IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-0020-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	W AND W Applicant
AND	SR Respondent

PRELIMINARY DECISION OF C P SOMERVILLE
[EFFECT OF JOINT ENGINEERING REPORT]

11 September 2020

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[1] It was agreed at the first case management conference on 11 June 2020 that the Tribunal would determine a preliminary issue after receiving written submissions. A bundle of agreed

documents has been prepared and filed. The parties have now filed their submissions on that preliminary issue as directed.

The issue

[2] The Tribunal's minute of 11 June 2020 described that preliminary issue as:

> Is SR prevented by an agreement recorded in the JER from proposing to repair the global foundation settlement by any method other than the construction of a foundation overlay?

[3] It is apparent from counsels' submissions that the answer to this question depends on the answer to three subsidiary questions:

(a) Did the parties intend to be bound by any agreement recorded in the Joint Engineering Report (JER)?

(b) Is SR estopped from resiling from any agreement recorded in the JER?

(c) Even if the parties are not bound by any agreement recorded in the JER, did S R act unreasonably in failing to ratify that agreement?

Background

[4] The applicants' home at Christchurch, was damaged by an earthquake in the Canterbury earthquake sequence. However, which earthquake was not made clear. The applicants say in their application that it was the earthquake of 4 September 2010 but the engineer they consulted in 2017 attributed the damage he observed to the earthquake of 22 February 2011. Whichever earthquake it was, the progress of the claim was very slow.

[5] The Earthquake Commission (EQC) took until early 2014 to decide that the cost of repairing the damage to the applicants' house exceeded its cap. The applicants' insurer, SR, then began its own investigation, receiving structural engineering reports from ANZL on 18 December 2015 and 14 January 2016. The applicants sought their own structural engineering report from SL but did not receive it until 1 December 2017. It was not until 6 December 2017 that each party had a full set of structural engineering reports.

[6] The applicants' house is on a back section and borders a watercourse. By the time ANZL and SL provided their respective reports they were aware that global settlement, caused by the Canterbury earthquake sequence, had caused the ground floor level in the house to sink below the Christchurch City Council's flood management minimum floor height by about a metre, leaving it subject to periodic flooding.

[7] The first three pages of SL's report outlined the brief it had received from the applicants and then defined its "performance criteria" which included its understanding, in structural engineering terms, of reinstatement to an "as new" standard. It then summarised the geotechnical issues derived from a geotechnical report obtained by the applicants, before identifying and analysing structural earthquake damage in the building. From this analysis, SL concluded, among other things, that foundation replacement was the only viable option that would result in acceptable structural reinstatement.

[8] By contrast, ANZL's reports were silent about the instructions it had received from EQC. Nor did it identify its "performance criteria". But its conclusion, that neither partial nor complete removal of the foundation was required, was clearly based on the application of the MBIE Guidance.

[9] It is apparent from both reports, that the authors (Rakovic for SL and Howard for ANZL) were aware that replacement foundations would need to comply with the Christchurch City Council's flood management levels, but repairs would not.

[10] The parties subsequently agreed on a process whereby the engineers would meet to reach agreement on the extent of the earthquake damage to the property and the remediation strategy to repair it. They prepared a written one-page document recording the agreed objectives for the meeting, its terms of reference, and the design criteria to be used. The two engineers signed this document, met on 18 May 2018, and eventually prepared a 16-page report referred to since as the JER.

[11] Finally, this claim involves several controversial legal issues:

(a) SR's obligations under the "as new" policy standard;

(b) the extent to which the applicants' policy with SR responds to land damage; and

(c) the legal relevance of MBIE's Guidance document when assessing structural earthquake damage.

Principles of contractual interpretation

[12] Interpreting contracts is a fraught exercise in which different courts can come to different conclusions about the meaning of the same phrase, often influenced by the background and experience of the judge. The principles of interpretation, however, are now fairly clear and are summarised in the following passage:[1]

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words… in the documentary, factual and commercial context. That meaning has to be assessed in the light (i) of the natural and ordinary meaning of the clause, (ii) any other relevant to provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial commonsense, but (vi) disregarding subjective evidence of any party's intentions.

[13] As Professor D McLaughlan said in *Contracts don't always "mean" what they say:*[2]

> For the above reasons contract interpretation is often described as a "unitary exercise". This means that the document, its context and the commercial consequences of the rival intentions are indispensable and inseparable components of the interpretation process. Thus, one does not ask whether the words in dispute have a particular meaning and then seek to determine whether that meaning is *displaced* by the context.

[14] Even though more weight may be given to the context where formal agreements are prepared without professional advice than would be the case where the parties had the assistance of professional advisers, there remains the possibility that logic and coherence may be affected by the conflicting aims of the parties, failure of communication, differing drafting practices, or deadlines which require compromise.[3]

[15] In the United Kingdom, the courts consider that, although the ordinary meaning of the language used by the parties is not likely to be departed from, that meaning may not be

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[1] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [15].
[2] David McLauchlan "Contracts don't always "mean" what they say" (2019) 227 NZLJ 227 at 228.
[3] *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [13].

conclusive if a reasonable person would conclude that such a meaning would be anomalous or "uncommercial" and cannot have been intended by the parties.[4]

[16] The position in New Zealand, however, appears to be less liberal, with the Court of Appeal in *Malthouse Ltd v Rangatira Ltd* expressing support for the comment made by the majority of the Supreme Court in *Firm Pi 1 Ltd v Zurich Australian Insurance Ltd* that:[5]

> where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.

Subsidiary question 1: Did the parties agree to be bound by the JER?

[17] The agreement between the parties to convene a conference of the engineers is not recorded in a formal written document. Identifying the nature of that agreement and its terms requires an examination of the surrounding circumstances, the correspondence between the parties, and the written document prepared by the parties for signature by the engineers.

[18] The most relevant contextual circumstances are:

(a) this agreement was reached in 2018, more than seven years after the first earthquakes in the Canterbury earthquake sequence;

(b) the agreement was negotiated by two people (Ms Davidson, a lawyer representing the applicants and Mr Hurrell, a claims specialist for SR) who were experienced in dealing with insurance claims arising from the Canterbury earthquake sequence;

(c) both would have been aware of the controversial legal issues involved in this claim and would have possessed the expertise to understand the reasoning and conclusions contained in the parties' respective structural engineering reports; and

(d) both would have encountered similar situations before.

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[4] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 899.
[5] *Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621 at [24]; and *Firm Pi 1 Ltd v Zurich Australian Insurance Ltd (t/as Zurich New Zealand)* [2015] 1 NZLR 432 at [93].

[19] It is also relevant that, when Engineering New Zealand members asked about the status of the MBIE Guidance and what consideration they should give to the standard of repair set out in insurance policies, they were told in December 2016 through an article on the Engineering New Zealand website:

> Engineers must be guided by the brief they receive from the client. It is not the engineer's role to make decisions, or advise, on the extent of the insurer's obligations.

[20] Finally, the High Court Code of Conduct for expert witnesses provides:

> **Code of conduct for expert witnesses**
>
> Duty to the court
>
> 1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
>
> 2 An expert witness is not an advocate for the party who engages the witness.
>
> [2A If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.]
>
> [2B In subclause 2A, conditional fee agreement has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.]
>
> Evidence of expert witness
>
> 3 In any evidence given by an expert witness, the expert witness must—
>
> (a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
>
> (b) state the expert witness' qualifications as an expert:
>
> (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
>
> (d) state the facts and assumptions on which the opinions of the expert witness are based:
>
> (e) state the reasons for the opinions given by the expert witness:
>
> (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
>
> (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.

4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.

5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to confer

6 An expert witness must comply with any direction of the court to—

(a) confer with another expert witness:

(b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:

(c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.

7 In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.[6]

[21] The table below shows matters of relevance obtained from an examination of the emails between the parties:

Date	**Author**	**Text**
19-3-18	Davidson	We believe it may be more productive to arrange a meeting between the engineers to attempt to narrow issues…
28-3-18	Hurrell	I can confirm that Lee Howard from ANZL is happy to meet with Lee Rakovic to narrow the issues between them.
5-4-18	Davidson	It is apparent… that differences between the parties can, at least in part, "be attributed to the difference in understanding of the concepts of damage and "as new". Obviously it would be preferable if we can reach an agreed position on the legal definitions of "damage" and "as new" and, subsequently, for an agreement to be reached between the engineers as to how these definitions should be applied in the structural engineering context. This will help to narrow the issues in this matter, and hopefully reduce the prospect of (and at least the scope of) disagreement between the parties.

[6] High Court Rules 2016, sch 4.

11-4-18	Hurrell	… I can confirm that Lee Howard from ANZL is happy to meet with Zoran Rakovic to narrow the issues between them…
24-4-18	Hurrell	As also discussed [in our recent phone discussion], I do not feel it is productive or indeed the appropriate forum, to continue discussing the legal interpretation of "as new" or damaged by email correspondence. This is particularly relevant to how the engineers apply the definitions, as per [your] email below, because it is not the engineer's role to make decisions, or advise, on the extent of the insurer's obligations.
3-5-18	Davidson	Further, we note that our clients are minded to ensure that this meeting is as productive and efficient as possible, with a view to narrowing the issues between the parties for determination in order to progress the claim. As such, please find attached a proposed agenda document for the engineers, confirming the objectives of the site visit and the basis on which they are meeting. We note that on a without prejudice basis, our clients are prepared to instruct Zoran Rakovic to proceed on the basis of the "damage" and "as new" definitions supplied by SR as set out further in the attached document, in order to minimise any areas of potential disagreement and progress this matter as effectively as possible.
3-5-18	Hurrell	Also, Lee pointed out that although this claim is not before the courts, the High Court Code of Conduct for Expert Witnesses is noted, however both Zoran and Lee are bound by the Code of Ethical Conduct from Engineering New Zealand.
10-5-18	Hurrell	Please refer to the attached signed meeting agenda form. Also, I support Lee's request that the meeting next Friday is held on a without prejudice basis, with the joint report produced to be the record of the engineers discussions during the meeting.
10-5-18	Davidson	… We confirm that our clients instructions are as follows: • discussions between the engineers at the meeting on Friday, 18 May 2018 are without prejudice; • any joint position statement (or report) agreed between the engineers following the meeting is without prejudice to the insureds' position (on the basis that the insureds have instructed the experts to use the SR definition of "as new" on a without prejudice basis for the purposes of this meeting only, as set out in the Meeting Agenda document);

		• any joint position statement (or report) agreed between the engineers following the meeting is otherwise an open document (except as to the insureds' position, as set out above).
10-5-18	Hurrell	Yes, I agree the email below is a record of the conversation regarding how the engineers will engage during there [sic] meeting and the final report they produce will be an open document. However, the wording around the insured's or your clients position on the definition of "as new" did not form part of our conversation, as per .2 of your email below.
10-5-18	Davidson	I do not agree with your comment below that discussion of our client's position did not form part of our earlier conversation. I expressly noted that given our clients' position that they are agreeing to the use of SR's definitions on a without prejudice basis for the purpose of the engineers meeting only, my instructions were that any joint report produced by the engineers is without prejudice to our clients' position in that regard.
10-5-18	Hurrell	Yes, apologies for the misunderstanding, I confirm I agree with the points in your email below.

[22] The Meeting Agenda signed by the two engineers is attached as Appendix A.

[23] The genesis of this process of consultation by the engineers, was Ms Davidson's suggestion on 3 April 2018 that such a meeting would "help to narrow the issues in this matter and, hopefully reduce the prospect of (and at least the scope of) disagreement between the parties."

[24] Ms Davidson repeated this sentiment in her email of 3 May 2018 when she produced the proposed agenda for the meeting "with a view to narrowing the issues between the parties for determination in order to progress the claim."

[25] The Agenda itself recorded that the meetings objective was for the engineers to discuss and attempt to reach agreement on the extent of earthquake damage to the property and on a remediation strategy to repair the earthquake damage to the required standard of remediation.

[26] Quite clearly, Ms Davidson did not envisage that the meeting would see agreement being reached on every issue, but she was hopeful that it would reduce the number of issues in

dispute. An examination of the report eventually prepared reveals that this was a realistic expectation, with agreement being reached on some issues and not on others.

[27] The Agenda also set out the terms of reference for the meeting, but there is conflict between these provisions, some of which point towards an agreement which would bind the parties and others of which leave the parties with a discretion as to whether to honour the agreement.

[28] In the first category, are the undertakings given by the engineers:

(a) to engage in good faith and endeavour to reach agreement;

(b) to perform their roles objectively and independently; and

(c) that they had been authorised by their respective clients to reach agreement on the structural aspects of the property within their area of expertise and competence and within the bounds of the agreed design criteria.

[29] In the second category are:

(a) ANZL statement that it was not its role to advise on the extent of SR's obligations; and

(b) SL statement that its use of SR's definition of "as new" was for the purposes of this meeting only and was made on a "without prejudice basis".

[30] A reasonable observer, aware of this background and familiar with the correspondence, would perceive that the process developed by the parties and recorded in the Meeting Agenda was intended to be an improvement on the normal JER process adopted by the High Court. The parties were not in litigation and were presumably hoping to avoid that. Instead, they were wanting to develop an agreed engineering scope of works as a preliminary step towards the repair of the applicants' home.

[31] They each authorised their respective engineers to reach agreement on structural engineering issues and, in the spirit of compromise, neutralised the controversial legal issues by itemising the Design Criteria they were authorised to apply.

[32] To protect themselves:

(a) the applicants recorded that their acceptance of the SR definition of "as new" was without prejudice; and

(b) SR limited the scope of any potential agreement to "structural aspects" of the property that were within the engineers' expertise and competence, reminding the engineers that it was not within their role to advise on the extent of SR's obligations.

[33] This was made clearer in the exchange of emails on 10 May 2018 which concluded with an understanding that:

(a) the discussions between the engineers of the meeting were without prejudice; and

(b) the report of any agreement was without prejudice to the applicants' position but was otherwise an open document.

[34] Clues about what was intended by the parties can be found in the use of the expressions "without prejudice" and "open document", which appear to be treated as opposites.

[35] The Dictionary of New Zealand Law defines "without prejudice" as meaning:[7]

> 1. A statement or offer made without an intention to affect the legal rights of any person. A statement is inadmissible in a civil action if it is made upon an express or implied condition that evidence of it is not to be given. A letter marked without prejudice protects both subsequent and previous letters in the same correspondence. See the (NZ) Evidence Act 2006 s 57 (privilege for settlement negotiations or mediation).
>
> 2. Without dismissing, damaging or otherwise affecting a legal provision or interest. The phrase "without prejudice" is commonly used in statutory provisions to preserve other legal provisions or rights. See the (NZ) Crown Proceedings Act 1950 s 35 (saving of certain rights).

[7] Peter Spiller *Dictionary of New Zealand Law* (9th ed, LexisNexis, online) at "without prejudice".

[36] With that definition in mind, I consider that a reasonable observer aware of the background and the correspondence, would have understood that the parties had agreed that evidence could be given of any statement described as "open", but not of any statement made "without prejudice".

[37] But that begs the question about whether the parties are bound by any agreement reached by the engineers. As the W's have said, they would not have invested so much time, effort and money in the process if the meeting of the engineers was simply to narrow issues but still leave SR open to select any repair method preferred.

[38] When the same issue was encountered by the High Court in *C & S Kelly Properties Limited v Earthquake Commission,* it favoured the foundation repair strategy agreed to by the experts in the JER but did so by finding that the homeowners had not established that further foundation works were required, rather than by ruling that the parties were bound by the agreement reached between the engineers.[8]

[39] From a common-sense point of view, it is hard to understand why either the homeowners or their insurers would agree to be bound by a process over which they did not have, and were prevented from having, any control.

[40] On the one hand, the meeting of the engineers could be treated as simply an exercise in which two witnesses with the same expert qualifications held independent discussions to refine their views in the hope that the engineering issues in dispute might be reduced by them, agreeing on some issues, on which they had previously disagreed. Their reasons for continuing to disagree on other items would be clarified for the benefit of the parties and the Court.

[41] On the other hand, many claims progress through a process during which issues are progressively agreed. For example:

(a) Is the floor dislevel?

(b) Was that dislevelment caused by an earthquake?

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[8] *C & S Kelly Properties Limited v Earthquake Commission and Southern Response Earthquake Services Limited* [2015] NZHC 1690.

(c) How is that damage to be repaired?

[42] Each step is built upon the agreements reached in the step before. Many of the Tribunal's claims have progressed in this fashion, even those such as *M v IAG New Zealand Ltd* and *B R L v Earthquake Commission & IAG New Zealand Ltd*.[9] Chaos would result if, at the end of the negotiation process, parties were able to resile from agreements reached earlier in the process.

[43] It makes better commercial sense if the agreements referred to in the preceding paragraphs are agreements reached by the parties and not their expert witnesses. The process might start by the expert witnesses conferring but would not be complete until the parties themselves had reviewed the JER and decided whether an agreement could be reached between them. For example, the homeowners might decide that the agreement between the engineers did not accord with their understanding of the policy standard. Similarly, the insurer might decide that the engineers had agreed on matters outside their expertise. In either case, there would be no agreement between the parties, despite their engineers recording an agreement in the JER.

[44] That interpretation is supported by the steps the parties took to protect themselves as outlined in [32] and is bolstered by:

(a) the parties' constant reference to the conferral as a "meeting";

(b) the form of the only written document as an "agenda" rather than an agreement;

(c) the absence of any of the normal clauses one would expect to see in an agreement to arbitrate; and

(d) the signing of the document by the engineers rather than the parties.

[45] When all of this is considered, I conclude that a reasonable observer aware of the background and the correspondence, would have understood that the parties did not consider themselves to be bound by any agreement recorded in the JER.

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[9] *M and M v IAG New Zealand Ltd* [2019] CEIT 0047; and *B R L v Earthquake Commission & IAG New Zealand Ltd* [2020] CEIT 0051.

Subsidiary question 2: Are the parties estopped from resiling from any agreement reached?

[46] The doctrine of estoppel has been developed to protect:[10]

> … against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted.

[47] Estoppel will be established on proof of the following elements:[11]

> (a) a belief or expectation by [A] has been created or encouraged by words or conduct by [B];
>
> (b) to the extent an express representation is relied upon, it is clearly and unequivocally expressed;
>
> (c) [A] reasonably relied to its detriment on the representation; and
>
> (d) it would be unconscionable for [B] to depart from the belief or expectation.

[48] All these elements must be proven to justify relief. The courts in New Zealand have been flexible in applying this principled approach as estoppel is a remedy governed by equitable concerns about good conscience.[12] As Mander J said in *Doig v Tower Insurance Ltd*:[13]

> A mere failure to fulfil an expectation was not by itself sufficient to found an estoppel. Whether the detriment was sufficient to found an estoppel was to be judged by whether it would be unjust or inequitable to allow the assurance to be disregarded.

[49] Mander J further said:[14]

> It is not the existence of an unperformed promise or failed expectation that requires equity to intervene but the detrimental consequences to the plaintiff arising from having acted upon the expectation.

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[10] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [72]; as cited in *Commonwealth v Verwayen* (1990) 170 CLR 394, (1990) 95 ALR 321 at [409], as cited in *Sidhu v Van Dyke* [2014] HCA 19, (2014) 308 ALR 232 at [1].

[11] *Doig v Tower Insurance Ltd* [2018] 2 NZLR 677 at [15], applying *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 12, at [44], applying *Burberry Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 at 361; and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86.

[12] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 12, at [75]; and R P Meagher, J D Heydon and M J Leeming (Eds) *Meagher Gummow & Lehane's Equity Doctrines & Remedies* (4th ed, Butterworths, Australia, 2002) at 17 - 75.

[13] *Doig v Tower Insurance Ltd*, above n 14, at [678].

[14] *Doig v Tower Insurance Ltd*, above n 14, at [49].

[50] If an estoppel has been established, then the remedy need only be sufficient to remedy the injustice. No more or no less; just enough as to avoid the detriment which the party would have suffered in relying and acting upon the promise.[15] A court should only award a remedy for equitable estoppel if by not doing so would cause an injustice and would be unconscionable for the promisee.[16]

[51] The W's contend that:

(a) the email correspondence between the parties during the first half of 2018 amounts to a representation by SR that it was willing to be bound by the expert agreement recorded in the JER;

(b) this representation was clearly and unequivocally expressed;

(c) the Ws' reasonably relied on this representation to their detriment by incurring costs of $27,730.49 with their lawyer and their engineer in connection with the JER; and

(d) it would be unconscionable for SR to depart from the belief/expectation that it created in its dealings with the W's.

[52] They further contend that it would be sufficient relief if the Tribunal were to

(a) hold SR to the agreement recorded by the experts in the JER; and

(b) require SR to refund to the W's the costs of $11,073.41 they have incurred since the JER which they would not have incurred had SR honoured its representation.

[53] SR denies representing that it would be bound by any agreement made between the engineers and disputes the W's' claim to have acted to their detriment on the alleged representation.

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[15] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 12, at [78].
[16] At [115].

[54] Assuming for the purposes of this preliminary decision, as I must, that the W's genuinely believed that the alleged representation had been made by SR, then I consider that they acted reasonably when they instructed their lawyer to make the necessary arrangements and instructed their engineer to meet with his opposite number to prepare a JER. By incurring legal and engineering costs in that process, they acted to the detriment.

[55] However, the difficulty for the W's, is that they have failed to establish that SR represented that it was willing to be bound by the agreement recorded by the experts in the JER. Not only is that representation neither clearly nor unequivocally expressed, but, as my analysis in connection with the first preliminary question establishes, SR made no such representation. Although it authorised its engineer to meet with the Ws' engineer to reach agreement on the structural aspects of the property, both parties protected themselves by issuing caveats. The engineers themselves acknowledged that it was not their role to advise on the extent of SR's obligations. The parties reserved the right to review the agreements recorded in the JER and decide whether to ratify them.

[56] I find, therefore, that SR did not represent that it was willing to be bound by the expert agreement recorded in the JER. Thus, there is no justification in equity for providing the W's with the equitable relief they seek.

Subsidiary question 3: Did SR act unreasonably in failing to ratify any agreement reached?

[57] Absolute discretions vested in an insurer under its policy "must be exercised in a way that is not capricious, arbitrary or unreasonable."[17] Such decisions do not occur in a vacuum. In deciding whether an insurer has acted unreasonably in exercising its discretion, the court is entitled to look at several factors, including whether the insurer has had due regard to the interests of the insured, as a mortgagee would do when exercising a power of sale of mortgaged property. Anything less would allow an insurer with an obligation to act with the utmost good faith to wield unbridled power, which would be unconscionable.[18]

[17] *C & S Kelly Properties Limited v Earthquake Commission*, above n 10, at [68].
[18] *M v IAG New Zealand Ltd*, above n 9, at [17], [18] and [21].

[58] The process I have outlined in [43] involves the insurer deciding whether to ratify an agreement on structural engineering matters recorded in a JER. For the reasons given in the previous paragraph, this discretion cannot be exercised unreasonably.

[59] The W's contend that SR has acted unreasonably when it refused to ratify the agreement recorded in the JER. The section of the JER upon which they rely is set out in Appendix B.

[60] The engineers agreed about the following earthquake damage to the foundations:

(a) global foundation settlement at between 113 mm to 153 mm across the ground floor slab; and

(b) measured floor level variations at ground level totalling 40 mm.

[61] As counsel for SR has pointed out, "global settlement" is used to refer to the situation where the land in an entire area is at a lower level after the earthquakes than it was before, when compared to an objective datum level. The measured floor level variation of 40 mm referred to in the JER is commonly referred to as "differential settlement", being the variation between the highest point of the floor and the lowest point. Although differential settlement can be caused by several factors, the inclusion of this damage under the heading "earthquake damage" indicates that the engineers agreed that at least some of that differential settlement was caused by the earthquakes.

[62] The engineers considered two distinct options for repairing the floor dislevelment:

(a) option one involving the construction of a foundation overlay by lifting the house off the existing foundation until the underside of the bottom plate is returned to its level before the earthquakes; and

(b) option two involving relevelling the foundation via mechanical jacking on temporary screw piles.

[63] However, it is not easy to determine the level of agreement reached between the two engineers. Mr Howard answered "Yes" in the "Repair agreed" column for both options whereas Mr Rakovic answered "Yes" to option one but "Possibly – Conditional on receiving

further satisfactory information" to option two. Therefore, on the face of it, the only repair agreed to by both engineers was option one. Certainly, that is what the W's believe.

[64] However, this is a simplistic analysis which, if accepted, would cause difficulty every time two engineers met in a conferral. For example, imagine if the homeowner's engineer considered that the appropriate policy response involved rebuilding the house whereas the insurer's engineer believed that a repair would be sufficient. If you asked both engineers whether a rebuild of the house met their agreed "as new" policy standard, they might both agree that it did, but when it came to deciding whether repairing the house would do so, although the insurer's engineer might say that it did, the homeowner's engineer might disagree. Just because the only thing they agreed about was that rebuilding met their agreed "as new" policy standard does not mean that they agreed that the house should be rebuilt. The only sensible conclusion is that they have failed to agree. Even if those engineers agreed that both options, rebuilding and repairing, met the agreed "as new" policy, they have not agreed which course should be taken.

[65] Almost invariably, a conferral of the engineers is mooted when more than one repair strategy has been recommended. If the result of their discussions is that they settle on a particular method for repairing the earthquake damage, then they have reached agreement on the repair method. The insurer must not act unreasonably if it decides not to ratify the agreement reached by the engineers.

[66] If the result of their discussions is that they settle on more than one method for repairing the earthquake damage, then the insurer can choose between those repair methods, so long as it does not act unreasonably when doing so.

[67] If their discussions do not result in any agreement, the dispute about the repair method remains as it was before the conferral.

[68] The challenge in the present case, is to identify which of those three categories applies to the engineers' discussion about relevelling strategies.

[69] There are several significant matters recorded in the section of the JER that deals with dislevelment:

(a) two options are recorded;

(b) Mr Rakovic is recorded as favouring a third option, foundation replacement, as his preferred option if a building consent cannot be obtained for option one;

(c) there is no record of Mr Howard's preferred option if a building consent cannot be obtained for option one;

(d) Mr Howard has commented that option one requires "significant consequential works";

(e) although Mr Rakovic's views on that matter are not recorded, he noted in his December 2017 report to the W's that although lifting the house would be theoretically possible, it would be "riddled with challenges, including tight space to the boundary and size/complexity of the house";

(f) option one involves returning the bottom plate to "its level before the earthquakes" but Mr Howard has commented that there are construction tolerances of 15 to 20 mm and estimates that the house would need to be only lifted 20 to 25 mm to bring it back within "current construction tolerances";[19]

(g) Mr Rakovic has rejected the Smartlift method for option two but is open to considering the House Lifters method for that option;

(h) Mr Howard has recommended that a "specialist relevelling contractor" be asked to provide a method statement for option two "for approval by the Engineers"; and

(i) Mr Rakovic has indicated that, if that were to occur, he would need to have a separate discussion with the engineer proposing that method about "how 'as new' condition will be achieved."

[70] These factors indicate to me that:

[19] In another section of the JER, Mr Rakovic has noted that the construction tolerances could just as easily be added to the floor dislevelment as subtracted.

(a) further steps were contemplated before a final decision could be made;

(b) Mr Rakovic was contemplating an option that was not discussed; and

(c) no agreement on construction tolerances was recorded.

[71] Moreover, the comments in the right-hand column under both options record what each engineer said about each option and read more like reasons why they did not agree than why they did.

[72] I conclude from this that the engineers had not finalised their discussions and did not reach agreement about the appropriate repair strategy. But if this is the case, then what were they agreeing to when they both recorded "repair agreed" in relation to option one?

[73] I consider that this section of the JER is not a record of the agreement they reached but a record of negotiations that proceeded as follows:

(a) they began by discussing their respective reports to their clients, in which Mr Howard had recommended crack repairs and Mr Rakovic had recommended complete replacement of the foundations;

(b) they then moved to discuss two options, option one, probably proposed by Mr Rakovic and option two, probably proposed by Mr Howard;

(c) they both agreed that option one would repair the house to an "as new" functionality;

(d) they could not agree whether option two would repair the house to an "as new" functionality;

(e) Mr Rakovic indicated that he might consider option two as a contender if he were to receive further satisfactory information; and

(f) Mr Howard then proposed a method for obtaining further information, to which Mr Rakovic added a further step.

[74] I conclude, from that analysis, that the engineers did not reach agreement about the repair methodology they were discussing. The dispute about floor relevelling is as it was before the conferral.

Answer to the preliminary question

Question: Is SR prevented by an agreement recorded in the JER from proposing to repair the global foundation settlement by any method other than the construction of a foundation overlay?

Answer: No.

C P Somerville
Chair
Canterbury Earthquakes Insurance Tribunal

APPENDIX A

Meeting Agenda

Meeting for Friday, 18 May 2018 between structural engineering experts Zoran Rakovic (representing the insureds) and Lee Howard (representing the insurer) (together, **the Engineers**) for the property at [redacted] (**the Property**).

Meeting objective:

In accordance with the Terms of Reference and Design Criteria listed below, the objective is for the Engineers to discuss and attempt to reach agreement on;

1. The extent of Earthquake damage to the Property; and
2. Remediation strategy to repair the earthquake damage to the required standard of remediation (**the Required Remediation Standard**);

(set out further in Design Criteria below).

Terms of Reference:

1. The Engineers agree to engage in good faith and to endeavour to reach agreement on the extent of earthquake damage to the Property and the remediation strategy to repair the Property,
2. The Engineers agree that they must perform their roles objectively and independently in accordance with the High Court Code of Conduct for Expert Witnesses (copy attached).
3. The Engineers agree and accept that they are authorised to discuss and reach agreement on the structural aspects of the Property, within their area of expertise and competence and within the bounds of the below Design Criteria.
4. On a without prejudice basis, the insureds have instructed their expert to use the [redacted] definition of 'as new' for the purposes of this meeting only.
5. The Engineers acknowledge that it is not their role to advise on the extent of the insurer's obligations.

Design Criteria:

1. Definition of 'earthquake damage':
    a. Damage that has more likely than not been caused by the Canterbury earthquake sequence.
    b. For damage to have occurred there needs to be both a physical change to the building that is more than de minimis and an impairment to its value and usefulness.
    c. In considering the extent of earthquake damage, the structural functions of structural elements need to be assessed.
2. The Required Remediation Standard:
    a. The policy standard of 'as new' condition applies.
    b. The [redacted] 'as new' definition sheet (attached) that has been used by the insurers expert has been adopted by the insured, for the purpose of this meeting only, on a without prejudice basis in an attempt to reach agreement.
    c. All Building Work (as defined by the Building Act 2004) needs to comply with the current Building Act and Building Code.

Acknowledgment of receipt of instructions:

Zoran Rakovic

Lee Howard

APPENDIX B

Extract from Joint Engineering Report

Item	Earthquake damage	Repair to "as new" functionality	Repair agreed by L Howard	Repair agreed by Z Rakovic	Reasons for disagreement / comments
8a	Global foundation settlement as presented by Bonisch, from 113mm to 153mm across the ground floor slab. Measured floor level variations at ground level is 40mm (113 to 153mm). The first floor generally follows the fall of the ground floor with the exception of the first-floor area over the garage where there are some construction tolerance issues from the 2009 garage extension.	**Foundation repair - Option 1** Construct a foundation overlay (see sketch below). Relevel, replumb upper house structure – this will be effected via lifting the house off existing slab/foundation until underside of bottom plate is returned to its level before the earthquakes. Consequentially, the upper house structure is expected to resume its pre-earthquake geometry.	Yes	Yes	Mr Howard states: allowing for original construction tolerance of 15 to 20mm, the foundation is out of level by around 20 to 25mm, i.e. the amount of relevelling required to bring the foundation back to within current construction tolerances is estimated to be 20 to 25mm. He also notes that there are significant consequential works that will be required with this proposed repair approach. Mr Rakovic states that, if building consent cannot be obtained for this option, Option 2 (if demonstrated to be appropriate) and foundation replacement would be the next appropriate options.
8b	Ditto	**Foundation repair - Option 2** Relevel the foundation via mechanical jacking on temporary screw piles (House lifters / Smartlift or another specialist lifting contractor)	Yes	Possibly - Conditional on receiving further satisfactory information.	Mr Howard recommends that a specialist re-levelling contractor be asked to assess the property and to provide method statement for re-levelling for approval by the Engineers. Mr Rakovic states that objections to Smartlift have already been presented. House Lifters option is a possibility, but requires further detail. If another engineer will be demonstrating the compliance of the proposed relevelling method with the joint brief co-signed by Mr Howard and Mr Rakovic (e.g. "as new" standard), then Mr Rakovic needs to have a separate discussion with that engineer around how "as new" condition will be achieved.