

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	B B E & P N as executors of the P A E N TRUST Applicants
AND	IAG NEW ZEALAND LIMITED Respondent

Date: 23 September 2020
Appearances: R Johnstone, with Mr and Mrs N (applicants)
R Hargreaves for the respondent

DECISION OF C BOYS

[1] This decision considers the independence of expert advisors appointed by the Canterbury Earthquakes Insurance Tribunal (Tribunal).

BACKGROUND

[2] On 29 July 2020, I issued a direction regarding the appointment of an independent engineer to act as an expert facilitator. The facilitation procedure is used and favoured by this Tribunal as it allows technical differences between the parties to be swiftly resolved.

[3] The process used involves the application by the Chair to Engineering New Zealand (ENZ), which makes a recommendation from the available members of its panel of suitable

experts (the ENZ panel). The Chair then makes the appointment under s 24(1)(f) of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act).

[4] The ENZ panel was set up for use in the Greater Christchurch Claims Resolution Service (GCCRS) matters, and comprises 15 Structural Engineers, and eight Geotechnical Engineers. Of these, 12 are listed as being available as facilitators. The ENZ website states that:¹

The Panel was appointed by the Engineering New Zealand Board on the recommendation of a cross-stakeholder evaluation team.

The evaluation team included senior engineers, a homeowner representative, a barrister who works exclusively for homeowners, and a lawyer who works for both insurers and homeowners.

Engineers were recommended to the Panel based on a number of factors, including their technical expertise, experience and cross-stakeholder acceptability.

[5] ENZ recommended Mr Stephen Knowles, to act as facilitator in this case, and his appointment was made by the Chair.

[6] Mr Johnstone, counsel for the applicants has objected to Mr Knowles appointment on the basis that he has worked as an engineering advisor for the respondent, IAG, in a number of claims, including litigated claims before the High Court and in the Tribunal.

[7] Comment was sought from Mr Knowles regarding his involvement in matters where he was appointed by IAG. He advised:

I have completed the following work for IAG

2012 -2013 – Inspections of approximately 300 houses on the Port Hills to determine preliminary repair/ replacement strategies

2014 – present – Engagement as an expert witness for approximately 100 Christchurch earthquake damaged houses. Some are still current although it is hard to tell the number as there are many occasions where they lie dormant for months.

Other Christchurch earthquake claims 2014 – present

I have also been engaged as an expert witness for EQC, Vero and a few private homeowners on approximately 20, 10 and 5 times respectively.

¹ Engineering New Zealand “Christchurch Earthquake Expert Engineering Panel” Engineering New Zealand <www.engineeringnz.org>.

I have prepared/ reviewed approximately 150 Residential Advisory Service cases where I was engaged by MBIE on behalf of the property owner

I have completed approximately 40 GCCRS cases on behalf of the property owner.

TELECONFERENCE

[8] On 15 September 2020, a teleconference was held to discuss this matter. In attendance were Mr Hargreaves for IAG, Mr Johnstone for the applicants, and two of the trustee applicants M and P N.

[9] Mr Johnstone raised the issue as to whether or not Mr Knowles has been, or is currently, working under a retainer arrangement with IAG. Mr Hargreaves advised that he is not.

[10] The applicants' objection to Mr Knowles' involvement was that the extent of his involvement in Canterbury Earthquake Sequence (CES) matters, for IAG, raises a perception that he will not act impartially. Mr Johnstone did note that Mr Knowles has been appointed to act as a facilitator rather than as an expert witness. However, he raised the power afforded to a facilitator by the Practice Note, where there is absolute discretion to limit the involvement, or exclude an expert who engages in advocacy for their principles. Mr Johnstone says that he expected that Mr Knowles would decline the appointment due to the level of his prior involvement and points out the guidance provided by ENZ regarding conflicts of interest.²

[11] Mr N spoke of his experience of having 35 years as a consulting engineer. He pointed out that while repeated instructions from a single principal may not lead to a conflict of interest, it does indicate like-mindedness between the principal and a consultant, leading the principal to instruct the same person numerous times over the years.

[12] Mr Hargreaves pointed out that Mr Knowles has been instructed as a facilitator, sitting between the two engineers employed by the parties, and made an analogy to mediation. He also pointed out that there is a small pool of experts and that IAG, given its size and presence in the Canterbury market (some 30 to 40%), makes use of all available experts.

² Engineering New Zealand *Practice Note 8: Being Ethical* (18 September 2019) at 6.

SECTION 25

[13] Section 25 of the Act:

25 Independence of expert advisers

- (1) Expert advisers appointed by the tribunal—
 - (a) must act independently when assisting the tribunal with any particular claim or aspect of it; and
 - (b) must be independent of any of the parties to the claim.
- (2) An expert adviser who is being considered for appointment to assist, or is assisting, the tribunal and who has a conflict of interest in relation to the particular claim—
 - (a) must disclose it to the tribunal and all the parties; and
 - (b) unless all the parties agree otherwise,—
 - (i) must not accept the appointment;
 - (ii) must withdraw from acting in relation to the claim.
- (3) A party who agrees to an expert adviser being appointed or continuing to act forfeits any right to object to the expert adviser acting on the basis of the conflict of interest that was disclosed by the expert adviser.

[14] I note that s 25, unlike many other provisions in the Act, has no comparable provision in the Weathertight Homes Tribunal legislation. In the present case, s 25 sets out two relevant directions:

- (a) 25(1) is a direction that any expert advisers appointed by the tribunal must both act independently, and be independent of the parties; and
- (b) 25(2) directs that any expert advisor who has a conflict of interest must disclose that conflict and, unless agreed to by parties, must not accept the appointment.

[15] The application of s 25 requires a consideration of the broader purposes of the Act, the particular words of the section, and the context of the present case. The relevant factors include:³

- (a) the purpose of the Tribunal in providing fair, speedy, flexible and cost-effective services for resolving claims;
- (b) the Tribunal is a forum for civil litigation;
- (c) the Tribunal has a duty to apply the rules of natural justice;
- (d) Mr Knowles is being appointed as a facilitator, not as a witness;
- (e) the ENZ panel is selected through a consultative process;

³ ss 3 and 37(3); and including duties of s 25 to act with honesty, objectivity, and integrity; and s 25(2) disclose and appropriately manage conflicts of interest, and accept from any person anything intended to improperly influence your engineering activities

- (f) Mr Knowles appointment was made on a recommendation from ENZ, a body which is itself independent from both the parties and the Tribunal;
- (g) Mr Knowles duties' as an expert adviser are owed to the Tribunal, not to the parties;
- (h) Mr Knowles as a Chartered engineer is subject to the ethical rules of his profession; and
- (i) the need to protect the integrity of the Tribunal's expert advisers and the integrity of the Tribunal's decision-making processes.

[16] The particular history of the Tribunal and the events that led to it being established are relevant. The cases before the Tribunal regard the damage, which residential houses suffered, as a consequence of an earthquake/s event which occurred before 31 December 2011. In the years since that date the capacity of New Zealand's pool of engineering experts has been tested by:

- (a) the extent of the damage to buildings and structures;
- (b) the number of insurance claims;
- (c) the number of disputed claims; and
- (d) the trenchant nature of the litigation which has followed these disputes.

[17] The events since 2011 have reduced the numbers of qualified engineers willing and able to provide evidence. In *Jarden v EQC* Kós J commented: "It is a reality of the Canterbury Earthquake List that fully independent experts are difficult to obtain."⁴ The situation has not improved since.

[18] There are before this Tribunal cases involving nine separate insurers. However, excepting EQC, around half of the cases involve IAG, or AMI (now Southern Response). I note that currently IAG underwrites approximately 50% of the domestic insurance market. This means that both through the history of Canterbury Earthquake litigation, and currently, there are relatively few experienced, well qualified engineers who will not have had some form of engagement for, or against, IAG. These issues led to ENZ adopting the consultation mechanisms to appoint members of the panel.

⁴ *Jarden & Jarden v the Earthquake Commission & Lumley* [2015] NZHC 204 at [21(c)].

DISCUSSION – INDEPENDENCE

[19] Mr Knowles has conducted over 400 assessments for IAG, and Mr Johnstone argues that this number shows that Mr Knowles is not independent of IAG. However, the majority of the appointments referred to were 300 initial assessments completed prior to 2014. Of Mr Knowles' more recent work there is a balance between assessments completed for a number of insurers, and for homeowners (albeit through MBIE or GCCRS), with the balance (195/130) being work for homeowners.

[20] Mr Johnstone has argued that the test for independence is analogous with that applied in recusal cases.⁵ In recusal, the issue is whether there is an appearance of bias, when considered from the perspective of an objective lay observer acquainted with the facts. This test has been developed against the background of the constitutional importance of an independent judiciary, and the need for justice to be seen to be done.⁶ The importance of this test is obvious; in the civil context a judge or decision maker alone makes the decision on the outcome of a case. It is vitally important that they are seen to be unbiased.

[21] The difficulty with applying an apparent bias test, in these circumstances, is that s 25(1)(b) does not use language which implies or imports a bar on apparent bias, rather it requires actual independence. The level of rigour applied in recusal cases would be problematic in this context; of the structural engineers on the ENZ panel, an apparent bias approach could exclude the majority of the panel from acting in the majority of cases, as they have either acted as advisers, or witnesses, for or against EQC, IAG, Southern Response, or home-owners.

[22] I find that for an expert adviser to lack independence, s 25(1), requires more than the appearance of bias. There must be a real connection between the expert and one or other of the parties, such that their independence is affected. This could be based, for instance, on the expert's prior statements, their conduct in other cases, or if they exclusively accept instructions from a single party or class of parties.⁷ There is no evidence of any such connection between Mr Knowles and either party. Rather, there is a balance to his work.

⁵ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72.

⁶ Constitution Act 1986, ss 23 and 24.

⁷ For instance; acting only for insurers, or only for claimants.

[23] Mr Knowles' independence is further protected by the ENZ consultation mechanism for selecting panel members, by his own professional ethics, and by the fact that his duties are to the Tribunal and not to either party.

DISCUSSION - CONFLICT OF INTEREST

[24] Section 25(2) deals with conflicts of interest; specific circumstances where a person's personal interests may compromise their ability to act independently in that circumstance. The classic conflict of interest in the litigation setting is that of a lawyer asked to act against a former client. Due to the particular fiduciary nature of the relationship, the lawyer would be barred from acting. However, Engineers are not fiduciaries. Their duty is no more, nor no less, than to advise. There is no conflict of interest arising from an Engineer appearing as an expert witness in a case against a former principal.

[25] A conflict could arise if an expert had a financial interest in putting forward a biased view, because they may gain financially from a particular party winning a case, or from a particular outcome. This could arise if, for instance: they owned shares in a party, held a Directorship in a party or associated entity, worked under an exclusive retainer for a party, or sold a particular product which would be used to undertake a repair. There is no evidence that Mr Knowles has any such conflict in this case.

[26] If an Engineer acted under an exclusive retainer to an insurer, there would be a valid argument that the incentive of repeat business could constitute a conflict of interest. However, that is not the case here. Rather, as I have found, Mr Knowles has worked for a variety of insurers and claimants. There is no conflict of interest on the facts.

Christopher Boys
Member
Canterbury Earthquakes Insurance Tribunal