IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL CEIT-003-2023

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	RT Applicant
AND	IAG NEW ZEALAND LIMITED (IAG) First Respondent
AND	TOKA TU AKE (EQC) Second Respondent

Date: 5 October 2023

DECISION OF S M A MCCORMACK

On the issue of waiver of privilege on the settlement agreement

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[1] RT's property at XXXXXX, Christchurch (the **property**) was damaged in the Canterbury Earthquake Sequence (the **CES**). At the time of the CES the applicant had a residential comprehensive policy with State Insurance (the **policy**) which was underwritten by IAG. This policy provided top-up cover for damage due to a natural disaster beyond the cover provided under ss 18 and 20 of the Earthquake Commission Act 1993 (the **ECA**), defined in the policy as EQ Cover.

[2] RT lodged insurance claims with both EQC and IAG following the CES.

[3] Between 2011 and 2013, EQC engaged Fletcher Earthquake Recovery (**EQR**) to undertake repairs to rectify the earthquake damage to the property. The applicant disputed the quality of the repairs and, in or around March 2013, the applicant contacted Mr Doug Marquet from Quality Assistance at EQC to inspect the repairs. RT states that Mr Marquet was concerned about the repairs at the time of inspection.

[4] RT disputed the quality of EQC's repairs and its alleged failure to properly scope and repair all earthquake damage. This resulted in the applicant claiming against EQC for:

(a) Delay in settlement of reinstatement.

(b) Failure to settle claims within a reasonable time.

(c) Failed repairs to the internal wall linings.

(d) Failure to assess damage to the inferior floor.

(e) Failure to settle the claim in respect of the damage to the exterior cladding.

(f) Failure to repair the exterior entrance step.

(g) Failure to repair damage to the internal garage.

[5] The applicant initiated proceedings against EQC in the Christchurch District Court in 2016. The applicant states that, on or around 15 December 2020, TMT Construction Ltd, estimated that the cost for the scope of works would be $238,579.34 (including GST).

[6] The applicant entered into a settlement agreement with EQC on or around 23 November 2021 (the **settlement agreement**). The applicant states that he received the sum of $211,000.00 as a settlement sum (the **settlement sum**).

[7] In June 2022, the applicant obtained an updated cost for the scope of works from TMT Construction Ltd. The applicant states that he was provided with an updated cost of $298,200.76.

RT's position

[8] In this proceeding the applicant seeks to recover the shortfall of $87,200.76 from IAG, reflecting the difference between the settlement sum received from EQC, (excluding the sums awarded for damages and legal costs) and the updated cost of $298,200.76. The applicant argues that IAG has obligations under the policy to pay the difference between the cost of repair covered under natural disaster damage and what EQC covers and pays.

[9] The applicant states that prior to, and in signing the settlement agreement with EQC:

1. EQC represented that the sum settled was in relation to one claim only.

2. That he had not seen the breakdown of the settlement before it was later provided to IAG by EQC and which apportioned damage across three claims, and after this application was filed.

3. That he was advised by EQC that he was being paid an "up to cap" or "over cap" sum.

[10] On this basis, the applicant seeks the shortfall from IAG as covered in paragraph 8 above.

EQC's position

[11] EQC submits that it entered a confidential, full, and final settlement agreement with RT on 23 November 2021, which represented a settlement of all of the applicant's claims for earthquake damage arising from the CES. EQC submits that the proceeding related to claims for earthquake damage caused by two events.

[12] EQC says the applicant's claims were settled on an under-cap basis; that the cost to repair earthquake damage from each event was less than EQC's (then) statutory cap of $100,000 plus GST, ($115,000.00).

IAG's position

[13] The basis of the settlement agreement between the applicant and EQC, that is whether it was under-cap or over-cap, is critical to this proceeding.

[14] IAG's position is that the claim is under-cap and therefore IAG has no liability under the policy for damage to the property. IAG submits that the applicant settled the claim with EQC in November 2021 as an under-cap claim, and IAG settled the claim with the applicant for damage to non-EQC items in 2017. IAG submits that it is significantly prejudiced by the long delay by the applicant in pursuing his claim for over-cap damage against IAG, both in respect of the ability to identify and assess earthquake damage that occurred over 12 years ago and in the escalation of construction costs. IAG further submits that the applicant's claims against it are statute-barred by the Limitation Act 2010, having been initiated on 31 January 2020, more than six years after the date on which the cause of action accrued (being the 1 January 2011 and 22 February 2012 earthquakes).

[15] As IAG submits, it is not liable in the event the claims (as opposed to the settlement amount) were found to be under-cap. And this has led to this application by the applicant to waive privilege and for EQC to provide to the Tribunal a copy of the settlement agreement, and associated preceding documents as set out in the memorandum by counsel for the applicant, filed in accordance with my directions of 19 May 2023. Before I turn to my analysis and finding I make some preliminary comments.

[16] This application is solely in relation to waiver of privilege of documents, and solely to resolve the issue of whether the settlement agreement between the applicant and EQC was in relation to claims that were under or over-cap.

[17] I will not therefore address IAG's submission in relation to statutory limitation, which will await determination later if necessary.

[18] The application for waiver does not seek to challenge the validity of the settlement agreement, the amount of which the applicant accepts.

[19] In relation to EQC's submission that the applicant provides no evidence as to his assertions set out in paragraph [9], I note two things.

1. The statement themselves are evidence, and

2. Evidence supporting those statements may well be included in correspondence that EQC asserts should not be disclosed to the Tribunal.

Analysis: Evidential Issues.

[20] I summarise the applicant's and EQC's positions in turn, and I provide my opinion on the issue of waiver.

[21] At the core of the issue, I am faced with the following differing positions of counsel on the settlement agreement which they have seen, and I have not.

1. The applicant's counsel submits:

> "The settlement agreement sets out the amount that was agreed on, not how the amount was arrived at."

I take this to be a submission that the agreement itself does not address the issue of whether the claim is under or over-cap for any one earthquake event and is why the applicant seeks production of associated correspondence.

2. EQC's counsel submits:

> "The fact and text of the Settlement Agreement evidences that the applicant's claims were under cap….."

Submissions for RT

[22] Counsel for the applicant submits that the disclosure of the settlement agreement — as well as documents and correspondence listed in its memorandum — is required "because the applicant's claim against IAG cannot be resolved without a determination being made by the Tribunal on whether the EQC made an up to cap payment".

[23] Counsel for the applicant refers to s 57 of the Evidence Act 2006, which provides:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
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> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
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> (a) was intended to be confidential; and
>
> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.
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> (3) This section does not apply to—
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> (a) the terms of an agreement settling the dispute; or
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> (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
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> (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
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> (i) is expressly stated to be without prejudice except as to costs; and
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> (ii) relates to an issue in the proceeding; or
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> (d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

[24] Counsel for the applicant refers to Justice France's comments in *Minister of Education v Reidy McKenzie Ltd* on the jurisprudence relating to "without prejudice documents".[1] Counsel refers to the following excerpt from that judgment:

> The list of existing exceptions is settled. The important exceptions were set out by Robert Walker LJ as he then was in Unilever.
>
> > …in *Oceanbulk Shipping*, Lord Clarke listed nine situations where evidence of without prejudice communications were accepted to be admissible. One such category was "where rectification is sought in respect of a settlement agreement".
> >
> > *Oceanbulk* is a recent example of a new exception, namely what is termed the "interpretation" exception. In disputes over the meaning of a contract, evidence of the objective factual matrix relevant to interpretation is admissible.

[25] Counsel for the applicant also refers to Lederman J's observation in *Rudd v Trossacs Investments Inc*, noting the following excerpt from that decision:[2]

> …once a settlement is achieved but its interpretation is in question, disclosure of mediation negotiations may be necessary in order to ensure substantive justice. In such circumstances, disclosure of discussions will not undermine the mediation process as it is sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that the parties have arrived at.

[26] Against this background, counsel for RT submits that the claim against IAG "cannot begin to be commenced, let alone resolved, without interpretation of the [settlement agreement]". This is because "[t]he information passed between the parties prior to the [settlement agreement], relates to the factual matrix in which the [settlement agreement] was entered". It follows, the applicant's counsel submits, that "the interpretation exception established in *Oceanbulk Shipping* applies in this case."

[27] Counsel for the applicant further submits that the information and documentation leading up to the settlement agreement should be disclosed due to public policy considerations. Counsel refers to the Court of Appeal's remarks in *Sheppard Industries Ltd v Specialised Bicycle Components Inc* that "…evidence could be given to show the factual matrix against which the agreement was made, thus assisting in its interpretation",[3] as well as the High Court's view in *Intelact Ltd v Fonterra* that s 57(3) allows for privileged communications to be introduced into

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[1] *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326 at [22] to [25].

[2] *Rudd v Trossacs Investments Inc* (2004) 244 DLR (4th) 758 (ONSC) at [19].

[3] *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346 at [41].

evidence "…to the extent that the communications and discussions provide evidence of objective facts necessary to assist the Court to interpret the settlement agreement in accordance with the parties' true intentions."[4]

[28] On this basis, counsel for the applicant submits that "where representations were made in the lead-up to the [settlement agreement], which resulted in the [settlement agreement], and which after the fact turn out to be false, or alternatively were breached, that evidence of those communications ought to be revealed to the Tribunal, as the evidence of the [settlement agreement] is not in line with EQC's position (and therefore, IAG's position)". Counsel submits that in relation to RT that EQC "represented to him that he was paid out by EQC to an up to cap/over cap sum, plus added costs", and that "EQC has breached its obligations under s 18 of the Earthquake Commission Act, whereby EQC are liable to pay up to the statutory cap, being $100,000.00 plus GST".

Submissions for EQC

[29] EQC submits that it is open to assisting the Tribunal by disclosing the settlement agreement but "will do so only on a provisional basis (for the purposes of section 8(3)(f) of the District Court (Access to Court Documents) Rules 2016)".

[30] EQC submits, however, that in terms of the communications between EQC and the applicant which took place in connection with an attempt to settle or mediate the dispute between them, RT "has failed to provide any basis for the Tribunal to order release of privileged documents in this case, and further, it is not required in this case".

[31] EQC submits that "the fact and text of the Settlement Agreement evidences that the applicant's claims were under cap, as does the assurance previously provided to the Tribunal." If that evidence does not suffice, EQC submits that the communications both between the parties and between employees of EQC about the communications and negotiations are privileged, and no exceptions apply.

[32] EQC submits that the interpretation exclusion under s 57(3) of The Evidence Act 2006 does not assist the applicant. EQC submits that RT does not challenge the validity of the

[4] *Intelact Ltd v Fonterra* [2017] NZHC 1086 at [18].

settlement agreement, and that the principal issue in this proceeding is between RT and his private insurer. It follows, EQC submits, that "this is not a case where further information is required to "interpret the settlement agreement in accordance with the parties' true intentions."

[33] EQC submits that the settlement agreement is "clear and unambiguous", that the applicant was represented by legal counsel at the time of negotiating and executing the agreement, and that the applicant has not provided any explanation as to what terms of the agreement now require interpretation.

[34] EQC further submits that counsel for the applicant has, in outlining case authority to support its application for waiver of privilege, failed to set out the full context for the excerpts provided. EQC notes that in *Sheppard Industries Ltd* where the Court explained "…evidence could be given to show the factual matrix against which the agreement was made, thus assisting in its interpretation" it also observed:[5]

> [42] In each of the instances just identified, the policy underlying the without prejudice rule is reinforced rather than undermined by the admission of the evidence. This is because the evidence goes either to whether there was a genuine settlement agreement or to its meaning – *it does not go to the parties' positions in the mediation on the merits of the underlying dispute, which is what that the rule seeks to protect*.
>
> (Emphasis added.)

[35] Similarly, EQC submits that counsel for the applicant's reference to *Rudd v Trossacs Investments Ltd* omits the full context where it prefaced its finding with:

> *The notions of privilege and confidentiality which cloak mediation sessions encourage parties to be frank and candid in seeking resolution without concern that, if no settlement is forthcoming, anything that they may have said at the mediation could be used against them*. However, once a settlement is achieved but its interpretation is in question, disclosure of mediation discussions may be necessary to ensure substantive justice. In such circumstances, disclosure of discussions will not undermine the mediation process as it is sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that both parties have arrived at.
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> (Emphasis added.)

[36] EQC reiterates in its submissions that the settlement agreement is "clear and entirely orthodox", and it follows that no disclosure is needed to determine specific terms. EQC submits

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[5] *Sheppard Industries Ltd*, above n 2, at [41]-[42].

that this can also be said for the applicant's application to waive privilege over settlement discussions: no evidence has been presented that the discussions which took place prior to the signing of the agreement can be 'read into' the settlement agreement, which, EQC submits, contains clear terms and an entire agreement clause.

[37] In terms of public policy considerations, EQC submits that "[t]he need to protect settlement discussions is important and longstanding". EQC denies the applicant's suggestion that it made false representations or that it breached representations made during settlement discussions. EQC suggests that the applicant has raised this allegation in order for the request for waiver to fit within *Sheppard Industries Ltd* where Arnold J held that 'where there was a written settlement agreement, evidence of what occurred at the mediation could be given in support of a claim for rectification or an argument that the agreement resulted from misrepresentation, a breach of the Fair Trading Act, mistake, undue influence or fraud".[6]

[38] EQC submits that the applicant has produced no evidence to support his allegation that EQC made false representations during the settlement process. Furthermore, EQC submits that, even if the applicant had identified a false representation, this "would need to be balanced against public policy reasons for maintaining privilege". EQC maintains that "the policy supporting privilege in these circumstances is to encourage settlement".

My assessment of the submissions

[39] I turn to my assessment of the parties' submissions.

[40] I note that neither party addresses whether the Tribunal is bound by the Evidence Act 2006. In *Trustees of the DGF Trust v IAG*,[7] Chairperson Somerville noted that the Tribunal is not strictly bound by the Evidence Act but that it is informative in terms of the types of evidence which should and should not be admissible:

> [10] The real challenge comes when we look at the admissibility of hearsay evidence. SM has referred to provisions in the Evidence Act 2006 which, strictly speaking, do not apply to a Tribunal because the Evidence Act only applies to courts. RS has referred to High Court authority ruling that the Weathertight Homes Tribunal is not bound by the Evidence Act. This Tribunal and its legislation were modelled on the

[6] *Sheppard Industries Ltd,* above n 2, at [41]

[7] *Trustees of the DFG Trust v IAG* CEIT-2019-0037, 8 July 2020.

> Weathertight Homes Tribunal, so you would imagine that the same applies to this Tribunal.
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> [11] The matter is not quite as black and white as that, though. This Tribunal is required to observe the principles of natural justice. It is important that all parties to claims before it are treated fairly and justly. The rules of evidence are there for a reason: it is important that the evidence in court proceedings is relevant and reliable. That is just as much the case in this Tribunal.
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> [12] The more detailed provisions of the Evidence Act comprise a set of standardised rules to ensure that courts are consistent in their treatment of the evidence on questions of reliability. *It is not surprising that SM is able to draw my attention to cases where tribunals have decided that the Evidence Act should be used as a guide to what is reliable. I will be doing the same, but I have a discretion to admit evidence that might otherwise be inadmissible, giving whatever weight I think is appropriate to that evidence* …
>
> (Emphasis added.)

[41] Following *Trustees of the DGF Trust*, I find that the Tribunal is not strictly bound by s 57, but the provision and relevant case law remain useful for determining what the Tribunal should and should not admit as admissible evidence.

[42] Turning to consider the parties' reference to relevant case law, I consider it useful to set out the United Kingdom Supreme Court's summary of the principle in *Oceanbulk Shipping*, which was affirmed by the Court of Appeal in *Minister of Education v Reidy McKenzie Ltd*.[8]

[43] The editorial comment in that judgment helpfully summarises the finding in the case in the following terms:

> The 'without prejudice' rule is a rule governing the admissibility of evidence. The general rule is that statements made in the course of negotiations to attempt a compromise are not admissible in evidence. The 'without prejudice' rule is based on the public policy of encouraging litigants to settle their differences rather than litigate them to a conclusion and on the express or implied agreement of the parties that communications made in the course of negotiations should not be admissible in evidence in any subsequent contested hearing regarding the matters under negotiation.
>
> However, the court has always recognised exceptions to the 'without prejudice' rule where justice required the admissibility of such negotiations in order to provide the court with the best evidence available. The Supreme Court approved the judgment of Robert Walker LJ in *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783, [2000] 1 WLR 2436 (CA) in which the general principles of the rule were set out, and summarised the exceptions to the rule, the relevant examples of which were as follows:

[8] *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326 at

(1) where the issue was whether the without prejudice communications had resulted in a concluded agreement;

(2) where it was alleged that a concluded agreement should be set aside on the grounds of misrepresentation, undue influence or fraud;

(3) where the issue was whether a without prejudice statement gave rise to an estoppel;

(4) where exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety;

(5) where the issue was whether the contract should be rectified.

This case did not fall within any of the identified exceptions. However, it was argued successfully by the appellant that evidence of the parties' negotiations could, as a matter of principle, constitute relevant evidence of the factual matrix and therefore be admissible as an aid to construction of the settlement agreement.

…

The Supreme Court acknowledged that the principles governing the correct approach to the interpretation of contracts have been the subject of some development or clarification over the past decade … The question to be asked in each case is what would a reasonable person, in the circumstances in which the parties were placed at the time, have understood the parties to have meant by the specific language used, taking into account all relevant background knowledge. Such background knowledge could include objective facts communicated by one party to the other in the course of the negotiations. There was no justification for adopting a different approach to the rules governing the construction of contracts where communications leading up to the agreement were 'without prejudice'. …

> 'When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted "without prejudice". This principle applies both in the case of a contract that results from the without prejudice negotiations and in the case of any other subsequent contract concluded between the same parties.'

[44] The applicant's counsel submits that the proceedings against IAG "cannot begin to be commenced, let alone resolved, without interpretation of the [settlement agreement]". I say that the issue is not the interpretation of the settlement agreement, but whether the applicant's claims were found to be under or over-cap. That is, to determine any outstanding liability owed by IAG to RT following the settlement agreement between the applicant and EQC, it is necessary for the Tribunal to know whether EQC settled over or under its statutory cap, as well as how the settlement was apportioned across the CES that caused earthquake damage to the

property.[9] I disagree with EQC's submission that an assurance from EQC will suffice. The provision of the settlement agreement itself is not to challenge the settlement agreement, but to aid in and facilitate a resolution for the parties and should not prejudice the position of EQC.

[45] However, in line with EQC's submissions, I am of the view that counsel for the applicant is premature in concluding that the admission of information passed between the parties prior to the settlement agreement is necessary to determine "the factual matrix in which the [settlement agreement] was entered". It may be that the terms of the settlement agreement itself will be sufficient for the purposes of the Tribunal's inquiry. I note that counsel for the applicant has not specified the terms of the settlement agreement which are purportedly ambiguous. I reiterate that the purpose of the Tribunal's inquiry is not an interpretation of the settlement agreement, but to determine whether this was an under-cap or over-cap claim.

[46] My view is that, at this stage of the proceedings, it will be sufficient for the settlement agreement to be admitted as evidence. I note that in *Jarden and Jarden v Lumley*, which concerned a dispute over an insurer's top-up liability following a homeowner's settlement with EQC, the High Court allowed the admission of a settlement agreement between the policyholder and EQC, albeit that agreement "[was] made in express contemplation that it might be produced in these proceedings, and would be disclosed to Lumley".[10] Moreover, in subsequent proceedings the Court of Appeal allowed an application to adduce a memorandum signed in the High Court recording the terms of settlement, as well as affidavits by lawyers representing the parties to the settlement. The evidence explained that the settlement figures included $55,313 for costs. In allowing the application, the Court of Appeal was "satisfied that justice requires that the application to adduce further evidence be allowed".

[47] I also note that the privilege for settlement negotiations, mediation, or plea discussions does not apply to the terms of an agreement settling the dispute.[11]

[48] The parties to the present proceedings are RT and IAG, and EQC's role in the proceeding as an added party is so that the Tribunal can determine IAG's outstanding liability, if any. The proceedings should not depart from that inquiry.

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[9] See *Jarden and Jarden v Lumley* [2015] NZHC 1427 at [133]-[136].

[10] *Jarden and Jarden v Lumley* [2016] NZCA 193 at [20].

[11] Evidence Act 2006, s 56(3).

[49] After the Tribunal has received the settlement agreement, it may determine that further information is required to determine the issue of under or over-cap, and it may direct the parties to provide further evidence (including the pre-settlement communications listed in counsel for the applicant's memorandum). By allowing only the admission of evidence which is strictly necessary is in line with the Tribunal's objective to facilitate the expeditious resolution of the proceedings and is also in line with the fundamental principle in the Evidence Act 2006 that evidence must be relevant to the proceedings for it to be admissible.[12]

Conclusion

[50] In conclusion, my findings are that:

(a) The Tribunal allows the applicant's application to have the settlement agreement between him and EQC to be admitted into evidence. It is necessary for the Tribunal to know whether EQC settled over or under its statutory cap, as well as the associated issue of how the settlement was apportioned across the different instances of earthquake damage.

(b) The Tribunal should not, at this stage, allow the admission of pre-settlement negotiation discussions between the applicant and EQC. It may be that the terms of the settlement agreement itself will be sufficient for the purposes of the Tribunal's inquiry.

[51] I make the following direction:

(a) I direct that EQC provide a copy of the settlement agreement to the Tribunal and other parties by 5pm on Tuesday 10 October 2023.

S M A McCormack
Member
Canterbury Earthquakes Insurance Tribunal

[12] Evidence Act 2006, s 7.