IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0006-2021

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	S B Applicant
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Respondent

Hearing Date: 26 July 2021

Appearances: B. Walker
E Walton and H. Bowering-Scott

DECISION OF MEMBER C D BOYS

28 October 2021

Introduction

1) In 2015, Mr B and Southern Response agreed to a rebuild of his earthquake damaged home. The agreement included an agreed estimate to rebuild the house, and a process to deal with the need for enhanced foundations, should they be required. Southern Response paid the money then due under the agreement. However, Mr B did not follow the process in the agreed timeframe or the agreed extensions to the timeframe, and his claim was closed. He has now applied to this Tribunal to have his claims for enhanced foundations considered.

2) This decision considers whether Southern Response can rely on the agreement as a defence against Mr Bs' application. Mr B says that Southern Response's actions since the agreement means that it is estopped from relying on the agreement and must pay his claim.

3) For the reasons discussed below, Southern Response can rely upon the agreement and Mr Bs' application is dismissed. In short, Mr B agreed to a process which he then failed to follow, despite numerous allowances being made by Southern Response. The situation he is now in cannot be attributed to Southern Response. Rather, Mr B had a number of opportunities to validly further his claim for enhanced foundations, but for reasons known only to himself, he chose not to take those opportunities.

Background

4) Mr B and his late wife J R owned the house at XXXX, XXXX. The house was badly damaged in the earthquakes on 4 September 2010 and 22 February 2011. Claims were made to EQC, and to Mr Bs' insurer, AMI. AMI subsequently became insolvent and its liabilities were taken on by Southern Response.

5) The damage to the property was extensive and it was agreed that the home was to be rebuilt. There was initial agreement that Southern Response would manage the rebuild of the property. However, disputes arose which in 2013 were taken to the High Court. At the heart of the disputes and a key issue in this decision, is that the house was built on landfill.

6) In November 2015, Mr B and Southern Response agreed a way forward. This involved the parties' engineers agreeing in a joint report that there were two suitable foundation types allowing for "*existing fill* [to be] *rolled, tested and improved where necessary.*" Both solutions allowed for an initial 800mm excavation and then ground testing by proof-rolling and the use of a penetrometer (the joint report).

7) On 15 December 2015, following the joint report, a written settlement agreement (the agreement) was signed, recording various terms including:

    a. the agreement was full and final;

    b. the rebuild costs for the house were agreed at $445,230, with $36,607 apportioned to NZS 3604 type foundations. All up $481,350, was paid to Mr B, including EQC payments;

    c. once excavations had been carried out, should the NZS 3604 foundations prove unsuitable due to sub-soil conditions, the agreement set out a mechanism based on the joint report, to assess if "*enhanced foundations*" were necessary (the foundation assessment); and

    d. there were timeframes for obtaining a building consent, demolition and the foundation assessment.

    Key terms are set out in full below at paragraph [50].

8) On the same day Mr B emailed a list of issues regarding his disagreement with the joint report to his engineer S and the other engineers. He stated:

> [I]t seems obvious to me that all the uncontrolled fill should be removed from under the house before backfilling of any sort should proceed. Otherwise how can the true compaction of the whole site be confirmed?

9) On or around 15 January 2016, the agreed settlement funds were paid to Mr B. It appears that there had been some delay due to the need for one of the financially interested parties to execute the agreement.

10) 1 April 2016, the date on which the application for building consent was to be made by Mr B, came and went. The High Court litigation had continued despite the agreement recording that a stay of proceedings would be jointly applied for by 7 May 2016. On 12 May 2016, Associate Judge Osborne, as he then was, issued a Minute which recorded continuing frustrations and disagreements between the parties. A trial date was set down for mid-November 2016.

11) On 1 June 2016, Southern Response's lawyers wrote to Mr Bs' lawyers. The letter acknowledged that Mr B was working on the application for building consent. The letter also put Mr B on notice that:

    a. Southern Response considered that he was in breach of his obligations under the settlement, as he had not applied for building consent within the agreed timeframe;

    b. for the agreed demolition to occur the property needed to be vacated by 15 July 2016; and

    c. if the building consent was based on enhanced foundations in excess of those anticipated by the agreement, Mr B would be required to either amend the consent, or Southern Response would pay him for a foundation considered suitable by its' own experts.

The first extension

12) An extension of time was agreed by the parties on 14 November 2016, as part of a without prejudice variation of the agreement. As the discussions were without prejudice, I do not have the terms of the variation before me, however, both parties have referred to the requirement that Mr B use his "*best endeavours*" to provide designs, specifications, and a build contract by 24 November 2016. Subsequent correspondence shows that Southern Response agreed to vary the depth of the foundation excavations up to two metres, but with the initial inspection and testing at 800mm remaining.

13) On 16 November 2016, the High Court proceedings were discontinued. Mr B provided a signed building contract with 10 Star Homes.

14) On 30 November 2016, one of Mr Bs' lawyers, Jai Moss, contacted Southern Response's lawyers, asking for a breakdown of the cost calculations behind the agreement, and whether Southern Response would deal with foundation sub-contractors directly.

15) On 15 December 2016, another of Mr Bs' lawyers, Corbin Child, provided architect's drawings and details of a rammed aggregate pier foundation design system prepared by S. He repeated Mr Moss' request for information.

16) On 16 December 2016, Southern Response's lawyers wrote to Mr Moss and Mr Child and advised of the calculations of the settlement funds, that Southern Response would not be involved in the rebuild, apart from the foundation assessment, and concluded:

> On that basis, Southern Response expects that 10 Star Homes will manage the entire process, once Southern Response has arranged for the demolition of the existing house, and Southern Response's experts have been involved in assessing the ground at the base of the 800mm excavation to determine whether further material is to be removed, and if so how much. …
>
> Should your clients incur costs over and above what is necessary and reasonable to reinstate the insured property, with the required foundations, Southern Response will not be responsible for those costs.

17) On 7 April 2017, LF of Southern Response, emailed Mr Moss advising that the new building contract and confirmation of consent had not been received. The email refers to a previous discussion between Ms F and Mr Moss and finishes "*should* [Mr B and Ms R] *now wish to retain the home and step outside the signed agreement, I am happy to discuss and find a suitable resolution for all parties*". Mr Moss responded that Mr B and Ms R "*have all but moved out of their home to ready it for demolition*".

18) On 8 May 2017, Mr B signed a second build contract with 10 Star Homes. This was forwarded by Mr Child to Southern Response's lawyers in an email which finished "*I understand that the house has been vacated and can now be demolished. Can you please advise when Southern Response will be in a position to carry out this work?*"

19) On or around 22 June 2017, Mr B and Ms F spoke. She says he asked that Southern Response demolish the house, which he denies. The upshot is that later that day

Southern Response's lawyers emailed Mr Moss agreeing to the demolition prior to consent being issued, provided that the agreement was varied as follows:

> 1. There will be no request for further temporary accommodation payments if the house is demolished before consent is issued;
>
> 2. Mr B agrees to allow Don Bruggers and Lee Howard to attend site and provide advice about the suitability of the agreed foundation solution (from the joint report), prior to any foundation designs being finalised;
>
> 3. Mr B provides copies of the consent drawings (for the foundations and superstructure) before they are sent to the Council; and
>
> 4. Mr B will apply for consent within 8 weeks of demolition being completed.

20) On 28 June 2017, Mr B emailed Southern Response referencing the earlier discussion with Ms F. The email states:

> I… informed you that we had moved out of our house and it could be demolished as soon as you were ready … I understand that our lawyer had informed you that we had moved out in Mid April which means the house has been empty awaiting demolition for two and a half months and you have done nothing".

EB of Southern Response responded later that day with copies of the correspondence between Southern Response and Mr Bs' lawyers, including the email referred to at [19] above.

The second variation

21) On 6 July 2017, Ms F emailed Mr B citing the agreement regarding the timing of the building consent and demolition, offering to arrange for demolition prior to the consent being granted, and finishing:

> On the basis that you have had sufficient time (and received the professional fees necessary) to draft the house and foundation designs and now wish to confirm the details of the foundations following demolition, we expect that you will be able to lodge an application for building consent by Wednesday 6 September 2017, and that excavation for the foundations will be completed… such that any consultation between [the engineering experts] can take place and the foundation design be agreed by Thursday 30 November 2017… Time is of the essence to Southern Response, and these dates must be strictly adhered to, or no further payments will be made under the settlement agreement, and Southern Response will consider your claims to have been fully and finally settled.

Later that day, Mr B responded to Ms F, that there was no urgency regarding demolition, alleging that any delay was due to Southern Response withholding information and its

engineers' inaction, and that he could not agree to a timeframe due to issues with Christchurch City Council's timeframes.

22) On 14 July 2017, Ms B responded that no information had been withheld, the entire process was set out in the agreement, and that Southern Response had been waiting on Mr B to complete the foundation design. She repeated the offer to vary the agreement to allow for demolition to occur prior to consent, asking Mr B to affirm the variation in writing.

23) On 13 September 2017, DW of the Greater Christchurch Group, acting for Mr B, advised that engineering documents would be ready to submit by the end of that month and the architectural documents would follow. He advised that Southern Response could proceed with the demolition "*as soon as you are ready to do so*".

24) Over the next three weeks the steps towards demolition were put in place with an intended demolition start date of 11 October 2017. However, on 6 October 2017, Mr W emailed Ms F advising that "*I have received an email from* [Mr B] *that suggests the demolition should be put on hold*".

25) On 6 October 2017, Ms F and Mr B spoke. It appears that a variation to the agreement was proposed, whereby the house would remain standing for Mr B to do with as he wished, and Mr B would retain the settlement funds, but the claim would be at an end. A formal variation was drafted and sent to Mr B. However, Mr B decided not to proceed with that variation and instead decided to rebuild.

26) On 10 October 2017, Mr B contacted Mr Hodder, who worked for the demolition contractor. Mr Hodder recorded in an email to Ms F that Mr B told him that he did not agree to the demolition because he believed that Southern Response was liable to remove all the fill on the site. Later that day Mr Moss sent an email to Mr B which records that Ms F had put to him the offer to choose to leave the house standing. Ultimately the demolition was postponed.

27) On 26 October 2017, Mr B emailed Ms F advising that consent was unlikely to be granted before March 2018, concluding: "[b]*e that as it may, if you wish to proceed with Demolition at this stage, feel free to do so*".

28) On 14 December 2017, Mr B indicated that the consent documents should be submitted to Council by the end of February 2018.

29) The house was demolished on 21 February 2018.

30) Despite assurances, no consent application was made. Mr B puts this down to the fact that Ms R passed away in March 2018 and that he felt stonewalled by Southern Response.

31) On 12 December 2018, Community Law, acting for Mr B, emailed Ms F asking what steps Mr B needed to take to obtain the enhanced foundation costs. Ms F met with Community Law and was advised that Mr B was ready to apply for a building consent. Ms F agreed to an extension to 22 March 2019.

The third extension

32) On 25 January 2019, Ms F emailed Victoria Wood of Community Law with copies of relevant reports, correspondence with Mr Moss and the terms of the agreement around foundation assessment. Southern Response granted an extension of eight weeks.

33) On 20 February 2019, Ms Wood responded that Mr B had advised that "*he would be immediately instructing his engineer to oversee the excavation to 800mm*". She understood that the excavation had occurred earlier that same day, overseen by Robert Smith of CGW consulting engineers. Ms Wood stated that the type B foundations set out in the joint report appeared to now be the appropriate solution subject to the engineers' approval. The email concludes by asking when Southern Response's engineers would be available for the inspection. In his evidence, Mr B says that he never instructed Community Law to request an extension or that his consent application would be made by February 2019.

34) On 21 February 2019, Ms F emailed Ms Wood indicating that the engineers would attend the site on 25 February 2019. She also indicated the presence of fill meant that an environmental specialist would also attend.

35) On 26 February 2019, Don Bruggers, Southern Response's nominated geotechnical engineer, reported that they had attended the site the previous day. He advised that the foundations had not been excavated, instead three test pits had been dug. These test pits were not in the house footprint. This was not what was anticipated by the agreement entered into in December 2015.

36) On 27 February 2019, Ms Wood emailed Ms F. Ms Wood says she had been mistaken about the extent of the investigations, and that the full excavation did not occur on the instruction of Mr Smith due to environmental concerns. She advises that Mr Smith's advice was that either ground improvement or the removal of all fill were necessary for the rebuild and asked for an extension to the timeframe.

37) On 1 March 2019, Ms F responded noting that the instructions and information provided to Mr Smith were not of the level required for the rebuild. She agreed to: an extension, provided detailed design documents, confirmation of resource consent being applied for the excavations, and a copy of a signed building contract with an expected start date were provided.

38) On 6 March 2019, Mr Smith issued a report on the findings from the test pits. The report refers to instruction to carry out "*a limited geotechnical investigation to confirm the consistency of the founding soils for the proposed development of a new residential building at XXXXXX Street*".

39) On 22 March 2019, Ms Wood requested confirmation of the extension of time for the consent applications to be made. She advised that Mr Bs' engineer had confirmed the type A foundation was suitable, and supplied design documents, and an environmental site management plan.

The fourth extension

40) A further exchange of emails occurred on 25 and 27 March 2019. These included detailed questions regarding progress from Ms F and equally detailed responses from Ms Wood. The upshot of this was that the timeframe for the consent application was extended to 27 March 2019. Ms F finished:

> Southern Response has to date afforded Mr B significant leniency on the dates by which the agreed steps were to be taken, this cannot continue indefinitely. Southern Response remain concerned about the inconsistencies in documentation and correspondence since the signing of the Settlement Agreement of 2015. We reserve our position this [sic].
>
> We reiterate that no further extensions will be given past 27 March 2019, unless the requested information above is received and satisfies Southern Response that construction of the home is genuinely proceeding.
>
> As previously advised we have met the terms of the policy and settlement and discharge agreement. Beyond 27 March 2019 Southern Response consider no further comeback or payment for enhanced foundations will be permitted and the claim will be closed.

41) To which Ms Wood replied:

> Please note that significant progress has been made in the last while on the engagement of professionals and finalisation of documentation for the rebuild. There was a misunderstanding about the foundation design at the time we became involved, which has been clarified and the matter is now moving successfully forward to enable the required documentation for the rebuild to be provided. However, the strict timeframes recently imposed at a time when the foundation design was not clear and the then unavailability of the professionals to turn their work around, meant the timeframes were never achievable. We hope Mr B has sufficiently demonstrated his stated intention to do the work and a more realistic timeframe to provide the documentation recorded above can be agreed.

I note that Ms Wood's response specifically refers to have sought and received information and instructions from Mr B.

42) On 26 April 2019, Ms Wood updated Southern Response, advising that there had been an issue with the plans for building consent and that Mr B expected to be applying for consent the following week.

43) On 17 May 2019, Ms F responded that the claim was closed due to repeated failures to meet the timeframes.

44) On 21 May 2019, Ms Wood requested that Southern Response re-visit its decision, citing:

a. delays caused by Council and trades;

b. that delays were inevitable given Ms R's death, and Mr Bs' grief;

c. that the decision to close the claim would be unenforceable due to Mr Bs' "*good faith efforts made to meet SRES' requirements before the additional costs owed under the policy would be paid*"; and

d. "*considerable confusion*" caused by S's withdrawal and the uncertainty around the status of the fill.

45) Later that same day Ms F responded that a request to re-open the claim would only be considered if it was accompanied by copies of the approved building consent pack, the resource consent application, and a signed building contract with a genuine construction start date.

46) On 12 July 2019, Ms Wood advised that the consent applications had been made and asked for the experts' conferral to occur.

47) On 7 October 2019, Building Consent was issued. Later that day Mr B emailed Ms F asking for Southern Response to "*speed up my rebuild as a priority*". He later supplied a one-page tender document from Stratton Homes Ltd, estimating the rebuild cost at $1,879,729.00. The tender does not break down the costs and, where detail is provided, includes line items which had already been paid under the settlement. It is noted that Mr B holds a 25% shareholding in Stratton Homes Ltd.

48) On 29 October 2019, lawyers acting for Southern Response wrote to Mr B confirming that the claim was closed and that "[i]*n the circumstances, Southern Response is not willing to re-open your claim*".

49) The work was never started, and the section remains bare.

The Agreement

50) The key terms of the agreement are:

> 1. The terms or this Agreement are in full and final settlement of all issues between them arising directly or indirectly from the events, the claims, the dispute and the proceeding.
>
> 2. Southern Response will pay the policyholder $366,350.00 including GST (the "Settlement Payment") as settlement of all claims for damage to the Insured property from the events under *Earthquake top-up cover* and *Cover for your house* of the policy, except in relation to costs for enhanced foundations as detailed below at 7.
>
> …
>
> 5. The policyholder accepts the Settlement Payment In full and final settlement and discharge of claims for temporary accommodation, and removal and storage of household contents, and the superstructure rebuild cost based on and including existing 3604 foundations. The parties acknowledge that Southern Response has agreed to meet the cost of enhanced foundations separately as set out at 7.
>
> 6. The policyholder and Southern Response agree that the proceeding will not be discontinued at this stage, but:
>
> a. the joint experts' report following the conferral on 18 November 2015 is to be completed and filed by Friday 4 December 2015;
>
> b. the policyholder and Southern Response will file a Joint Memorandum of Counsel to seek a stay of the proceeding to 7 May 2016 to allow the steps set out at 7 to be completed; and
>
> c. the policyholder will file a Notice of Discontinuance on 7 May 2016, or as soon as a foundation solution is agreed in accordance with 7 below.
>
> 7. The policyholder will use their best endeavours, time being of the essence, to ensure that
>
> a. a building contractor is engaged on standard terms to rebuild the house and external works to a design and specification that replicates the existing house (the "replacement house") on the same site and footprint. based on the foundation solution agreed in the Joint experts' report;
>
> b. S and Paul Sykes are appointed to be the engineers for the replacement house (“the engineers”);
>
> c. the design and specification for the replacement house is completed as soon as reasonably practicable;
>
> d. a building consent application for the replacement house is lodged with the Christchurch City Council as soon as possible following the design and specification being completed, and in any event by 1 April 2016;

e. access is provided to Southern Response and its demolition contractors to effect demolition and removal of salvageable items (if any) within 3 weeks of the granting of a building consent for the replacement home. Southern Response will arrange and pay the costs of demolition and debris removal, including any resource consents required, directly to the demolition contractor, and leave a clean site ready for construction;

f. If the bearing capacity at the base of the excavated area for the foundations for the replacement house is found by the engineers to be inadequate or compromised, contrary to indications from the existing investigations, then:

i. the engineers will consult with Lee Howard of Aurecon and/or Don Bruggers of ENGEO, or a nominee appointed by them in case of absence, to agree on a variation to the design of the foundations, if any;

ii. if no agreement over design is reached within 10 working days, Southern Response and the policyholder will refer the matter to the High Court for determination, for example through the appointment of an Independent engineer;

iii. once a foundation system has been agreed or determined, Southern Response will pay the building contractor for the cost of the enhanced foundations that takes the build contract price above $445,230, bearing in mind that the amount of $36,607 has already been included in the settlement payment for NZS 3604 foundations and associated margin, professional fees and contingency;

iv. Southern Response will pay the additional costs incurred by the engineers for the variations to the extent that that work takes the build contract price above $445,230.

8. Southern Response will not have responsibility for, or be involved in, the repair or reinstatement of the Insured Property, except as required to approve an additional foundation payment that takes the build contract price above $445,230.

…

13. Except on the basis that the terms of the Settlement Agreement are breached, this Agreement may be pleaded as an absolute bar to any further or other claim arising directly or indirectly out of the events, the claims, the dispute or the proceeding.

51) The agreement is a contract and is to be interpreted like any other, *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[1]

> [The] ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended the words to bear.

52) To determine the intentions of the parties the words in the contract need to be read in context. In this case that context includes the settlement of a long-standing litigated

[1] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [19].

dispute, the terms of the policy, and the agreements recorded in the joint report. The parties' subjective intentions are not relevant, instead the meaning is what a reasonable person, knowing what the parties knew, would determine.[2]

53) I read the agreement as showing an intention shared by the parties to settle the underlying dispute with as much finality as was possible in the circumstances. To reach this finality the parties compromised on their rights and obligations set out in the policy. It is common ground between the parties that those policy obligations and rights are subsumed by the agreement but provide context as to what the agreement is trying to achieve.

54) The engineers' agreement recorded in the joint report is not part of the contract itself, and therefore does not bind the parties. However, the joint report provides context by which the words used can be understood. In particular, I interpret the procedure at clause 7(f) to include the assessment of bearing capacity and subsoil conditions using an initial 800mm excavation, followed by proof-rolling, and the use of a penetrometer, as set out in the joint report. This is also consistent with the parties' subsequent correspondence.

55) If parties mutually agree to a variation, they may do so. In this case the variations were generally proposed by Southern Response, and while it appears that not all of these proposals were formally responded to, I find that Mr Bs' conduct showed that he accepted the variations offered.

56) The only aspect of the dispute left unresolved by the agreement was the possibility that enhanced foundations would be required. This possibility is dealt with by the foundation assessment in clauses 7(d), (e) and (f). In short, the mechanism was:

    a. a building consent application would be made by Mr B;

    b. the house would be demolished by Southern Response;

[2] *Junior Farms Ltd v Cavendish Real Estate Ltd (in liq)* CA218/04, CA258/04, 12 April 2006 at [60].

c. an initial 800mm excavation would be carried out by Mr B, followed by ground testing, this was varied on 16 November 2016 to allow for an excavation of up to 2 metres if necessary;

d. once the initial excavation had been carried out the nominated engineers would consult on whether an enhanced foundation solution is necessary;

e. if the engineers could not agree on an enhanced foundation solution the High Court would be approached as a resolution mechanism; and

f. Southern Response would pay the costs of the final enhanced foundation solution insofar as those costs exceed the apportionment for foundations already paid.

57) The foundation assessment mechanism was the only way by which additional foundation costs could be assessed and was not varied. The timeframes and ordering of steps were varied by agreement of the parties, the details of which are discussed below.

Evidence

58) Mr B and Ms F appeared before me and gave evidence, backed by copies of the correspondence between the parties.

Mr B

59) In summary Mr Bs' evidence is:

a. He is a qualified civil engineer and quantity surveyor. He has 66 years' experience in construction including working on roads, motorways and hydro-electric dams.

b. He believes that the site was one of the worst in Christchurch due to liquefaction and issues with the uncontrolled fill. He knew that fill was an issue before the agreement was signed. However, he agreed to the settlement as he thought it was the only way to progress his claim. He called it an "interim agreement".

c. That he never asked for the house to be demolished, rather he was pressured to allow Southern Response to demolish the house. However, he also stated that he always had the option to retain the house in its damaged state, as it was his house.

d. He alleged that S was forced to agree with the joint report. He alleges that S refused to do further work for him shortly after, as he was concerned about his liabilities as the certifying engineer, if a type 2 foundation was built on the site. Mr B alleges that S added qualifications to the joint report to "*cover his bum a bit*". Mr B also referred to S's continued involvement in the foundation assessment in an email on 6 July 2017.

e. Mr B gave evidence that S and Walker Architect's plans were prepared without his authority. He also made comments that the various lawyers working for him made concessions and agreements without him instructing them to do so.

f. Mr B said he knew that two metres of fill needed to be removed and said that the consent application could not be made until Southern Response agreed to remove all fill down to two metres. He said that Southern Response were controlling him, and by implication, his ability to rebuild.

g. He considered that after the house was demolished, the agreement was overtaken by events. However, he also commented that he "*couldn't afford to step outside the agreement*."

h. That the excavations set out in the foundation assessment did not occur because, when the test pits were dug, the stench and risks of collapse were too great. However, the test pits were two metres deep, rather than the agreed 800mm.

60) Mr B alleged that on several occasions' lawyers working for him, whether Mr Childs, Mr Moss, Community Law, or Ms Woods, took steps without his instructions, including agreeing to timetables, requesting extensions and forwarding documents. I do not accept this. I note that Ms Woods specifically mentions receiving Mr Bs' instructions, which he later denied he gave. Even if true these allegations would not assist Mr B. The

law of agency holds that an agent with apparent authority can bind their principal, even if their actual authority is over-stepped.[3] A lawyer conducting negotiations for their client can bind that client.

61) Mr B claims that S was intimidated into agreeing to the joint report, despite knowing the subsoil conditions[4]. This is in effect an argument that the agreement was obtained by duress. I do not accept that this occurred. S is an experienced engineer and well-regarded in earthquake matters. In any event, the agreement specifically addressed the possibility that the assumptions about subsoil conditions underpinning the experts' agreement could be incorrect.

62) Mr B said that he was delayed in taking the steps the agreement required of him due to alleged failures on the part of Southern Response, or its engineers. However, the agreement is clear that, beyond demolition and the foundation assessment, Southern Response has no part in the rebuild. Mr B's correspondence with Ms F showed that he was aware that he, rather than Southern Response, was responsible for the design, consent and building work.

Ms F

63) In summary Ms F's evidence is:

a. Southern Response was aware of the sub-soil conditions at the site, having rebuilt several nearby properties, none of which required soil improvements at the level Mr B sought.

b. Southern Response could not help Mr B as he never provided the information or made the applications set out in the agreement or the variations. Southern Response could not take those steps for him, but Ms F believes that had Mr B followed the steps any issues with fill could have been resolved.

[3] See *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257.
[4] S was doing design work for a neighbouring property when the joint report was drafted.

c. That Mr B chose for the house to be demolished. Southern Response did not force the issue, which is why the variation allowing for the house to remain was offered to him.

d. Southern Response could not leave the claim open indefinitely. The agreement terms allowing for additional costs should enhanced foundations be required are a common practice for Southern Response. However, Southern Response was not unreasonable about extending timeframes.

64) Ms F disputed that Southern Response wished to change the order of the demolition and consent. However, there was an understandable urgency for Southern Response to finalise the claims. I find that the change of the order was a mutual decision made by both parties.

The agreement and variation timeframes

65) To aid my analysis below, I set out the timeframes of the agreement and the variations:

a. 15 December 2015 - **the agreement** – Mr B to apply for building consent by 1 April 2016, demolition to be carried out three weeks later.

b. 14 November 2016 – **first variation**, design, specifications and build contract to be provided by Mr B by 24 November 2016, other steps as in the agreement.

c. 7 April 2017 – offer by Southern Response to allow Mr B and Ms R to keep the house 'as is where is'.

d. 6 July 2017 – **second variation**, Mr B to apply for building consent by 6 September 2017, foundation excavation by 6 November 2017.

e. 21 February 2018 – **house demolished.**

f. 25 January 2019 **third variation,** Mr B to conduct the excavations and apply for building consent by 22 March 2019.

g. 25 March 2019 – **fourth variation** making time of the essence;

> [N]o further extensions will be given past 27 March 2019, unless the requested information above is received and satisfies Southern Response that construction of the home is genuinely proceeding.
>
> … Beyond 27 March 2019 Southern Response consider no further comeback or payment for enhanced foundations will be permitted and the claim will be closed.

h. 17 May 2019 – **claim closed**, cancelling the agreement.

Was the claim validly closed?

66) Southern Response claims the agreement as an absolute defence against Mr Bs' application. It says that the failures of Mr B to adhere to the agreed timetable, as varied, meant it could close his claim. This argument is lent emphasis by references in the agreement and the correspondence about the variations, to "best endeavours" and "time being of the essence".

67) Southern Response's defence is that the yet to be performed aspects of the contract, namely, the consent application, and foundation excavation, were not completed within the timeframes, in breach of the agreement. These breaches were repudiations of the agreement by Mr B and discharged Southern Response from having to perform any future obligations under the agreement.

68) The discharge is governed by the Contractual Remedies Act 1979.[5] Subsection 7(2):

> (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

69) For Southern Response to refuse to engage with Mr B any further on the rebuild of his home, it must be entitled to cancel the agreement. To do so, Southern Response must establish that Mr B repudiated the agreement.

70) For the reasons below, I find that Mr B did repudiate the settlement agreement. He made it clear by his words and actions that he did not intend to perform his obligations under

[5] Since replaced by the Contract & Commercial Law Act 2017.

the agreement. Therefore, Southern Response was entitled to and did, validly cancel the agreement.

Discussion

71) Reviewing the background of the claim, I find:

a. Mr B was assisted by an experienced lawyer, an experienced advocate and an experienced engineer at the mediation where the agreement was reached.

b. Mr B has extensive experience in the construction industry, including as an engineer, quantity surveyor, and director of building firms.

c. The terms of the agreement are clear and unambiguous, and it is clear from those terms that time was of the essence. That requirement was not changed by the extensions, which repeated the need for prompt action.

d. From the outset Mr B showed that he did not intend to carry out the steps required of him to assess the need for enhanced foundations. Instead he showed that he would not proceed until and unless Southern Response unequivocally agreed to remove all fill on the site.

e. Mr Bs' failures to meet the timeframes were in breach of the agreement and extensions were necessitated by his inaction.

f. Southern Response's correspondence is largely consistent with clause 7(f) of the settlement agreement, apart from the allowance on 24 November 2016 that excavation could go to 2m (but with initial inspection at 800mm).

g. Southern Response made concessions about timeframes, the depth of the excavations, and the order of the steps. However, it did not make concessions about other matters.

h. Southern Response repeated the requirements for assessing the possibility of enhanced foundations being required and took reasonable steps to carry out its obligations under the agreement.

i. Mr B failed, within the numerous extended timeframes given to him by Southern Response, to comply with his obligations under the settlement agreement. Those failures entitled Southern Response to make time of the essence for performance and to cancel the settlement agreement.

72) While Mr B did not give notice that he did not intend to perform his obligations, it was clear from his conduct that he considered he was not bound by the requirements of the agreement. The authors of *Burrows, Finn, and Todd on the Law of Contract in New Zealand* state that "[a] *repudiation is implicit where the reasonable inference from the defendant's conduct is such that he or she no longer intends to perform his or her side of the contract*".[6]

73) The agreement was clear that to claim the costs of enhanced foundations Mr B needed to carry out the steps set out at cl 7 within the agreed timeframe(s). While the timeframes were varied, the requirements for excavation and inspection did not change. Mr B did not carry out the steps required of him under any iteration of the timeframes. It is not the case that Mr B was trying to comply, but circumstances conspired against him. He seems to have taken no note of the clear communications from Southern Response at each extension that he needed to act promptly.

74) I find that almost as soon as the agreement was signed, Mr B formed a view that he did not have to perform the conditions of cl 7 to further his claim for enhanced foundations. Amongst other conduct this is evidenced by:

a. Mr Bs' email to the engineers on 15 December 2015;

b. Mr Bs' failure to discontinue the High Court proceedings in the agreed timeframe;

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[6] J Finn, S Todd, and M Barber *Burrows, Finn, and Todd on the Law of Contract in New Zealand* (6ed) (LexisNexis New Zealand, Wellington, 2018) at 18.2.1 p692

c. Mr Bs' repeated failures to have plans completed in accordance with the terms of the agreement, to make a consent application in the agreed time frame(s);

d. Mr Bs' comments as a witness that he did not agree with every word in the agreement, and that it was "*a step forward that I had to take*"; and

e. the excavations carried out on Mr Bs' specific instructions were not those specified by the experts' report, rather they were test pits which were largely outside of the house footprint.

75) I conclude that the timeframes were an essential term, or became so, when Southern Response agreed to extend time for performance on the basis that time was of the essence. Mr Bs' failures to act within the timeframes were breaches of that essential term which gave rise to a right to cancel. Ms F's evidence was that the delays in rebuilding have coincided with a marked increase in construction costs. The delays had an actual consequence to Southern Response, the innocent party.

Affirmation

76) Affirmation occurs when a party with a right to cancel a contract fails to do so and, by its words or actions, demonstrates a choice to rely on the contract. As the cancellation of and reliance on a contract are fundamentally inconsistent acts, the affirming party surrenders the right to cancel.[7] It may be argued that by offering to vary the timeframes, Southern Response elected to affirm the agreement, waiving the right to cancel, and could not then cancel the settlement agreement based on breaches of those timeframes.

77) In *Jansen v Whangamata Homes Ltd* Randerson J said: [8]

> It must be shown that the electing party made a firm and settled choice and does not intend to go back on it. Putting it another way, the electing party must be shown to have committed irrevocably to one of two inconsistent courses of action.

78) In the present context each time an agreed date came and went, Mr B was in breach. At each breach a right to cancel accrued to Southern Response. I find that none of the

[7] See *Crump v Wala* [1994] 2 NZLR 331 at 336.
[8] *Jansen v Whangamata Homes Ltd*, HC, Hamilton, CIV 2003-419-1511, 29 November 2004, unreported, at [27].

variations offered amounted to an irrevocable choice by Southern Response not to rely upon its right to cancel on several grounds;

a. Each offer to vary the agreement was communicated in a way that made it clear that the performance of the agreed steps was necessary, and that the timeframes were expected to be kept to. Language warning of the possibility of cancellation was used and rights were reserved. At most the variations can be read as extensions of time, no more.

b. Each breach led to a fresh right to cancel. This means that even if the variations were elections to affirm, the final breach; when Mr B failed to take the agreed steps by 27 March 2019, created a fresh right to cancel which was validly exercised and was confirmed on 29 October 2019.

c. Mr B conduct showed more than just non-compliance with timeframes, it shows that he felt that he need not follow the agreed process at all.

d. While Ms F's email of 21 May 2019 left open the possibility of re-considering the decision, it was contingent on the provision of completed approved construction documents with a genuine start date. When the approved building consent was provided by Mr B, the other documents were not. Following this the cancellation was confirmed.

79) As a result, I find that Southern Response was within its rights to cancel the settlement agreement and refuse to pay any claim for enhanced foundation costs.

Mr Bs' position - Estoppel

80) I must now consider Mr Bs' argument that Southern Response's actions after the agreement mean that it is now unconscionable for the agreement to be terminated, as Southern Response contend. Mr Walker for Mr B argues that Southern Response cannot rely on the agreement as it is estopped by the demolition of the house occurring before consent was granted. He relies on the modern formulation of equitable estoppel which

is that "*a party will not be permitted to deny an assumption, belief or expectation that it has allowed another to rely on where such denial would be unconscionable*".[9]

81) To prove estoppel Mr B must show:

a. that he has formed a belief or expectation created by an act or omission of Southern Response;

b. that he has reasonably relied upon that belief or expectation;

c. that he would suffer detriment if the belief or expectation is departed from; and

d. it would be unconscionable for Southern Response to depart from the belief or expectation.[10]

82) If Mr B can prove estoppel this would prevent Southern Response from cancelling the (varied) settlement agreement.

What was Southern Responses' action or omission?

83) Mr Walker has argued that unconscionability is the touchstone for an estoppel arise and in the modern formulation it is certainly the most important criteria.[11] However, there still needs to be an action or omission for a party to be estopped. From *Goldstar v Gaunt;*[12]

> It nevertheless remains clear that before judgment can be given against a defendant on the grounds of estoppel, some action, or representation, or omission to act, must have been carried out by, or on behalf of, that defendant causing the plaintiff to have acted in a manner causing loss.;

84) The action alleged to have created Mr Bs' belief or expectation must either be the actual demolition, the refusal to accept that the house needed enhanced foundations, or the change of the sequencing so that demolition would precede the consent application.

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[9] A Butler Ed, *Equity and Trusts in New Zealand,* (2009, Thomson Reuters, New Zealand) at [19.1.3(2)].
[10] At [19.2]
[11] At [19.2.4]
[12] *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86.

85) The first possibility, that Southern Response carrying out the demolition caused it to be estopped, cannot be correct. This is because the demolition was something Southern Response was obliged to pay for under the policy, a step set out in the agreement and a necessity if the house was to be rebuilt. Mr B agreed to the demolition in the agreement.

86) Mr B changed his mind about whether to demolish and rebuild or not, and Southern Response was open to varying the agreement accordingly. However, once Mr B confirmed on 6 October 2017 that the rebuild was to proceed, the demolition had to occur. The decision to demolish was Mr Bs' rather than that of Southern Response and Mr B said as much in his evidence. Once he made that decision Southern Response was obliged to carry out the demolition. Performance of an obligation in these circumstances cannot create an estoppel.

87) In his evidence Mr B alleged that Southern Response's refusal to accept that the house required enhanced foundations, stopped him from applying for Building Consent. However, on the facts Southern Response repeatedly sought the opportunity to assess subsoil conditions so the need for enhanced foundations could be assessed. Mr B never allowed the foundation assessment procedure in the agreement to occur. No action or omission in this regard can be attributed to Southern Response.

88) The scheduling of the demolition and consent application can be attributed in part to Southern Response. There was considerable correspondence over the change in order of these steps between June 2017 and February 2018:

a. 22 June 2017 – conversation between Mr B and Ms F where changing the order of consent and demolition was discussed;

b. 14 July 2017 – Southern Response repeats its offer to change the order, if affirmed in writing by Mr B;

c. 13 September 2017 - GCCRS confirmed that Southern Response could proceed with the demolition "*as soon as you are ready to do so*";

d. 6 October 2017 - Mr B had second thoughts and Ms F offered a variation allowing for the house to remain standing but Mr B decided to rebuild;

e. 10 October 2017 - Mr Moss sent an email to Mr B repeating Ms F's offer to leave the house standing; and

f. 26 October 2017 - Mr B emailed "*if you wish to proceed with Demolition at this stage, feel free to do so*".

89) I note that Mr B had moved out some time prior to the demolition. He was part of the discussion with Ms F about changing the order and he and his lawyers and advocates had at various stages made statements that the house was ready to be demolished. There is disagreement over who decided to change the timing of the demolition, but that does not need to be resolved. However, Southern Response was part of the decision to change the order and therefore, could be estopped by this action.

Did Mr B form a reasonable belief based on the change of the order of demolition?

90) Mr Walker has argued that once Southern Response changed the order of the demolition Mr B formed a reasonable belief or expectation that enhanced foundations would be paid for by Southern Response. In evidence Mr B also said that he believed he could not apply for a building consent without Southern Response agreeing to a foundation solution. These arguments are not supported by the facts.

91) Mr B believed that the foundation solution required enhanced foundations as far back as 15 December 2015, when he emailed the engineers criticising their findings in the joint report. His evidence was that he had "*always known*" that enhanced foundations were required. His view was that Southern Response must unreservedly accept that only by removing all fill and using enhanced foundations could the house be rebuilt. He held this view when the agreement was signed, well before the order of the demolition was changed and the change made no difference to his belief.

92) For Southern Response to be estopped Mr Bs' qualifying belief or expectation needs to be reasonably held. Southern Response's agreement to change the order of demolition was subject to qualifications about the need to complete the steps in the agreement and

the need for the foundation assessment to occur. A reasonable person faced with these qualifications would not have formed a view that Southern Response was going to pay enhanced foundation costs without these further steps.

93) Mr B says he believed that, after the house was demolished, he could not apply for building consent without Southern Response's agreement to the enhanced foundations. This is contrary to the facts and the clear process set out in the settlement agreement. Since the agreement was signed and the settlement funds paid, Mr B has not needed Southern Response's permission to rebuild. He had control over the consent application process from the outset. The consent process is iterative. The initial consent could have been applied for based on the experts' report and then varied if enhanced foundations were required once the excavation had been completed. That was anticipated by the settlement agreement. The additional costs of the variation would have been part of the enhanced foundation costs and payable by Southern Response under the agreement. Mr B was not stopped from applying for consent at any stage, evidenced by the fact that consent was applied for and granted in 2019.

94) I find that Mr Bs' beliefs and expectations were not changed by Southern Response's actions. He relied on his own strongly held views on the state of the subsoils rather than anything Southern Response did or did not do. As Mr B cannot show reliance on Southern Response's actions, his claim of estoppel cannot succeed. This finding disposes of Mr Bs' application. However, equitable estoppel turns less on technicalities and more on the equitable fairness of the circumstances, so I will consider whether it was unconscionable for Southern Response to refuse to further consider the enhanced foundation costs.

Unconscionability

95) Unconscionable conduct is where a party's actions are so unreasonable, unjust, or excessive as to be against good conscience. The assessment is whether the conduct is objectively unconscionable looking at the circumstances from the point of view of the

party claiming the estoppel.[13] The focus is on the effect that the alleged behaviour has had on the party claiming the estoppel.

96) It is important to bear in mind that the question is not one of unfairness, contracts may have unfair outcomes. The doctrine of estoppel is not intended to save someone from a bad bargain. Instead, circumstances must have changed in such a way that it would be against good conscience for the strict terms of a contract to now be enforced.

97) I find:

a. Mr B had been paid the funds to rebuild with NZS 3604 foundations, this payment indemnified him for the proven aspects of his claim for earthquake damage.

b. The agreement clearly states that Southern Response had no part in the rebuild. Mr B had control of the rebuild process. Southern Responses only involvement was if enhanced foundation were shown to be necessary through the foundation assessment. The foundation assessment process could not occur because Mr B did not perform his obligations.

c. Mr B had two years between the signing of the agreement and the demolition to complete the steps to assess the foundations.

d. Mr B had fourteen months after the demolition to complete the steps to assess the foundations.

e. Southern Response allowed numerous variations to the timeframes in the agreement, these variations were for Mr Bs' benefit.

f. At any stage in the three years and two months in question Mr B could have carried out the agreed process, and then, had it been necessary, invoked cl 7(f) to obtain enhanced foundation costs. For reasons known only to himself, he did not take these steps.

[13] *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) (at [356] and [359] per Richardson J and at [361] and [364] per McMullin J).

g. Southern Response conceded that excavations up to two metres might be required and agreed to deeper investigations provided the initial 800mm excavations occurred, as required and anticipated by the agreement.

h. When Mr B had second thoughts about demolishing the house, Southern Response offered to settle the claim where he kept the house and the settlement funds. He chose to forgo this option in order to rebuild the house.

i. When Ms Wood asked for the situation to be re-assessed, more time was given but Mr B still failed to complete the steps.

98) I note that Mr B was dealing with the death of Ms R, and this was clearly a challenging time for him. However, it does not appear that Southern Response were ever advised of her health issues and in any event, Southern Response was responsive to the other issues challenging Mr B, albeit in a business-like fashion.

99) It was not in poor conscience for Southern Response to close the claim. Mr B had been indemnified for the earthquake damage to the house, with standard foundations. He was offered and accepted four extensions of time over a period of almost 4 years to complete the steps to assess the need for enhanced foundations. He was offered other variations favourable to him which he chose to turn down. He had the time and the opportunity to have allowed the foundation assessment to go ahead, but for reasons known only to himself he failed to engage in the process. The decision to close the claim in the face of this behaviour was not excessive, unjust, or unreasonable.

100) The outcome is that Mr Bs' application is dismissed.

C D Boys
Member
Canterbury Earthquakes Insurance Tribunal