made under this Act) give notice thereof, either orally or in writing, to the Commission; and
>
> (b) as soon as practicable deliver to the Commission—
>
> (i) a claim in writing for the natural disaster damage, including, in particular, such account as is reasonably practicable of all property lost or damaged, and of the respective amounts claimed in respect of each such item of property, having regard to their value at the time of the natural disaster damage; and
>
> (ii) particulars in writing of all other insurances covering that property (if any).
>
> (2) Notwithstanding subclause (1), if natural disaster damage is not immediately apparent, or if the insured person is unable by his or her absence or incapacity, or by other disability suffered by him or her and proved to the satisfaction of the Commission, to give notice, or deliver a claim to the Commission, at or within the required time, it shall be sufficient compliance with this clause for notice to be given to the Commission as soon as the natural disaster damage is apparent or the insured person is able to do so, so long as the notice is given within 3 months (or such longer time as may be prescribed by regulations made under this Act) after the natural disaster damage has taken place, and the Commission is not prejudiced by the lapse of time.
>
> (cl 7)

[37] On 4 October 2010, the Earthquake Commission Amendment Regulations 2010, extended the reporting period to 3 months, but left the wording from cl 7(1)(b) unchanged.[13]

[38] The application of cl 7 was discussed in *Coughlan v Earthquake Commission.*[14] Ms Coughlan made a claim for landslip damage, the damage had occurred in May 2004, but the claim was not made until October 2004. It was argued that s 9 of the Insurance Law Reform

[13] The new timeframes as set out at 17(1)(a) and 17(1)(b) in the Earthquake Commission Amendment Regulations 2010.
[14] *Coughlan v Earthquake Commission* [2007] NZAR 533.

Act 1977 (ILRA), which restricts an insurer's reliance on time limits for making claims, should also apply to EQC, and to cl 7.

[39] Venning J reasoned that the EC Act is legislation rather than a contract of insurance so the ILRA did not apply, and concluded: [15]

> If the claim is not made within three months of the damage taking place then, even absent prejudice, the claim is out of time and will not be accepted. Parliament has determined that a three-month period provides sufficient time for an insured to discover the damage and lodge a claim. There is nothing inconsistent or ambiguous about that aspect of the clause.

[40] Venning J found that cl 7 operated as a condition precedent to liability. That means that EQC's liability for the damage would only have been engaged had the claim been made in time.

[41] In the present case the Remaining Claims needed to have been made to EQC by 25 March 2011, and 14 September 2011, respectively. No claims were made.

[42] Ms L argued that she and Mr M were not made aware of the timeframes for making claims. I do not accept this. At the time of the earthquakes there was a significant information campaign about the need for claims to be made to EQC. Ms L and Mr M made claims for the earlier and later earthquakes, indicating an awareness that they knew they needed to make claims in a timely manner. Furthermore, the language used in cl 7 makes the reporting period mandatory. There is no ability to vary or waive the requirements of cl 7 because of ignorance.

[43] Ms L and Mr M have also argued that EQC's omissions and actions prevented claims from being made. They allege that EQC failed to assess and report on damage from the 22 February 2011 earthquake in a timely fashion. Further, they allege that EQC's decision to decline claims for fraud caused them to not make the Remaining Claims in a timely manner. Cl 7 requires "notice" to be made to EQC "orally, or in writing". Any mention of potential damage would have satisfied this criterion. I do not believe that EQC's actions or inaction prevented the claims from being made.

[44] As Ms L and Mr M failed to make the claims in the time frame provided by cl 7 they are prevented from making the claims in 2019 when they filed their application with the

[15] At [42].

Tribunal. This finding makes the claims against EQC for damage from the 26 December 2010 and 13 June 2011 earthquakes untenable.

Tower's liability for earthquake damage

[45] Tower's liability turns on the interactions between the EC Act and the terms of the policy held by Ms L and Mr M. The policy states:

> Natural disaster damage
>
> If **your house** suffers **natural disaster damage**, **we** will pay the difference between the amount paid under EQCover and the sum insured shown in the **certificate of insurance**.
>
> ...
>
> What you are not insured for
>
> **Loss, damage, liability or claims for or arising from:**
>
> …
>
> *any excess imposed by the conditions of insurance under the Earthquake Commission Act 1993 or any amendments, or if for any reason, the EQCover is not paid or payable by the Earthquake Commission;*
>
> **natural disaster damage** up to the limits in Section 18 of the Earthquake Commission Act 1993 or any amendments

[46] The policy definitions include:

> **Natural disaster damage** means loss or damage as a direct result of earthquake, **natural landslip**, volcanic eruption, hydrothermal activity or tsunami and includes loss or damage occurring (whether accidentally or not) as a direct result of measures taken under proper authority to avoid the spreading of, or to otherwise reduce the consequences of, an earthquake, **natural landslip**, volcanic eruption, hydrothermal activity or tsunami. It does not include any loss or damage for which compensation is payable under any Act of Parliament other than the Earthquake Commission Act 1993.

[47] At the time of the damage the limit in s 18 EC Act was $100,000 plus GST.

[48] In *Doig v Tower Insurance* the Court of Appeal commented on a clause which was for all intents and purposes the same as in the current case:

> It was what is commonly called "top-up cover", over and above the EQC statutory obligation. Tower's obligation to pay is triggered by EQC making payment. Some policies state that expressly, but in this case it is plainly in these policy terms.

[49] As I have found that EQC is not liable for paying for the damage from the 26 December 2010 and 13 June 2011 earthquakes, it follows that Tower cannot be liable for damage from these events either.

[50] Tower has argued that when the factual evidence of damage is considered, the prospect of damage being from the Remaining Claims, and that it exceeds the EQC cap of $100,000 +GST for each event, is negligible. To evaluate this submission would require an analysis of the evidence of damage, which is not before me. However, my other findings make such analysis unnecessary.

[51] Tower also made submissions about the difficulties that exist with apportioning the damage to each earthquake given the time passed since the damage occurred, and these are valid. The observation was also made that Ms L's and Mr M's dishonesty has prejudiced the ability of Tower to assess damage.

[52] I conclude that Ms L's and Mr M's claims against Tower for earthquake damage are untenable.

Tower's liability for loss of rent

[53] Ms L and Mr M have claimed that, as well as over-cap damage, Tower has liability for loss of rent, a policy entitlement unrelated to EQC's liability. They have claimed for lost rent of 52 weeks while repairs are being carried out, and 165 weeks during which, it is alleged, the house was uninhabitable.

[54] Loss of rent cover is an optional benefit:

> Loss of rent and landlord's fixtures and fittings
>
> If **you** have selected this benefit and **your house** is let, lent, leased, rented or tenanted and suffers loss or damage for which a claim is accepted under this policy or which is covered under EQCover **we** will pay **you**:
>
> up to $20,000 or six months rent, whichever is less, which is lost as a result of **your house** being made uninhabitable. No loss of rent will be paid after repairs have been completed or **your** claim has been paid;

[55] The maximum payable under the policy is six months, so any liability is limited to this period. Examining the certificate of insurance, I find that cover was selected for Landlords Fixtures and Fittings, but not for loss of rent.

[56] The cover is only available when there is a valid claim for damage, which I have found is not the case. There was evidence put before the Tribunal during the hearing of the fraud allegations that Ms L and Mr M continued living in the house throughout the CES events. They also carried out repairs which they say were to make the house habitable, including to windows, door seals, and to manage dust from damaged linings. The house was, therefore, habitable.

[57] In conclusion, no cover was available for loss of rent, had there been there was no valid damage claim to trigger the loss of rent benefit, and in any event the house was habitable. Any claim for loss of rent is untenable.

Outcome

[58] While the powers to remove parties and strike out are discretionary, the Tribunal's discretion must be applied reasonably and with a view of the purposes of the CEIT Act. Ending an application with no reasonable prospect of success, is fair, speedy and cost effective. As a result, I order that EQC and Tower are removed from this application and the application is concluded.

Christopher David Boys
Chairperson
Canterbury Earthquakes Insurance Tribunal