IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL CEIT-0024-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	LS Applicant
AND	MEDICAL INSURANCE SOCIETY LIMITED Respondent

Date: 10 November 2020

Appearances: LS – applicant
A El Sawaf for the applicant
N Frith (in person) with O Brown and D Forman (via AVL) for the Respondent

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DECISION NO 1 OF MEMBER C D BOYS

[ELECTION TO REPAIR]

27 January 2021

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[1] This decision is about whether LS told his insurer, Medical Insurance Society Ltd (MIS), that he had chosen not to repair earthquake damage to his house, in such a way that his choice has fixed, or limited, his rights under the insurance policy. The legal name for this concept is election, but at its heart the issue is simply about whether a choice has been made that cannot be changed

BACKGROUND

[2] LS owns the house at XXXXX. He bought the house in 1997 and has rented it since, although it has been untenanted at times. At one stage, prior to September 2010, he lived in the house next door. At all relevant times the house was insured with the respondent, Medical Assurance Society, which has subsequently renamed itself MIS.

[3] The house is older, built in the 1930s in a style common at the time, timber framed, weatherboard clad, with internal brick chimneys, plaster on lathe linings, and concrete perimeter ring beam and piled foundations.

[4] While the extent of the damage is not an issue before me at this stage, it is important to note the effects of the Canterbury Earthquake Sequence (CES) events, as LS's claims for damage, and the parties' interactions regarding these claims, form the background to the election issue. The house was damaged by the 4 September 2010, Darfield earthquake, and the 22 February 2011, Port Hills earthquake.[1]

(a) The Darfield earthquake caused damage to the lathe and plaster linings, chimneys, and affected drainage and services.

(b) The Port Hills earthquake further damaged the chimneys (which were removed for safety reasons), caused more lining damage, affected the foundations (which suffered cracking and spalling), and caused material changes to floor levels.

[5] LS made claims to EQC and MIS for the earthquake damage. EQC assessed the damage and made payments as follows:

(a) for the Darfield event, $69,103.31, in addition to reimbursement of $2,176.46 for emergency repairs carried out by LS; and

(b) for the Port Hills event, $110,417.63, in addition to reimbursement of $3,432.37 for emergency repairs carried out by LS, in total bringing payments up to EQCs statutory cap.

[1] There may also have been damage from later aftershocks, but that damage is not relevant to this decision.

[6] What followed involved four years of correspondence between LS and MIS. This correspondence has relevance to the issue before me, and I discuss it in a detailed manner below. For background purposes I record that, beyond emergency repairs carried out to make the house habitable and safe, the house has not been repaired.

[7] The extent of the damage is disputed. MIS says that the foundations had settled, the house was in poor repair, and floors were out of level before the CES events. Therefore, any additional dislevelment, or foundation changes, are *de minimis*, that is the physical changes have not been significant enough to qualify as insured damage. The lack of agreement has led LS to make this application.

[8] In its response to the application, MIS say that LS made the choice not to repair and that his choice was communicated to MIS in a way, and under conditions, which mean he is bound by that decision. If MIS can prove this happened LS can only recover the indemnity value of the damaged part of the property. Under the particular policy wording, if LS has chosen to restore or rebuild the property, the policy will pay replacement value, the full cost of bringing the property to a condition substantially the same as new. If he has chosen not to restore or rebuild, the policy pays a bare indemnity, the economic value of the loss with reference to the age and condition of the damaged parts of the property. The argument that LS elected not to repair the damage has been raised as a defence to the application.

ISSUE

[9] I decided to hear this issue before any making directions regarding the substantive issue of the damage to the property. This Tribunal has been created with the purpose of providing fair, speedy, flexible, and cost-effective resolution of claims.[2] In this case, if election is made out, it appears that the indemnity value of the damaged property, at the time of loss, may not greatly exceed the payments already made by EQC. If defences are raised which may have the effect of substantially determining the issues between the parties, without further steps needing to be taken, the purposes of this Tribunal are fulfilled.

[10] During the initial case management conference, I identified the two questions to be answered in determining the election defence:

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[2] Canterbury Earthquakes Insurance Tribunal Act 2019, s 3.

(a) whether LS did, in fact, communicate to MIS that he did not intend to remediate the damage; and

(b) if LS did communicate that he did not intend to repair the damage, whether the circumstances of that discussion was an election in the context of the policy.

THE POLICY

[11] As with any insurance claim, the policy records the agreement about how the insurer will respond to a claim for an insured event. The terms of policy govern the relationship between an insurer and an insured, and any interactions must be viewed through the lens of the policy. In this case the words of the policy lend significance to the communications between LS and MIS, communications which, under a different policy wording, may not have been of importance at all.

[12] The relevant clauses from the policy:

> Our Undertaking
>
> Medical Insurance Society Limited undertakes that if, during any period for which the premium has been paid, any unintended and unforeseen physical loss or damage occurs or costs or losses arise which have been provided for by the Policy, its Schedule or any Renewal Advice, then the Society will compensate you in the manner and to the extent described.
>
> …
>
> A) Building
>
> 1) Rental Property – Replacement Value – When selected, the Society will cover the cost of rebuilding or restoring the rental property to a condition substantially the same as new, so far as modern materials allow, and including any additional costs which may be necessary to comply with any statutory requirements or Local Authority by-laws. There is no maximum sum insured but the liability of the Society shall not be greater than the reasonable cost to rebuild or restore the dwelling based on a floor area no greater than that declared in the proposal and specified in the Schedule.
>
> …
>
> In either case, if you elect not to rebuild or restore the rental property we will make a cash settlement not exceeding the indemnity value of the damaged part of the rental property, as assessed by a qualified valuer.

(the election clause)

> What this Policy Does Not Cover

…

Loss or damage caused by:

…

• Earthquake, natural landslip (as defined in the Earthquake Commission Act 1993), volcanic eruption, hydrothermal activity, tsunami, or fire following any of them. This exclusion does not apply to Type of Cover c) Disaster Cover Excess of EQCover.

…

C) Disaster Cover Excess of EQ Cover

This cover extends the Policy to include loss or damage by earthquake, natural landslide (as defined in the Earthquake Commission Act 1993 (Act)), volcanic eruption, hydrothermal activity, tsunami or fire following any of them, as follows:

• Where the Insured Property is covered under the Act then, to the extent that the loss or damage exceeds the liability of the Commission under the Act, the Society will pay the difference between that liability and the maximum amount payable under this Policy. The Society will not pay the excess under the Act.

[13] The schedule of insurance records:

Cover: Rental Property Replacement Size 170 sqm.

THE ELECTION DEFENCE

[14] MIS relies on the election clause. If LS did in fact elect not to repair the remaining damage, MIS's liability is only for the depreciated value of the damaged parts of the house. LS denies telling MIS that he was not going to repair the remaining damage, and says that, even had he done so, the circumstances of that communication are not such that he made a binding election.

[15] Election clauses are not uncommon in insurance policies. They allow a nominated party to the contract of insurance, usually the insurer, to decide how a claim will be assessed or resolved. To provide certainty around these decisions the law has developed a rule that, once a choice has been made between two, or more, possible options and the choice communicated, that choice cannot be changed. Election acts as a one-way valve.

ONUS OF PROOF

[16] As MIS seeks to rely on the alleged election, it must prove that the two questions at [10] above are answered in the affirmative. This involves a factual question of what was said,

and an interpretive question of how the law should be applied in these circumstances and under this policy wording. I deal with the legal issues first.

[17] There is a degree of agreement between the parties about the legal requirements for an election to bind an elector. However, they differ on points which add nuance to those requirements.

INTERPRETATION

[18] Applying the rule of election in this case also involves the interpretation of the policy. Insurance policies are governed by the normal rules of contractual interpretation. In the words of Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[3]

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

[19] Tipping J also set out that the interpretation of the words must include consideration of the circumstances in which the contract was made. The Supreme Court approved the approach taken by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society*.[4] This approach requires that the background circumstances of the contract are considered when interpreting its terms. In this instance the contract is a consumer level, home insurance policy. The policy must be read to take account of, amongst other things:

(a) the relative imbalance in understanding and legal sophistication between the parties;

(b) the objective intention of the parties in offering and accepting insurance cover for a domestic dwelling; and

(c) that technical, legal or jargon terms and words may be understood by one side but not at all by the other.

[20] The majority of the cases on the issue of election in an insurance context consider whether an *insurer* has made an election. This does not mean that the rule cannot be applied

[3] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [19].
[4] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912–913.

to an election by the *insured*. However, that the elector is a consumer insured means the context has relevance to how both the policy should be interpreted, and how the rules of election should be applied. I discuss this below.

DOMENICO

[21] In *Domenico Trustee Ltd v Tower Insurance Ltd*, Gendall J considered the issue of election in some detail, reviewing the relevant authorities.[5] Under the heading "What is an election?", he made the following observation:[6]

> The concept of election arises in many contexts. Its fundamental premise is that where a party has an option as between two or more inconsistent rights, when he or she selects one of them, that decision is irrevocable and there can be no resiling, as the other options irretrievably disappear from the moment the election is made.

[22] His Honour set out the elements of election:[7]

> (a) [E]lection is an irrevocable act between two or more inconsistent rights that must be unequivocal, unqualified and communicated to the other party;
>
> (b) the assessment as to whether there has been an election is evaluative in nature, drawing upon the entire factual matrix of the particular case;
>
> (c) an election can be made either by words or conduct. The test is whether the reasonable bystander would consider the totality of the actions of the party entitled to elect meet the threshold of election;
>
> (d) the electing party must be apprised of all relevant facts and information such that it is in a position to make an informed election;
>
> (e) the act is unilateral and needs no agreement from the insured – the responsibility for making an election therefore rests solely upon the party entitled to do so, including the requirement to do so in a timely manner;
>
> (f) a mere offer to settle a claim without more will not ordinarily amount to an election; [and]
>
> (g) the making of inquiries by the insurer, even where it creates expectations upon the insured, will not ordinarily amount to an election…

[23] There was an additional step, regarding delay, however this was rejected on appeal while the other elements were approved.[8]

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[5] *Domenico Trustee Ltd v Tower Insurance Ltd* [2015] NZHC 981 at [37]–[75].
[6] At [37] (footnotes omitted).
[7] At [71] (footnotes omitted).
[8] *Tower Insurance Ltd v Domenico Trustee Ltd* [2015] NZCA 372.

[24] I clarify Gendall J's point above at (a) regarding the inconsistency of rights. Some choices may be between rights where the exercise of one makes the other a practical or legal impossibility. The discussion of rights being mutually incompatible appears to come from cases regarding election through affirmation, rather than election as the exercise of contractual discretions. Affirmation captures situations where a party has elected to continue a contractual relationship,[9] despite having the right to cancel or avoid the contract.[10] In such cases there is true inconsistency between the rights as a party cannot rely on an agreement while denying it exists.

[25] In this situation the issue is whether LS has chosen to exercise a contractual discretion, rather than whether he has affirmed the existence of the contract itself. Accepting an indemnity payment does not prevent LS from repairing damage at a later stage. The competing rights are not inconsistent to the degree that one cannot exist while the other stands. Why then should the choice be irrevocable?

[26] The answer from the cases, is that the rule provides fairness and certainty. From *Cape York Airlines v QBE Insurance (Australia) Ltd*:[11]

> A party called on to make an election is in a situation in which that party is "confronted" with a number of mutually exclusive courses of action (specifically in this case under a contract) between which the party must, in fairness to the other party, make a choice.

[27] There is another key difference between the affirmation cases and those regarding contractual discretions. There is commentary that affirmation may occur in situations where there is no evidence of subjective knowledge of the right to elect or subjective intention to make an election.[12] This occurs because the "choice" of, for instance, accepting premium payment for, or paying a claim against, a purportedly cancelled policy is completely inconsistent with that policy being cancelled,[13] so the law steps in to undo the purported cancellation. Where the choice is between contractual discretions, there must be subjective knowledge of the right to choose, otherwise an elector cannot be said to have made an informed choice as required by *Domenico*.

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[9] Or, through its conduct, is deemed to have elected.
[10] Cancellation or avoidance respectively being the remedies for fraud and non-disclosure.
[11] *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313 at [118].
[12] See D St L Kelly and M L Ball *Kelly & Ball Principles of Insurance Law* (online looseleaf ed, LexisNexis) at [5.0210.1].
[13] *Sargent v ASL Developments Ltd* [1974] HCA 40.

KNOWLEDGE

[28] The key consideration, to paraphrase *Domenico*, is what were the relevant facts and information LS needed to be aware of, so he was able to make an informed election? Gendall J uses the word "apprised", meaning informed or aware of, rather than "appraised", meaning having assessed the quality, value, or nature of. The consideration is what is an *informed* election in the circumstances.

[29] An issue with many of the case authorities, including *Domenico* is that they are about election by insurers. An insurer is deemed to know and understand a policy wording, which it authored, and to know of the legal concepts involved. This underlies the frequency of the application of the *contra proferentem* rule against insurers. An insurer will be professionally advised on legal issues, civil construction issues, quantum and building regulation issues. The damage sustained by buildings in the CES events and the remediation of those buildings have shown the complexities of engineering and building regulation issues involved. The natural disaster cover provided by the Earthquake Commission Act 1993, and the handling of claims by EQC provided another layer of complexity. As stated above, by 2013 insurers were well practiced in dealing with these complexities, individual consumer insureds were not.

Knowledge of the legal right to choose

[30] In the present case Mr Frith argues that LS is deemed to know of his contractual rights. He relies on commentary from *Kelly & Ball.*[14] This is consistent with the approach in *Sargent v ASL Developments Ltd.*[15] A party to a contract is deemed to know what the contract says, even if they have not actually read it.[16] *Sargent* also states that uncertainty as to the interpretation of the contract is irrelevant and that an informed election can occur without knowledge of the right to elect. This conclusion is due to the deeming of knowledge of the terms of a contract. However, reading *Sargent* and the commentary in *Kelly & Ball* leads me to conclude that only the knowledge of the existence of the right to choose can be deemed. There is no authority that knowledge of the effect of the choice can be deemed. Knowledge of the likely outcome of a particular choice is part of the factual matrix and is necessary for a party

[14] *Kelly & Ball*, above n 12 at [5.0210.1].
[15] *Sargent*, above n 13 at [28].
[16] Subject to the requirement that the contract does not contain "onerous or unusual" clauses; see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (EWCA).

to make a truly informed election. A choice cannot be "informed" if the elector does not appreciate the effects of their choice.

Knowledge of the facts giving rise to the choice

[31] Mr El Sawaf argued that LS must know of the extent of the damage and that the insurer will pay for the repairs, relying on *Western Trading Ltd v Great Lakes Reinsurance (UK) Plc.*[17] This case is not direct authority for the present situation as it is about the mechanisms for recovering incurred costs in a "to-pay" type policy, rather than election. However, it is useful by analogy. The level of knowledge required to make an informed decision in situations such as LS's may well include an appreciation of the scope and nature of the repairs. It may also involve knowledge of the quantum involved, particularly where the choice is between options with significant value differences.

[32] In-depth forensic knowledge of the damage and remediation required is unnecessary. However, a reasonable appreciation of the damage and the steps to remediate is necessary. From a practical point of view, the full extent of damage in earthquake cases is often not known until repairs are underway. Knowledge that the insurer will pay has relevance to incurring the costs of remediation work, but the issue in the present is choosing to do the work, not about incurring the costs.

A duty to inform?

[33] Mr El Sawaf argued that, at a minimum, MIS was under a duty to have a structural engineer's assessment of the damage and share it with LS. A geotechnical report with comment on the foundation was obtained but it was not shared with LS. This raises the issue of what steps an insurer is required to take to assess a claim and advise the insured. Mr Frith argued that the duty to provide relevant material did not crystallise as first LS needed to decide which path he would take under the policy.

[34] It has been held that an insurer with a contractual discretion is under a positive duty to accurately assess a claim, by asking the correct questions of relevant experts.[18] The problem here is that a domestic insured does not have the expertise, or means of obtaining and

[17] *Western Trading Ltd v Great Lakes Reinsurance (UK) Plc* [2015] EWHC 103 (QB) at [129].
[18] *Van der Noll v Sovereign Assurance Co Ltd* [2013] NZHC 3051 at [94].

interpreting, the information in the same way as an insurer does when presented with a discretion. An insured is required to prove their claim, however, in the modern domestic policy this goes to advising of the claim, co-operating with the assessment of the claim, and complying with requests for information. An insurer is obliged to assess its liability to fulfil its contractual duty to pay valid claims.

[35] In *Young v Tower Insurance Ltd*,[19] Gendall J found that Tower had agreed to be bound by the Fair Insurance Code (the Code). The Code sets out insurer's obligations to their insureds. MIS is, and was, a member of the Insurance Council of New Zealand and was bound by the provisions of the Code at all relevant times. There were two versions of the Code for the period in question; one issued in April 2011, and another in November 2013. Both versions state:

> When you make a claim, we will:
>
> …
>
> - explain what information you must give us to process your claim
> - explain the steps we will take while handling your claim
>
> …
>
> - keep you informed of the progress of your claim

[36] The Code recognises that an insurer has an obligation to advise insured claimants of process and informational requirements. It does no more than recognise the standards by which the industry has operated for many years. In the normal course of large-scale domestic claim events, house fires for instance, the insurer will assess the damage, advise the insured of the policy response, and often will work closely with the insured to remediate the damage. These steps are normally carried out by Loss Adjusters, either employed by or contracted to the insurer. The tens of thousands of such large-scale events which occurred in the CES placed strains on the capacity of the insurance industry. However, this does not remove the obligation to accurately assess the claim, and to explain the process to the insured.

[37] There is another analogous practice, that of the steps taken by insurers when settling claims on a full and final basis. Settlements often involve the insured taking on the risk that the settlement funds are inadequate to carry out the remediation and an element of compromise

[19] *Young v Tower Insurance Ltd* [2016] NZHC 2956 at [162].

between two differing positions. Because of the almost irrevocable nature of such settlements, the industry has almost universally adopted the practice of fully advising insureds of the effects of accepting the offered settlement and advising them to seek independent legal advice.[20] I see no practical difference between an insured's irrevocable acceptance of a settlement, and an insured making an irrevocable election. Given the choice is between outcomes whose monetary values could differ by several hundreds of thousands of dollars, the onus is on the insurer to ensure the insured understands their options. Given the insurer will rely upon the election and this may well be to its advantage, it would be in poor faith for it to be otherwise. This does no more than recognise normal industry practice.

[38] I find that an insurer in this situation is under a duty to:

(a) investigate its liability for the damage and provide the findings to the insured; and

(b) make sure the insured is aware of their right to make an election under the policy and explaining what the choice entails.

SUMMARY

[39] Taking the above into account I make the following observations:

(a) an insured elector is deemed to know of the existence in the contract of the right to elect, however, they cannot be deemed to know of the effect of their election;

(b) an elector must have actual knowledge of the event(s) which created the right;[21]

(c) the elector must have a reasonable appreciation of the differences between the options (such as the monetary value of each, or the timeframe for repair) such that they are able to make an informed choice between the options;

[20] See *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016 and *Prattley Enterprises Ltd v Vero Insurance Ltd* [2015] NZHC 1444.
[21] *McDrury v Luporini* [2000] 1 NZLR 652 (CA) at [13].

(d) where the elector is an insured party under a consumer contract of insurance, the insurer has a duty to ensure that the insured has a reasonable appreciation of the differences between the options and the effects election could have on the insured's rights;

(e) the elector's communication of their choice, whether it is communicated by words or actions, must be unequivocal;[22] and

(f) once a choice has been communicated it is binding on both parties.

ADMISSABILITY OF THE EVIDENCE

[40] I now apply the above to the facts of this case. As a starting point I must address the evidence and how it is to be dealt with in this matter. The evidence is comprised of LS's evidence, both in his brief and under cross-examination, damage reports, and the records of the communications between LS, EQC, and MIS. These records involve letters, emails, and notes recording phone discussions.

[41] The most significant record is the note (the file note) recording a discussion that occurred on 21 August 2015, between LS, and Q, an employee of MIS. MIS says that the file note records an unequivocal election by LS to not repair the property.

[42] Mr Frith advises that MIS approached Q to appear as a witness, however Q wanted payment to be a witness, beyond the witness costs which are recoverable under the Witnesses and Interpreters Fees Regulations 1974. Payment was refused, as it would be inappropriate for a party to pay a witness of fact (as opposed to an expert witness) for their evidence. Q has since "gone to ground".

[43] Mr El Sawaf has challenged the admissibility of the file note. He says that as Q is not appearing as a witness, the accuracy of the file note cannot be tested, and it is inadmissible hearsay.

[22] See Robert Merkin *Colinvaux's Law of Insurance* (10th ed, Sweet and Maxwell, London, 2014) at [10-074].

[44] Mr El Sawaf rejects the position that Q was not available. He relies on *Ithaca (Custodians) Ltd v Perry Corp*,[23] where the Court of Appeal considered a situation where a seemingly relevant witness of fact was not called to give evidence about the accuracy of business records. He invites me to follow *Perry Corp* and draw an adverse inference against MIS for choosing not to call Q. Mr El Sawaf says that the onus is on MIS to prove what was said during the discussion between Q and LS.

[45] Without Q present the file note is, of course hearsay. Chair Somerville dealt with this issue in *DGF Trust v IAG.*[24] The Chair observed that, while the Tribunal is not bound by the Evidence Act 2006, it is required to observe the principles of natural justice. An important aspect in that case was balance between the cost to subpoena unwilling witnesses, particularly those who have not been involved for a number of years, against the need for evidence to be relevant and reliable.

[46] Consequently, I use s 19 of the Evidence Act 2006 as a guide to how this matter can be approached. Section 19 allows hearsay statements contained in a business record to be admissible if:

(a) the author is unavailable;

(b) their recollections would not be useful because of the time which has passed since the record was created; or

(c) there would be undue expense or delay if that person was required to be a witness.

[47] In *R v Graham*,[25] Dobson J referred to the application of s 19 in situations where the content of a file note records something of a repetitive, non-distinctive, or mundane nature which the author could not reasonably be expected to recall.

[48] I briefly considered issuing a subpoena for Q before the hearing. However, there is questionable value in compelling Q to give evidence regarding a brief interaction he had over

[23] *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA).
[24] *DGF Trust v IAG (New Zealand) Ltd* [2019] NZCEIT 37.
[25] *R v Graham* HC Wellington CRI-2010-085-2538, 8 July 2011.

five years ago. My experience of the insurance industry leads me to note that staff such as Q may make a number of phone calls regarding policy renewals and other similar matters on any given day. By all appearances the discussion in question was unremarkable. Therefore, it is questionable whether Q would have any useful recollections. I note, as discussed below, that LS had no specific recollection of the conversation.

[49] Considering both party's submissions, MIS' reasons for not calling Q are reasonable, and I find no inference can be drawn against the failure to call him. The file note is admissible. The rest of the records were unchallenged.

THE RELEVANT COMMUNICATIONS

[50] As well as the documentary evidence LS appeared as a witness under oath giving evidence of his dealings with MIS. I found him to be a careful and accurate witness; for instance, he was frank in admitting when he was unable to recall what had been said in some of the conversations recorded in the documents.

[51] During the cross-examination and re-examination of LS, both parties focused to a degree on the exact words and phrasing used by LS, or MIS and its agents, in their communications. I did not find this forensic level of analysis useful. LS is not a lawyer or a person skilled in the technical aspects of insurance or construction. What is important, and what I need is to evaluate, is whether he made and communicated an informed choice to repair or not.

[52] The relevant records are considered chronologically:

(a) 4 March 2011, a file note of LS lodging the claim for damage with MIS. The note records that LS thought that the house was uninhabitable, and the damage was such that a structural engineer was necessary. It records that the brick wall "does not look good" and that the chimney was damaged. LS gave evidence that, at this time, he believed there were changes in the floor slopes in the property.

(b) 14 March 2011, TM Consultants inspection report. The report records that the lathe and plaster were damaged, the perimeter foundation was damaged;

requiring injection and patch repairs with structural mortar, and the house was not safe for occupancy until the chimneys were removed and ceiling plaster repaired. It recorded that the pile foundations needed to be inspected but were not accessible at the time.

(c) 30 March 2011, Mainland Claims Management inspection report. The report records damage to chimneys, fireplaces lathe and plaster, and cracking to the perimeter foundation.

(d) 7 April 2011, Richard Turnbull Builder invoice. LS arranged repairs involving; demolishing the chimneys, removing rubble, reframing walls, windows, and ceilings where the chimney and fireplaces were removed, repairing the floors at the chimney penetrations, and preparing ceilings for relining. LS's recollections are that this work was carried out because there was urgency to make house habitable for the tenants.

(e) 21 April 2011, email from MIS forwarding the Mainland report to LS. The email includes a comment that "EQC may decline to accept any recommendations from [the Mainland Claims Management] report as [EQC] generally do not accept reports other than those prepared by their own assessors".

(f) On 26 April 2011, LS wrote to EQC, enclosing the TM Consultants, Mainland loss adjuster, and Richard Turnbull documents referred to above. He stated "[w]ith all due respect I have organised the repairs of the (rental) property at the above address. These repairs are currently being undertaken." Under cross-examination LS said that:

> "[T]here was some urgency for those repairs to be carried out. If I can enlarge on that, the new tenants were due to move in on the day of the earthquake, in fact some of their possessions had been placed in the house. There were urgent repairs that were required, namely the collapse of the large chimney complex within the centre of the building and that was undertaken within a week… And the other repairs that were then undertaken or plans were made for them to occur at that time, were those of the lathe and plaster and replacement with gib, both the walls and the ceiling. So, I took it in my own hands to do that because I could see that EQC was, as I have already mentioned under a fair degree of pressure.

(g) 29 April 2011, EQC damage assessment. The recommended repairs proposed included; repairs to linings, relevelling of floors, replacement of the perimeter footing and internal piles. LS initialled each page of this assessment. Under examination he commented that he hadn't decided whether to carry out the foundation work at that point in time. He also stated that he did not recall the details of the assessment, in part because the assessment occurred as he was under pressure to complete tasks before leaving on an overseas trip. There was a costed version of this scope prepared by EQC, However, it was not supplied to LS until an OIA request was made in 2019.

(h) 29 June 2011, email from MIS to LS, advising that his request for re-imbursement of the cost to repair broken windows should be sent to EQC, as the claim was still under-cap.

(i) 19 July 2011, email recording a courtesy call made by MIS to LS regarding damaged carpet and minor cracking of the perimeter foundations from the 13 June 2011 event.

(j) 21 November 2012, email from MIS querying whether LS had completed the repairs himself, or if he would like MIS to manage the repairs. On 21 November 2012 LS advised: "some repairs have been completed wit[h] EQC payment. I have plans for the balance of work to be done using EQC payment, I do not require MIS to manage repairs." Under cross-examination LS said that his response; which was that he had plans to do the balance of the work using EQC payments, was made without realising the implications. He said that the plans that he had were "somewhat nebulous, it was an idea rather than actual concrete plan so to speak".

(k) 19 February 2013, an MIS employee and an engineering consultant from BECA met with LS on site. This visit was recorded in a file visit note authored by the engineering consultant, recording the description of damage to the house and noting that the "[h]ouse is currently tenanted and member does not want to disrupt tenants with internal repairs at this stage. He has used EQC payment to replace carpet throughout entire dwelling, one double fireplace and chimneys

has [sic] been removed". The employee sent an email on 26 July 2013, recording her notes. She found it to be a strange visit and was unsure whether LS was completely aware of the claims process. She recorded that LS asked if the claim was over cap and advised that he was working through the repairs. When asked if he was working from the EQC scope, LS confirmed that he was. In his brief of evidence LS states that he had a slightly different recollection of the damage recorded in the note and says that at no point did MIS advise him that the repair costs exceeded EQC's cap and would be payable by MIS. Under cross-examination in response to a question regarding whether by February 2013 he knew that the claim was over cap, LS answered "yes".

(l) 10 September 2014, an MIS employee left a phone message querying the repairs completed. From the context of this note it appears this query was relating to an underwriting decision about ongoing insurance for the property. The employee followed up on 22 September 2014.

(m) On 25 September 2014, LS responded to the above messages in an email. The email advises that "[r]epairs have been undertaken with the replacement of fibrous plaster in several rooms and the removal of a large cracked chimney, replaced by timber framework, and more plaster repair work after that. Completed within the first few months following the February 22, 2011 earthquake."

(n) 24 July 2015, letter from MIS headed "rental insurance renewal". The letter states "[w]e understand that the property suffered damage in the Canterbury Earthquakes and that you received a cash settlement from EQC to manage the repairs yourself". The letter goes on to request a copy of the EQC scope of works and confirmation that the repairs have been completed. The letter states that if the requested information is not provided by 16 March 2015 (although later document suggests that the date should be 16 August 2015), cover will cease after the policy renewal date.

(o) 21 August 2015, the file note recording the discussion between Q and LS. The note records that Q:

> Outlined our position in that home is in poor condition and has unrepaired EQ damage as well is deferred maintenance from before EQ's. He mentioned he has done some internal work (new paint etc), but not completed any of the structural work required to piles. EQC suggested lifting house and replacing all piles and ring foundation. **He said he does not intend to do this work**. (Emphasis added).

[53] LS's relevant sworn evidence:

(a) In his brief of evidence LS says that he does not recall the conversation with Q, but he accepts that it occurred. He gives reasons why he does not believe that the file note is accurate. However, these reasons are hypotheticals around what he may or may not have said, or asked, of MIS had the discussion been as the file note records it. I found these hypotheticals somewhat speculative and, given the brevity of LS's other communications with MIS, unconvincing.

(b) Under cross-examination LS stated that the internal works which were carried out were significant, rather than just a few coats of paint, and that, at the time of the phone conversation, he had done some of the internal work at the property but not the structural work. Under re-examination he said that, had he been asked to describe the work done, the response would have been more fulsome than that recorded.

(c) When I questioned LS on his intentions for the property he advised that, were he to be successful in this application, he would repair or reconstruct the house, although he was careful not to be drawn given the financial uncertainty around the practicality of either course.

(d) When I asked LS about the tenancy of the house he advised that the house was tenanted from shortly after the Port Hills earthquake until roughly mid-2015. The property was then vacant until the end of 2018.

(e) I asked LS about the personal effects of the CES events on him. He described being busy after the earthquake events in 2010 and 2011, saying that he felt at times, like he had a few balls in the air and was juggling a bit but he thought he managed to function reasonably well.

DISCUSSION

[54] The election clause says:

> In either case, if you elect not to rebuild or restore the rental property we will make a cash settlement not exceeding the indemnity value of the damaged part of the rental property, as assessed by a qualified valuer.

LS's knowledge of the facts

[55] During the hearing much was made of the status of various technical reports and what LS did or did not know regarding the state of the house after the earthquakes. I found much of the discussion unhelpful, because at its heart, the question of whether LS made an election or not does not turn on him having a forensic knowledge of the extent of the damage. However, to make an informed choice, he needed a reasonable appreciation of the scope of the damage and the work required to remediate as well as the likely indemnity should he choose not to repair.

[56] It is apparent from LS's actions; making claims to MIS and EQC, accurately describing the damage, and carrying out repairs to a portion of the damage, that LS had knowledge of the damage and an appreciation of the scope required to repair it, which was recorded in the EQC scope. However, he did not have an appreciation of the difference in value between the two options. This is because he had not been provided with the costed version of the EQC scope during the period in question, nor had a costing of the indemnity settlement been carried out.

[57] The discussion during the site visit of 19 February 2013 shows that LS was unsure of the claims process. During re-examination, LS said that he did not appreciate that the choice in the policy was irrevocable. I note that throughout the period in question, the claim records show a degree of confusion in the mind of LS as to the process by which EQC and MIS assessed and handled claims.

[58] Because the indemnity settlement had not been costed, MIS had not fully investigated its indemnity. Mr Frith said that this was because the duty to evaluate the claim crystallises only after the election has been made, however, I do not accept this. MIS needed to evaluate the claim properly before expecting LS to have made an informed choice. However, this did not occur. MIS knew LS was confused about the claim process but did not at any time explain

the options under the policy, or the effects of making an election to LS. MIS did offer managed repairs to LS, an offer which was declined, but the advice did not go far enough.

[59] In LS's case the house was tenanted for much of the time in question. Minor repairs; plastering and painting or targeted relevelling for instance, could be carried out without putting tenants to much inconvenience. Shorter terms breaches of a tenant's quiet enjoyment due to construction works are often acceptable to a tenant when accompanied by rent reductions. Major repairs, such as lifting a house to replace foundations, or relevelling which requires flooring to be lifted, render a dwelling untenantable, for safety or comfort reasons. The timeframe for major repairs may involve months of work, and few tenants would be prepared to put up with longer term losses of quiet enjoyment. For LS to have appreciated the effect of an election under these circumstances, he would, at the least, have needed to know enough to consider the effect of repair work on his tenants.

[60] As stated above LS is deemed to have read the policy. The words used in the election clause are technical; it refers to "election", rather than a choice, and one of those options leads to the payment of an "indemnity". I note that since 2011, the issues of what "election" and "indemnity" mean has required guidance by appellate Courts. Prior to 2011, the meaning of these words was unclear to many lawyers, let alone to a lay person, albeit an intelligent, professionally qualified one. While there is authority from *Sargent* that knowledge of technical meanings can be deemed, this authority does not extend to deeming that an elector can make an election between two outcomes when they cannot reasonable appreciate the difference between those outcomes.

[61] I find from at least 29 April 2011, the date of the EQC scope of works, LS had a reasonable appreciation of the extent of the damage and the works necessary to repair. However, prior to 2019, he did not know of the respective value of repair versus payment of an indemnity. Therefore, I find that he was not aware of the difference in outcome between the two competing options. This knowledge was necessary for him to have made an informed election.

The communications

[62] If I am incorrect about LS's level of knowledge, I need to consider what he communicated to MIS.

[63] There is a degree of artificiality in focusing only on the conversation recorded by the file note, during which MIS say LS made an election. There were other interactions and events which must be considered. These were:

(a) the builder's invoice of 7 April 2011, showing that LS had carried out relatively extensive repairs to the internal damage;

(b) the 21 November 2012 email, where LS advised MIS of the work he had done and advising that he had plans to do the balance of the work;

(c) the 19 February 2013 meeting where LS advised MIS that he was working from the EQC scope; and

(d) the 25 September 2014 email, where LS described the repairs he had carried out with a reasonable level of detail.

[64] As stated above, from 29 April 2011, LS knew of the extent of the damage and the steps necessary to repair. On MIS's conception of election, he had sufficient knowledge to have made an informed election from this point on.

[65] In each of these interactions, LS communicated to MIS, either directly or through his actions, an intention to repair the damage. In doing so he made the election required by the policy. As stated above election is a one-way valve – having chosen to restore the property, it was not open to either party to reverse that choice.

[66] It could be argued that LS elected only to repair those parts of the property where the work has been carried out in 2011 but had elected not to repair the foundations and other damaged portions of the property.

[67] I am not persuaded by this reasoning. The choice under the policy is to rebuild or restore the "rental property" or not. The words "rental property" are not defined, although "rental property building" and "rental property contents" are. While the election clause refers to the damaged part of the property, this is purely as a mechanism for the calculation of the indemnity value. There are no further words which limit or enlarge the election clause. The choice is all or nothing. Once the choice has been made to rebuild or restore, the policy does not provide

for this to be done in a partial or piecemeal way. To interpret the policy in any other way would result in the very uncertainty that the rule around election is designed to avoid. If, having chosen to repair a property, a party could subsequently change its mind as its intentions were only to repair a portion of the damage, the scheme behind the election clause would become unworkable.

The 21 August 2015 file note

[68] For completeness I consider whether, taken on its own, the discussion recorded by the 21 August 2015 file note was an election to not restore the property. MIS's position is that the file note records a clear and unequivocal communication of the choice not to carry out the restoration of the property.

[69] I am unconvinced by LS's evidence that the file note is inaccurate. By his own admission LS does not recall the conversation, and the short nature of the discussion is consistent with the other communications between the parties. This is not to say that I believe that LS is being untruthful, rather, he is applying his interpretation of the events, after the fact, and in the absence of an accurate recollection of what was said.

[70] Having found the file note is reliable evidence, the question is what does it record? The file note records: "EQC suggested lifting house and replacing all piles and ring foundation. [LS] **said he does not intend to do this work**." (emphasis added). The conversation the file note records occurred in the context of some four years of discussions.

[71] I find that, at most, the file note records a statement that LS did not intend to follow EQC's scope. Communication of an election must be unequivocal. Choosing not to follow a particular repair strategy is not the same as rejecting of the right to restore the property.

[72] Therefore, the file note does not record an unequivocal communication of the intention to not restore, necessary for election to be made out. The actions of MIS after August 2015 support this finding. Had LS made the election alleged by MIS, his choice would have required MIS to take steps to calculate the indemnity and to pay it. It did not do so.

Next steps

[73] As I have found that there was no election, the claim for repairs remains a live issue between the parties. This will require an assessment of the extent and nature of the damage to the property. The next step in this application is to have the case manager convene a further case conference regarding how the damage to be assessed and directions will follow.

C D Boys
Member
Canterbury Earthquakes Insurance Tribunal