

[2] Southern Response has determined that the W's house can be economically repaired and have elected to pay them "the cash equivalent of the cost of repairs." It has engaged experts

to examine the house, identify what damage has been caused by the earthquake, and cost the repairs needed to repair that damage. It has then paid that sum, including allowances for consent, professional fees and contingencies, to the W's.

[3] However, the W's do not agree that Southern Response's experts have properly identified the earthquake damage. Nor do they consider that the repair methodology recommended is reasonable. It is even possible, they contend, that the house is beyond economic repair. Reasonable efforts have failed to produce agreement on these issues.

[4] The W's are also upset that, after Southern Response made its election to pay a cash sum, it refused to approve the W's engagement of experts to develop a repair methodology on the grounds that this was a duplication of Southern Response's assessment process.

### **The policy**

[5] The policy under which the W's property is insured provides that Southern Response has the right to elect whether to repair/rebuild the house to an "as new" standard or pay the W's the cash equivalent of the cost of repairs.<sup>1</sup> Southern Response has elected to take the second option and has not sought to revoke that election.

[6] The policy also provides that Southern Response will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild the house subject to those expenses being approved by it before they are incurred.<sup>2</sup>

### **The W's position.**

[7] The W's consider that the proper process, once Southern Response has made that election, should be for the W's to:

- (a) carefully select who they will engage to repair their home;
- (b) obtain Southern Response's permission before arranging for any repairs or incurring any expense; and

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<sup>1</sup> *Cover for your house* Cl 1a and d.

<sup>2</sup> *Cover for additional costs* cl 1a.

- (c) answer any reasonable requests from Southern Response for further clarification.

[8] They believe that they have the right to:

- (a) engage their own experts to undertake an assessment of the earthquake damage;
- (b) prepare their own scope of works using their preferred methodology;
- (c) identify a suitable builder to provide them with a quotation or estimate for undertaking those works; but
- (d) they acknowledge that before they incur any expenses or sign a building contract they must seek Southern Response's approval, which, they assert, cannot be unreasonably withheld.

### **Southern Response's position**

[9] Southern Response submits that a two-step process is involved. It must first assess the earthquake damage, determine whether it is covered under the policy, scope the required repair, and then identify the cost to carry out those repairs.

[10] It contends that this process involves them in:

- (a) engaging experts to advise on the extent of the earthquake damage, propose a repair methodology to fix earthquake damage, and provide a cost to carry out the required earthquake repair works;
- (b) considering any input from the homeowners and any experts they retain; and
- (c) confirming its position.

[11] It accepts that homeowners are not required to use the experts engaged by Southern Response to develop the scope of works and cost it. They are free to choose their own experts, and their own builder.

[12] It also accepts that homeowners may reinstate their property using an alternative repair methodology at a greater cost than Southern Response considers is reasonable, but points out that Southern Response may not contribute towards the additional cost. It recommends that homeowners minimise this risk by seeking its agreement on the scope of works and contract price before entering into a building contract.

[13] If agreement is not possible, then Southern Response says that the burden of proof is on the homeowners to prove that its assessment of the works and associated costs is incorrect.

[14] Southern Response bases its submissions on *Ginivan v Southern Response* where the High Court provided process directions on an interim application to resolve an impasse about whether the fees to be charged by the homeowner's architect, were "reasonable."<sup>3</sup>

## Analysis

[15] Although the insurance policy being interpreted in *Ginivan* appears to have been similar to the policy presently being considered, those homeowners had elected to rebuild their house. In that case, therefore, Southern Response was paying to rebuild the Ginivan's house, but in this case it has elected to pay the W's "the cash equivalent of the cost of repair."

[16] However, there are many similarities and the decision contains many relevant comments, among them:

An ancillary issue arises here. This is a question as to whether the Trustees' choice of the professionals they wish to engage for the rebuild (such as the builder, the architect, engineers, quantity surveyors et cetera) must be approved by Southern Response. In my view, the answer to that question is no. The policy provides that, if the house is damaged beyond economic repair it is the Trustees as the insured who can choose the option to rebuild on the same site, with Southern Response, then paying the full replacement cost of such rebuild. With this rebuilding option chosen, I am satisfied that the Trustees must also have the option to choose their own builder, architect and experts, providing of course that they properly fit those descriptions and they are competent to rebuild the house in compliance with the current building legislation and rules at the time. Approval of the fees charged by those professionals as "reasonable" before Southern Response is required to meet this cost is another matter, however.<sup>4</sup>

As I have noted earlier, the real issue in this case relates to the policy requirement that Southern Response is to pay only "reasonable" professional fees of the architects and other experts engaged by the Trustees. This must mean that if the costs of the Trustees'

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<sup>3</sup> [2018] NZHC 2403.

<sup>4</sup> *Ginivan v Southern Response* at [24]

chosen experts are not objectively “reasonable”, being fair and proper, then Southern Response can be required to pay under the policy only what is the “reasonable” professional fee for that expert that should have been incurred. This is an important safeguard for Southern Response as insurer under the policy. A process for submission and approval or rejection of these “reasonable” costs with a defined time-frame is clearly desirable in the interests of both parties, here.<sup>5</sup>

If, when submitted, only a portion of the expert’s charges would be seen as “reasonable” then the Trustees at their option could continue to use the services of that expert, but on the basis that they themselves pay the additional fee above what was regarded as reasonable.<sup>6</sup>

[17] Although in this case, the W’s have been paid what Southern Response considers to be the cash equivalent of the cost of repair, and are under no obligation to carry out those repairs, the same logic applies when they do carry out those repairs: they can select their own experts and builder, choose their own repair methodology, develop their own scope of works, and enter into a building contract for a price they consider to be reasonable.

[18] But Southern Response is entitled to undertake its own assessment of the damage, prepare its own scope of works, and arrange for the repairs to be costed to determine how much it is willing to pay the W’s as the cash equivalent of the cost of repairs. It does this at its own expense.

[19] If, for any reason, the amount offered by Southern Response as the cash equivalent of the cost of repairs is less than the cost of the repairs using the W’s own scope, then the W’s will need to meet the additional cost themselves unless they satisfy either Southern Response or this Tribunal that Southern Response’s figure is unreasonable.

[20] It appears from the W’s submission, however, that the real issue in contention is whether it was unreasonable of Southern Response to refuse to meet the cost to be incurred by the W’s when they instructed their engineers, but they have been paid an undisclosed sum for those professional fees, and I do not have the information I need to decide whether that amount is sufficient to meet the professional costs incurred.

[21] I am aware that this is a contentious issue that needs to be better argued than it has been in these submissions. I can also see that the W’s consider that Southern Response has breached

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<sup>5</sup> *Ginivan v Southern Response* at [26]

<sup>6</sup> *Ginivan v Southern Response* at [27]

its obligations to them in many other ways, but I am not willing to entertain submissions about that without first hearing evidence. In those circumstances, I consider that all the W's complaints, including the issue of the experts' fees, should be dealt with together rather than in a piecemeal fashion.

## **Conclusion**

[22] As I suspected at the case management conference, the parties have a very similar view of the process, but quite different perceptions about how it has been implemented. That is a matter for another day.

A handwritten signature in blue ink, appearing to read 'C P Somerville', written in a cursive style.

C P Somerville  
Chair  
Canterbury Earthquakes Insurance Tribunal