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High Court Earthquake List

HC litigation list & LINX case summaries

High Court Earthquake List – LINX case summaries for judgments for the period February 2016 to October 2021 follow.

Most decisions are available on *Judicial Decisions online*
https://forms.justice.govt.nz/jdo/introduction.jsp

All judgements listed below are available from the Law Society Library (Document delivery fee applies).

The High Court's spreadsheet for HC Earthquake List litigation, current to 13 September 2021 is available on the court's website https://www.courtsofnz.govt.nz/the-courts/high-court-lists/earthquake-list-christchurch

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8 October 2021

NAME	Ginivan v Southern Response Earthquake Services Ltd
JUDGE(S)	Ellis J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000116
JUDG DATE	4 August 2021
CITATION	[2021] NZHC 1997
FULL TEXT	PDF judgment
PARTIES	William Francis Ginivan, Cameron David Bailey as trustees of the Gift Trust (First Plaintiffs), William Francis Ginivan, Diane Shirley Carson (Second Plaintiffs), Southern Response Earthquake Services Ltd (Defendant)
NOTE	High Court Earthquake List
STATUTES	High Court Rules 2016 R14.6 - Judicature Act 1908 - Senior Courts Act 2016
CASES CITED	Bradbury v Westpac Banking Corp [2009] NZCA 234, [2009] 3 NZLR 400, (2009) 19 PRNZ 385
REPRESENTATION	GA Cooper, MA Powell
PAGES	7 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	[2020] NZHC 1469, [2018] NZHC 2403

NAME	Sleight v Beckia Holdings Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000818
JUDG DATE	30 October 2020
CITATION	[2020] NZHC 2851
FULL TEXT	PDF judgment
PARTIES	Joan Margaret Fraser Sleight and Alan Leithfield Sleight (plaintiffs), Beckia Holdings Limited (previously FR 2012 Limited and Farrell Residential Limited) (first defendant), Orange H Management Limited (Previously Hawkins Management Limited) (In Receivership and In Liquidation) (second defendant), IAG New Zealand Limited (third defendant), QBE Insurance (Australia) Limited (fourth defendant)
SUBJECT	INSURANCE - successful claims by plaintiffs (insured) for alleged defective and inadequate repairs of home damaged in Canterbury earthquake sequence 2010 to 2011 - test case - issue of insurer's potential liability for costs of completing earthquake repair work where original repairs under their "managed

repair programme" were defective - whether insurer remained liable under its standard insurance policy for defective repairs - novel claims brought against insurer in tort, under Consumer Guarantees Act (CGA) and in equity - liability issues between insurer and builder's indemnity insurer (QBE) potentially relevant for future defective repair litigation - principal claim against builder (in liquidation) for breach of contract for defective and inadequate work carried out under building contract - further claims against insurer, project management company (in liquidation) and QBE - cross claims by insurer against project management company and indemnity claims against QBE - QBE brought cross claim against insurer - insured's standard State "Home Comprehensive" insurance policy (policy) issued Apr 2007 - whether reinstatement policy or costs incurred "to pay" policy - "out of policy claim" - repairs carried out as part of insurer's managed repair programme - standard form building contract signed between builder and insured Oct 2013 - another contract between insurer and project management company signed Aug 2012 (2012 contract) - insured not aware of 2012 contract or its terms at any operative time - little disagreement in expert evidence that builder had failed to meet performance and quality obligations under building contract - insured's earthquake damage repairs remained to be completed - Council declined to issue code compliance certificate and warned "notice to fix" would be issued unless significant repair work completed - insured pleaded causes of action against: - (i) builder for breach of contract, negligence and under CGA; - (ii) project management company for negligence and under CGA; - (iii) insurer for breach of contract, negligence, under CGA and estoppel; - (iv) QBE on basis of charge over insurance monies in contracts of insurance entered into between QBE and builder - insured sought declarations that exclusion or limitation clauses in building contract purporting to limit liability of builder were unenforceable - insured sought general damages - whether general damages were recoverable against insurer for its breach of policy - whether general damages were recoverable against all defendants for losses insured may have suffered that could not be objectively quantified in money terms, such as pain and suffering, indignity and humiliation and mental distress - Court observed high threshold for general damages against insurer had not been met - overall by a reasonably fine margin, neither insurer nor project management company had acted so unreasonably, in all the circumstances of this case, particularly as result of earthquake sequence events, such that an award of general damages should lie against either of them - while no doubt builder significantly breached terms of building contract and in all the circumstances, some award of general damages may properly lie against it - however given builder was in liquidation with no realisable assets, award of general damages against builder would serve no purpose

HELD: insurer breached its duty to insured under CGA - insurer liable to insured for cost of carrying out necessary work to remediate defects and deficiencies in repair work - policy clearly a "to pay" policy rather than reinstatement policy - in words of policy, election to repair or reinstate rested with insured and insurer's policy obligation was simply to meet cost of those repairs to policy standard - insured largely successful in claims against: - (a) insurer under policy and CGA; - (b) builder under building contract, in negligence and under CGA; - (c) project management company under CGA - insured entitled to judgment for initial amount now entered on damages claims: - (1) against insurer, builder and project management company being sum of $389,848 (reasonable measure of damages represented by "costs to fix" being estimated cost to rectify repair defects); - (2) against QBE as to part only of initial amount of $389,848 in sum of $339,848 - in all cases jointly and severally - declaration made that insured entitled to award of damages against defendants (jointly and severally) for accommodation costs for alternative accommodation over reasonable period while work to rectify defective repairs carried out - as between insurer and QBE, declaration made that insurer to indemnify QBE pursuant to cl17.2 of 2012 contract for 79.64 percent of ultimate alternative accommodation amount - QBE to indemnify insurer pursuant to cl17.1 of 2012 contract for 20.36 percent of ultimate alternative accommodation amount - further, insurer entitled to judgment against QBE pursuant to indemnity in cl17.2 of 2012 contract for sum of $80,468 - QBE entitled to judgment against insurer pursuant to indemnity in cl17.1 of 2012 contract for sum of $259,379 - net apportionment of amounts to be paid to insured under overall judgment in proceeding of $389,848 (plus accommodation) - IAG to meet $309,379 (plus share of accommodation) - QBE to meet $80,468.96 (plus share of accommodation) - declaration that, other than for purposes of insured's various claims under CGA, limitation provisions in building contract general conditions were not voided - insured bound by these clauses - claim for general damages against defendants dismissed - written submissions on appropriate award of interest in favour of insured invited - costs reserved

DAMAGES

CONTRACT LAW

MATURAL DISASTERS

NEGLIGENCE

STATUTES Building Act 2004 s17 - Building Regulations 1992 Schedule 1 - Canterbury

	Earthquakes Insurance Tribunal Act 2019 s53 - Consumer Guarantees Act 1993 s2(1), s2(1)(b), s 2(1)(b)(i), s 2(1)(b)(iii), s28, s32, s32(c), s36, s43 - Contract and Commercial Law Act 2017 s12, s17 - Declaratory Judgements Act 1908 s3 - Interest on Money Claims Act 2016 s5 - Law Reform Act 1936 s9, s9(1), s9(4), 17(1)(c) - Limitation Act 2010 s11, s11(1)
CASES CITED	Sleight v Beckia Holdings Ltd (in liq) [2020] NZHC 571 ; Parkin v Vero Insurance New Zealand Limited [2015] NZHC 1675 ; Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2014] NZSC 147, [2015] 1 NZLR 432 ; Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, [1998] 1 All ER 98, [1998] 1 BCLC 493 ; Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 101 ; [2009] 3 WLR 267 ; Vector Gas Ltd v Bay of Plenty Ltd [2010] NZSC 5, [2010] 2 NZLR 444, [2010] NZCCLR 23, [2010] BCL 156, (2010) 9 NZBLC 102,874 ; Wholesale Distributors Limited v Gibbons Holdings Ltd v [2008] NZSC 37, [2008] 1 NZLR 277, (2007) 5 NZ ConvC 194,493, (2007) 8 NZCPR 374, [2008] ANZ ConvR 413, [2007] BCL 626 ; Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341 ; Fund Managers Canterbury Ltd v AIG Insurance New Zealand Ltd [2017] NZCA 325 ; Blanshard v National Mutual Life Association of Australasia Ltd (2004) 13 ANZ Insurance Cases 61-621 ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 ; Dodds v Southern Response Earthquake Insurance Services Ltd [2019] NZHC 2016, [2019] 3 NZLR 926, (2019) 15 TCLR 395 ; Southern Response Earthquake Services Limited v Dodds & Ors [2020] NZCA 35 ; The University of Newcastle v GIO General Ltd (1995) 8 ANZ Insurance Cases 61-281 ; Best Food Fresh Tofu Ltd v China Taiping Insurance (NZ) Co Ltd [2014] NZHC 1279 ; Bruce v IAG New Zealand Ltd [2018] NZHC 3444 ; D A Constable Syndicate 386 v Auckland District Law Society Inc [2010] NZCA 237, [2010] 3 NZLR 23, 16 ANZ Insurance Cases 61-850 ; Anglo-International Bank Ltd v General Accident Fire & Life Assurance Corp Ltd [1934] 48 LILR 151 ; Xu v IAG New Zealand Ltd [2019] NZSC 68, [2019] 1 NZLR 600, [2019] Lloyd's Rep IR 552, (2019) 20 ANZ Insurance Cases 62-223 ; McLean v IAG New Zealand Limited [2013] NZHC 1105 ; Evans v IAG New Zealand Ltd [2020] NZHC 1326 ; J Spurling Ltd v Bradshaw [1956] 1 WLR 461, [1956] 2 All ER 121 ; Spiteri v RCR Infrastructure (New Zealand) Ltd [2017] NZHC 438 ; Curtis v Chemical Cleaning and Dyeing Co [1951] 1 KB 805 ; Gustav & Co Ltd v Macfield Ltd [2007] NZCA 205, [2008] NZSC 47, [2008] 2 NZLR 735, (2008) 6 NZ ConvC 194,648, (2008) 9 NZCPR 469 ; Lumley General Insurance (NZ) Ltd v Body Corporate No 205963 [2010] NZCA 316, [2010] 16 ANZ Ins Cases 9161-853 ; Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163, [1971] 2 WLR 585, [1971] 1 All ER 686 ; Bowkett v Action Finance Ltd [1992] 1 NZLR 449 ; Nightingale

	v Barfoot & Thompson Ltd (HC, Auckland, CIV-2009-404-4073, 22 October 2009) ; L'Estrange v F Graucob Ltd [1934] 2 KB 394, [1934] All ER Rep 16, 103 LJKB 730 ; Nesbit v Porter [2000] 2 NZLR 465, (2000) 6 NZBLC 103,018, (2000) 9 TCLR 395 ; Kaori Ltd v Shrinkforce Shrink Wrap Services Ltd (in rec) NZHC 3204 ; Civil Aviation Authority v Airline Pilots' Association Industrial Union of Workers Inc [2011] NZCA 520, [2012] NZAR 66 ; Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 ; Body Corporate 185960 v North Shore City Council (2008) 2 NZTR 18-032 ; Auckland City Council v Grgicevich (HC, Auckland, CIV-2007-404-6712, 17 December 2010) ; Sayles v Adams [2014] NZHC 1915 ; South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282, (1991) 3 NZBLC 102,301 ; Hotchin v NZ Guardian Trust Co Ltd [2016] NZSC 24, [2016] 1 NZLR 906 ; Turvey Trustee Ltd v Southern Response Earthquake Services Ltd [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 961-965 ; O'Loughlin v Tower Insurance Ltd [2013] NZHC 670 ; Kilduff v Tower Insurance Ltd [2018] NZHC 704 ; Gabolinscy v Hamilton City Corporation [1975] 1 NZLR 50 ; Young v Tomlinson [1979] 2 NZLR 441 ; Ridgway Empire Ltd v Grant [2019] NZSC 85 ; Body Corporate 185960 v North Shore City Council [2008] 2 NZTR 18/032 ; White v Rodney District Council (2009) 11 NZCPR 1 ; Day v Black (2004) 6 NZCPR 169 ; Sloper v W H Murray Ltd (HC, Dunedin, A31/85, 22 November 1988)
OTHER SOURCES	Rob Merkin QC, "Insurers' Liability for Defective Repairs" (2019) 25 NZBLQ 133 ; Robert Merkin, Colinaux's Law of Insurance (12th ed), Sweet & Maxwell, Croydon 2019 ; Michael Ball and David Kelly, Kelly and Ball Principles of Insurance Law (Online ed LexisNexis) at [12.0140.10] ; Malcolm Clarke, The Law of Insurance Contracts (6th ed Informa, London, 2009) at [29-2B] ; Malcolm Hyde, Brendon McCarthy and James Deacon, Property Insurance: Law and Claims (Witherby Publishing Group, London, 2010) at 153 ; Jeremy Finn, Stephen Todd and Matthew Barber, Burrows Finn and Todd Law of Contract in New Zealand (6th, LexisNexis, Wellington, 2018) at [15.2.3] ; Roger Thornton (ed), Gault on Commercial Law (online ed, Thomson Reuters) at [CG2.13.01(2)] ; Concise Oxford English Dictionary (11th ed, Oxford University Press, Oxford, 2004) ; Stephen Todd (ed), Todd on Torts (8th ed, Thomson Reuters, Wellington, 2019) at [25.2.04] ; NZS 3910:2013 Conditions of contract for building and civil engineering construction: and INGENIUM and Others "Conditions of Contract for Consultancy Services" (3rd ed, August 2009) ; John Birds, Ben Lynch and Simon Paul, MacGillivray on Insurance Law (14th ed) Sweet & Maxwell, London, 2019 at 708
REPRESENTATION	DJ Cooper, MJ Borcoski, NS Gedye QC, OV Collette-Moxon, MK Booth, DH McLellan QC, SD Galloway, L Green

PAGES	199 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	HC Judgment

NAME	Claims Resolution Service Ltd v Roberts
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2020-409-000197, CIV-2019-409-000704
JUDG DATE	5 October 2020
CITATION	[2020] NZHC 2605
FULL TEXT	PDF judgment
PARTIES	Claims Resolution Service Ltd (appellant), Jamie Roberts (first respondent), Natasha Maree Roberts (second respondent), The Staples Group Ltd (appellant), Rachael Louise Beeton (respondent)
SUBJECT	CIVIL PROCEDURE - unsuccessful appeals of DC decisions (x2) to adjourn proceedings pending developments in representative action against Claims Resolution Service (CRS) - two separate appeals heard together - appellants were CRS and parent company Staples Group (Staples) - appeals raised similar issues particularly as to jurisdiction of DC to adjourn proceedings - CRS offered insurance advocacy and litigation funding services to homeowners affected by Canterbury earthquake sequence 2010 to 2011 - respondents were former CRS clients who awaited outcome of CA appeal of HC decision which granted leave for proceedings between CRS and group of homeowners, to continue as representative action on an "opt in" basis - DC proceedings and proposed representative action shared common questions of law and facts - DC cases adjourned were: (a) CRC's claim against the R's - sought judgment for $43,932 unpaid invoices for services plus interest and costs - R's pleaded affirmative defences including breach of fiduciary duty; - (b) Staples Group sued RB in defamation for sum of not less than $100,000 for comments she made on a Facebook page (taken down several days after posting) - Mr A owned house in which he and RB lived - RB authorised to act as agent in dealings with CRS and appointed as Mr A's litigation guardian due to his incapacity issues - CRS applied for summary judgment against Mr A - claimed $60,000 unpaid invoices for services - claim denied on similar grounds as the R's - summary judgment proceedings had been stayed due to overlap with legal and factual issues in representative action - RB obtained adjournment on defamation proceedings

until HC proceedings against Mr A had been determined - issues on appeal: - (1) whether DC lacked jurisdiction to order adjournments - whether DCR r10.10 or r10.18 applied - distinction between postponement of a trial and adjournment or stay of proceeding - Court noted lacuna in DC Rules - suggested it was an unintended oversight rather than intentional effect to limit DC's ability to govern its own processes; - (2) whether DCJ erred in omitting to impose any conditions on order or requiring the R's to apply to transfer proceeding to HC, or for leave to consolidate proceedings - whether DCJ wrong to adjourn proceeding sine die without any conditions (defamation case); - (3) whether DCJ erred in exercise of its discretion - whether discretion to stay or adjourn proceeding in interests of justice; - (4) whether DCJ adopted correct mechanism to ensure type of duplication that would arise from hearing of defamation proceeding and claim against Mr A separately, would be avoided

HELD: - (1) DC had residual inherent power necessary to enable it to effectively manage and control its own proceeding to adjourn or stay matter in present situation - no readily discernible reason why objective of r10.18 should be defeated because second proceeding was one that lay in HC's jurisdiction and could not otherwise be met by an application to this Court and exercised on this appeal - ability to delay hearing, pending outcome of related proceeding in another court was an obvious and necessary power inherent to a court exercising civil jurisdiction in order to allow it to exercise its functions and duties in a manner consistent with securing just, speedy and inexpensive determination of proceedings; - (2) DCJ not obliged to impose any requirement on R's to take any particular steps while outcome of CA decision awaited, nor to adjourn to a particular date - adjournment sine die pending arrangement of a new trial date possible in principle - imposition of any conditions and terms at discretion of Court - given fate of Mr A's proceeding was dependent on determination of representative proceeding in HC, sensible to direct that defamation proceeding be recalled after outcome of CA appeal known; - (3) DCJ had very wide discretion to order stay of proceedings in accordance with interests of justice - postponement of proceedings avoided possible inconsistent findings of fact and law being made in separate proceedings before DC and HC - DCJ did not err in grant of application to adjourn or stay matter in order to allow the R's opportunity to consolidate their proceeding with representative action and to "opt in" to that action should that be available as outcome of CA decision; - (4) DC correct in its assessment of merits of RB's application - it was just that two proceedings be tried together, or at least defamation proceeding not heard until after determination of Mr A's litigation - in interests of justice the best course was to utilise r10.18 and order determination of defamation proceeding be stayed to allow an assessment of whether those proceedings should remain in abeyance

	until after determination of group action in HC - while possible effect would be long delay of defamation action, when regard was had to common issues that litigation involving Staples subsidiary company and its alleged treatment and conduct towards its former clients, such an approach was appropriate in the unusual circumstances of case - order that defamation proceeding be stayed until outcome of CA appeal known - should appeal be unsuccessful, interim stay to extend until determination of any application by Mr A to "opt in" to representative action, or notice given of his intention not to make such an application - result: both appeals dismissed - the R's entitled to scale costs on 2B basis - as RB self-represented no costs order made
STATUTES	District Court Act 2016 s89 - District Court Rules 2014 R1.3, R1.4, R7.3(8)(b), R10.10, R10.18, R15.1 - High Court Rules 2016 R10.12
CASES CITED	Smith v Claims Resolution Service Ltd [2019] NZHC 127 ; Claims Resolution Service Ltd v Roberts (HC, Christchurch, CIV-2020-409-000197, 10 June 2020) ; Smith v Claims Resolution Service [2019] NZHC 2738 ; Regan v Gill [2011] NZCA 607 ; Minister of Education v Opus International Consultants Ltd [2018] NZHC 2949 ; Body Corporate 366567 v Auckland Council [2017] NZHC 1520, (2017) 23 PRNZ 569 ; Malley & Co v Burgess [2015] NZHC 841 ; Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331, (2009) 20 PRNZ 215 ; Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 ; APN New Zealand Ltd v Simunovich Fisheries Ltd [2009] NZSC 93, [2010] 1 NZLR 315
OTHER SOURCES	McGechan on Procedure (online loose-leaf ed, Thomson Reuters) at [HR10.2.03(2)]
REPRESENTATION	D Ballantyne, RD Ashton, R Lynn, B Hood, R Beeton in person
PAGES	26 p
LOCATION	New Zealand Law Society Library

NAME	Marriner Property Ltd, Re
JUDGE(S)	Doogue J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2020-409-000131
JUDG DATE	17 July 2020
CITATION	[2020] NZHC 1747
FULL TEXT	PDF judgment
PARTIES	Marriner Property Ltd (Applicant)

SUBJECT	EASEMENTS - successful application for extinguishment of right of way (ROW) easement - successful application to commence proceedings by way of originating application - matter proceeded by way of formal proof - applicant company (MPL) was equitable owner of 11 Marriner St, Christchurch (the property), being the nominated purchaser under an unconditional agreement for sale and purchase - property was the subject of a unit plan development created under the Unit Titles Act 1972 and comprised 50 units which were damaged in the Canterbury earthquake sequence - ROW easement created in 1932 in favour of FHCL and H - H died in or around 1934, and his associated company was removed from the companies register in 1990 - easement had not been used as a ROW for some decades and by at least 1998 there was no longer any practical purpose for the easement - whether grounds for extinguishing easement made out - s317 Property Law Act 2007 applied and in particular s317(a)(i), s317(a)(ii), and s317(d) - change in use of property meant easement now impeded the reasonable use of the property to a different extent from that which could reasonably have been foreseen by the original parties to the easement - **HELD**: easement redundant and could be extinguished - leave granted under R19.5 High Court Rules 2016 to bring this application by way of originating application - order extinguishing ROW in gross VENDOR & PURCHASER UNIT TITLES
STATUTES	District Court Rules 2014 R20.13 - High Court Rules 2016 R19.2, R19.5, pt19 - Property Law Act 2007 s4, s316, s317, s317(1)(a)(i), s317(1)(a)(iii), s317(1)(b), s317(1)(d) - Unit Titles Act 1972
CASES CITED	White v VXJ Holdings Ltd [2019] NZHC 3095 ; Sutherland v MacAlister (2010) 11 NZCPR 732
REPRESENTATION	KM Paterson, OD Peers
PAGES	8 p
LOCATION	New Zealand Law Society Library

NAME	Alexander v Southern Response Earthquake Services Ltd
JUDGE(S)	Associate Judge Paulsen
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000694

JUDG DATE	10 July 2020
CITATION	[2020] NZHC 1660
FULL TEXT	PDF judgment
PARTIES	David James Alexander, Katrina Jane Alexander, Estuary Trustees Limited as trustees of the Daka Trust (plaintiffs), Southern Response Earthquake Services Limited (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - wasted costs order made following vacation of settlement conferences due to plaintiffs expert's delays in completing joint experts report - quantum to be fixed following receipt of further evidence of costs thrown away [PRELIM H/NOTE]
STATUTES	High Court Rules 2016 R11.5, R14.1(a)
CASES CITED	Alexander v Southern Response Earthquake Services Ltd (HC, Christchurch, CIV-2018-409-694, 9 August 2019) ; Nielsen v Earthquake Commission [2019] NZHC 629 ; Neilsen v Earthquake Commission [2020] NZHC 490 ; Jeffreys v Morgenstern [2013] NZHC 1361 ; Burgess v Monk [2015] NZHC 1881 ; EBR Holdings Ltd (in liq) v van Duyn [2018] NZHC 1065 ; Marley New Zealand Ltd v Skellerup Rubber Services Ltd [2013] NZHC 3040 ; Fu Hao Construction Ltd and Lanco Albany Ltd (HC, Auckland, CIV-2004-404-6608, 23 May 2008) ; Opua Coastal Estate Ltd (in Liq) v Mulholland [2014] NZHC 1467 ; Simpson v Hubbard [2012] NZHC 3020
OTHER SOURCES	McGechan on Procedure (loose-leaf ed, Thomson Reuters) at [14.16A], [14.16A(4)]
REPRESENTATION	PJ Woods, KL Vilsbaek, R Hargreaves, H Bowering-Scott
PAGES	13 p
LOCATION	New Zealand Law Society Library

NAME	Kkeshav International Ltd v Heaton Holdings Ltd
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2020-409-000120
JUDG DATE	30 June 2020
CITATION	[2020] NZHC 1513
FULL TEXT	PDF judgment
REPORTED	(2020) 21 NZCPR 125
PARTIES	Kkeshav International Ltd (applicant), Heaton Holdings Ltd (respondent)

SUBJECT	CIVIL PROCEDURE - unsuccessful application to set aside statutory demand - landlord issued statutory demand for unpaid rent - demand claimed $8,625 in respect of lease 1 (supermarket) and $4,312 for lease 2 (storage unit) - both lease agreements on ADLS forms - included no set-off clauses - tenant relied on abatement clause (cl27.3) in relation to lease 1 - tenant had taken assignment of supermarket lease in Sept 2011 - lease renewed in 2012 for 3 year term - lease renewed again in Jun 2015 for 6 year term with expiry date Jun 2021 - tenant vacated premises late 2019 - statutory demand issued 24 Feb 2020 related to rents due on 10 Feb 2020 (lease 1) and 01 Feb 2020 (lease 2) - supermarket damaged in Canterbury earthquake sequence - nature and extent of damage in dispute - tenant complained premises had been subject to unrepaired damage since Feb 2011 and that full rent had been paid throughout period premises occupied - argued rental claimed by landlord needed to abate to reflect unrepaired earthquake damage - registered valuer calculated rental abatement for tenant's period of occupation at about $80,000 - dispute over retrospective abatement referred to arbitration - whether claim was for retrospective abatement or set off - whether combined effect of obligation to pay rent without any deduction or set-off and fact that arbitration did not prevent landlord from recovering rent (cl44.3) meant tenant was obliged to pay disputed rent pending determination of abatement claim - tenant had not purported to cancel lease until after rental period covered by demand - Court observed tenant could not rely on its claim for historical retrospective abatement as an answer to rent claimed in statutory demand as it amounted to tenant claiming a set-off against rent due (Browns Real Estate Ltd) - landlord argued further issue in relation to lease renewals - submitted when a lease contained an option to renew, exercise of that option ordinarily involved creation of a new lease - argued because lease had been renewed in Jun 2012, 9 months after tenant took assignment of lease, any right to retrospective abatement tenant may have had, only applied to period from assignment to renewal at Jun 2012 - any claim would be now be statute barred - submission based on fact supermarket was not further damaged by earthquake or otherwise after Jun 2012 renewal and that wording "shall be damaged" in lease clause meant damaged after commencement of lease - Court agreed rental for a premises was determined by state of premises at commencement of lease **HELD**: proposition by tenant that claimed abatement would prevail until arbitration was inconsistent with scheme of lease as a whole - no basis to treat disputed abatement claim any differently from any other disputed tenant claim - landlord was not to be deprived of benefit of no deduction, no set-off clause, by assertion of a right to an abatement even if claim referred to arbitration - result:- (a) amount claimed for lease 2 payable by virtue of no set-off clause in lease; -

	(b) true nature of historical abatement was a claim to set-off - abatement not available in respect of any part of rent subject to statutory demand, as no damage had been caused to premises during current term of lease such as to trigger abatement clause - costs reserved - application declined LANDLORD & TENNANT LEASES
STATUTES	Companies Act 1993 s290(4)(a), s290(4)(b), s290(4)(c) - Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 R2.3 - Property Law Act 2007 s256
CASES CITED	AAI Ltd v 92 Lichfield Street Ltd (rec and liq) [2015] NZCA 559, [2016] NZAR 1338 ; Commissioner of Inland Revenue v Chester Trustee Services Ltd [2003] 1 NZLR 395 ; McWillaim Consulting Group Ltd v Keith Ussher Architecture Services Ltd [2012] NZHC 33 ; 31 Innovation Ltd v Black Magic Design Studio Ltd [2020] NZHC 1173 ; Browns Real Estate Ltd v Grand Lakes Properties Ltd [2010] NZCA 425, (2010) 20 PRNZ 141 ; Aladdins Motor Inn Ltd v Bowcorp Holdings Ltd (HC, Palmerston North, CIV-2011-454-000412, 16 December 2011) ; Aladdins Motor Inn Ltd v Bowcorp Holdings Ltd [2012] NZCA 532 ; Robt. Jones Investments Ltd v RG Caie Ltd (HC, Wellington, CP695-88, 22 November 1988) ; Auckland Council v Cosdo Equity Ltd [2014] NZHC 1900
OTHER SOURCES	David Brown, "Leases" in Elisabeth Toomer (ed), New Zealand Land Law (Thomson Reuters, Wellington, 2017) at 8.13.10
REPRESENTATION	KM Graham, J Moss
PAGES	13 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	,

NAME	Ginivan v Southern Response Earthquake Services Ltd
JUDGE(S)	Associate Judge Paulsen
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000116
JUDG DATE	26 June 2020
CITATION	[2020] NZHC 1469
FULL TEXT	PDF judgment
PARTIES	William Francis Ginivan and Brett William Reid as trustees of the Gift Trust

	(first plaintiffs), William Francis Ginivan and Diane Shirley Carson (second plaintiffs), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for leave to appeal - no arguable error of fact or law - interests of justice favoured refusing the application for leave [PRELIM H/NOTE] INSURANCE
STATUTES	High Court Rules 2016 R7.48(1) - Senior Courts Act 2016 s56, s56(3)
CASES CITED	Ginivan v Southern Response Earthquake Services Ltd [2018] NZHC 2403 s56 ; Finewood Upholstery Ltd v Vaughan [2017] NZHC 1679 ; A v Minister of Internal Affairs [2017] NZHC 887 ; Li v Chief Executive, Ministry of Business, Innovation and Employment (No 2) [2018] NZHC 1171, [2018] NZAR 1134 ; Ngai Te Hapu Inc v Bay of Plenty Regional Council [2018] NZCA 291 ; SM v LFDB [2014] NZCA 326, [2014] 3 NZLR 494
REPRESENTATION	GA Cooper, MA Powell
PAGES	16 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Ginivan v Southern Response Earthquake Services Ltd [2018] NZHC 2403, Costs decision [2021] NZHC 1997

NAME	White v VXJ Holdings Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2019-409-000157, CIV-2019-409-000221
JUDG DATE	26 November 2019
CITATION	[2019] NZHC 3095
FULL TEXT	PDF judgment
PARTIES	Michael Leslie White and Body Corporate 78462 (applicants), VXJ Holdings Ltd (respondent/applicant)
NOTE	Also known as the Cave Rock decision ; High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful applications by Body Corporate and Chairperson of Committee representing 46 supporting owners - residential and commercial complex (Cave Rock apartments)- application for orders regarding distribution of certain funds and insurance proceeds following Christchurch earthquake sequence - reinstatement of apartments determined uneconomic by

insurer - $21M in settlement of overall insurance claims paid to Body Corporate for owners - disagreement by 4 of 50 owners as to how settlement money to be distributed - interim payment of approximately $17M distributed to 46 of 50 owners prepared to accept arrangements - Body Corporate received EQC payment of $120,051 in 2012 for damage to parts of complex arising from Sept 2010 earthquake - Body Corporate received offer from third party to purchase complex in its earthquake damaged and partially demolished condition for $4.8M conditional on agreement of all unit owners to sale offer - 46 of 50 owners accepted sale offer - complex had also suffered weathertight issues arising shortly after it was built - Weathertight Homes Tribunal proceedings settled by mediation Jan 2010 - settlement agreement funds received by Body Corporate - certain settlement funds paid to some owners - $210K remained in Body Corporate bank accounts -whether scheme under s74 Unit Titles Act 2010 (UTA) should be introduced and if so how should insurance and sale proceeds and any remaining property be distributed - applicants sought all insurance and other proceeds be distributed in accordance with each unit's currently registered "ownership interest" (OI) as defined under UTA - in opposition respondent submitted Court should order distribution in accordance with original ownership interests - "unit entitlement" set when complex built in 1998 - Court set out how OIs of each unit had changed over time through valuation reviews and reassessments - - reassessment registered under UTA in April 2018 - Dominion Finance Group Ltd v BC 3829020 considered - Court observed that based on valuation evidence, it was just and equitable that on cancellation of unit plan proceeds should be divided on basis of registered and reassessed ownership interests rather than original unit entitlement interests fixed in 1998 - applications before Court: - (1)settlement of scheme for Body Corporate under s74 UTA to distribute insurance proceeds and any other property remaining; - (2) order for cancellation of Unit Plan pursuant to s188(2)UTA; - (3) order to require 4 unit owners to join Body Corporate and 46 other unit holders in acceptance of sale offer (s339 - s343 Property Law Act 2007) - respondent sought order that an administrator be appointed to conduct audit and take over affairs of Body Corporate -

HELD: orders as follows: - (a) weathertight homes settlement of $210,000 to be distributed - each contributing unit owner to be reimbursed their full contribution to legal costs to bring weathertight claim, a total of $39,167 with remainder $170,832 to be distributed to unit owners who participated as claimants in proceeding in proportion to assessed damage to each unit; - (b) EQC proceeds of $120,051 to be distributed - sums paid in respect of claims made by individual units to be paid to those units - sums paid in respect of exterior of each building in complex be paid to units in particular building to be apportioned in

	accordance with OI of each unit within that building; - (c)insurance proceeds and all remaining funds and assets, including property sale proceeds to be disbursed in line with currently registered OI; - (d) just and equitable outcome for unit plan to be cancelled and for currently registered OIs to be used with remaining insurance proceeds, assets and funds from the sale of remaining complex to be distributed on that basis; - (e) by consent, order made under Property Law Act 2007 for sale of remaining development interests under existing sale offer; - (f)-respondents' application to appoint an administrator for Body Corporate dismissed - costs reserved
	UNIT TITLES
STATUTES	Property Law Act 2007 s339, s340, s341, s342, s343 - Unit Titles Act 1972 s48 - Unit Titles Act 2010 s38(2), s39, s39(2), s39(2A), s74, s141, s177, s188(2), s188(3), s189(5), s189(5)(aa), s210,
CASES CITED	Tisch v Body Corporate No 318596 [2011] NZCA 420, [2011] 3 NZLR 679, (2011) 12 NZCPR 533, (2011) 6 NZ ConvC 95-558 ; Body Corporate 312431 v Auckland Council [2015] NZHC 961 ; Dominion Finance Group (in rec, in liq) v Body Corporate 382902 [2012] NZHC 3325, (2012) 7 NZ ConvC 96-003, (2012) 14 NZCPR 252 ; Lake Hayes Property Holdings Ltd v Petherbridge [2014] NZHC 1673, (2014) 15 NZCPR 590 ; World Vision of New Zealand Trust Board v Seal [2004] 1 NZLR 673, (2004) 5 NZ ConvC 193,823, (2003) 11 TCLR 90, (2003) 5 NZCPR 618 ; OM Hardware Ltd v Body Corporate 303662 (2015) 15 NZCPR 921
REPRESENTATION	HC Matthews, VA Nichols
PAGES	27 p
LOCATION	New Zealand Law Society Library

NAME	Dewes v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000662
JUDG DATE	7 November 2019
CITATION	[2019] NZHC 2899
FULL TEXT	PDF judgment
PARTIES	Catherine Frances Dewes, Robert Denton Green and Diana Rosemary Shand (as trustees of the Dewes Green Family Trust), IAG New Zealand Ltd (first

	defendant), Max Contracts Ltd (second defendant), Max EQ Ltd (third defendant), Orange H Management Ltd (formerly Hawkins Management Ltd) (in rec, in liq)(first third party), Orange H Group Ltd (formerly Hawkins Management Ltd (in rec, in liq) (second third party), Max Contracts Ltd (third third party), QBE Insurance (Australia) Ltd (fourth third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application by fourth third party (QBE) for leave to appeal decision transferring proceeding to Canterbury Earthquake Insurance Tribunal (Tribunal) - claim against QBE based on Law Reform Act 1936 - QBE sought leave to appeal on the basis there was no jurisdiction under s16(2) Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) to transfer the third party claim to the Tribunal - submitted it was not a qualifying claim under the Act - argued that even if jurisdiction existed, discretion to transfer should be exercised in QBE's favour - Court considered phrase 'proceedings may also include additional parties to those referred to in s8' in s16(2)(a) of the Act included all parties - statutory language was clear - 'parties' not restricted to other defendants - Parliamentary materials did not alter the plain meaning - consistent with purpose of Act - Parliament intended Tribunal to make the decision whether removing a third party was necessary for the fair and speedy resolution of a claim - addressed by s11(1)(b) of the Act - whether to grant leave for QBE to appeal - **HELD**: leave application dismissed - no reasonably arguable case that s16(2) of the Act prohibited the transfer of third party proceedings to the Tribunal - not reasonably arguably that s16(2) permitted the Court to transfer part of a proceeding to the Tribunal - issue of the Court exercising its discretion to transfer the proceeding did not raise an issue of general or public importance that required determination - discretion issue would not warrant the delay of an appeal - costs reserved
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s3, s8, s8(1), s11, s11(1), s11(1)(a), s11(1)(b), s16, s16(2), s16(2), s16(2)(a), s27(1)(d), s45- High Court Rules 2016 R4.7(1) - Law Reform Act 1936 - Senior Courts Act 2016 s56(3)
CASES CITED	Smith v Claims Resolution Service Ltd [2019] NZHC 2738 ; Dewes v IAG New Zealand Ltd [2019] NZHC 2270
REPRESENTATION	CF Dewes (in person), NS Gedye QC, O Collette-Moxon, R Smedley, D McLellan QC, LR Green
PAGES	13 p
LOCATION	New Zealand Law Society Library

NAME	Toomey v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Paulsen
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000659
JUDG DATE	6 November 2019
CITATION	[2019] NZHC 2882
FULL TEXT	PDF judgment
PARTIES	Jerome Anthony Toomey and Josie Louise Simpson and Canterbury Trustees (2016) Ltd as trustees of the Toosim Family Trust (plaintiffs), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - successful application by defendant to strike out statement of claim - plaintiff's unsuccessful claim to be paid reinstatement costs to repair undiagnosed earthquake damage - previous owners of the property had made insurance claims following Christchurch earthquake and repairs had been carried out - property then sold to the plaintiff who took an assignment of any residual rights previous owners had in respect of any insurance claim made or that might arise from the earthquakes - plaintiff later discovered undiagnosed earthquake damage (the underfoot damage) - in reliance on the Supreme Court decision in Xu v IAG, insurance company argued that plaintiff had no reasonably arguable cause of action - at the date of assignment the previous owner had not incurred the cost of restoring the home to repair the underfloor damage so as to satisfy the condition of reinstatement benefit, nor did they have any accrued right to any payment from IAG - defendant also argued that the plaintiff had no alternative claim to an indemnity payment under the policy as the previous owner had not suffered any indemnity value loss which the plaintiff as assignee could recover - **HELD**: plaintiff's statement of claim disclosed no arguable cause of action - deficiencies in the statement of claim could not be remedied by allowing it to amend its pleadings - plaintiff's claim struck out - cost submissions, if any, by memoranda [PRELIM H/NOTE]
STATUTES	High Court Rules 2016 R15.1
CASES CITED	Xu v IAG New Zealand Ltd [2019] NZSC 68, [2019] 1 NZLR 600, [2019] Lloyd's Rep IR 552, (2019) 20 ANZ Insurance Cases 62-223 ; Attorney-General v Prince [1998] 1 NZLR 262, (1997) 16 FRNZ 258, [1998] NZFLR 145 ; Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725 ; Bryant v Primary Industries Insurance Co Ltd [1990] 2 NZLR 142 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases

	62-074, [2016] Lloyd's Rep IR 118 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; Brkich & Brkich Enterprises Ltd v American Home Assurance Co (1995) 127 DLR (4th) 115, (1995) 8 BCLR (3d) 1 ; Castellain v Preston (1883) 11 QBD 380
OTHER SOURCES	Ian Enright and Robert Merkin, Sutton on Insurance Law: Volume 1 (4th ed, Lawbook Co, Australia, 2015) vol 1 at [11.740] ; AW Welford and WW Otter-Barry, The Law Relating to Fire Insurance (4th ed, Butterworth & Co, London, 1948) at 234
REPRESENTATION	C Johnstone, B Burke, M Ring QC, R Hargreaves
PAGES	15 p
LOCATION	New Zealand Law Society Library

NAME	Heale v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Paulsen
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000166
JUDG DATE	1 November 2019
CITATION	[2019] NZHC 2829
FULL TEXT	PDF judgment
PARTIES	Thomas Edward Fairfax Heale and Anthea Clare Heale (plaintiffs), IAG New Zealand Ltd (defendant), QBE Insurance (Australia) Ltd (proposed first third party), Buildtech Restorations Ltd (proposed second third party), Engineering Design Consultants Ltd (proposed third third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful applications by defendant (insurer) to join third parties; successful application by proposed first third party (QBE) objecting to admissibility of affidavits - plaintiffs' home damaged in Canterbury earthquakes - made claim under policy with insurer - insurer accepted claim - 2012, insurer entered Rebuild Solution Master Agreement (RSMA) with two entities (Hawkins) - obliged Hawkins to manage reinstatement of earthquake damage on behalf of insurer's clients - Canterbury Home Repair Scheme - plaintiffs elected to repair home under Scheme - entered building contract with proposed second third party (Buildtech) - insurer not party to building contract but paid for repairs as they were completed - Buildtech engaged proposed third third party (EDC) to provide engineering advice in relation to repairs, foundations and other structural elements - Buildtech completed repairs -

plaintiffs filed proceedings against insurer - pleaded breach of policy, breach of Fair Trading Act 1986, negligence and loss of a chance - contended they were not advised of appropriate options available under policy - submitted insurer recommended Buildtech to do repairs when it was not competent - repair process not managed properly - repairs expected to take 20 weeks - took over a year - meant policy entitlements for alternative accommodation and landscaping were inadequate - plaintiffs alleged scope of works was deficient and they were misled by it -plaintiffs had to pay large costs for work outside insurance budget - plaintiffs submitted they were forced to sell home at under-value due to financial pressure caused by delays and having to incur costs that policy should have covered - pleaded losses of $16,042 accommodation costs, $116,929 building costs paid above insurance budget and $500,000 loss on sale of house - insurer applied to join Buildtech and EDC as third parties - pleaded they both owed and breached a duty of care to the plaintiffs to exercise reasonable care and skill in performance of repair work - insurer asserted it was entitled to claim contribution from them as co-tortfeasors under s17(1)(c) Law Reform Act 1936 (Act) - Court found significant benefits in joining Buildtech and EDC joined as third parties - would avoid confusion, prejudice or oppression for individual parties - higher prospect of final resolution by alternative dispute resolution should all relevant parties be involved - all issues between parties could be resolved in one trial - removed possibility of inconsistent decisions - separate proceedings would result in duplication of costs - Court acknowledged joining third parties may result in some delays and escalate issues to be determined at trial - attainment of justice by the most efficient means was overriding consideration - Hawkins now in liquidation - at all material times, Hawkins had professional indemnity and general liability insurance policies underwritten by QBE - insurer claimed it had a charge on the insurance monies that were or may become payable in respect of Hawkins' liability to the insurer under s9(1) of the Act - QBE accepted criteria under s9(4)(a) and s9(4)(c) were met - claims-made-and-notified policy - Hawkins did not notify QBE of any circumstances that might give rise to claim under Policy during the period of insurance in respect of work at plaintiffs' property - Court outlined test for a notifiable circumstance - during repairs, plaintiff sent complaint emails to Buildtech, the insurer and Hawkins - included repeated threats to seek compensation from Buildtech - one email made it clear the plaintiffs considered Hawkins was responsible for builder selection, one of their major complaints - (1) whether to join Buildtech and EDC as third parties; - (2) whether affidavits of a project manager filed on behalf of the insurer and purporting to provide expert opinion on the repair project were admissible; - (3) whether, for the purpose of s9(4)(b) of the Act, Hawkins became aware of circumstances in

	relation to the plaintiffs' property which could give rise to a claim against it during the relevant periods of insurance - **HELD**: insurer granted leave pursuant to R4.4 HCR to join Buildtech, and EDC as third parties - insurer granted leave under s9(4) of the Act for the insurer to continue its third party statement of claim against QBE and join QBE as first third party - (1) Buildtech and EDC joined as third parties - Court had jurisdiction as R4.4(1)(a), R4.4.(1)(c) and R4.4(1)(d) applied - discretionary factors favoured joinder; - (2) Court declined to have regard to project manager's affidavits - evidence unhelpful - appeared to lack independence; - (3) insurer showed prima facie case that notifiable circumstances arose during the relevant period of insurance - no need for emails to Hawkins to expressly refer to a complaint or claim against Hawkins to satisfy relevant test - adequate specificity in plaintiffs' email complaints to demonstrate that a claim against Hawkins was reasonably possible, and that such claim could be brought by the plaintiffs, insurer or Buildtech
	INSURANCE
	EVIDENCE
STATUTES	Consumer Guarantees Act 1993 - Evidence Act 2006 s25 - Fair Trading Act 1986 - High Court Rules 2016 R4.4. R4.4(1), R4.4(1)(a), R4.4(1)(c), R4.4(1)(d), R4.8, R4.16, R9.43, Schedule 4 - Law Reform Act 1936 s9, s9(1), s9(4), s17(1)(c)
CASES CITED	Hotchin v New Zealand Guardian Trust Co Ltd [2016] NZSC 24, [2016] 1 NZLR 906 ; TSB Bank Ltd v Burgess [2013] NZHC 1228 ; Barclays Bank Ltd v Tom [1923] 1 KB 221 ; Turpin v Direct Transport Ltd [1975] 2 NZLR 172 ; Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd [2018] NZHC 2077 ; Self-Realization Meditation & Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd [2019] NZHC 763 ; Mammoet Shipping BV v Compter (HC, Whangarei, CP 13-86, 6 July 1987, McGechan J) ; Sinclair Horder O'Malley Ltd v National Insurance Co of New Zealand Ltd [1992] 2 NZLR 706, (1992) 4 NZBLC 102,491 ; Attorney-General (suing in respect of the Ministry of Agriculture & Forestry) v Aon New Zealand Ltd (HC, Wellington, CIV-2005-485-001814, 10 April 2008, Mallon J) ; Minister of Education v McKee Fehl Constructors Ltd [2018] NZAR 970, (2018) 20 ANZ Insurance Cases 62-180 ; Barnes v QBE Insurance (International) Ltd (HC, Auckland, CIV-2010-404-005651, 4 April 2011, Faire J) ; J Rothschild Assurance Plc v Collyear [1999] 1 Lloyd's Rep IR 6 ; Euro Pools plc v Royal Sun Alliance Insurance plc [2019] EWCA Civ 808, [2019] Lloyd's Rep IR 595 ; HLB Kidsons (a firm) v Lloyd's Underwriters [2008] EWCA Civ

	1206, [2009] Bus LR 759, [2009] 2 All ER (Comm) 81, [2009] 1 Lloyd's Rep 8
OTHER SOURCES	Lord Goff and Gareth Jones, Goff & Jones The Law of Restitution (7th edition, Sweet & Maxwell, London, 2007) at 385
REPRESENTATION	AN Riches, NS Gedye QC, BR Cuff, D McLellan QC, PA Cowey, D Bell, JM Morrison
PAGES	32 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Costs decision

NAME	Fraser v Earthquake Commission
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000954
JUDG DATE	30 October 2019
CITATION	[2019] NZHC 2768
FULL TEXT	PDF judgment
PARTIES	Mandy Joan Fraser as executive of the estate of Violet Fraser (plaintiff), The Earthquake Commission (first defendant)(discontinued), Tower Insurance Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - successful application under s16 Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) to transfer proceeding Canterbury Earthquakes Insurance Tribunal (Tribunal); successful wasted costs application by second defendant (insurer) - plaintiff brought proceedings against first defendant (EQC) and insurer - proceedings against EQC discontinued - plaintiff changed lawyers three times - abandoned expert reports after they had been served - plaintiff resisted insurer's claim for wasted costs on the basis changes of solicitors and engineers was due to her being let down by her advisers - insurer sought to have wasted costs application resolved prior to transfer to Tribunal lest transfer mean outstanding application for wasted costs could not be resolved - Court observed Act did not make any specific reference to HC's jurisdiction in relation to costs for steps in a proceeding prior to transfer to Tribunal - whether the Act limited the HC's inherent jurisdiction in respect of costs - whether transfer of a proceeding to the Tribunal rendered the HC functus officio - whether the plaintiff was liable for wasted costs - **HELD**: HC retained jurisdiction to deal with costs issues for steps in HC in

	respect of a proceeding that was transferred to the Tribunal - limitation in s47(4) of the Act was in respect of costs of the parties in the Tribunal and not otherwise - plaintiff liable for wasted costs - calculation of quantum outlined in judgment - whether and to what extent the insurer's experts' involvement with plaintiff's different experts was truly wasted could not be determined at this stage - insurer's application for wasted costs in respect of experts' fees adjourned - to be brought back on upon 10 working days notice by insurer COSTS
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s16, s47 - High Court Rules 2016 R14.1, R15.21, R15.22, R15.23 - Public Safety (Public Protection Orders) Act 2014
CASES CITED	Simpson v Hubbard [2012] NZHC 3020 ; Chief Executive of the Department of Corrections v Chisnall (No 3) [2016] NZHC 1725 ; Black v Taylor [1993] 3 NZLR 403, (1993) 6 PRNZ 690, (1993) 2 NZPC 200 ; Zaoui v Attorney-General [2005] 1 NZLR 577, (2004) 8 HRNZ 181 ; Jacobs v Brett (1875) LR 20 Eq. 1 ; Henderson v The Wangapeka Gold-Dredging Co Ltd (1904) 23 NZLR 833 ; Maehl v Lenihan [2019] NZHC 1457 ; Wilson v Selwyn District Council (2004) 17 PRNZ 461
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [SC12.02(5)(a)(iii) ; Rosara Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Cant L Rev 220 ; Philip A Joseph, Constitutional and Administrative Law in New Zealand (4th ed, Brookers, Wellington, 2014) at 847
REPRESENTATION	MJ Fraser (in person), TJ Mackenzie (amicus curiae), MC Harris, JM Alexander
PAGES	13 p
LOCATION	New Zealand Law Society Library

NAME	Birchs Road Ltd v Earthquake Commission
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000803
JUDG DATE	26 September 2019
CITATION	[2019] NZHC 2439
FULL TEXT	PDF judgment
PARTIES	Birchs Road Ltd (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)

NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application under s16 Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) to transfer proceedings to Canterbury Earthquakes Tribunal (Tribunal) - plaintiff's property damaged in earthquake - filed proceedings against first defendant (EQC) and second defendant (insurer) - progressed slowly - set down for trial commencing 21 Oct 2019 - substantive evidence exchanged - expert conferral completed - plaintiff no longer had legal representation - directors of plaintiff company were husband and wife - husband made transfer application - intended to represent plaintiff himself - contended the Tribunal was a better forum for self-representation than HC - wished to minimise further litigation costs - no evidence as to plaintiff's ability to incur further cost of being represented through HC hearing - estimated to take eight days - defendants submitted transfer to Tribunal risked further delay - defendants may be unable to claim costs for preparation for HC hearing if they succeeded - defendants agreed to take a neutral stance to transfer application if plaintiff's directors undertook to sign a joint memorandum for the Tribunal confirming the proceedings were ready for hearing and able to be set down for adjudication without delay - plaintiff's directors agreed to provide undertaking subject to the proviso they be given time to file further evidence within 15 working days of case management conference - no dispute the plaintiff met transfer eligibility criteria - Court found vast majority of legal costs had already been incurred in three years since filing of claim - desire to save costs on brink of trial was not compelling reason for transfer unless plaintiff was genuinely impecunious - transfer risked speedy resolution of proceedings - delay following transfer unknown - Tribunal's inability to award costs to successful party in the usual course of events was particularly relevant here - Court observed costs for steps taken to date may still be able to be claimed - did not determine issue - HC was considering how costs incurred to the point of transfer could be dealt with in Fraser v Earthquake Commissioner & Tower Insurance Ltd - hearing on 14 Oct 2019 - whether to allow the plaintiff's directors to appear on behalf of the plaintiff for the purpose of advancing the transfer application - whether it was in the interests of justice to transfer the proceeding - **HELD**: leave granted for plaintiff's directors to appear on behalf of plaintiff - proceeding transferred to Tribunal - in the interests of justice in light of agreement by plaintiff's directors to give undertaking - by consent, costs on this application to lie where they fell - costs otherwise reserved pending outcome of Fraser - if HC determined costs up to transfer were claimable, the relevant party could apply for costs - copy of this decision to be provided to Tribunal INSURANCE

	NATURAL DISASTERS
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s16, s16(2)
CASES CITED	Girvan & Anor v Briggs & Ors (2009) 19 PRNZ 230 ; Body Corporate 204464 & Ors v Waitakere City Council & Ors (HC, Auckland, CIV-2008-404-007428, CIV-2009-404-002124, 1 December 2010, Rodney Hansen J) ; Phillips & Anor v Petrou & Ors (HC, Auckland, CIV-2007-404-001771, 5 October 2007, Associate Judge Abbott)
REPRESENTATION	A Cowie, K Krawcyzk, EM Light, R Raymond QC, C Jamieson, M Gall
PAGES	8 p
LOCATION	New Zealand Law Society Library

NAME	Pinot Properties Ltd v Vero Insurance New Zealand Ltd
JUDGE(S)	Osborne J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000103
JUDG DATE	6 September 2019
CITATION	[2019] NZHC 2244
FULL TEXT	PDF judgment
PARTIES	Pinot Properties Ltd (plaintiff), Vero Insurance New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application to transfer proceeding to Canterbury Earthquakes Insurance Tribunal (Tribunal) - plaintiff's building damaged in Canterbury earthquakes - insured by defendant insurer - standard policy for commercial premises - broker who arranged cover unaware there was a residential component to building - Oct 2012, plaintiff advised broker the first floor had been rented to a domestic tenant but tenancy had reverted to commercial offices - three storey building - 1112m2 - at date of damage, building leased to three tenants - ground floor and basement primarily occupied by cafe business - first and top floor primarily occupied for office purposes - upper two floors each had toilets, bathrooms and kitchens - potential for residential use - leases for first and second floors described the premises as 'first floor offices' and 'second floor offices' respectively - top floor lease required landlord to remove walls - left majority of floor suitable for open plan office - Court not satisfied anyone was using building as their residence at time of earthquakes or when insurance policy was taken out - EQC conducted a dwelling apportionment -

	made payments on the basis the dwelling within the building accounted for 33 percent of building - concluded balance of building was 'commercial' - this application dealt with in accordance with Practice Note - Court observed definition of 'residential building' was materially different under Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) and Earthquake Commission Act 1993 - Act's legislative history showed focus on homeowners - whether the plaintiff's building and property constituted a residential building or residential property for the purpose of s8 of the Act - whether the plaintiff's claim met the Act's transfer eligibility criteria - **HELD**: application to transfer proceeding to Tribunal dismissed - plaintiff's building and property did not constitute a residential building or residential property under s8 of the Act - transfer eligibility criterion in s9(1)(a) of the Act not met - 'residential building or residential property' referred to the use to which the building and property was intended to be put and was put - the fact the plaintiff's building had some capacity for accommodation in a minority of its area did not alter the correct characterisation of the building as commercial or non-residential - plaintiff to pay the defendant $1,561 costs
	INSURANCE
WORDS CONS/DEF	"residential building" "residential property"
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s2, s3, s7, s8, s8(1), s8(3), s8(5), s8(5)(a), s8(5)(b), s8(7), s9, s9(1)(a), s11, s16, s16(2) - Earthquake Commission Act 1993 s2 - Interpretation Act 1999 s5(1)
OTHER SOURCES	Practice Note: Canterbury Earthquakes Insurance Tribunal Act 2019 : Arrangements for Transfer of Proceedings HCPN 2019-2 (civ) (1 July 2019) ; JF Burrows and RI Carter, Burrows and Carter on Statute Law in New Zealand (5th ed, LexisNexis, Wellington, 2015) at 290 ; Canterbury Earthquakes Insurance Tribunal Bill (4 September 2018) 732 NZPD 6216 (intro) ; Canterbury Earthquakes Insurance Tribunal Bill (11 April 2019) 737 NZPD 10542 (r2) ; Canterbury Earthquakes Insurance Tribunal Bill (23 May 2019) 738 NZPD 11223 (r3)
REPRESENTATION	MJ Borcoski, FA Darlow
PAGES	16 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission

JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	6 September 2019
CITATION	[2019] NZHC 2236
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application for costs against plaintiff (insured) and non-party costs against litigation funder (CRS) - insured's house damaged in Canterbury earthquakes - Nov 2012, insured entered 'no win, no fee' contract with CRS - if successful, CRS would receive 10 percent of final settlement or award - contract stated CRS would give ongoing advice about merits of case and claim settlement - on CRS's recommendation, insured commenced proceedings against first defendant (EQC) and second defendant (insurer) - CRS selected insured's lawyer, nominated experts - trial scheduled to commence 31 Oct 2016 - insured's lawyer expressed doubts as to merits of claim - CRS disagreed with lawyer's assessment - encouraged insured to proceed - CRS changed its view shortly before trial - advised insured to settled - insured refused - 27 Oct 2016, CRS exercised contractual right to withdraw funding - insured's lawyer withdrew from acting - insured did not appear - trial aborted - default judgment entered against insured - insured engaged new counsel - successfully applied to have default judgment set aside - HC dismissed insured's revived claim in its entirety - Dec 2017, Court ordered insured and CRS to pay EQC and insurer wasted costs - ordered payment of 'reasonable solicitor/client costs and disbursements' for four day period leading up to aborted trial - wasted costs in favour of EQC to be borne 33.3 percent by insured and 66.7 percent by CRS - Court made non-party costs award against insured's lawyer - directed he be responsible for 40 percent of non-party costs, CRS responsible for 40 percent and insured responsible for 20 percent - insured failed to accept five Calderbank offers made jointly by insurer and EQC - three made prior to aborted hearing, two after - last offer was for $250,000 - Court considered approach to costs awards against litigation funder - approach in Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) applied - CRS either gave incorrect advice or failed to give advice after committing to do so - CRS had real control and responsibility for proceedings - not a 'pure funder' - (1) whether to grant EQC's application for 2B costs against the insured in respect of the proceeding for the period up to that covered by the wasted costs award; - (2) whether to grant the insurer's application for 2A and

	2B costs against the insured with a 50 percent uplift for the period up to that covered by the wasted costs award; - (3) what was the quantum of wasted costs the insured and CRS were liable to pay EQC pursuant to the Dec 2017 judgment; - (4) whether EQC was entitled to costs on the wasted costs hearing; - (5) whether the insured was entitled to costs on his successful non-party costs application against CRS; - (6) what was the quantum of the insured's costs against CRS on the setting aside judgment; - (7) whether the insurer and EQC were entitled to a non-party costs award against CRS; - (8) whether EQC and the insurer were entitled to costs against CRS on the non-party costs application - **HELD**: - (1) EQC awarded 2B costs against the insured, being $100,959 less any steps covered by wasted costs award (if any) - EQC awarded $112,859 disbursements - Court certified second counsel; - (2) insurer awarded $118,748 costs and $84,056 disbursements against the insured as sought - 50 percent uplift justified on steps after 30 Sept 2016, the date of the first Calderbank offer - Court certified second counsel; - (3) quantum of wasted costs CRS and insured were liable to pay EQC pursuant to the Dec 2017 decision was $30,708 plus $2,207 wasted disbursements - insured and CRS jointly and severally liable; - (4) EQC awarded costs against insured and CRS on wasted costs application - jointly and severally liable; - (5) insured awarded $13,380 costs on 2B basis and $2,441 disbursements against CRS on non-party costs application; - (6) insured's counsel ordered to complete a memorandum quantifying costs in accordance with this judgment; - (7) EQC and insurer entitled to non-party costs against CRS - CRS jointly and severally liable for the costs payable by the insured in respect of the proceeding up to 28 Oct 2018 - as between the insured and CRS, insured liable for 33.3 percent with CRS liable for balance; - (8) EQC and insurer awarded 2B costs plus disbursements fixed by the Registrar against CRS on non-party costs application
	INSURANCE
STATUTES	High Court Rules 2016 R14.1, R14.14
CASES CITED	Bligh v Earthquake Commission [2017] NZHC 995 ; Bligh v Earthquake Commission [2017] NZHC 3179 ; Bligh v Earthquake Commission [2018] NZHC 2392 ; Bligh v Earthquake Commission [2016] NZHC 2619 ; Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965, [1986] 2 WLR 1051, [1986] 2 All ER 409 ; Carborundum Abrasives Ltd v Bank of New Zealand Ltd [1992] 3 NZLR 757, (1992) 6 NZCLC 67,873, (1992) 5 PRNZ 418 ; Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145, (2004) 17 PRNZ 115, [2004] 1 WLR 2807, [2005] 4 All ER 195 ; Mana Property Trustee Ltd v James Developments Ltd [2010] NZSC 124, [2011] 2 NZLR 25, (2010) 20 PRNZ 715 ; Hamilton v Al Fayed (No 2) [2002] EWCA Civ 665,

	[2003] QB 1175, [2003] 2 WLR 128, [2002] 3 All ER 641 ; Excalibur Ventures LLC v Texas Keystone Inc [2016] EWCA Civ 1144, [2017] 1 WLR 2221, [2017] CP Rep 13, [2016] 6 Costs LO 999, [2017] CILL 3919 ; Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613, [1997] 1 All ER 418, [1997] BCC 165 ; Arkin v Borchard Lines Ltd (Costs Order) [2005] EWCA Civ 655, [2005] 1 WLR 3055, [2005] 3 All ER 613, [2005] 2 Lloyd's Rep 187 ; Arklow Investments Ltd v MacLean (HC, Auckland, CP 49-97, 19 May 2000, Fisher J) ; Carborundum Abrasives Ltd v Bank of New Zealand Ltd [1992] 3 NZLR 757, (1992) 6 NZCLC 67,873, (1992) 5 PRNZ 418
OTHER SOURCES	McGechan on Procedure (loose-leaf ed, Thomson Reuters) at [14.2.01(1)(b)] ; Chris Nicoll, "Non-Party Costs and Security where Litigation Funders are Involved" (2018) 24 NZBLQ 237 at 247
REPRESENTATION	GA Cameron, RJ Lynn, NS Wood, JW Upson, PM Smith, SJ Connolly, HM Weston
PAGES	35 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	[2020] NZHC 874

NAME	Dodds v Southern Response Earthquake Services Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2019-009-000417
JUDG DATE	16 August 2019
CITATION	[2019] NZHC 2016
FULL TEXT	PDF judgment
REPORTED	[2019] 3 NZLR 826, (2019) 15 TCLR 395, [2020] Lloyd's Rep IR 129
PARTIES	Karl Gregory Dodds and Alison Roma Jacqueline Dodds and St Martins Trustee Services Ltd as trustees of the Matson Trust (plaintiffs), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CONTRACT - plaintiffs sued alleging misrepresentation, misleading and deceptive conduct and breach of the insurer's implied duty of utmost good faith under an insurance policy - insured had been provided with an abridged report (the Detailed Repair/Rebuild Analysis (DRP) on the cost of rebuilding their earthquake damaged house and settled their claim on that basis - later discovered the full unredacted report, which included costings that the insurer thought were

	beyond their entitlement - plaintiffs felt deceived and misled - property had been insured for full replacement cover - whether misrepresentations had induced the plaintiffs to enter into the Settlement Agreement - actionable misrepresentation - re plaintiff's second cause of action, that the defendant acting in trade engaged in misleading and deceptive conduct, the plaintiffs claimed damages under s43 FTA - two-stage test - (Red Eagles v Ellis) - tort rather than contract was the appropriate measure of damages for misrepresentation claims under the FTA - identification of the loss or damage - breach of duty of good faith - post-contractual duties of the insurer - having found actionable misrepresentation and misleading and deceptive conduct, the Court set aside a definitive decision on the plaintiff's alternative claim for breach of the duty of good faith - whether the full and final settlement counted - interpretation of settlement agreements and release clauses - predicated on the foundation that parties had freely reached their bargain - plaintiff's claims arose by virtue of statute, not the insurance policy - Canterbury earthquake sequence formed part of the context but the plaintiffs' claims were based on the conduct of the respondent - no ability to contract out of liability for fraudulent misrepresentation - damages to be calculated under the misrepresentation claim - defendant wrongly represented the total cost of repairs to the plaintiff's house as $894,937 - the true reasonable estimate at the time was $1,186,920 - adjusting the figure to take into account one-off costs already paid for, or those for which compensation would not have been made, the shortfall totalled $178,984 being the difference between the true value of the claim and the received settlement payment - discussion of the issue of general damages in an insurance context - plaintiffs claim for general damages of $15,000 each did not reach the high threshold and so failed - **HELD**: plaintiffs largely succeeded in their claim against Southern Response in this proceeding and orders made that defendant to pay damages of $178,894 and to pay interest at the statutory rate on this sum from 23 December 2013 until final date of payment - costs to the plaintiffs - in the event counsel for the parties cannot agree, memoranda as to costs can be filed
	INSURANCE
STATUTES	Contract and Commercial Law Act 2017 s34, s35 - Contractual Mistakes Act 1977 - Fair Trading Act 1986 s2(1), s2(2), s9, s43, s43(2), s43(3), s43(3)(f) - Interest on Money Claims Act 2016 s5, s6(1), s10
CASES CITED	Southern Response Earthquake Services Ltd v Shirley Investments Ltd [2017] NZHC 3190 ; Turvey Trustee Ltd v Southern Response Earthquake Services Ltd [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965, [2013] Lloyd's Rep IR 552 ; Avonside Holdings Ltd v Southern Response Earthquake Services Ltd [2013] NZHC 1433 ; Avonside Holdings Ltd v Southern Response Earthquake

Services Ltd [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040, [2015] Lloyd's Rep IR 653 ; Southern Response Earthquake Services Ltd v Avonside Holdings Ltd [2015] NZSC 110, [2017] 1 NZLR 141, (2015) 18 ANZ Insurance Cases 62-079, [2016] Lloyd's Rep IR 210 ; Brennan v Bolt Burdon [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321 ; Shen v Ossyanin [2019] NZHC 135 ; Savill v NZI Finance Ltd [1990] 3 NZLR 135, (1989) 2 NZBLC 103,771, (1989) 3 TCLR 673 ; Bisset v Wilkinson [1927] AC 177 ; Magee v Mason [2017] NZCA 502, (2017) 18 NZCPR 902 ; Walsh v Kerr [1987] 2 NZLR 166 (HC) ; New Zealand Motor Bodies Ltd v Emslie [1985] 2 NZLR 569 ; Redgrave v Hurd (1881) 20 Ch D 1 ; Premium Real Estate Ltd v Stevens [2008] NZCA 82, [2009] 1 NZLR 148, (2008) 8 NZBLC 102,220, (2008) 12 TCLR 133, (2008) 9 NZCPR 446, (2008) ANZ ConvR 312 (extract) ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep IR 118 ; Prattley Enterprises Ltd v Vero Insurance Ltd [2015] NZHC 1444, (2015) 18 ANZ Insurance Cases 62-075 ; Kyle Bay Underwriters Subscribing Under Policy No 0190 57/08/01 [2007] EWCA Civ 57 ; Southern Response Earthquake Services Ltd v Shirley Investments Ltd [2017] NZHC 3190 ; Sullivan v Wellsford Properties Ltd [2019 NZCA 168 ; Red Eagle Corporation Ltd v Ellis [2010] NZSC 20, [2010] 2 NZLR 492, (2010) 9 NZBLC 102,910, (2010) 11 NZCPR 157, (2010) 12 TCLR 526 ; Cox & Coxon Ltd v Leipst [1999] 2 NZLR 15, (1999) 6 NZBLC 102,666, (1998) 8 TCLR 516 ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Pegasus Group Ltd v QBE Insurance (International) Ltd (HC, Auckland, CIV-2006-404-006941, 1 December 2009, Winkelmann J) ; State Insurance Ltd v Cedenco Food Ltd (CA 216-97, 6 August 1998) ; Sadat v Tower Insurance [2017] NZHC 1550, [2018] Lloyd's Rep 170 ; Carter v Boehm (1766) 3 Burr 1905, (1766) 97 ER 1162 ; Banque Keyser Ullmann SA v Scandia (UK) Insurance Co Ltd [1987] 2 All ER 923 (QB); [1989] 2 All ER 952 (CA); [1990] 2 All ER 947 (HL) ; State Insurance General Manager v McHale [1992] 2 NZLR 399 ; Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622; (1984) 3 ANZ Insurance Cases 60-581; (1984) 54 ALR 639; (1984) 58 ALJR 502; [1984] HCA 55 ; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363, (1978) 52 ALJR 20, (1977) 180 CLR 266, (1977) 45 LGRA 62 ; Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, [1980] 2 WLR 283, [1980] 1 All ER 556 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67, [2016] 2 NZLR 750, (2016) 19 ANZ Insurance Cases 62-097, (2016) 10 NZBLC 99-722 ; Bank of Credit & Commerce International SA v Ali [2001] UKHL 8, [2002] 1 AC 251, [2001] 2 WLR 735, [2001] 1 All ER 961 ; Dairy Containers Ltd v Tasman Orient Line CV [2005] 1 NZLR 433,

	[2005] 1 WLR 215, [2004] UKPC 22 ; Saunders v Ford Motor Co [1970] 1 Lloyd's Rep 379 ; Baghbadrani v Commercial Union Assurance Co Plc [2000] Lloyd's Rep IR 94 ; UCB Services Ltd v Thomason [2004] EWHC 1164 (Ch), [2004] 2 All ER (Comm) 774 ; Contrast Kyle Bay Ltd (t/a Astons Nightclub) v Certain Lloyd's Underwriters [2007] EWCA Civ 57, [2007]Lloyd's Rep IR 460 ; Hayward v Zurich Insurance Co Plc [2016] UKSC 48, [2017] AC 142, [2016] 3 WLR 637, [2016] 4 All ER 628, [2016] 2 All ER (Comm) 755 ; Smythe v Bayleys Real Estate Ltd & Ors (1993) 5 TCLR 454, [1994] ANZ ConvR 424 (extract) ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Bruce v IAG New Zealand Ltd [2018] NZHC 3444
OTHER SOURCES	Jeremy Finn, Stephen Todd and Matthew Barber, Burrows, Finn and Todd on the Law of Contract in New Zealand (6th ed, LexisNexis, Wellington, 2018)at 368, 869, at [11.2.6] ; RJ Hollyman, Falsehood and Breach of Contract in New Zealand : Misrepresentations, Contractual Remedies and the Fair Trading Act (Thomson Reuters, Wellington, 2017) at [5.2.1] ; James Edelman, McGregor on Damages (19th ed, Sweet & Maxwell, London, 2014) at [47-027], [47-055] ; Robert Merkin, Colinvaux's Law of Insurance in New Zealand (2nd ed, Thomson Reuters, Wellington, 2017) at [4.8.2](4), [4.6.8(1)], [8.7.3](1) ; Hamish McIntosh, "Damages for Insurers Breach of Duty of Utmost Good Faith" NZ Lawyer (online ed, 10 August 2012) at 16
REPRESENTATION	PJ Woods, TD Grimwood, DJ Friar, NFD Moffat
PAGES	68 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Correction of slip decision

NAME	Kitchen v AA Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2019-409-000233
JUDG DATE	6 August 2019
CITATION	[2019] NZHC 1902
FULL TEXT	PDF judgment
PARTIES	Lewis Quinn Kitchen and Sharyn Jane Kitchen (plaintiffs), AA Insurance (defendant)
NOTE	High Court Earthquake List

SUBJECT	CIVIL PROCEDURE - successful application under s16 Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) to transfer proceeding to Canterbury Earthquakes Insurance Tribunal (Tribunal) - plaintiff's home damaged in Canterbury earthquakes - Apr 2018, filed proceedings to resolve liability of defendant (insurer) under insurance policy and remedies that should follow - Tribunal did not exist when proceeding was filed - parties accepted eligibility criteria under s9 of the Act were met - s16(2)(b) satisfied - insurer opposed application on the basis it would result in substantial delay, increase costs and as dispute was novel and complex - 10 day trial scheduled to commence 2 Dec 2019 - Court found transfer would not necessarily result in substantial delay - transfer likely to reduce parties' costs - issue of whether obtaining a waiver of clB2 of the Building Code in respect of replacement cladding complied with the policy terms was not inherently novel or complex - discretionary power under s28 of the Act was for Tribunal to exercise - not for Court to pre-judge application of that provision - whether transferring the proceeding to the Tribunal would be in the interests of justice under s16(2)(c) of the Act - **HELD**: proceeding transferred to Tribunal - costs reserved INSURANCE
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s3, s8, s9, s16, s16(2)(b), s16(2)(c), s16(4), s27(1), s28, s53
CASES CITED	Busby v IAG NZ Ltd [2019] NZHC 1852
REPRESENTATION	TJ Brown, CM Brick
PAGES	13 p
LOCATION	New Zealand Law Society Library

NAME	Busby v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000464
JUDG DATE	1 August 2019
CITATION	[2019] NZHC 1852
FULL TEXT	PDF judgment
PARTIES	Paul James Busby and Margaret Letitia Busby as trustees of the Busby Trust (plaintiffs), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List

SUBJECT	CIVIL PROCEDURE - successful application for proceeding to be transferred to Canterbury Earthquakes Insurance Tribunal pursuant to s16 Canterbury Earthquakes Insurance Tribunal Act 2019 (Act) - whether transfer was in the interests of justice - whether complexity favoured proceeding not being transferred - whether claim was an eligible claim - property suffered global settlement - whether damage was covered by insurance policy - whether global settlement was result of damage to land and not the building - foundation damage - benefits of transferring to Tribunal lay in its flexible procedures, ability to instruct independent experts, absence of hearing fees and it ability to closely manage cases - Parliament's anticipation that complex legal issues might arise in cases transferred to Tribunal - s53 of Act provided means to resolve involved or complex legal issues - **HELD**: Court satisfied transfer of proceedings to Tribunal was in the interests of justice - direction that file be transferred to Tribunal - given that this was one of first opposed transfers it was appropriate that costs should lie where they fall, if plaintiffs do not agree, submissions may be filed INSURANCE
STATUTES	Canterbury Earthquakes Insurance Tribunal Act 2019 s3, s5, s8(1), s9, s16, s16(2)(a), s16(2)(c), s24(1)(f), s24(1)(g), s40, s53, s53(3), s54
CASES CITED	Earthquake Commission (EQC) v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381 ; Rout v Southern Response Earthquake Services Ltd [2013] NZHC 3262 ; Al Amoudi v Brisard [2006] EWHC 1062, [2007] 1 WLR 113, [2006] 3 All ER 294
REPRESENTATION	DJC Russ, JA Maslin-Caradus, CM Laband, SR Hudson, IJ Thain
PAGES	10 p
LOCATION	New Zealand Law Society Library

NAME	PVG Securities Trustee Ltd v 100 Investments Ltd
JUDGE(S)	Hinton J
COURT	High Court, Auckland
FILE NUMBER	CIV-2018-404-002838
JUDG DATE	31 July 2019
CITATION	[2019] NZHC 1847
FULL TEXT	PDF judgment
REPORTED	(2019) 20 NZCPR 280

PARTIES	PVG Securities Trustee Ltd (Plaintiff), 100 Investments Ltd (Defendant)
SUBJECT	PROPERTY LAW - unsuccessful application for declaration that plaintiff was entitled to part of an insurance settlement between IAG and the defendant relating to a building that was damaged in Canterbury earthquake sequence - property was insured by IAG for $2.7M and was subject to two mortgages - first mortgage had priority sum of $3.3M - owner of property went into liquidation - IAG paid out first mortgagee $789,929 under insurance claim on a without prejudice basis - first mortgagee sold the property to the defendant for $1.3M and assigned the benefit of any residual insurance claim - second mortgage was eventually assigned to the plaintiff - defendant brought proceedings against IAG for the residual insurance rights - defendant and IAG reached a settlement in which IAG paid the insurance proceeds to the defendant conditional on a HC declaration that defendant was entitled to the funds - Court granted the application and made the declaration - plaintiff sought declaration that it was entitled to a substantial part of the settlement payment by virtue of an equitable charge to secure sums owed to the plaintiff by the former owner of the property - whether plaintiff had an equitable charge over the settlement payment - whether any such charge survived the mortgagee sale and assignment of the property to the defendant - **HELD**: declaration not made - s183(4) of the Property Law Act 2007 has the effect that property assigned under a mortgagee sale is taken by the purchaser free from all liability on account of any subsequent mortgage - a right to receive insurance proceeds is a thing in action (or chose in action) which has always been considered property - Act applies whether the relevant charge was legal or equitable - argument rejected that an assignee of rights on a mortgagee sale cannot acquire greater rights than the mortgagee had itself - first mortgagee realised and assigned to the defendant all of the secured assets that were the subject of the mortgage - any charge or interest the plaintiff had in the insurance rights was extinguished when those rights were assigned - plaintiff had other forms of recourse as second mortgagee at time of mortgagee sale but did not pursue them - Colonial Mutual v ANZ distinguished - Court declined to make declarations sought MORTGAGES
STATUTES	Property Law Act 2007 s4, s183, s183(4), s185
CASES CITED	100 Investments Ltd v IAG New Zealand Ltd [2018] NZHC 3244 ; Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd [1995] 3 NZLR 1 (PC), [1995] 1 WLR 1140, (1995) 3 NZ ConvC 192,219 ; Bank of Credit & Commerce International SA (in liq) (No 8), Re [1998] AC 214,

	[1997] 3 WLR 909, [1997] 4 All ER 568
OTHER SOURCES	Law Commission, A New Property Law Act (NZLC R29, 1994) at [258]
REPRESENTATION	K Francis, KM Moon, P Michalik
PAGES	11 p
LOCATION	New Zealand Law Society Library

NAME	Moore v IAG New Zealand Ltd
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000320
JUDG DATE	3 July 2019
CITATION	[2019] NZHC 1549
FULL TEXT	PDF judgment
REPORTED	[2020] Lloyd's Rep IR 167
PARTIES	Graeme John Moore (plaintiff), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - unsuccessful claim that insured entitled to be paid up to the sum insured for two separate earthquake events - proper interpretation of aggregation clause - parties agreed relevant clause was an aggregation clause which required that in certain circumstances, losses from separate events were aggregated together for purpose of the application of a policy limit - property insured suffered extensive damage in earthquakes on 22 February 2011 and 13 June 2011 - property insured for accidental loss with IAG under an NZI Supersurance house policy - policy specified maximum sum for cost of repair or replacement of $2.5M plus GST - estimated cost of repair or replacement significantly exceeded sum insured - plaintiff claimed to be entitled to be paid up to the sum insured for each event and that IAG had failed or neglected to pay approximately 1.7M under the policy - discussion of purpose of aggregation clauses - contractual interpretation - parties post-contract conduct - plaintiff argued that failure by insurer to raise aggregation clause as a reason for limiting its liability until six years after accepting the claims was post-contract conduct that shed light on interpretation of contract - Court did not accept there was post-contract conduct in this case from which it could be inferred that parties intended the clause would not apply - Court observed test for causation was the same in insurance law as in general tort law - proximate cause - "but for" test - whether an aggregation clause in an insurance policy limited an insurer's liability for

	damage caused by two earthquake events to the sum insured - whether February and June earthquakes were a "series of events which had the same cause" as both were categorised as September 2010 aftershocks - what degree of connection was required to satisfy the test of having "the same cause" in order to aggregate events and losses - whether expert evidence satisfied that requirement - **HELD**: undisputed expert evidence that probability of both events being an aftershock of the September earthquake was 97 per cent or greater - "common-sense test" that September earthquake was the direct or proximate cause of February and June earthquakes and consequent losses had been met - on a proper interpretation of the aggregation clause, the most IAG was required to pay for losses of 22 February 2011 and 13 June 2011 earthquakes was the sum insured - costs reserved
	NATURAL DISASTERS
STATUTES	Earthquake Commission Act 1993 Schedule 3 cl1
CASES CITED	Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd [2003] UKHL 48, [2003] 4 All ER 43, [2003] 2 All ER (Comm) 665, [2003] Lloyd's Rep IR 623 ; Lloyds TSB General Insurance Holdings Ltd and others v Lloyds Bank Group Insurance Co Ltd [2001] 1 All ER (Comm) 13 (QB) ; Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, [1998] 1 All ER 98 ; AIG Europe Ltd v Woodman [2017] UKSC 18, [2017] 1 WLR 1168, [2018] 1 All ER 936, [2017] Lloyd's Rep IR 209 ; Wholesale Distributors Ltd v Gibbons Holdings Ltd [2007] NZSC 37, [2008] 1 NZLR 277, (2007) 5 NZ ConvC 194,493, (2007) 8 NZCPR 374 ; AIG Europe Ltd v OC320301 LLP [2016] EWCA Civ 367, [2017] 1 All ER 143, [2016] Lloyd's Rep IR 289 ; Distillers Company v Ajax Insurance Company (1974) 130 CLR 1 ; [2016] EWHC 141 (Comm); [2016] 4 WLR 18; AXA Reinsurance (U.K.) PLC. v Field [1996] 1 WLR 1026 99
OTHER SOURCES	R Shcherbakov, M Nguyen & M Quigley "Statistical Analysis of the 2010 M W 7.1 Darfield Earthquake Aftershock Sequence" (2012) 55(3) New Zealand Journal of Geology and Geophysics 305
REPRESENTATION	PA Cowey, A Summerlea
PAGES	19 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, SC judgment

NAME	Brooker v IAG New Zealand Ltd
JUDGE(S)	Osborne J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000349
JUDG DATE	31 May 2019
CITATION	[2019] NZHC 1225
FULL TEXT	PDF judgment
PARTIES	Toni Joanne Brooker (plaintiff), IAG New Zealand Ltd (first defendant), HAH Ltd (in liq) (previously Holloway Builders Ltd) (second defendant), Cresco Engineers New Zealand Ltd (first third party), Cornwall Civil Engineering Ltd (second third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application by first defendant (insurer) to join party; successful application for leave to join QBE as third party - plaintiff's home damaged in Canterbury earthquake sequence - insurer accepted claim under policy to repair or rebuild to 'as new' standard - pursuant to arrangements with insurer, plaintiff entered contract with second defendant (Builder) for repair works - defective repairs - insurer denied any further liability - Builder denied liability for poor workmanship - plaintiff sued insurer and Builder for breach of contract - sought judgment against insurer for sum required to repair home to policy standard, or alternatively a declaration that the insurer must perform its policy obligations - Builder in liquidation - plaintiff's proceeding against Builder stayed - only surviving part of proceeding was claim against insurer - any analysis of causation and responsibility for defects which might have been required in claim against Builder fell away - only remaining question was whether insurer breached contract by not repairing property to as new condition - essentially claim for specific performance of insurance contract - insurer signalled it or plaintiff had claim against Project Manager - Project Manager in liquidation - had insurance policy with QBE - all parties and QBE consented to QBE being joined as third party - insurer applied for leave to join QBE as third defendant - application opposed by QBE and plaintiff - insurer contended Project Manager owed common law duties of care to plaintiff to carry out project management and inspection roles with due skill and care - submitted Project Manager may be liable for damages in relation to its certification of payments either upon basis of negligence or through breach s28 or s29 Consumer Guarantees Act 1993 - Court discussed relationship between two limbs of R4.56(1)(b) - reviewed factors relevant to exercise of Court's discretion - fact specific - delay and prejudice to applicant and other parties - expansion of issues - availability of third party remedy - interests of justice an overriding

	consideration - approach in Bridgeway Projected Ltd v Webb adopted - generally liberal approach to joinder tempered by reasonable regard to plaintiff's wishes - insurer entered contract with Project Manager with limitation provisions - could avoid limitation provisions if plaintiff pursued tortious claim against Project Manager and QBE - case where insurer engaged Project Manager on certain basis - no longer content with those contractual rights - insurer knew what evidence would assist in any claim against Project Manager - plaintiff did not - insurer had ability to join QBE as third party - joining Project Manager as defendant likely to impose significant cost and delay on plaintiff - insurer offered undertaking to meet any orders for costs and disbursements incurred by plaintiff as consequence of QBE's joinder - undertaking did not overcome weight of factors against QBE's joinder - (1) whether QBE ought to be joined as a defendant pursuant to R4.56(1)(b)(i) HCR; - (2) whether presence of QBE was necessary to enable Court to adjudicate on and settle all questions in proceeding pursuant to R4.56(1)(b)(ii); - (3) whether, if jurisdiction established under R4.56(1)(b), Court should exercise its discretion to join QBE as a defendant - **HELD**: insurer's application to join additional defendant dismissed - insurer granted leave to join QBE as third party - insurer to pay QBE and plaintiff 2B costs plus disbursements fixed by Registrar - (1) QBE did not qualify under R4.56(1)(b)(i) - Newhaven Waldorf Management Ltd v Allen applied; - (2) R4.56(1)(b)(ii) threshold not met - Mainland Products Ltd v BIL (NZ Holdings) Ltd applied - nothing required QBE to be involved as a defendant to enable complete and effectual adjudication of all questions in case; - (3) even if jurisdiction existed, discretion would be exercised against joinder
	INSURANCE
STATUTES	Companies Act 1993 s248(1)(c)(i) - Consumer Guarantees Act 1993 s28, s29 - Contractual Remedies Act 1979 - Fair Trading Act 1989 - High Court Rules 2016 R1.2, R4.3(1), R4.56, R4.56(1)(b), R4.56(1)(b)(i), R4.56(1)(b)(ii), R14.3(1), R14.5(2) - Law Reform Act 1936 s9, s9(4)
CASES CITED	Fonterra Co-operative Group Ltd v Waikato Coldstorage Ltd (HC, Hamilton, CIV-2010-419-000855, CIV-2009-419-000614, CIV-2009-419-000615, 22 December 2010, Rodney Hansen J) ; Bridgeway Projects Ltd v Webb (HC, Auckland, CIV-2003-404-001965, 7 July 2003, Randerson J) ; Newhaven Waldorf Management Ltd v Allen [2015] NZCA 204, [2015] NZAR 1173 ; Beattie v Premier Events Group Ltd [2012] NZCA 257 ; Knight v Attorney-General (HC, Wellington, CP 566-92, 29 October 1992, M Williams QC) ; Mainzeal Corporation Ltd v Contractors Bonding Ltd (1989) 2 PRNZ 47 ; Paccar Inc & Ors v Four Ways Trucking Inc & Ors [1995] 2 NZLR 492, (1995) 8 PRNZ 423 ; Robin v IAG New Zealand Ltd [2018] NZHC 204 ; Body

	Corporate 78462 v IAG New Zealand [2016] NZHC 320 ; Mainland Products Ltd v BIL (NZ Holdings) Ltd (HC, Wellington, CP 192-01, 9 April 2002, M Venning) ; Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641 ; Body Corporate 185960 v North Shore City Council (2008) 2 NZTR 18-032 ; Westfield Freezing Co Ltd v Sayer & Co (NZ) Ltd [1972] NZLR 137 (CA) ; Robin v IAG New Zealand Ltd [2018] NZHC 1464 ; Home Mortgage Co Ltd v Aon Consulting (NZ) Ltd (HC, Auckland, CP 584-SD-00, 13 December 2001, Priestley J) ; Bruce v IAG New Zealand Ltd [2018] NZHC 3444 ; Robin v IAG New Zealand Ltd [2018] NZHC 204
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR4.56.07], [HR4.56.08]
REPRESENTATION	PM Smith, DJ Ballantyne, DH McLellan QC, SD Galloway
PAGES	34 p
LOCATION	New Zealand Law Society Library

NAME	Pfisterer v Claims Resolution Service Ltd
JUDGE(S)	Osborne J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000649
JUDG DATE	28 May 2019
CITATION	[2019] NZHC 1179
FULL TEXT	PDF judgment
PARTIES	Lucia Renate Pfisterer (defendant/counterclaim plaintiff), Claims Resolution Service Ltd (plaintiff/first counterclaim defendant), Grant Shand Barristers and Solicitors (second counterclaim defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - Interrogatories - partially successful discovery application by defendant (insured); successful application by insured under R8.38 HCR for orders that the counterclaim defendants answer interrogatories; unsuccessful discovery application by second counterclaim defendant (Solicitors) - insured owned property damaged in Canterbury earthquakes - engaged plaintiff (CRS) to assist in resolving claim with insurer - proceedings issued in insured's name - Solicitors retained to represent her - Solicitors purported to commit insured to settlement with insurer - insured denied Solicitors were authorised to enter settlement - terminated relationship with counterclaim defendants - CRS sought recovery of sums under contract it entered

	with insured - insured denied liability - counterclaimed asserting misrepresentation, breach of Fair Trading Act 1986 and breach of fiduciary duty - applied for orders requiring counterclaim defendants to answer interrogatories - sought to establish whether, to the extent arrangements between the two counterclaim defendants were undocumented, they provided for the Solicitors to share in what would otherwise be viewed as CRS' entitlements - if so, to what extent - Court considered proposed interrogatories were relevant to trial issues - not oppressive - Solicitors applied for particular discovery from insured of advice provided by three law firms in relation to her insurance claim and documents relating to the sale and demolition of insured's property - (1) whether to grant the insured's application for discovery against the counterclaim defendants; - (2) whether to order the counterclaim defendants to answer interrogatories pursuant to R8.38 HCR; - (3) whether to grant the Solicitors' application for particular discovery against the insured - **HELD**: - (1) aspects of discovery application adjourned to allow insured's solicitors to review bundle of 329 additional documents recently received - timesheets recently provided to the other parties by the Solicitors to be the subject of a brief supplementary affidavit of discovery deposing as to the producer of the timesheet and date on which the version provided was produced - some aspects of discovery application dismissed - not reasonably necessary, lacking sufficient materiality or not reasonably proportionate - CRS ordered to make additional discovery of documents; - (2) both counterclaim defendants to answer interrogatories; - (3) Solicitors' discovery application dismissed - documents sought lacked relevance - costs reserved
	DISCOVERY
STATUTES	Evidence Act 2006 s54, s65, s65(2), s65(3) - Fair Trading Act 1986 - High Court Rules 2016 R8.34, R8.38, R8.39
CASES CITED	Dixon v Kingsley [2015] NZHC 2044, [2015] NZFLR 1012 ; Houghton v Saunders (2009) 19 PRNZ 476 ; Potter v Potter [2003] 3 NZLR 145, [2003] NZFLR 1035 ; Astrazeneca Ltd v Commerce Commission (2008) 12 TCLR 116 ; Smith v Claims Resolution Service Ltd [2019] NZHC 127
REPRESENTATION	MS Smith, ARB Barker, AB Darroch
LOCATION	New Zealand Law Society Library

NAME	Smith v Claims Resolution Service Ltd

JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000643
JUDG DATE	9 May 2019
CITATION	[2019] NZHC 1013
FULL TEXT	PDF judgment
PARTIES	Karlie Margaret Smith (plaintiff), Claims Resolution Service Ltd (first defendant), Grant Shand Barristers and Solicitors (second defendant)
SUBJECT	CIVIL PROCEDURE - directions for the conduct of a proceeding following leave being granted to the plaintiff in February 2019 for the matter to proceed as a representative action - matter was to proceed on an "opt in" basis and potential group members were given 4 months to decide whether to join - memoranda from counsel was called for in order that further directions for the conduct of the proceeding could be given - in this judgment the Court gives directions regarding the wording for the court-approved Notice of the proceeding to potential group members, management of the publication, dissemination and receipt of responses to the Notice, security for costs and case management directions - plaintiff as former client sues both defendants for breach of fiduciary duty and unconscionable bargain - joint venture - whether independent professional services were provided - house damaged during the Canterbury earthquake sequence - **HELD**: plaintiff entitled to costs on R4.24 application on 3B basis totalling $14,685 plus disbursements totalling $2,679 - order for payment in equal shares by both defendant made [PRELIM H/NOTE]
STATUTES	High Court Rules 2016 R4.24
CASES CITED	Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331, (2009) 20 PRNZ 215
REPRESENTATION	MS Smith, ARB Barker QC, AB Darroch
PAGES	12 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, [2019] NZHC 127

NAME	Young v Attorney-General
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000110

JUDG DATE	8 May 2019
CITATION	[2019] NZHC 993
FULL TEXT	PDF judgment
REPORTED	[2019] 3 NZLR 808, [2019] NZAR 1015
PARTIES	Steven Richard Young (plaintiff), Attorney-General (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - determination of preliminary issue of law - whether s145 Greater Christchurch Regeneration Act 2016 (Act) provided the Crown with complete immunity from plaintiff's claim in nuisance - alleged Crown breached duty of care as neighbouring landowner to prevent wrongful interference with enjoyment of plaintiff's land - cliffs around plaintiff's land collapsed in Canterbury earthquakes - extensive rubble on plaintiff's property - notice had been issued under s45 Canterbury Earthquake Recovery Act 2011 (CER Act) - area designated residential red zone - 2013 Crown purchased all adjacent cliff top properties - plaintiff rejected Crown's offer to purchase land - CER Act repealed - s45 notice treated as being imposed under s86 of Act - notice removed 2018 - Crown advised removal of notice did not mean life risks affecting property were removed - plaintiff filed nuisance action - submitted wrongful interference in form of safety hazard created by risk of rock fall and cliff collapse from Crown's adjacent properties - failure to remove rubble and ongoing intermittent fall of debris - interference with plaintiff's access to land prior to removal of s45 notice - plaintiff sought declarations requiring Crown to remediate risk of rock fall and or cliff collapse and remove debris - if not reasonable for Crown to carry out remedial work, plaintiff sought damages or declaration requiring Crown to install safety measures to enable access to and quiet enjoyment of property - Crown pleaded two affirmative defences: (1) statutory immunity under s145; - (2) that Crown exercised powers to purchase cliff top properties and held land in accordance with statutory authority - common law defence to nuisance - Crown submitted it issued s45 notice, purchased adjacent properties and now held land in accordance with statutory authority - Court found instability of Crown's land had caused and was likely to continue to cause, debris to fall onto plaintiff's land - discussion of relevant authorities on nature of nuisance - Leakey duty (Leakey v National Trust) - Court considered history, purpose and scope of immunity under s145 - immunity under s145(1) was dependent upon some causal connection, direct or indirect, between statutory action and loss or adverse effect - Court acknowledged some ambiguity between s145(1) and s145(3) - considered reference in s145(3) to an 'omission' was to failure or refusal by Crown to mitigate or remedy adverse consequences of statutory actions - damage or loss for which plaintiff sought to

	sue Crown was not a consequence, even indirectly, of Crown's acquisition or holding of cliff top properties - hazard from unstable cliff face and debris fallen onto property was due to earthquake sequence which likely aggravated existing cliff instability - that state of affairs caused the nuisance - notwithstanding background to acquisition of land, Court did not consider s145 was intended to extend an immunity to Crown from responsibility and liability assumed in the ordinary way as purchaser of land - Crown's liability no different from any other landowner - if Crown was immunised from any nuisance claim after 'stepping into the shoes' of a neighbouring landowner this would result in plaintiff's private law rights to use and enjoy his land being extinguished without compensation - Court indicated defence of statutory authorisation unlikely to succeed - also required linkage between 'activity' authorised by Parliament and 'creation' of the nuisance - whether s145 of Act provided Crown with complete immunity from plaintiff's claim - **HELD**: s145 did not provide Crown with complete immunity from plaintiff's claim - in context of determination of defined preliminary question it was not appropriate to comment further on potential application of common law defence - as successful party on determination of preliminary issue plaintiff entitled to 2B costs
	NUISANCE
STATUTES	Building Act 2004 s124(1)(a) - Canterbury Earthquake Recovery Act 2011 s38, s45, s53, s53(1), s83 - Crown Proceedings Act 1950 s17(1) - Greater Christchurch Regeneration Act 2016 s38(2)(b), s38(2)(c), s55, s77, s77(2)(b), s77(2)(c), s85, s86, s91, s91(1), s91(1)(b), s93, s102, s103, s104, s114, s145, s145(1), s145(1)(a), s145(1)(b), s145(3), Schedule 1, cl7 - Interpretation Act 1999 s5(1), s5(3)
CASES CITED	Rapier v London Tramways Company [1893] 2 Ch 588 ; Sedleigh-Denfield v O'Callaghan [1940] AC 880, [1940] 3 All ER 349 ; Leakey v National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485, [1980] 2 WLR 65, [1980] 1 All ER 17 ; Goldman v Hargrave [1967] 1 AC 645, [1966] 3 WLR 513, [1966] 2 All ER 989, [1966] 2 Lloyd's Rep 65 ; Ruapehu Alpine Lifts Ltd v State Insurance Ltd (1998) 10 ANZ Insurance Cases 74,432, (1998) 8 TCLR 348 ; Easton Agriculture Ltd v Manawatu-Wanganui Regional Council [2012] 1 NZLR 120 ; Double J Smallwoods Ltd v Gisborne District Council [2017] NZHC 1284, [2017] NZAR 1167 (extract) ; Commerce Commission v Fonterra Co-Operative Group Ltd [2007] 3 NZLR 767, [2007] NZSCR 702 ; Quake Outcasts v Minister for Canterbury Earthquake Recovery [2015] NZSC 27, [2016] 1 NZLR 1 ; Attorney-General v Cunningham [1974] 1 NZLR 737 ; SMW Consortium (Golden Bay) Ltd v Chief Executive of the Ministry of Fisheries

	[2013] NZCA 95 ; Downard v Kaipara Excavators Ltd (HC, Tauranga, CP 3-92, 12 March 1992, Penlington J) ; Allen v Gulf Oil Refining Ltd [1981] AC 1001, [1981] 2 WLR 188, [1981] 1 All ER 353 ; Manchester Corporation v Farnworth [1930] AC 171 ;
OTHER SOURCES	Michael Jones (general ed), Clerk & Lindsell on Torts (22nd ed, Thomson Reuters, London, 2018) at [20-1] ; Stephen Todd (general ed), The law of Torts in New Zealand (7th ed, Thomson Reuters, Wellington 2016) at [10.2], [10.2.08(3)]
REPRESENTATION	Andrew Barker QC, Jai Moss, K Stephen, M Madden
PAGES	23 p
LOCATION	New Zealand Law Society Library

NAME	Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000816
JUDG DATE	10 April 2019
CITATION	[2019] NZHC 763
FULL TEXT	PDF judgment
PARTIES	Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) (plaintiff), IAG New Zealand Ltd (defendant), H Construction North Island Ltd (in rec, in liq) (first third party), Orange H Management Ltd (in rec, in liq) (second third party), Brenchley Developments Ltd (third third party), Building Onward Ltd ((proposed) fourth third party), Hi Tech Building Systems Ltd ((proposed) fifth party), Orange H Group Ltd (in rec, in liq) (sixth third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application by insurer for review of decision by AJ striking out third party notices against contractors - litigation concerned insured's claim in relation to buildings damaged in Canterbury earthquake sequence - insurer filed third party notices against six ultimate third parties as defendants - Aug 2018 AJ struck out third party notices against contractors Onward and Hi Tech (now in liquidation) - remaining third party contractors all in receivership and liquidation - agreed that of originally joined third parties this review would only deal with AJ's decision as it concerned Onward - whether Onward should remain joined as third party - AJ considered

significant feature of litigation was that plaintiff chose to sue only its insurer and thereby to enforce its rights under its contracts of insurance - had chosen not to sue for defects which had arisen in context of building repairs undertaken pursuant to contracts between builders and plaintiff - AJ noted that while insurer's counsel had identified ways in which reports of plaintiff's experts had indicated there may have been significant defects in work undertaken by one or more builders, plaintiff did not seek damages for any such defects or omissions to complete contracted work - plaintiff had based its claim on obligation of insurer to reinstate properties or pay indemnity value which it contended insurer had breached - claimed all earthquake damage it had identified in its claim remained to be reinstated - insurer denied any breach of its policy with insured - insurer asserted it had paid for scope repairs and any liability for defective repairs lay with others - AJ noted plaintiff had not sought damages for any such defect or omissions to complete contracted work but focussed on the contractual responsibilities of insurer - insurer's evidence suggested third parties other than Onward and Hi Tech were most centrally involved in any repair deficits - main issues: (1) whether AJ erroneously entered into an examination and assessment of contentious and lengthy evidence; (2) whether AJ failed to identify or give effect to plaintiff's need to adduce evidence and also test insurer's evidence about workmanship and performance of contractors in order to make out its case at trial; - (3) whether AJ failed to recognise and give effect to insurer's contingent subrogation rights; - (4) whether AJ failed to give effect to fundamental need to have all questions determined in one proceeding between all parties; - (5) finding of review as rehearing -

HELD: (1) AJ referred to evidence primarily to assess extent to which third parties would have an interest in both legal and evidential issues as between plaintiff and insurer - it was on that basis AJ concluded this was a case where there was "a grave risk to the third parties that they would sit idly by while plaintiff's pleaded claim takes up preponderance of preparation and trial time" - appropriate for AJ to make assessment primarily on basis of pleadings but also on basis of evidence which insurer had put before Court - particularly appropriate where plaintiff had made it clear it was not pursuing any claim for defective workmanship against Onward - no need to make findings on evidence in dispute - satisfied Onward would only have limited interest in both legal and evidential issues which will have to be resolved as between plaintiff and insurer; - (2) AJ recognised that if there were separate proceedings against third parties issues that might have to be addressed as between insurer and builders might have to be dealt with in two separate trials - referred to principles in TSB Bank Ltd v Burgess to inform exercise of jurisdiction - AJ's assessment that role of both Hi Tech and Onward appeared to have been modest was appropriate and

	reasonable assessment - AJ Judge did not make finding that Onward would have no involvement in trial - determined Onward would not be involved with preponderance of preparation and trial time required in insurer's response to plaintiff's claim; (3) satisfied AJ did consider potential for insurer by subrogation, to enforce plaintiff's entitlement to reimbursement of any excessive payment to builder - subrogation rights were subject to contract exercisable only where insurer had made full payment under the policy - even if insurer had satisfied its obligations under policy it had no right to demand control of action until insured had received full indemnity - this was not a case where based on pleadings it was clear that even if plaintiff were to succeed against insurer, insurer would be entitled to relief sought if Onward were joined as third party - weighed in balance against joinder; (4) no question AJ had regard to potential value of having all relevant parties between the Court so that Court could determine all potential issues as between all parties - correct to distinguish Robin v IAG NZ - not an authority for proposition that, in any situation where a person whose work may be subject of investigation or dispute in an earthquake damage case and who could have liability to an existing party to proceedings, it would be appropriate for that person to be joined either as defendant or third party - no error in way AJ reached his decision to strike out third party notice against Onward - AJ did not fail to take account of any relevant consideration nor did he have regard to any irrelevant consideration; (5) limited prospect that if Onward was not joined as third party to proceedings, through rights of subrogation, insurer might have to pursue claim against Onward in separate proceedings with associated delay and costs - weighed against that would be cost and burden to Onward of having to remain as party to proceedings in respect of which its exposure and its connection both with evidential and legal issues would be modest and largely peripheral - interests of justice between all parties paramount - not just for Onward to remain as third party to current proceedings - result: application to review AJ's decision declined - decision to strike out third party notice against Onward confirmed - costs to follow the event
	INSURANCE
STATUTES	Declaratory Judgments Act 1908 s2 - High Court Rules 2016 R4.16(3) - Law Reform Act 1936 s9, s9(4) -
CASES CITED	Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd [2018] NZHC 2077 ; TSB Bank Ltd v Burgess [2013] NZHC 1228 ; Robin v IAG New Zealand Ltd [2018] NZHC 1464 ; Barclays Bank Ltd v Tom [1923] 1 KB 221 ; KPMG Peat Marwick v Cory-Wright & Salmon Ltd (in rec, in liq) (CA 77-94, 20 May 1994) ; Sutcliffe v Tarr [2017] NZCA 360, [2018] 2 NZLR 92, (2017) 24 PRNZ 294 ; Austin, Nichols & Co Inc

	v Stichting Lodestar [2007] NZSC 103, [2008] 2 NZLR 141, (2007) 18 PRNZ 768, (2008) 8 NZBLC 102,172, (2007) 74 IPR 452 ; Wilson v Neva Holdings Ltd [1994] 1 NZLR 481, (1993) 6 PRNZ 654, (1993) 2 NZPC 189 ; Mammoet Shipping BV v Compter (HC, Whangarei, CP 13-86, 6 July 1987, McGechan J) ; Myers v N & J Sherick Ltd [1974] 1 WLR 31, [1974] 1 All ER 81 ; Allison v Church of England Hospital Inc & Anor (HC, Christchurch, A 399-76, 25 August 1980, Roper J) ; Bruce v IAG New Zealand Ltd [2018] NZHC 3444 ; Central Insurance Co Ltd v Seacalf Shipping Corporation [1983] 2 Lloyd's Rep 25 ; Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1962] 2 QB 330, [1961] 2 WLR 1043, [1961] 2 All ER 487 ; Turpin v Direct Transport Ltd [1975] 2 NZLR 172 ; Bank of New Zealand (BNZ) v Equiticorp Industries Group Ltd (in statutory management) [1994] 3 NZLR 548 ; Telesis Corp Ltd v Reed (HC, Auckland, CP 36-91, 4 November 1991, Thomas J)
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR4.16.01]
REPRESENTATION	NS Gedye QC, SD McIntyre
PAGES	28 p
LOCATION	New Zealand Law Society Library

NAME	Nielsen v Earthquake Commission
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000763
JUDG DATE	28 March 2019
CITATION	[2019] NZHC 629
FULL TEXT	PDF judgment
PARTIES	Gloria Dianne Nielsen, Annas Christian Nielson (plaintiffs), The Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List ; Schedule 1p
SUBJECT	COSTS - successful wasted costs application by second defendant (insurer) - litigation arising from Canterbury earthquakes - Nov 2017, joint experts' report filed - Aug 2018, plaintiffs (insured) advised they were changing their expert - rendered joint report process worthless - insurer sought wasted costs incurred in joint experts site visit and work associated with the insurer's expert being involved - isolated step - plaintiffs (insured) opposed application - Court found nothing unreasonable in insured having to bear consequences of tactical decision

	- whether the insurer was entitled to wasted costs - **HELD**: insurer awarded $6,574 wasted costs and 2B costs plus disbursements on this application
	INSURANCE
CASES CITED	EBR Holdings Ltd (in liq) v Van Duyn [2018] NZHC 1065
REPRESENTATION	Gloria Dianne Nielsen (in person), Annas Christian Nielson (in person), S Campbell, B Entwistle
PAGES	9 p
LOCATION	New Zealand Law Society Library

NAME	Myall v Tower Insurance Ltd
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000230
JUDG DATE	21 March 2019
CITATION	[2019] NZHC 528
FULL TEXT	PDF judgment
PARTIES	Paul Geoffrey Myall (plaintiff), Tower Insurance Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - unsuccessful application by insurer for orders requiring insured to account for use of money interest on interim insurance payments; unsuccessful application for orders requiring insurer to pay balance of full replacement value immediately on basis it waived or varied policy requirements - insured owned historic mansion - damaged in Canterbury earthquake sequence - insured for full replacement value - defined by policy as "costs actually incurred to rebuild, replace or repair your house to same condition and extent as when new up to same area as shown in certificate of insurance" - insurer not bound to pay more than present day value until cost of replacement or repair "actually incurred" - policy gave insurer options to settle claim - could repair or rebuild, or pay insured monetary sum sufficient to do that - if insurer did not undertake repair or rebuild itself, it was obliged to pay insured "present day value" until insured incurred costs of replacement or repair, at which point insurer would meet additional costs - present day value was indemnity value of house - 2011 insurer accepted insured's claim for total loss - 700sqm house demolished - insured floor area 650sqm - dispute arose over what sum comprised

full replacement value - insurer conceded it elected to cash settle - following earlier HC and CA decisions in this proceeding parties agreed full replacement value was $5.27M - insured received interim payments in 2012 and 2013 (Interim Payments) - totalled $2.97M - expressly made and received on basis they were not in full and final settlement of insured's claim - insurer repeatedly reminded insured of his obligation to rebuild or replace before full replacement value would be paid - insured repeatedly accepted he was bound by that before and after second Interim Payment - no evidence insured operated under any understanding other than that he must rebuild or replace property before he was entitled to further payment - insured initially advised insurer he intended to rebuild - Jun 2015 decided to buy replacement home instead - insured used Interim Payments to pay mortgage and purchase another property in Australia - claimed full replacement value was due now - insurer submitted insured was required to account for use of money interest at 'on call interest rate' in relation to Interim Payments - $431,139 between date of receipt and judgment date - Court applied reasoning in Vintix v Lumley General Insurance - observed what constituted present day value was not settled in this case - could exceed amount of first Interim Payment - Court found to extent second Interim Payment exceeded present day value, there was no obligation on insurer to pay it - unconditional payment made outside policy terms - insurer could have made payment conditional on insured accounting for interest if he subsequently wished to establish full replacement value was higher figure - no proof insured had actually profited - even if he had that had to be balanced against fact that if insured did become entitled to payment of balance now, insurer would have benefit of paying in 2017 dollars a payment made in 2019 or later - (1) whether Court had addressed issue of use of money interest issue in its earlier decision; - (2) whether insured must account for use of money interest on first Interim Payment of $1.36M; - (3) whether to extent it represented a sum exceeding present day value, insured must account for use of money interest on second Interim Payment; - (4) whether insurer obliged to pay balance of full replacement value regardless of whether insured rebuilt or replaced house because by making second Interim Payment without making it conditional on insured replacing or rebuilding, insurer irrevocably waived or varied policy's requirements; - (5) whether purchase of house or houses overseas constituted purchase of replacement property under policy; - (6) whether insured entitled to interest under R11.27 on judgment sum from date of earlier HC judgment to date of payment -

HELD: consent orders made that full replacement value of insured's house, including exterior works and after pro rata adjustment for 700sq m house size and 650sq m insured area was $5,273,022 including GST - insured to pay insurer

	$32,000 costs on earlier HC proceedings - insurer not entitled to use of money interest earned on Interim Payments - insurer not required to pay balance of full replacement value until and unless policy's requirement to incur cost of rebuild or replacement was met - interest could only run from when that cost was incurred - (1) earlier judgment made no finding on use of money interest - issue fell within reservation of leave in that judgment; - (2) insured could not reasonably be required to account for interest earned on first Interim Payment - clearly payment of present day value - insured entitled to that sum as of right as claim for full loss was accepted - entitled to that amount whether or not insured subsequently reinstated or replaced building; - (3) no contractual obligation on insured to account for interest on second Interim Payment - not reasonable to imply such a term; - (4) insurer did not need to pay balance of full replacement value until and unless policy's requirement to incur cost of rebuild or replacement was met - insurer in its discretion, chose to make payment in advance of cost of rebuild or repair being incurred with hope that would settle claim - did not bind itself to make any further payment on that basis - no estoppel; - (5) leave reserved for parties to seek further directions or decision from Court on what constituted "replacing ... your house under the policy"; - (6) declaration in earlier HC judgment regarding full replacement value did not constitute judgment debt under R11.27 - no determination insurer obliged to pay that amount immediately - interest could only run from when insured incurred cost of rebuilding or replacing house and became entitled to further payment under policy - costs reserved
	CIVIL PROCEDURE
STATUTES	High Court Rules 2016 R11.27 - Judicature Act 1908 s87
CASES CITED	Myall v Tower Insurance Ltd [2017] NZHC 251 ; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363, (1977) 180 CLR 266, (1977) 45 LGRA 62, (1977) 52 ALR 20 ; Vintix Pty Ltd v Lumley General Insurance Ltd (1991) 24 NSWLR 627, (1991) 6 ANZ Insurance Cases 61-050 ; Skyward Aviation 2008 Ltd v Tower Insurance Ltd [2013] NZHC 1856 ; Kilduff v Tower Insurance Ltd [2018] NZHC 704, [2018] Lloyd's Rep IR 621
REPRESENTATION	KP Sullivan, MC Harris
PAGES	16 p
LOCATION	New Zealand Law Society Library

NAME	Richmond Hills Holdings Ltd v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Lester
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000738, CIV-2018-409-000739
JUDG DATE	8 March 2019
CITATION	[2019] NZHC 380
FULL TEXT	PDF judgment
PARTIES	Richmond Hill Holdings Ltd (plaintiff), IAG New Zealand Ltd (defendant), Alice Noelle Shannon and Erik Carlton Ellis (plaintiffs)
NOTE	High Court Earthquake List
SUBJECT	SUMMARY JUDGMENT - unsuccessful application for summary judgment - two claims brought in separate proceedings heard together - Richmond and Tuawera properties were damaged during Canterbury earthquake sequence - both properties deemed to be rebuilds rather than repairs - at issue was meaning and effect of insurer's offer to cash settle both claims if plaintiffs decided to accept a cash settlement - insured contended insurer was obliged to make one-off lump sum payment representing rebuilding costs for properties on full and final basis - insurer proposed to cash settle value of dwellings and pay for certain 'excluded items' as and when the cost of those items was incurred - claimed excluded items were retaining walls, contingency, future increased costs, demolition and professional fees - in accordance with insurer's standard policy - 8 Aug 2013 insurer emailed insured - stated dwellings were rebuilds - Court found reference to 'dwelling' in that email and to 'rebuild costs' would not naturally lead a reasonable recipient to conclude what was being offered in the cash settlement was in effect carpentry and other trades relating to rebuild of dwelling alone - Court held that as excluded items were a natural aspect of a rebuild, reference to a payment based on 'rebuild costs' would be read as including those items - 17 Sept 2013 insured emailed insurer - asked whether a final cash settlement figure would be based on rebuild costs - insurer replied by email that cash settlement would be based on rebuild costs and not present value - stated rebuild figures would be established based on information from an identified quantity surveyor - Court found this email unequivocal that if plaintiffs decided to cash settle, the figure would be based on rebuild cost - no basis for reading that rebuild cost would be subject to certain exclusions to be paid subsequently - insured received fact sheet from insurer in Sept 2013 - Court held this reinforced what could be reasonably understood from insurer's email of 17 Sept - in fact sheet insurer reserved right to 'change, update or correct any information from time to time without notice' - rebuild costings not collated until mid-2018 - Court unable to determine reason for delay on affidavit evidence - no communication from

	insurer correcting fact sheet until meeting on 24 Jul 2018 - insurer then stated cash offer would exclude "excluded items" - parties unable to reach agreement - insured filed proceedings - cause of action in estoppel - insured claimed representations contained in emails from insurer reinforced by fact sheet were unequivocal representations as to basis upon which a cash settlement offer would be calculated - pleaded reliance and passage of time of approximately 5 years since statements relied on were made that it was unconscionable for insurer to depart from representations - Court noted unconscionability and reliance interrelated - insurer contended paying excluded items as and when they were incurred could only cause detriment to insured if the insured did not in fact reinstate - Court accepted there was potential for dispute in respect of costings for excluded items - opined that was always a risk of cash settlement process - (1) whether insurer made clear and unequivocal representation regarding cash settlement; - (2) whether insured's reliance on insurer's representations reasonable; - (3) whether insured relied on insurer's representations to their detriment; - (4) whether unconscionable for insurer to depart from insured's belief or expectation - **HELD**: (1) insurer made clear and unequivocal representations that insured would have option of cash settlement - that if insured opted for cash settlement amount offered would be based on rebuild costs including value of 'excluded items' - that rebuild costs would be established based on information provided by named quantity surveyor; - (2) insured's reliance was reasonable; - (3) issue of reliance not determined due to Court's view on unconscionability; - (4) not established insurer had no arguable defence in relation to unconscionability - possibility of disagreement over cost of excluded items did not make unconscionability unarguable in summary judgment context - result: summary judgment application dismissed - insured failed to establish insurer had no arguable defence in relation to unconscionability - costs reserved
	INSURANCE
CASES CITED	Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd [2014] NZCA 407, [2014] 3 NZLR 567, (2014) 15 NZCPR 615
REPRESENTATION	P Woods, T Grimwood, B Cuff, C Henley
PAGES	17 p
LOCATION	New Zealand Law Society Library

NAME	Kitchen v AA Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000233
JUDG DATE	7 March 2019
CITATION	[2019] NZHC 348
FULL TEXT	PDF judgment
PARTIES	Lewis Quinn Kitchen and Sharyn Jane Kitchen (plaintiffs), AA Insurance Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for separate questions order - residential property damaged in Canterbury earthquake sequence - claim lodged with defendant (insurer) and EQC - cladding replacement necessary - subject to District Plan Fixed Minimum Floor Level Overlay in High Flood Hazard Management Area - resource consent required if minimum Finished Floor Level (FFL) not met - Council declined building consent for repair work - unable to determine compliance with Building Act 2004 (Act) and Building Code - dwelling floor would need to be raised to meet FFL - if raised likely foundations would need replacing - Council advised parties it would grant a waiver under s67 of Act regarding requirement for repair work to comply with Flood Hazard Rules - enable Council to grant building consent without property meeting Building Code FFL - conditional on plaintiffs (insured) signing a Statement acknowledging repair work would not meet requirements of Building Code and would not be guaranteed to be durable for 15 years while immersed in sea flood waters - insured refused to sign Statement - Council yet to provide s67 waiver or grant building consent - insurer argued lifting strategy proposed by insured not 'necessary' to comply with policy's obligations given Council's offer of waiver - insured issued proceedings - made separate question application under R10.15 HCR - sought to determine whether insurer could rely on a waiver of requirement to comply with Building Code issued by territorial authority under s67 prior to grant of building consent in order to meet its policy obligation to 'rebuild or repair the property as new including the additional cost necessary to comply with statutes, regulations and local government bylaws' - Court observed there was at least a moderate presumption against splitting a trial - adopted criteria in Turners and Growers v Zespri Group - Court set out five questions - practical approach to work through criteria - likely to be difficult demarcation issues arising between two hearings - potential duplication of evidence and need to recall witnesses for subsequent trial - unintended estoppel issues may be created by inadvertent findings on matters that were intended to be subject of

	full evidence and argument at subsequent trial - possible disqualification of Judge concerned if views were expressed on matters intended to be finally decided at subsequent trial - likely to be some disputed facts with evidence required - assessment of how policy applied to facts and what was reasonable approach by insurer could not be made in isolation from full factual matrix - neither answer to separate question would end proceeding - determining separate question unlikely to be timesaving - real prospect of appeals on proposed separate question issue - practical difficulties in having same Judge rostered to consider separate question and subsequent trial - whether to exercise discretion to order separate question hearing - **HELD**: application dismissed - insured failed to displace presumption proceeding should be determined at one substantive trial - leave reserved for parties to apply for pre-trial directions if required - relatively complex matter - defendant insurer entitled to 2B costs plus disbursements
	INSURANCE
STATUTES	Building Act 2004 s67 - High Court Rules 2016 R7.9(1)(e), R10.15
CASES CITED	Clear Communications Ltd v Telecom Corporation of New Zealand Ltd (1998) 12 PRNZ 333 ; Turners & Growers Ltd v Zespri Group Ltd (HC, Auckland, CIV-2009-404-004392, 5 May 2010, White J) ; NZ Iron Sands Holdings Ltd v Toward Industries Ltd [2018] NZHC 1571 ; KPMG New Zealand v Gemmell (HC, Auckland, CIV-2008-404-004288, 27 March 2009, Allan J) ; Hayden v Attorney-General (2011) 22 PRNZ 1 ; Karam v Fairfax New Zealand Ltd [2012] NZHC 1331
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at HR10.15.01
REPRESENTATION	TJ Brown, MJ Chrisp, AR Durrant
PAGES	19 p
LOCATION	New Zealand Law Society Library

NAME	Hood v Earthquake Commission
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001024
JUDG DATE	5 March 2019
CITATION	[2019] NZHC 349
FULL TEXT	PDF judgment

NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application by EQC for costs review of Associate Judge's decision; unsuccessful cross-review for additional costs by insured - insured's home damaged in Canterbury earthquake sequence - insured rejected EQC's initial assessment repairs would cost $10,729 - Oct 2016 filed proceedings against EQC and second defendant (insurer) - defendants worked co-operatively - sought further engineering advice - 20 Dec 2017 finalised report responding to insured's claim - concluded full rebuild was required at cost of $438,293 - issues of apportionment between two earthquakes needed to be resolved before EQC's liability could be quantified - Mar 2018 EQC sent letter showing how that was calculated - insurer and EQC then promptly finalised settlement terms for balance - EQC paid its assessed statutory liability - insurer paid balance - insured settled with insurer on basis no costs would be paid - insured sought full $21,631 costs and $9,418 disbursements from EQC alone - sought departure from general principle of 50/50 sharing of costs between defendants in earthquake litigation - EQC paid $12,179 being its calculation of 50 per cent of scale costs and disbursements - insured sought $18,870 balance from EQC - AJ ordered EQC to pay 50 percent of scale costs and disbursements - included costs for discovery awarded using Band B - two and a half days - only 36 documents discovered - discovery not required to be completed by formal affidavit - AJ stated band for costs was 'stipulated and should be followed' in this case - only category of proceedings as category 2 was stipulated - AJ awarded one 2B allowance for inspection - allocated all costs to EQC on basis insurer gave no discovery - insurer informally disclosed all relevant documents - inspected by insured - AJ awarded insured $3,345 additional costs - declined to award costs on costs application as neither party was entirely successful - EQC applied for review of AJ's decision - insured applied for cross-review five days out of time - on review, Court considered EQC's initial assessment was plainly deficient - in determining costs, focus was on parties' behaviour once proceedings were issued - Court noted key principle of HCR 2016 costs regime was to allow determination of costs to be "predictable and expeditious" - principle particularly important in cases managed in High Court Earthquake List - List intended to see earthquake cases dealt with as swiftly as Court's resources permit - EQC submitted that while present application involved a modest costs award, the AJ erred in principle and acted inconsistently with other decided cases on costs in earthquake cases - submitted it was important that costs decisions in earthquake cases were consistent and predictable in order to assist parties in achieving settlement - (1) whether AJ erred in awarding costs for discovery using Band B time allocation; - (2) whether costs award for inspection was wrong; - (3) whether to extend time for insured to bring a review application pursuant to

	R2.32 HCR; - (4) whether AJ erred in ordering EQC to pay only half scale costs and disbursements; - (5) whether to set aside AJ's decision to award no costs on original costs application; - (6) whether to award costs on these review applications - **HELD**: (1) AJ's decision regarding costs on discovery set aside - EQC's liability for costs on discovery should be on basis of one day, not two and a half days - matter considered afresh as AJ erroneously stated band for costs was 'stipulated and should be followed' - step more analogous to Band A than Band B ; - (2) AJ awarded inspection costs on erroneous understanding insurer did not discover documents - EQC should only be liable for half costs of inspection calculated on 2B basis - additional $2,788 costs awarded against EQC for inspection set aside; - (3) time extended for insured to bring a review application - only slightly out of time - no party prejudiced - issues had precedent value in Earthquake List proceedings; - (4) appropriate to award 50 per cent of costs against EQC - nothing to attribute disproportionate responsibility for delay to EQC; - (5) AJ's decision to award no costs on costs application set aside - EQC awarded costs on 2A basis plus usual disbursements; - (6) EQC awarded 2A costs plus reasonable disbursements on review and cross-review applications - result: EQC's review application allowed - $3,345 costs award against EQC set aside - insured's application for review dismissed
	INSURANCE
	CIVIL PROCEDURE
STATUTES	High Court Rules 2016 R1.2, R2.3(2), R14.2(1)(c), R14.2(1)(g), R14.5, R14.5(2), Schedule 3 - Senior Courts Act 2016 Schedule 5 cl11(3)(b)
CASES CITED	Hood v Earthquake Commission [2018] NZHC 2393 ; Deo Gratias Developments Ltd v Tower Insurance Ltd [2018] NZHC 1881 ; Wilson v Neva Holdings Ltd [1994] 1 NZLR 481, (1993) 6 PRNZ 654, (1993) 2 NZPC 189 ; Teinangaro v Fastway Couriers (NZ) Ltd (HC, Napier, CIV-2009-441-000751, 25 November 2011, Kos J) ; Driessen v Earthquake Commission [2016] NZHC 1048 ; Zygadlo v Earthquake Commission [2016] NZHC 1699 ; Ramage v Earthquake Commission [2016] NZHC 2327 ; Oakes v Earthquake Commission [2018] NZHC 1193 ; Zeng v Cai [2016] NZHC 503 ; Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411 ; Shirley v Wairarapa District Health Board [2006] NZSC 63, [2006] 3 NZLR 523
REPRESENTATION	GDR Shand, A Mackey, K Rouch
PAGES	15 p
LOCATION	New Zealand Law Society Library

NAME	Smith v Claims Resolution Service Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000643
JUDG DATE	12 February 2019
CITATION	[2019] NZHC 127
FULL TEXT	PDF judgment
PARTIES	Karlie Margaret Smith (plaintiff), Claims Resolution Service Ltd (first defendant), Grant Shand Barristers and Solicitors (second defendant)
SUBJECT	CIVIL PROCEDURE - successful application for leave to bring representative action - plaintiff's home damaged in Canterbury earthquake sequence - engaged first defendant (CRS) to resolve earthquake insurance claim against insurer on 'no win no fee' basis - CRS engaged second defendants (lawyers) to provide legal representation - Earthquake Services Ltd (ESL) carried out damage assessments - CRS funded legal proceeding on commission - plaintiff claimed CRS and lawyers represented they were providing independent professional services - submitted CRS, lawyers and others related to CRS and its principal, involved in undisclosed joint venture arrangement - plaintiff lost opportunity to engage independent experts and solicitors - lost opportunity to achieve a more timely and/or financially better settlement of insurance claims than with defendants - sought damages for mental distress and to recover amount paid to CRS - filed proceedings for breach of fiduciary duty and unconscionable bargain - sought leave under R4.24 HCR to bring proceeding as representative action for benefit of large number of defendants' former clients - plaintiff submitted group members could not realistically proceed individually - intended claimants all owned homes damaged in Canterbury earthquakes - all contracted CRS for insurance claim resolution funding and advocacy services - all obtained what was described as an independent damages assessment from ESL - all represented by lawyers who were engaged by CRS to prosecute civil proceedings - all submitted they settled their insurance claims for significantly less than sum defendants identified and advocated to be the full and true value of their insurance claims - consent not provided by some potential claimants in terms of R4.24(a) HCR - defendants opposed leave - Court observed common ingredients in cause of action of each member of represented group - group members could be identified with certainty in most cases from four principal documents commonly held by defendants - CRS contract, damage assessment prepared by

	ESL, statement of claim filed by lawyers and CRS's invoice following settlement of claim - alleged loss sufficiently identified - lawyers owed fiduciary duty to group members - arguable CRS also owed fiduciary duty - proceeding concerned an alleged pattern of behaviour by defendants and common thread - required evidence of experience of a large group of claimants - would be difficult for an individual claimant to adduce such evidence - relevant legal principles governing representative proceedings recently summarised by CA in Cridge v Studorp - determining matter in representative manner would avoid duplication - more expedient - representative action served wider public policy ends - ensured minor but widespread harm resulted in litigation - deterred wrongdoing - interests of judicial economy favoured grant of leave - avoided risk of inconsistent findings - supported access to justice - whether to grant leave under R4.24 HCR for proceeding to be conducted as a representative action - **HELD**: leave granted for proceeding to be conducted as a representative action - matter to operate as an 'opt in' proceeding - potential group members to be given four months to be informed about proceedings and to decide whether to join - subsequent decision would determine starting point for 'opt in' period and further directions for conduct of this proceeding - submissions invited on directions and costs
STATUTES	High Court Rules 2016 R1.2, R4.24, R4.24(a), R4.24(b), R10.5
CASES CITED	Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 ; John v Rees [1970] Ch 345, [1969] 2 WLR 1294, [1969] 2 All ER 274 ; Cridge v Studorp [2017] NZCA 376, (2017) 23 PRNZ 582 ; Blair v Martin [1929] NZLR 225 ; Premium Real Estate Ltd v Stevens [2009] NZSC 15, [2009] 2 NZLR 384, (2009) 9 NZBLC 102,532, (2009) ANZ ConvR 241 (extract) ; Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489, [2018] 2 NZLR 312 ; Prudential Assurance Co Ltd v Newman Industries Ltd (No 1) [1981] Ch 229, [1980] 2 WLR 339, [1979] 3 All ER 507 ; Taspac Oysters Ltd v James Hardie & Co Pty Ltd [1990] 1 NZLR 442, (1988) 2 PRNZ 621 ; Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69
OTHER SOURCES	A Butler (ed), Equity and Trusts in New Zealand (2nd ed, 2009, Thomson Reuters, Wellington) at [17.6.3] ; McGechan on Procedure (online, looseleaf ed, Thomson Reuters) at [HR4.24.01]
REPRESENTATION	AS Butler, EJ Flaszynski, A Barker QC, G Davis, AB Darroch
PAGES	17 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, [2019] NZHC 1013

NAME	Fitzgerald v IAG New Zealand Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-404-000779
JUDG DATE	20 December 2018
CITATION	[2018] NZHC 3447
FULL TEXT	PDF judgment
PARTIES	Stephen Patrick Fitzgerald, Nicola Mary Fitzgerald and Hamish Alexander Scott (plaintiffs), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - decision determining repair methodology required to meet policy standard - house owned by plaintiffs (insured) damaged in 2010-2011 Canterbury earthquake sequence - parties agreed on scope of work to be done to superstructure of building - area of contention was unreinforced 'rubble' perimeter foundation with internal piles - earthquake caused foundation to settle - exacerbated foundation cracking - ground classified as TC3 - policy required defendant (insurer) to pay cost of repairing house to a 'condition as similar as possible to when it was new, using current materials and methods' - provided insurer would pay for 'any costs of compliance with Government or local authority by laws or regulations as long as we pay the cost of compliance only for that part of the home that has suffered loss as covered by this policy' - 'loss' defined as 'physical loss or physical damage' - 'when new' policy standard required for repairs - Court observed 'when new' imported a different standard from 'as new' - repairs must put house in same position as far as possible as it originally was - foundations must provide same level of functional support as when they were new - no prima facie obligation on insurer to ensure foundations were at modern standards - insurer required to undertake sufficient repairs to render fact of earthquake damage immaterial - insurer proposed to repair foundations with epoxy, re-level house with jacking and packing - plaster over epoxy to restore aesthetics - insured contended policy required new foundation set lower in soil for better load bearing capacity - filed proceedings seeking declaratory relief - parties' experts agreed earthquakes caused settlement of house and garage foundations - agreed settlement and cracking of foundations required remediation - Ministry of Business, Innovation and Employment (MBIE) produced Residential Guidance document - recommended jacking and packing for houses of this type for dis-levelment of 50 to 100mm as here -

material before Court strongly suggested insurer's proposed repairs would comply with Building Act 2004 (Act) - (1) whether rubble perimeter foundation, being a part of the house, suffered 'loss' covered by policy; - (2) whether nature of material used to build perimeter foundation of original house meant no code compliant repair work could be done on, or on top of, that foundation; - (3) did fact perimeter foundation was on topsoil mean that no code compliant repair work could be done to, or on top of, that foundation; - (4) whether structural implications of cracks in perimeter foundation and garage floor slab; - (5) whether proposed filling of cracks with epoxy resin would be code compliant and restore perimeter foundation and garage floor slab to policy standard; - (6) after cracks were filled with epoxy resin would aesthetic quality of perimeter foundation and garage floor be able to be restored to policy standard; - (7) whether differential levels of garage floor were sufficiently material as to impact amenity so as to require remediation -

HELD: declarations made that if consents and ultimately code compliance were required but not given for insurer's proposed repairs, insured's proposed remediation must be carried out - that would require a new foundation for house including sun room and garage - if any necessary consents and code compliance certificates were given for insurer's proposed repairs, or appropriate authorities confirmed no such consents or certificates were reasonably required, new foundations were not required and insurer's proposed repairs could be carried out - if necessary, parties to instruct their experts to settle a final scope for undertaking repairs to foundations if either option above applied - leave reserved to either party to apply further regarding implementation of these directions or any further directions that may be required - costs reserved - (1) perimeter foundations suffered loss under policy; - (2) subject to necessary consents and ultimately code compliance certificates that may be required being given for insurer's proposed repairs (Caveat) nature of material used to build perimeter foundation of original house did not necessarily mean no code compliant repair work could be done on or on top of that foundation; - (3) subject to Caveat outlined above, fact perimeter foundation was on top soil did not necessarily mean no code compliant repair work could be done to, or on top of that foundation; - (4) cracks in perimeter foundation and garage floor slab had no structural implications; - (5) subject to Caveat, proposed filling of cracks with epoxy resin was likely to be code compliant and would restore perimeter foundation and garage floor to policy standard; - (6) filling cracks with epoxy resin would restore aesthetic quality of perimeter foundation and garage floor slab to policy standard; - (7) differential levels of garage floor not sufficiently material to impact amenity so as to require remediation

	NATURAL DISASTERS
	CIVIL PROCEDURE
WORDS CONS/DEF	"when new"
STATUTES	Building Act 2004 s17, s42A, s112
CASES CITED	East v Medical Assurance Society New Zealand Ltd [2014] NZHC 3399 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep IR 118 ; Turvey Trustee Ltd v Southern Response Earthquake Services Ltd [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965, [2013] Lloyd's Rep IR 552 ; Spina v Mutual Acceptance (Insurance) Ltd (1984) 3 ANZ Insurance Cases 60-554 ; Lion Nathan Ltd v NZI Insurance (1994) 8 ANZ Insurance Cases 75-398 ; Colonial Mutual General Insurance Co Ltd v D'Aloia (1988) 5 ANZ Insurance Cases 60-846 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; He v Earthquake Commission [2017] NZHC 2136 ; Bligh v Earthquake Commission [2018] NZHC 2102 ; Wheeldon v Body Corporate 342525 [2015] NZHC 884, (2015) 16 NZCPR 829
OTHER SOURCES	Judith Cheyne and others, Building Law in New Zealand (online looseleaf ed, Thomson Reuters) at [BL112.02]
REPRESENTATION	SP Rennie, WAL Todd, IJ Thain, CJ Jamieson
PAGES	27 p
LOCATION	New Zealand Law Society Library

NAME	Bruce v IAG New Zealand Ltd
JUDGE(S)	Mallon J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001223
JUDG DATE	20 December 2018
CITATION	[2018] NZHC 3444
FULL TEXT	PDF judgment
PARTIES	Joanne Tracey Bruce, Stephen Leslie Bruce, Leslie Gordon Willetts (as trustees of the Jo & Stephen Family Trust) (Plaintiffs), IAG New Zealand Ltd (Defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE LAW - partly successful claim over replacement insurance for a house damaged in the Christchurch earthquakes - IAG elected to reinstate the

	house - IAG accepts a large number of defects exist but disputes defects relating to interior finish, wall verticalities, floor level and the fireplace - house was built in 2006 to the highest specifications and won a gold award in the House of the Year competition - B bought the house in 2009 - under the policy IAG was required to repair the house to the same condition as when it was originally built or as near as reasonably possible - Hawkins Construction was engaged to do the repairs - the actual building was done by JTB which submitted payment claims to Hawkins - a contract was signed between B and JTB - B was concerned a repair might not be possible but IAG had expert advice repairs could be carried out - the house was to be lifted and a new slab laid, then then house reconnected - work started February 2015 and practical completion and handover occurred 15 May 2016 - B had advised IAG of a number of problems prior to this - code compliance certificate was provided 17 June 2016 - IAG engaged Axis to inspect the house - Axis found the floor was not level and the ground floor walls were not vertical - JTB was removed from the Companies register on 15 July 2016 - **HELD**: relevant comparison is between the house as it was when it was built in 2006 and as it is now after repairs - there is reliable evidence from tradespersons involved about the original finish - IAG is required to remediate the finish of walls and ceilings - wall verticalities are not as good as they were when the house was originally built - any variations would have been minor and within the standard - there are no structural, functional or amenity issues with the walls even though in some instances they do not comply with the standard in places - straightening the walls is not a reasonable option, nor is demolition and rebuilding - parties to consider settling this matter - floor levels are outside acceptable tolerances and it is not clear that any reasonable remedial work could fix this - parties to consider whether grinding and filling would be worthwhile - IAG is not required to replace the undamaged downstairs fireplace to match the upstairs one now an exact match for the existing downstairs one cannot be purchased - replacement is to be as close as reasonably possible - quantum of damages to be settled at a further hearing
CASES CITED	Robson v New Zealand Insurance Co Ltd [1931] NZLR 35 ; Best Food Fresh Tofu Ltd v China Taiping Insurance (NZ) Co Ltd [2014] NZHC 1279 ; Parkin v Vero Insurance New Zealand Ltd [2015] NZHC 1675 ; Morlea Professional Services Pty Ltd v South British Insurance Co Ltd (1987) 4 ANZ Insurance Cases 60-777 ; Lion Nathan Ltd v New Zealand Insurance Co Ltd (1994) 8 ANZ Insurance Cases 61-217 ; Colonial Mutual General Insurance Co Ltd v D'Aloia (1988) 5 ANZ Insurance Cases 60-846 ; Bloxham v Robinson [1996] 2 NZLR 664 (Note), (1996) 7 TCLR 122, (1996) 5 NZBLC 104,225 ; Mouat v Clark Boyce [1992] 2 NZLR 559, (1992) 2 NZ ConvC 191,196, (1992) 4 NZBLC 102,536 ; Pine v DAS Legal Expenses Insurance Co Ltd [2011] EWHC 658 ;

	Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd (No 2) (1988) 5 ANZ Insurance Cases 75,274 ; Ruxley Electronics v Forsyth [1996] AC 344, [1995] 3 WLR 118, [1995] 3 All ER 268 ; Fidler v Sun Assurance Co of Canada [2006] 2 SCR 3, (2006) 271 DLR (4th) 1, [2006] 8 WWR 1, (2006) 57 BCLR (4th) 1
OTHER SOURCES	John Birds, Ben Lynch and Simon Milnes, MacGillivray on Insurance Law relating to all risk other than marine (12th ed, Sweet & Maxwell, London, 2012) at [22-006] ; Anthony A Tarr and Julie-Anne R Kennedy, Insurance Law in New Zealand (2nd ed, The Law Book Company Ltd, Sydney, 1992) at 233 ; Jeremy Finn, Stephen Todd and Matthew Barber, Burrows Finn and Todd on the Law of Contract in New Zealand (6th ed, LexisNexis, Wellington, 2018) at 821 ; E Peel, Treitel The Law of Contract (11th ed, Sweet & Maxwell, London, 2015) at [20-037]-[20-046] ; Neil Campbell, "Claims for Damages Against Insurers in New Zealand" (paper presented to New Zealand Law Association Conference, Christchurch, 2001) ; James Edelman (ed), McGregor on Damages (20th ed, Sweet & Maxwell, London, 2018) at [5-016]-[5-017]
REPRESENTATION	G Shand, P Biddle, R Raymond QC, O Collette-Moxon, M Booth
PAGES	48 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, [2020] NZHC 661

NAME	Ross v Southern Response Earthquake Services Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2018-409-000361
JUDG DATE	13 December 2018
CITATION	[2018] NZHC 3288
FULL TEXT	PDF judgment
PARTIES	Brendan Miles Ross and Colleen Anne Ross (plaintiffs), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application under R4.24(b) HCR for leave to bring a representative action - plaintiffs' residential property damaged in Canterbury earthquakes - defendant insurer arranged for damaged home to be inspected - Detailed Repair/Rebuild Analysis (DRA) prepared - DRA recommended whether a home was beyond economic repair and estimated cost

to repair or rebuild - plaintiffs alleged two DRAs prepared for each house - full version and abridged version - both supplied to defendant - only abridged version supplied to insured - abridged version excluded costs for internal administration, demolition, design and project contingency - estimated rebuild cost in abridged DRA was $113,000 below that in full DRA - plaintiffs settled claim with defendant for figure in abridged DRA - later discovered existence of full DRA - sued defendant - pleaded the defendant represented the sum in the abridged DRA was a genuine estimate of rebuild costs and was the extent of plaintiffs' entitlement under policy - sued for breach of Fair Trading Act 1986, misrepresentation, breach of implied duty of good faith - alleged they entered settlement agreement under influence of factual mistakes - applied for leave to bring proceeding as representative of a group of defendant's other policy holders - sought judgment for difference between sums show in two DRAs plus general damages, interest and costs - estimated 3,000 insured may fall within class - intended to engage litigation funder - no potential costs liability for plaintiffs or any member of proposed class - defendant did not oppose representative action - opposed breadth of orders - Court rejected defendants' suggestion class be limited to persons who elected 'buy another house' option - policy pegged entitlements under the options of rebuilding on the same site, rebuilding on another site and buying on another site to the cost of rebuilding on present site - was claimant's house being damaged beyond economic repair that triggered right to choose a settlement option - appropriate for class to include all claimants whose residential dwelling was damaged beyond economic repair - not appropriate to limit class to only those who could not rebuild on their own land - not a relevant factor - observed law on opt out/opt in orders was presently as expressed by French J in Houghton v Saunders - opt-in orders made in all previous New Zealand cases - strongest argument in favour of opt out order was that it may act as a 'fail safe' - all class members would have been house owners at time of their claim - have some familiarity with legal and financial matters - unlikely a significant number of the class would be ill-equipped to make a decision on joining class - on what terms should the representative order be made - whether members of the class should be determined on an opt-in or opt-out basis -

HELD: plaintiffs granted leave to bring representative action - opt-in procedure - Houghton followed - class included those who own or owned a residential dwelling in Canterbury that was insured with the defendant under a 'Premier House Cover' or 'Premier Rental Property Cover' policy (Policy) - lodged a claim or claims with the defendant under the Policy for damage suffered as a result of the 2010 to 2012 Canterbury earthquakes (Claim) - residential dwelling subject to Claim was damaged beyond economic repair - they received a DRA from the

	defendant that did not include the Office Use section - they did not receive a DRA from the defendant that included the Office Use section - they entered into a settlement agreement with the defendant prior to 1 Oct 2014 in settlement and discharge of their Claim - they were not persons for whom the defendant managed the repair of their home, or rebuilt their home -class member could elect to opt into proceeding by completing an opt-in election form approved by the Court for that purpose and sending it the HC Registrar on or before a date to be fixed - this order to take effect from 25 May 2018, date of filing - costs reserved
STATUTES	Fair Trading Act 1986 - High Court Rules 2016 R4.24, R4.24(b)
CASES CITED	Duke of Bedford v Ellis [1901] AC 1 ; Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 ; RJ Flowers Ltd v Burns [1987] 1 NZLR 260 ; Carnie v Esanda Finance Corp Ltd [1995] HCA 9, (1995) 182 CLR 398, (1995) 127 ALR 76, (1995) 69 ALJR 206 ; LDC Finance Ltd v Miller [2015] NZHC 3165 ; Cridge v Studorp Ltd [2016] NZHC 2451, (2016) 23 PRNZ 281 ; Southern Response Earthquake Services Ltd v Avonside Holdings Ltd [2015] NZSC 110, [2017] 1 NZLR 141, (2015) 18 ANZ Insurance Cases 62-079, [2016] Lloyd's Rep IR 210 ; Carnie v Esanda Finance Corporation Ltd (1996) 38 NSWLR 465 ; Western Canadian Shopping Centres v Dutton [2001] SCC 46, [2001] 2 SCR 534 ; Houghton v Saunders (2008) 19 PRNZ 173, [2009] NZCCLR 13 ; Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331, [2010] NZCCLR 35, (2009) 20 PRNZ 215
OTHER SOURCES	Anthony Wicks, Class Actions in New Zealand: is legislation still necessary [2015] NZ L Rev 73
REPRESENTATION	PG Skelton QC, C Pearce, TC Weston QC, K Paterson, O Gascoigne
PAGES	29 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, SC judgment

NAME	Kristinsson v Southern Response Earthquake Services Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000318
JUDG DATE	6 November 2018
CITATION	[2018] NZHC 2863
FULL TEXT	PDF judgment

PARTIES	Hjortur Kristinsson (plaintiff), Southern Response Earthquake Services Ltd (first defendant), The Earthquake Commission (second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - substantially successful strike out application by first defendant (insurer) in relation to fourth amended statement of claim (4ASOC) - insured's property damaged in Canterbury earthquakes - insured filed proceeding to enforce insurer's policy obligations - single claim based on contract of insurance - sought judgment for cost of reinstatement and general damages - insurer challenged five areas of pleading that appeared for the first time in 4ASOC - insured pleaded the insurer breached Fair Insurance Code 2016 (Code) and that the Code was an implied term of the insurance contract - pleaded insurer failed to comply with Best Practice Guidelines for the Prioritisation of Vulnerable Customers produced by the Human Rights Commission (Guidelines) - pleaded breach of Human Rights Checklist (Checklist) from a Human Rights Commission report about the Canterbury earthquakes - pleaded breach of privacy - pleaded proposed house reinstatement methodology breached s36 Health and Safety at Work Act 2015 - Court observed that general damages would be assessed for a specific breach of contract, if established - if obligations imposed on the insurer by the cited documents were not obligations under the contract, they would not be taken into account in assessing general damages - whether to strike out the five areas of pleading challenged by the insurer relating to the Code, Guidelines, Checklist, breach of privacy and Health and Safety and Work Act - whether the insured should be given an opportunity to replead his case appropriately, on the basis there was an implied term incorporating the Guidelines into the policy - whether the insurer was entitled to costs - **HELD**: 4ASOC partially struck out - if a fifth amended statement of claim was filed and served it must comply with this judgment - pleading as to the Code being an implied term of the insurance contract and breach of it was acceptable - challenged pleadings relating to topics other than the Code struck out - documents and principles relied on were not contractual terms - insured given opportunity to file further amended statement of claim with appropriate pleading regarding Guidelines - leave reserved to the insurer to file a memorandum if it considered the amended document did not comply with this judgment - insurer entitled to 2B costs plus disbursements fixed by the Registrar NATURAL DISASTERS - INSURANCE
STATUTES	Earthquake Commission Act 1993 - Health and Safety at Work Act 2015 s36 - High Court Rules 2016 R5.26, R15.1
CASES CITED	Attorney-General v Prince [1998] 1 NZLR 262, (1997) 16 FRNZ 258, [1998]

	NZFLR 145 ; Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725 (SC) ; Domenico Trustee Ltd v Tower Insurance Ltd [2015] NZHC 981 ; Rout v Southern Response Earthquake Services Ltd [2013] NZHC 3262 ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Marshall Futures Ltd (in liq) v Marshall [1992] 1 NZLR 316, (1991) 5 NZCLC 67,238, [1991] MCLR 358, (1991) 3 PRNZ 200
REPRESENTATION	J Goddard, J Parker, B Cuff, K Moor
PAGES	16 p
LOCATION	New Zealand Law Society Library

NAME	Hood v Earthquake Commission
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001024
JUDG DATE	12 September 2018
CITATION	[2018] NZHC 2393
FULL TEXT	PDF judgment
PARTIES	Rachel Mary Hood (plaintiff), The Earthquake Commission (first defendant) IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application for costs against Earthquake Commission (EQC) - application to recover more than 50 per cent costs and disbursements from EQC in insurance proceedings - plaintiff's house insured by second defendant (insurer) - damaged in Canterbury earthquakes in 2011 - EQC estimated $10,729 repair costs - Oct 2016 plaintiff filed proceedings against insurer and EQC - Mar 2018 EQC accepted plaintiff's claim exceeded $100,000 statutory cap - $438,293 assessed repair cost - after EQC accepted claim was over cap, settlement promptly achieved with insurer - plaintiff settled claims with insurer on basis costs would not be paid - no explanation why costs were not recovered from insurer or why proceedings were commenced late - plaintiff sought $21,631 costs plus $9,418 disbursements from EQC - EQC paid $12,179 towards plaintiff's costs - comprised 50 per cent of scale fees for various steps plus 50 per cent of claimed disbursements - plaintiff filed proceedings to recover $18,870 balance of sum claimed - Court observed well settled guideline in earthquake cases where there were two defendants - usually an award of costs against each defendant for half the overall costs payable to plaintiff (50 per cent guideline) -

	whether 50 per cent guideline should apply in this case - whether EQC had paid 50 per cent of costs plus disbursements - **HELD**: no reason not to apply 50 per cent guideline - EQC required to pay further $3,345 to plaintiff - EQC liable for $10,816 costs plus $4,709 disbursements - EQC incorrectly halved costs relating to inspection - it was only party liable to pay inspection costs as insurer did not provide formal discovery - EQC erred in allowing only one day's scale rates for discovery instead of 2.5 days - no costs on this application
	INSURANCE
CASES CITED	Deo Gratias Developments Ltd v Tower Insurance Ltd [2018] NZHC 1881 ; Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411
REPRESENTATION	GDR Shand, K Rouch
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	Ginivan v Southern Response Earthquake Services Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000116
JUDG DATE	12 September 2018
CITATION	[2018] NZHC 2403
FULL TEXT	PDF judgment
PARTIES	William Francis Ginivan and Cameron David Bailey in their capacity as trustees of the Gift Trust (first plaintiffs), William Francis Ginivan and Diane Shirley Carson (second plaintiffs), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - successful interlocutory application for orders regarding operation of an insurance policy -first plaintiffs (Trustees) owned a residential property - occupied by second plaintiffs as their family home - unique architectural design - insured under AMI Premier House Cover Policy (Policy) - house sustained significant damage in Canterbury earthquakes - insurer's obligations under Policy were assumed by defendant (insurer) - Trustees elected to rebuild house on original site - Policy required insurer to pay costs of rebuilding the house to an 'as new' condition up to 300sqm - insurer to pay the

	'reasonable costs' of any architects' and surveyors' fees provided the expenses were approved before they were incurred - parties agreed expert engagement would be necessary - insurer refused to approve fees of various engineers, architects and quantity surveyors - Trustees asserted refusal was oppressive and contrary to Policy's terms - delaying design and construction process - Trustees applied for orders that the insurer approve and pay any request by the Trustees for a range of existing experts it named and for future experts the Trustees proposed to engage - alternatively, sought interim payment by insurer of a lump sum to be held in trust on account of invoices rendered by experts engaged by the Trustees - insurer maintained it was complying with Policy - submitted there was a genuine dispute between parties as to the 'reasonable cost' of experts - Court observed parties had reached impasse - practical solution required - (1) what experts and professional fees was the insurer required to pay; - (2) whether the Trustees' choice of professionals they wished to engage had to be approved by the insurer; - (3) whether to order the insurer to pay particular expert fees - **HELD**: orders made for process to be adopted henceforth for engagement of experts and approval of their fees for rebuild - process not the blanket approval process sought by Trustees - process aligned with Policy's terms - by consent, order made for insurer to pay $11,385 of $15,260 claimed for geotechnical report - leave reserved for parties to return to Court regarding outstanding $3,875 if further evidence came to hand - (1) insurer required to pay the 'reasonable costs' of all experts' and professional fees incurred in the rebuild; - (2) professionals chosen by the Trustees did not need to be approved by the insurer provided they fit within the description of experts and professionals and were competent to rebuild the house in compliance with current law; - (3) Court declined to order the insurer to pay particular fees - insufficient independent evidence to determine whether suggested fees were 'reasonable' - costs reserved
	CONTRACT
	CIVIL PROCEDURE
CASES CITED	Myall v Tower Insurance Ltd [2017] NZHC 251 ; Kilduff v Tower Insurance Ltd [2018] NZHC 704, [2018] Lloyd's Rep IR 621
REPRESENTATION	GA Cooper, MA Powell
PAGES	16 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Ginivan v Southern Response Earthquake Services Ltd [2020] NZHC 1469, Costs decision [2021] NZHC 1997

NAME	Bligh v Earthquake Commission
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	11 September 2018
CITATION	[2018] NZHC 2392
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application for review of costs order against lawyer - Associate Judge had found wasted costs in relation to four days leading up to and including first scheduled day of trial - Canterbury Earthquake proceedings - claim for wasted costs arose because of events which led to trial not proceeding on its scheduled date with the trial still to be heard 16 months later - relevant events occurred during October 2016 - litigation funder had withdrawn and lawyer terminated retainer just before trial - however lawyer had applied to the Court and been granted leave to withdraw as counsel - in that application Court held lawyer entitled to withdraw having regard to r 4.2.1 Lawyers Conduct and Client Care Rules 2008 - rule referred to right of a lawyer to terminate a retainer due to inability or failure of client to pay a fee on an agreed basis - in current proceeding HCJ observed that counsel have a duty to the Court to avoid unnecessary adjournment of trials and wastage of Court time and resources through either misconduct or serious personal default - high threshold for default by a solicitor to be so serious as to render that solicitor personally responsible for costs was spelt out in Harley v McDonald (PC) - issue: whether failure to seek an adjournment was a breach of duty to the Court sufficient for the Court to make an order for costs - **HELD**: no serious dereliction of duty to the Court to justify liability for costs - withdrawal as counsel could not be seen as being in breach of a duty owed to the Court when the Court had given leave to withdraw - various orders requiring lawyer to pay costs quashed LAW PRACTITIONERS
STATUTES	Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 R4.2.1, R4.2.3, R10.8
CASES CITED	Bligh v Earthquake Commission [2016] NZHC 2619 ; Bligh v Earthquake

	Commission [2017] NZHC 995 ; Bligh v Earthquake Commission [2017] NZHC 3179 ; Bligh v Earthquake Commission [2017] NZHC 2964 ; Burmeister v O'Brien [2008] 3 NZLR 842, (2009) 9 NZBLC 102,415 ; Jaques v Main [2016] NZHC 1978 ; Harley v McDonald [2001] UKPC 18, [2002] 1 NZLR 1, [2001] 2 WLR 1749 ; Westpac New Zealand Ltd v Fonua [2010] NZCA 471 ; Tian v Zhang [2018] NZHC 1701 ; Harvey v Taste Tease Ltd (HC, Rotorua, CP 219-88, 2 April 1990, Fisher J) ; Kamo Sports & Dive Ltd v Harrison Sports (Kamo) Ltd (1993) 7 PRNZ 321 ; Deliu v Chief Executive of the Ministry of Social Development [2012] NZCA 406, (2012) 21 PRNZ 294, (2012) 28 FRNZ 851 ; Harley v McDonald [2001] UKPC 18, [2002] 1 NZLR 1, [2001] 2 WLR 1749
OTHER SOURCES	Frederic T Horne, Cordery's Law Relating to Solicitors (8th ed, Butterworths, London, 1988) at ch5
REPRESENTATION	PJ Napier, RJ Lynn, PM Smith
PAGES	32p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Bligh v Earthquake Commission [2017] NZHC 3179

NAME	Sadat v Tower Insurance Ltd
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2014-409-000207
JUDG DATE	10 September 2018
CITATION	[2018] NZHC 2375
FULL TEXT	PDF judgment
PARTIES	Sayad Mostafa Sadat and Mastoreh Sadat (plaintiffs),Tower Insurance Ltd (first defendant), Earthquake Commission (EQC) (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application by EQC for costs against plaintiffs and non-party litigation funder; unsuccessful application for costs against plaintiffs' expert witnesses personally - plaintiffs' home damaged in 2010 Canterbury earthquake - plaintiff brought proceedings against insurer and EQC - plaintiffs entered agreement with litigation funder (CRSL) - CRSL agreed to prosecute plaintiffs' claim on a no win no pay basis for 10 per cent of final settlement, plus all costs up to a maximum of $10,000 - trial scheduled for 20 Mar 2017 - plaintiffs' reply briefs were to be served by 10 Mar 2017 at latest - 15 Mar, EQC offered to pay plaintiffs $25,000 with costs to lie where they fell as between

EQC and plaintiffs (Settlement Offer) - plaintiffs rejected Settlement Offer - 16 Mar, plaintiffs' geotechnical engineer (T) served extensive brief of evidence with significant new material - 17 Mar 2017 plaintiffs' structural engineer (W) provided extensive further evidence - conferences with counsel on 17 and 21 Mar - various steps taken by plaintiffs' expert witnesses to enable defendants' experts to deal with new evidence - some modifications made to evidence to be presented by W - leave granted for further evidence to be admitted - trial delayed to 22 Mar 2017 - plaintiffs' claims against insurer and EQC dismissed - failed to prove damages for which EQC could be liable exceeded $43,000 already paid to plaintiffs - costs issues between insurer and other parties settled - in assessing costs, Court found HC preferred evidence of defendants' experts only after all expert evidence was thoroughly tested - He v Earthquake Commission distinguished - principles in Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) applied in relation to awarding costs against a non-party - CRSL conceded that, in relation to this case only, it was liable for any costs awarded against plaintiffs - Court found T failed to satisfactorily explain why further geotechnical examinations of ground conditions were required so close to trial - need for further investigations should have been raised earlier - this delay and production of new evidence based on investigations delayed start of trial - Court considered T tailored his evidence to be consistent with plaintiffs' claims - transparent in how he did that - W tried to act as plaintiffs' advocate - failed to demonstrate impartiality required of an expert witness - Court observed it was ultimately for the Court, acting effectively in supervisory jurisdiction, to decide whether a costs order was appropriate to recognise the duty which experts have to the Court in giving expert evidence - W and T both failed to meet obligations of expert giving evidence to assist Court - whether EQC was entitled to 25 per cent uplift on 2B costs as plaintiffs' contributed unnecessarily to time and expense of proceeding because their claim lacked merit and they unreasonably rejected Settlement Offer - whether EQC entitled to increased costs due to late presentation of extensive expert evidence which caused EQC to operate at 'trial intensity' for three working days longer than would otherwise have been the case - whether CRSL should be jointly and severally liable with plaintiffs to pay EQC's costs and disbursements - whether to make a costs order against plaintiffs' experts, T and W - whether to award costs on this application -
HELD: plaintiff and CRSL jointly and severally liable to pay EQC $79,043 costs on 2B basis plus $96,202 disbursements - EQC awarded $3,000 costs on this application against plaintiffs and CRSL jointly and severally - no costs awarded against W or T personally - T and W not entitled to costs - plaintiffs should not be penalised for rejecting Settlement Offer so close to trial - no egregious conduct by plaintiffs - genuine conflict between experts in their

	opinions and evidence - late filing of plaintiffs' experts' supplementary evidence addressed by increasing allowance for preparation for hearing by four and a half days (three days for senior counsel and one and a half days for junior counsel), being $10,035 - high threshold for costs award against expert witnesses had been met, but Court exercised discretion not to do so - did not want to deter experts in earthquake litigation from assisting the Court - Obiter: judgment should put expert witnesses, and counsel, on notice of the particular risks the parties or witnesses might face where, in breach of timetabling directions, by way of reply or supplementary briefs, experts effectively dump substantial new evidence on another party at a date close to trial
	INSURANCE
STATUTES	High Court Rules 2016 Schedule 4
CASES CITED	Sadat v Tower Insurance [2017] NZHC 1550, [2018] Lloyd's Rep 170 ; Sullivan v Wellsford Properties Ltd [2018] NZHC 129 ; He v Earthquake Commission [2018] NZHC 67 ; Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 ; Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145, (2004) 17 PRNZ 115, [2004] 1 WLR 2807, [2005] 4 All ER 195 ; Phillips v Symes (No 2) [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043, [2005] 4 All ER 519, [2005] 2 All ER (Comm) 538
REPRESENTATION	KT Dalziel, JR Pullar, KL Wright, MC Harris, SF Alawi, NS Wood, JW Upson, J Moss
PAGES	17 p
LOCATION	New Zealand Law Society Library

NAME	Hoju v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001096
JUDG DATE	17 August 2018
CITATION	[2018] NZHC 2138
FULL TEXT	PDF judgment
PARTIES	Petru Hoju and Andreea Monica Wilson (plaintiffs), Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List

SUBJECT	COSTS - successful application by insurer (second defendant) for costs on discontinuance - plaintiffs' house damaged in Canterbury earthquake sequence - lodged claims with EQC (first defendant) and insurer - EQC undertook some repairs - insurer cash-settled claim for damage to items out of EQC scope - plaintiffs contended repairs were incomplete - asserted entire concrete foundation needed to be replaced - replacement would have taken claim above EQC's $100,000 statutory clap - Jul 2016 plaintiffs wrote to insurer asking it to review EQC's repair strategy - letter submitted foundation was rebuild and that costs would exceed EQC cap - Sept 2016 insurer rejected any liability for repair costs - Nov 2016 plaintiffs commenced proceedings - by consent, directions made for exchange of experts' reports, conferencing of experts and joint reporting - defendants achieved savings by sharing some experts - late 2017 plaintiff served repair costing at $472,604 - separate repair costings served by EQC and insurer were $12,155 and $13,442 respectively - Dec 2017 insurer initiated discussions with plaintiffs with view to plaintiffs' claim being discontinued - matters relating to insurer's costs following discontinuance not resolved - May 2018 plaintiffs accepted claim was under EQC cap - discontinued proceedings against insurer with costs reserved - insurers sought 2B costs plus disbursements - disbursements sought reflected fact some experts were shared by defendants - legal principles of costs on discontinuance in earthquake litigation context established in Yarrall v Earthquake Commission (CA) adopted - Court took judicial notice of recurring difficulty faced by insured in earthquake litigation in deciding whether to join EQC and insurer - typically depended on competing views as to repair strategy which made it difficult to accurately predict amount in issue - relevant in determining just and equitable costs outcome - plaintiffs' discontinuance against insurer reflected their acceptance that basis on which they issued their claim was incorrect - not a criticism of plaintiffs - acted on expert advice - plaintiffs must accept responsibility for what turned out to be an unsuccessful outcome - limitation pressure did not reasonably require plaintiffs to join insurer when they did - twice in 2016 before proceedings were commenced, insurer publicly announced it would not rely on limitation defence for claims arising out of earthquake sequence for any proceedings filed before 4 Sept 2018 - Court found plaintiffs' claim against the insurer was doomed to fail once physical evidence was reliably assessed - stress and health issues experienced by plaintiffs acknowledged - did not alter appropriate incidence of costs - (1) whether costs should be refused as insurer unnecessarily instructed its own solicitors rather than sharing single legal representation with EQC, particularly as both defendants were 'government controlled' and instructed common experts; - (2) whether costs should only be awarded once EQC claim was determined as the Court may make Bullock and

	Sanderson orders to achieve overall justice; - (3) whether presumption in R15.23 displaced - **HELD**: insurer awarded $12,934 costs on 2A/2B basis, plus $15,537 disbursements - disbursements included experts' fees, ex GST - (1) separate representation appropriate - defendants were distinct entities - one had statutory responsibilities, other contractual responsibilities - potential conflict of interest between defendants - instructing a common expert on some matters did not detract from appropriateness of separate representation; - (2) no basis to await outcome of EQC proceeding - no prospect Court would entertain making Bullock or Sanderson order if claim against EQC succeeded; - (3) R15.23 presumption not displaced INSURANCE NATURAL DISASTERS
STATUTES	High Court Rules 2016 R14.2(1)(a), R14.5(2)(b), R14.15, R15.23
CASES CITED	Yarrall v Earthquake Commission [2016] NZCA 517, (2016) 23 PRNZ 765 (CA) ; Bullock v London Omnibus Co [1907] 1 KB 264 ; Sanderson v Blyth Theatre Co [1903] 2 KB 533 ; Ritchie v Earthquake Commission [2017] NZHC 1242 ; New Zealand Venue and Event Management Ltd v Worldwide NZ LLC [2016] NZCA 282, (2016) 27 NZTC 22-058, (2016) 23 PRNZ 260
OTHER SOURCES	GE Dal Pont, Law of Costs (3rd ed, LexisNexis, Wellington, 2013)
REPRESENTATION	C Halliday, SP Rennie, RC Harris
PAGES	11 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	16 August 2018
CITATION	[2018] NZHC 2102
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List

SUBJECT	INSURANCE - unsuccessful earthquake damage claim - Canterbury Earthquake sequence - plaintiff owned residential property constructed in 1800s - major alterations had been halted in early 1990s - evidence of condition of dwelling by an expert witness employed with EQC - Court noted witness was experienced builder with particular knowledge of historic buildings - employment with EQC did not disqualify him from giving evidence as an expert - witness noted dwelling was "work in progress" - lower storey was totally open plan - all internal walls had been removed - noted upper level floor had been propped by number of mismatched timber supports - caused upper level floor to sag and move - some electrical wiring hung exposed - insured by second defendant (insurer) for sudden accidental loss - 'loss' defined as 'physical loss or physical damage' - losses covered by insurer only to extent they were not covered by first defendant (EQC) and then only if EQC had not declined claim - plaintiff claimed house and garage were badly damaged in Canterbury earthquakes in 2010 - claim almost entirely related to structural damage rather than aesthetic value - EQC experts advised buildings suffered no material damage due to earthquakes - insurer supported EQC's position - plaintiff filed proceedings seeking cost of $963,000 rebuild plus $25,000 general damages from each defendant - claim subsequently amended to $596,249 remediation costs plus general damages - Court assessed pre and post-earthquake photographs of buildings and records - plaintiff seriously ill - illness affected memory - mainly short term memory impaired - Court found plaintiff's evidence as to state of building pre-quake unreliable at best - contrived explanations to suit his case - some assertions clearly untrue - Oct 2013 orders made for discovery of pre-quake photos of house - plaintiff's affidavit disclosed some pre and post-earthquake photographs - relevant photographs only discovered by plaintiff in Oct 2016 - showed significant decay - plaintiff claimed to have only received photographs from relatives two weeks earlier - under cross-examination, plaintiff conceded he must have had photographs by at least Mar 2016 - Court found incident reflected negatively on plaintiff's credibility - Court preferred evidence of defendants' engineer - held plaintiff's civil engineer allowed his opinion to be inappropriately influenced by plaintiff's views - investigation less detailed and thorough - definition of "natural disaster damage" - Court reviewed authorities outlining cover under Earthquake Commission Act 1993 - for elements of building that had a structural or functional purpose, damage had to affect that structural or functional purpose - for elements of building that had an aesthetic purpose, damage must affect that aesthetic purpose - damage must be more than de minimis - burden of proof on insured - whether insured had established there was earthquake damage to his home or garage for which defendants could be liable - whether plaintiff entitled to general damages as defendants' conduct

	caused him substantial distress and inconvenience - **HELD**: claims against EQC and insurer dismissed - not established damage caused by earthquake - no evidence either defendant acted unreasonably or in breach of their obligations in a way that could give rise to an entitlement to general damages - costs reserved
	NATURAL DISASTERS
STATUTES	Earthquake Commission Act 1993 s2(1)(a), s2(1)(d), s18, s18(1), s18(1)(c), s21(1)(a), s29(2), s29(3), Schedule 2, cl16, Schedule 3 cl9(1)(a) - Evidence Act 2006 s16(2)(a), s18 - Resource Management Act 1993 s93, s94
CASES CITED	O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, [2013] 3 NZLR 275 (extract), (2013) 17 ANZ Insurance Cases 61-966, [2013] Lloyd's Rep IR 458 ; Earthquake Commission (EQC) v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381 ; Kraal v Earthquake Commission [2015] NZCA 13, [2015] 2 NZLR 589, (2015) 18 ANZ Insurance Cases 62-055 ; Sadat v Tower Insurance [2017] NZHC 1550, [2018] Lloyd's Rep 170 ; He v Earthquake Commission [2017] NZHC 2136 ; Arrow International v QBE Insurance (International) Ltd [2009] 3 NZLR 650 (HC) ; Rod Milner Motors Ltd v Attorney-General [1999] 2 NZLR 568 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; Earthquake Commission (EQC) v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381 ; Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; Rhesa Shipping Co Ltd SA v Edmunds [1985] 1 WLR 948, [1985] 2 All ER 712 ; Bligh v Earthquake Commission [2016] NZHC 2619 ; Bligh v Earthquake Commission [2017] NZHC 995 ; Bligh v Police (CA 104-81, 16 September 1981) ; C & S Kelly Properties Ltd v Earthquake Commission [2015] NZHC 1690 ; Geddes v New Zealand Dairy Board (HC, Wellington, CP 52-97, 27 August 2003, Wild J) ; ANZ National Bank Ltd v Commissioner of Inland Revenue (CIR) (2005) 18 PRNZ 114, (2005) 22 NZTC 19,587 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67, [2016] 2 NZLR 750 (CA), (2016) 19 ANZ Insurance Cases 62-097, (2016) 10 NZBLC 99-722 ; Ithaca (Custodians) Ltd v Perry Corp [2004] 1 NZLR 731, (2003) 9 NZCLC 263,386 ; Nisha v LSG Sky Chefs New Zealand Ltd [2015] NZEmpC 171, [2015] ERNZ 1124, (2015) 13 NZELR 185 ; Yang v Chen (No 2) [2011] NZCCLR 13
REPRESENTATION	RJ Lynn, EJ Flaszynski, NS Wood, JW Upson, PM Smith, SJ Connolly
PAGES	93 p
LOCATION	New Zealand Law Society Library

NAME	Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000816
JUDG DATE	14 August 2018
CITATION	[2018] NZHC 2077
FULL TEXT	PDF judgment
PARTIES	Self-Realiztion Meditation and Healing Centre Charitable Trust (New Zealand) (plaintiff), IAG New Zealand Ltd (defendant), H Construction North Island Ltd (formerly Hawkins Construction Ltd) (first third party), Orange H Management Ltd (formerly Hawkins Management Ltd (second third party), Brenchley Developments Ltd (third third party), Building Onward Ltd (fourth third party), Hi Tech Building Systems Ltd (fifth third party), Orange H Group Ltd (formerly Hawkins Group Ltd (sixth third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application under R4.16(3) to set aside third party notices - plaintiff owned two properties insured by defendant (insurer) - damaged in Canterbury earthquake sequence - plaintiff filed proceedings for breach of contract - alleged breach of obligation to reinstate properties or pay indemnity value - sought orders requiring insurer to specifically perform its duties under the policy or a declaration that the properties suffered earthquake damage in identified earthquakes and that the scope of works to repair damage was as advised by plaintiff's engineer - plaintiff did not allege repairs effected by builders were defective - did not assert a claim for cost of remediating substandard or defective work - reports obtained by plaintiff indicated there may be significant defects in repair work undertaken by one or more builders, or omissions to complete contracted work - insurer denied it breached policy obligations - submitted it paid $504,647 to plaintiff and third parties on plaintiff's behalf for repair of earthquake damage - contended plaintiff received $76,163 cash settlement - argued any liability for defective repairs lay with others - issued third party notices against six builders who carried out repairs at properties - insurer sought relief against builders under three causes of action - declaration that each builder was liable to plaintiff for breach of contract - declaration that each builder was liable to plaintiff for negligence - contractual indemnity for breaches of special condition in owner/builder building contract in favour of insurer with enforcement under s12 and s17 Contract and Commercial

	Law Act 2017 - special condition required builder to deal with insurer in good faith and not damage insurer's business - second third party (Onward) and fifth third party (HiTech) applied to set third party notices aside - Court outlined principles governing applications to set aside third party notices - Robin v IAG New Zealand Ltd distinguished - significant that plaintiff chose to sue only insurer and thereby enforce its rights under contract of insurance - elected not to sue for defects in repairs undertaken pursuant to contracts between builders and plaintiff - insurer's evidence suggested third parties other than Onward and HiTech were most centrally involved in any repair deficits - grave risk they would sit idly by while plaintiff's pleaded claim took preponderance of preparation and trial time - insurer could make claim against Onward and HiTech in separate proceedings - if insurer made payment of repair costs to plaintiff, it would acquire through subrogation the rights of the plaintiff as against the builders - Court acknowledged some delays may ensue to insurer - whether to set aside third party notices issued to Onward and HiTech - **HELD**: third party notices set aside - in interests of justice - costs memoranda invited in absence of agreement
	INSURANCE
STATUTES	Arbitration Act 1996 - Companies Act 1993 s248(1)(c) - Contract and Commercial Law Act 2017 s12, s17 - Contracts Privity Act 1982 - High Court Rules 2016 R4.16, R4.16(3)
CASES CITED	Haddow v New Zealand Insurance (NZI) Co Ltd [1958] NZLR 704 ; TSB Bank Ltd v Burgess [2013] NZHC 1228 ; Barclays Bank Ltd v Tom [1923] 1 KB 221 ; Robin v IAG New Zealand Ltd [2018] NZHC 1464 ; Robin v IAG New Zealand Ltd [2018] NZHC 204 ; Mammoet Shipping BV v Compter (HC, Whangarei, CP 13-86, 6 July 1987, McGechan J) ; Turner & Anor v First Fifteen Holdings Ltd & Ors (1991) 3 PRNZ 145, (1991) 1 NZPC 821 ; KPMG Peat Marwick v Cory-Wright & Salmon Ltd (in rec, in liq) (1994) 7 PRNZ 549, (1994) 2 NZPC 272
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR4.16.01]
REPRESENTATION	RC Harris, SD McIntyre, PF Whiteside QC, TP McDonnell, O Collette-Moxon
PAGES	25 p
LOCATION	New Zealand Law Society Library

NAME	Deo Gratias Developments Ltd v Tower Insurance Ltd

JUDGE(S)	Nicholas Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-404-002088, CIV-2016-404-001786, CIV-2016-409-000722, CIV-2016-404-000984
JUDG DATE	27 July 2018
CITATION	[2018] NZHC 1881
FULL TEXT	PDF judgment
PARTIES	Deo Gratias Developments Ltd (plaintiff), Tower Insurance Ltd (first defendant), The Earthquake Commission (second defendant/first defendant), Angela Stanton Auld and Andrew Robert Auld (plaintiffs), IAG New Zealand Ltd (first defendant), Kevin Byron Thorpe and Yvonne Teresa Thorpe (plaintiffs), AA Insurance Ltd (second defendant, James Edward Frampton and Ann Charlotte Vanscheevensteen (plaintiffs)
NOTE	High Court Earthquake List ; Schedule 1 p
SUBJECT	COSTS - successful application for review of costs awards - four proceedings arose out of Canterbury earthquakes - each involved Earthquake Commission (EQC) and a private insurer (insurer) - all proceedings discontinued as result of settlement - EQC offered to pay 50 percent of scale costs - all plaintiffs sought 75 percent of scale costs - Associate Judge ordered EQC to pay 50 percent of scale costs to three sets of plaintiffs, 75 percent to one set (Aulds) - ordered EQC to pay more disbursements than it offered before hearing - Associate Judge drew an inference from timing of the Aulds' settlement with their insurer - inferred that EQC's litigation stance held up overall settlement as once EQC accepted an over-cap position, settlement promptly followed - all plaintiffs awarded costs as 'successful parties' in the costs argument - all plaintiffs received greater costs than EQC was prepared to pay before the hearing because of additional disbursements awarded - each received less than they sought overall - EQC applied for review of costs decision - Court observed established approach to costs on discontinuance in earthquake list cases - where EQC and an insurer were defendants and a plaintiff was 'successful' in settlement, each defendant was liable for 50 percent of plaintiff's costs unless there was reason to increase the contribution of one of them - Court considered a consistent approach was important - Ramage v Earthquake Commission distinguished - no reliable inference to be drawn that EQC held up settlement of Aulds' case - no principled basis to say that an insurer may refuse to make a payment until EQC made an over-cap payment - no evidence EQC 'dragged the chain' in the critical assessment of damage and repair - (1) whether the Associate Judge erred in awarding 75 percent of scale costs to the Aulds and departing from the costs guideline of general application in earthquake list cases; - (2) whether EQC

	should have had costs on the costs applications as it was successful in resisting most of the costs sought - **HELD**: EQC to pay 50 percent of scale costs in all four proceedings - costs and disbursements ordered on substantive proceeding and the 'costs on costs' awards would otherwise stand - (1) Associate Judge erred - nothing in EQC's stance in the Aulds' case warranted departure from the general 50/50 principle; - (2) costs outcome was not plainly wrong - valid reasons behind judgment including that there was a strong element of a test case as to where costs should fall and in what proportions - leave reserved for any further direction required to implement this judgment
	INSURANCE
STATUTES	Earthquake Commission Act 1993 - High Court Rules R14.2, R14.2(1)(a), R14.2(1)(f), R14.23
CASES CITED	Deo Gratias Developments Ltd v Tower Insurance Ltd [2018] NZHC 767 ; Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411 ; Whiting v Earthquake Commission [2014] NZHC 1736 ; Van Limburg v Earthquake Commission [2014] NZHC 2764 ; Ryde v Earthquake Commission [2014] NZHC 2763 ; Zygadlo v Earthquake Commission [2016] NZHC 1699 ; Teinangaro v Fastway Couriers (NZ) Ltd (HC, Napier, CIV-2009-441-000751, 25 November 2011, Kos J) ; Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103, [2008] 2 NZLR 141, (2007) 18 PRNZ 768, (2008) 8 NZBLC 102,172, (2007) 74 IPR 452 ; Wilson v Neva Holdings Ltd [1994] 1 NZLR 481, (1993) 6 PRNZ 654, (1993) 2 NZPC 189 ; Shirley v Wairarapa District Health Board [2006] NZSC 63, [2006] 3 NZLR 523 ; Ramage v Earthquake Commission [2016] NZHC 2327 ; Morris v Riverwild Management Pty Ltd [2009] VSC 439 ; Hong v Deliu [2016] NZCA 75 ; Jarden v Lumley General Insurance (NZ) Ltd [2016] NZHC 2820 ; Jarden v Lumley General Insurance (NZ) Ltd [2018] NZCA 6 ; Packing In Ltd (in liq) v Chilcott (2003) 16 PRNZ 869 ; Joint Action Funding Ltd v Eichelbaum [2017] NZCA 249, [2018] 2 NZLR 70 (CA), (2017) 23 PRNZ 551 ; Driessen v Earthquake Commission [2016] NZHC 1048
REPRESENTATION	GDR Shand, NTP Lala, MH Hayes
PAGES	21 p
LOCATION	New Zealand Law Society Library

NAME	Ace Developments Ltd v Attorney-General
JUDGE(S)	Nicholas Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-485-000933
JUDG DATE	11 July 2018
CITATION	[2018] NZHC 1705
FULL TEXT	PDF judgment
PARTIES	Ace Developments Ltd (appellant), Attorney-General (respondent)
SUBJECT	PUBLIC WORKS - unsuccessful appeal under s69(1A) Canterbury Earthquake Recovery Act 2011 (Act) regarding measure of compensation for compulsorily acquired property; appeal against refusal to order further professional fees, demolition costs and marketing fees adjourned part heard - Canterbury Earthquake sequence - appellant owned property developed and leased to car dealers - property taken by proclamation under Act - vested in Crown in Aug 2014 - appellant lodged $8.135M compensation claim - Jun 2015 Compensation Panel (panel) hearing determined value of land compulsorily acquired was $3.4M - appellant gave evidence it would cost $6.549M to buy two sites in substitution of compulsorily acquired property, demolish existing buildings, erect new building and find new tenant - claimed $3.149M difference between $6.549M and $3.4M for land taken as disturbance cost - panel did not accept appellant or any other reasonable person would spend $6.549M to generate an asset which evidence showed would be worth $2.58M - held claim infringed claimant's duty to mitigate loss - held appellant was not relocating a business but purchasing substitute investment property - dismissed claim for compensation for development - found s61(b) of Act engaged - found compensation excluded claims for economic and consequential loss and for business interruption - held claimant must carry on business on land acquired and appellant was just an investor landlord - appellant sought valuation and legal costs of $53,203 for land taken, $41,589 for land acquired - Oct 2015 decision that appellant entitled to $3.379M compensation plus interest - compensated $21,500 for reasonable valuation costs and contribution to legal fees prior to land vesting in Crown - awarded $3,000 for cost of relocating billboard - appellant appealed - contended it should have costs of developing substitute site so that its improvements were equivalent to those taken - sought costs of demolition, erecting new buildings and finding new tenant - did not challenge finding that cost of purchasing replacement property was not a disturbance cost under s66 PWA - Crown submitted appellant was fully compensated when paid value of property taken which included improvements - application by appellant to adduce further evidence on appeal declined - decision upheld by CA - on appeal Court

considered full compensation would not be achieved simply by reference to value of land and buildings or improvements taken - Act intended to put an owner in position they were in before property was taken - full compensation must be fair and reasonable - must bring into account betterment and measure of whether required investment in substitute property was warranted given value outcome achieved - costs of redevelopment may be compensable where it was reasonable, subject to discount for betterment where all landowner sought was to be put back in same or similar position it occupied before the take - must be objectively reasonable - (1) whether compensation sought by appellant was for loss of a 'business'; - (2) whether cost of new buildings or other development components may be compensatable as part of full compensation; - (3) whether appellant entitled to cost of developing substitute site as 'disturbance' payment under s66 PWA; - (4) whether appellant entitled to further compensation for professional fees, demolition costs and marketing fees -

HELD: appeal on substantive legal issues for measure of compensation dismissed - no further compensation payable - (1) compensation sought was not for loss of a business - 'business loss' under s68 PWA related to business carried out on property taken and included reference to 'goodwill of any such business' - incompatible with mere ownership of land and buildings - reference in s68(1) PWA to a 'business located on that land' distinguished business from land; - (2) cost of new buildings or other development components may be compensatable as part of full compensation but calculation must reflect no more or less than replacement of physical space and utility of land and improvements taken - must allow for any betterment in value, whether capital value which reflected new buildings by depreciated replacement cost valuation or otherwise so compensation would adjust to avoid a windfall - assessment of betterment was an exercise which evidentially would involve valuation methodology - calculation must be fair and reasonable - some commercial reality must attend development expenditure - that would involve reality of the exercise, just as here whether commercial outcome justified the expenditure; - (3) appeal dismissed due to evidential shortfall - Court lacked evidence necessary to assess whether appellant should receive further compensation for cost of new buildings or other development components - came from HC's refusal to grant leave to adduce further evidence, upheld by CA - Court could see no way it could or should reverse that; - (4) appeal against refusal to order further professional fees, demolitions costs and marketing fees adjourned part heard - answered in principle - appellant should have its legal fees and all valuation costs for work which related to land taken and advertising costs for new site - insufficient evidence as to costs - leave reserved for further argument if parties could not agree

	NATURAL DISASTERS
STATUTES	Canterbury Earthquake Recovery Act 2011 s3, s61, s61(b), s69(1A), pt2 subpt5 - Greater Christchurch Regeneration Act 2016 - High Court Rules 2016 pt20 - Public Works Act 1981 s60, s62, s62(1)(b), s64, s64(3), s65, s66, s66(1), s66(1)(a), s66(1)(a)(ii), s66(1)(a)(iii), s66(1)(b), s68, s68(1), s73, s74, s90, pt5
CASES CITED	Ace Developments Ltd v Attorney-General [2016] NZHC 2467 ; Ace Developments Ltd v Attorney-General [2017] NZCA 409, [2017] 3 NZLR 728, (2017) 24 PRNZ 390 ; Director of Buildings & Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111, [1995] 2 WLR 404, [1995] 1 All ER 846 ; Birmingham City Corporation v West Midlands Baptist Trust (Association) Inc [1970 AC 874, [1969] 3 WLR 389, [1969] 3 All ER 172[1963] All ER 172 ; Horn v Sunderland Corporation [1941] 1 All ER 480 ; Napier Lane Ltd v Minister of Lands (Land Valuation Tribunal, LVP 8/07, 19 October 2010, Judge Perkins, Mahoney and Stevenson) ; Dean Selak Carrying Co Ltd v Lonergan [2015] NZHC 2230 ; Drower v Minister of Works [1984] 1 NZLR 26 (CA) ; Minister of Works & Development v David Reid Electronics Ltd (1989) LVC 505, (1990) NZVJ (Mar) 40 ; Russell v Minister of Lands (1898) 17 NZLR 241 ; Telecom Corporation of New Zealand Ltd v Commerce Commission [1991] 2 NZLR 557, [1991] NZAR 337, (1991) 3 PRNZ 259 ; Pryor v Minister of Land Information [2015] NZHC 3117
OTHER SOURCES	McGregor on Damages (19th ed, Sweet & Maxwell, London, 2014) at [3-0008] ; JF Burrows and RI Carter, Statute Law in New Zealand (4th ed, LexisNexis, Wellington, 2009) at 232 ; Laws of New Zealand Compulsory Acquisition and Compensation at [11] ; Elizabeth Toomey, New Zealand Land Law (3rd ed, Thomson Reuters, 2017) at [15.6.07]
REPRESENTATION	GD Jones, J Patrick, PH Higbee, EJ Couper
PAGES	34 p
LOCATION	New Zealand Law Society Library

NAME	Staples v Freeman
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000309
JUDG DATE	2 July 2018
CITATION	[2018] NZHC 1604

FULL TEXT	PDF judgment
PARTIES	Bryan Douglas Staples (first plaintiff), Claims Resolution Service Ltd (second plaintiff), Richard Logan Freeman (first defendant), Mediaworks TV Ltd (second defendant), Kate McCallum (third defendant), Tristram Clayton (fourth defendant)
SUBJECT	DEFAMATION - successful application for orders to file and serve amended statement of defence with further particulars of honest opinion defence; successful application for orders that s68(1) Evidence Act 2006 did not apply and orders requiring more detailed affidavit - first plaintiff director of second plaintiff (CRS) - CRS assisted claimants against Earthquake Commission (EQC) for property damage sustained during Canterbury earthquake sequence - first defendant administrator of Facebook page - plaintiffs alleged he published defamatory statements on that page - obtained interim injunction requiring removal of all material related to plaintiffs from Facebook page - restrained those operating webpage and their employees or associates from publicising any information relating to proceeding - unknown third party supplied DC documents to TV3 (second defendant) - TV3 national television channel - broadcast programme regarding plaintiffs - plaintiffs alleged statements in programme and on TV3's website were defamatory - third defendant was television producer - fourth defendant TV reporter - plaintiffs sued all defendants in defamation - TV3 producer and reporter (media defendants) pleaded defences of qualified privilege and honest opinion - Court outlined principles applicable to honest opinion defence - media defendants pleaded 33 facts - Court could not discern which of stated facts were intended to be statements of facts in terms of s38(a) Defamation Act 1992 (Act) and which were intended to be facts and circumstances relied on in support of the allegation that those statements were true under s38(b) - affidavits sworn by media defendants contained list of 11 documents in their possession for which they claimed confidentiality pursuant to s68(1) Evidence Act 2006 - limited description of those documents - identity of informant who passed information to media defendants not disclosed - test in Slater v Blomfield applied - trial issue was whether opinion expressed was genuine opinion - pleaded defamatory meanings effectively alleged criminal conduct - Court observed personal vendettas were basis for casting aspersions on plaintiffs in publications as issue - possible documents disclosed to media defendants for same reasons - considered identity of informant relevant to whether honest opinion defence available - no suggestion in evidence of any specific adverse effect on unknown informant or any other person - no suggestion documents in questions were obtained illegally - seemed they were distributed to media in breach of injunction - passing over of documents

unlawful - that supported public interest in disclosure - diminished public interest in protection of information's source - public interest in airing issues relevant to people resolving earthquake insurance claims - public interest in whether views regarding plaintiffs' earthquake claim services were true - public interest in protecting media sources not major factor in this case - media defendants' affidavits described documents which they said were no longer in their possession or control - media defendants opposed application to provide further details of those documents - wished to protect informant - claimed lack of recollection of what documents were - events occurred four years ago - whether to direct media defendants pursuant to R5.48(5) and s38 of Act, to file and serve an amended statement of defence giving further particulars in relation to their honest opinion defence - whether to make orders pursuant to s68(2) Evidence Act 2006 that s68(1) of Act did not apply to identity of informant - whether to order media defendants, pursuant to R8.19 to file an affidavit of documents properly identifying documents in Part 4 of their affidavits which were no longer in their possession or control and precise dates on which they disposed of each document -

HELD: media defendants to file and serve an amended statement of defence - particulars to be given in form that clearly distinguished between facts relied upon for s38(1) of Act and facts relied on for s38(b) - s68(1)Evidence Act did not apply - media defendants had not complied with obligation to disclose details of documents no longer in their possession or control - considerably more detailed affidavit to be provided - to include full disclosure of documents destroyed and how they were destroyed - leave reserved to seek supplementary order if there was disagreement about whether disclosure and identification sufficient - plaintiffs entitled to costs - quantum reserved

CIVIL PROCEDURE

STATUTES Defamation Act 1992 s11, s38, s38(a), s38(b) - Evidence Act 2006 s68, s68(1), s68(2), s68(2)(a) - High Court Rules 2016 R5.48(5), R8.19

CASES CITED Television New Zealand Ltd v Ah Koy [2002] 2 NZLR 616 ; APN New Zealand Ltd v Simunovich Fisheries Ltd [2009] NZSC 93, [2010] 1 NZLR 315 ; Simunovich Fisheries Ltd v Television New Zealand Ltd [2008] NZCA 350 ; Price Waterhouse v Fortex Group Ltd (CA 179-98, 30 November 1998) ; Karam v Fairfax New Zealand Ltd [2012] NZHC 887 ; Police v Campbell [2010] 1 NZLR 483, (2009) 9 HRNZ 517 ; Slater v Blomfield [2014] NZHC 2221, [2014] 3 NZLR 835 ; Blomfield v Slater [2017] NZHC 1654

REPRESENTATION PA Morten, RL Freeman (in person), TF Cleary, LC Bercovitch

PAGES 25 p

LOCATION	New Zealand Law Society Library
RELATED DOCS	Mediaworks TV Ltd v Staples [2019] NZCA 133, Mediaworks TV Ltd v Staples [2019] NZCA 273

NAME	Robin v IAG New Zealand Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001182
JUDG DATE	19 June 2018
CITATION	[2018] NZHC 1464
FULL TEXT	PDF judgment
PARTIES	Suzanne Robin (plaintiff), IAG New Zealand Ltd (first defendant), Canterbury Reconstruction Ltd (in liq) (second defendant), Orange H Management Ltd (formerly Hawkins Management Ltd (first third party), Orange H Group Ltd (formerly Hawkins Group Ltd (second third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application by insurer for review of Associate Judge's dismissal of application to join four further defendants - insured had purchased residential property damaged in Christchurch earthquake sequence - assignment of insurance policy - previous owner had made claim under insurance policy for house repair - following repairs property sold to plaintiff - current insured claimed repairs were not carried out to standard required by IAG policy - defective workmanship - OHML had been appointed by insurer to act on its behalf in assessing scope of works and monitoring repair work - insurer sought to add four new parties involved in repair work - insured had opposed application - insurer's contingent subrogation rights - OHML appointed second defendant (CRL) to manage repairs - OHGL was guarantor of OHML - contract between CRL and previous owners governed repairs - foundation repairs carried out by foundation specialist - building work completed by builder - no contractual relationship between plaintiff and foundation specialist or builder - plaintiff filed breach of contract proceedings against insurer - alleged defective repairs and failure to meet policy standard - plaintiff sued CRL in negligence - contended it breached duty of care to carry out repairs to a good standard of workmanship - insurer joined OHML and OHGL as third parties - pleaded if plaintiff's claims were established OHML breached contractual duties owed to insurer - insurer applied under R4.56 to join as defendants foundation specialist,

builder and Council that issued code compliance certificate (CCC) - pleaded joinder would accommodate possible subrogation rights - avoid need for subsequent trial dealing with same matters if insurer was found liable - AJ declined to join any of proposed defendants on basis it was not in interests of justice - held it appropriate for plaintiff to sue insurer and insurer to pass any liability down contractual chain - AJ assumed CRL would join proposed defendants as third parties - AJ stated insurer had an obligation to repair house which it effected through other parties - opined that if insurer could not pass liability down contractual chain, then that was its own fault for setting up response mechanism to insurance claim as it had - on review, Court observed that as foundation specialist and builder were subcontractors or co-contractors of CRL, it was arguable they also breached a duty of care in relation to repairs - should be joined as defendants - key issue for trial whether insurer was obliged to physically reinstate house - AJ indicated insurer was obliged to reinstate - since AJ's decision, OHML and OHGL went into receivership and CRL into liquidation - affidavit from CRL indicated it was not proposing to join any of proposed defendants - Court considered majority of evidence plaintiff would need to prove breach of duty of care by builder and foundation specialist would be the same as that required for claim against CRL - plaintiff's case against Council would require evidence regarding CCC - would be relatively easy for plaintiff to obtain - much of necessary evidence would overlap with that used against CRL - principle applying to multi-party litigation - (1) whether AJ erred in making findings on merits of plaintiff's claim which he then used to determine joinder application; - (2) whether AJ relied on an incorrect assumption that by subrogation, insurer was unlikely to need to sue proposed defendants in tort because liability could be passed down contractual chain to parties responsible when determining joinder application; - (3) whether AJ incorrectly assumed case against proposed defendants went substantially beyond case already pleaded by plaintiff so joining proposed defendants would put plaintiff to undue cost and inconvenience; - (4) whether there had been a material change in circumstances as since January hearing three of six potential defendant parties were now in liquidation or receivership -

HELD: builder, foundation specialist and Council joined as defendants - (1) AJ took an irrelevant factor into consideration - erred in making determination at this stage that insurer obliged to physically reinstate house - determination appeared to influence his decision; - (2) AJ improperly limited liability pathways based on premature decision regarding insurer's liability; - (3) adverse effects suffered by plaintiff because of joinder did not outweigh benefit of having all necessary parties before Court and preventing need for second trial later; - (4) - impossibility of proposed defendants being joined by CRL was a material change

	in circumstances - AJ's decision did not ensure justice by having all relevant parties before the Court, it must therefore be seen as plainly wrong - costs reserved
	INSURANCE
STATUTES	Companies Act 1993 s248(c)(i) - High Court Rules 2016 R2.3, R4.56, R4.56.12
CASES CITED	Robin v IAG New Zealand Ltd [2018] NZHC 204 ; Fonterra Co-operative Group Ltd v Waikato Coldstorage Ltd (HC, Hamilton, CIV-2010-419-000855, CIV-2009-419-000614, CIV-2009-419-000615, 22 December 2010, Rodney Hansen J) ; Newhaven Waldolf Management Ltd v Allen [2015] NZCA 204, [2015] NZAR 1173 ; Puredepth Ltd v NCP Trading Ltd & Anor [2010] NZCA 392 ; Shirley v Wairarapa District Health Board [2006] NZSC 63, [2006] 3 NZLR 523 (SC) ; Robinson v Whangarei Heads Enterprises Ltd [2013] NZHC 2247 ; Haines v Herd [2016] NZHC 1928 ; Mainzeal Corporation Ltd v Contractors Bonding Ltd (1989) 2 PRNZ 47 ; Paccar Inc & Ors v Four Ways Trucking Inc & Ors [1995] 2 NZLR 492, (1995) 8 PRNZ 423
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR4.56.12]
REPRESENTATION	KJM Robinson, NR Musesengwa-Gwaze, NS Gedye QC, EA Boshier
PAGES	16 p
LOCATION	New Zealand Law Society Library

NAME	Offshore Holdings Ltd v Western Pacific Insurance Ltd (in liq)
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000884
JUDG DATE	6 June 2018
CITATION	[2018] NZHC 1307
FULL TEXT	PDF judgment
REPORTED	(2018) 24 PRNZ 195
PARTIES	Offshore Holdings Ltd (first plaintiff), NZ Cashflow Control Ltd (second plaintiff), Western Pacific Insurance Ltd (in liq) (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application by Land Information New Zealand (LINZ) for documents filed by parties to earthquake insurance litigation - plaintiffs' properties insured by defendant insurer - damaged in Canterbury earthquake sequence - Jan 2014 plaintiffs' properties compulsorily acquired by

Crown using powers governed by Canterbury Earthquake Recovery Act 2011- plaintiffs issued proceedings against insurer - sought sums due under insurance policies for earthquake damage - LINZ responsible for assisting Minister for Greater Christchurch Regeneration in determining quantum of compensation payable to plaintiffs for compulsory acquisitions - LINZ applied for access to 'any and all documents filed by either party' in earthquake damage proceedings - included statement of claim, statement of defence, memoranda regarding case management and timetabling, minutes of Court - sought for purpose of understanding extent of earthquake damage to properties, whether buildings were economically repairable and if so, estimated repair costs - plaintiffs opposed LINZ's application - defendant did not oppose - Crown made offer in 2013 based on properties having land value only - plaintiffs still seeking expert advice on compensation claim - had not yet submitted to LINZ all documents they intended to rely on in pursuing compensation - Court considered LINZ had proper interest in finding out what was at issue in current proceeding and earthquake damage claimed by each party - (1) whether LINZ sufficiently particularised documents sought as required by R11.(2)((b) Senior Courts (Access to Court Documents) Rules 2017; - (2) whether request by LINZ premature as plaintiffs' compensation claims were not finally formulated or quantified; - (3) whether application should be denied as inconsistent with 2013 Crown offer based on land value only -
HELD: LINZ granted access to documents sought on condition use of documents limited to assisting its understanding of extent of damage to buildings, whether buildings were economically repairable and if need be, estimated repair costs and for purpose of determining amount of compensation payable by Crown to plaintiffs - (1) documents sought were sufficiently particularised; - (2) access request not premature; - (3) LINZ's application not inconsistent with previous Crown offer - current proceedings could provide relevant information as to whether premise of that offer correct

LAND LAW

STATUTES Senior Courts (Access to Court Documents) Rules 2017 R11, R11(2)(b)
PAGES 4 p
LOCATION New Zealand Law Society Library

NAME Gabriel v Earthquake Commission

JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000784
JUDG DATE	31 May 2018
CITATION	[2018] NZHC 1255
FULL TEXT	PDF judgment
PARTIES	ME Gabriel, CE Gabriel and Landley Trustees Ltd being the trustees of the ME & CE Gabriel Family Trust (plaintiffs), Earthquake Commission (first defendant), Vero Insurance New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	SUMMARY JUDGMENT - unsuccessful summary judgment application by insurer - plaintiffs' home owned and insured by original owner at time of Canterbury earthquake sequence - property damaged - original owner filed claim with first defendant (EQC) - filed claims against insurer for damage over EQC's statutory cap (EQC included claim) and damage to items excluded from EQC cover such as paths (EQC excluded claim) - EQC and insurer concluded damage was below EQC's statutory cap - Jul 2011 original owner sold property to W - executed deed assigning EQC claims to W - 2012 EQC undertook remedial work at property - Jan 2013 insurer wrote to original owner about EQC excluded claim - offered cash settlement or repairs - original owner phoned insurer - insurer's notes recorded original owner advised house had sold without a deed of assignment - stated new owner had attended to repairs - original owner told insurer to close 'the claim' - insurer sent letter to original owner confirming closure of EQC-excluded claim - 2014 W sold property to plaintiffs - executed deed assigning EQC claims to plaintiffs - plaintiffs considered EQC's remedial works were defective - informed insurer claim relating to property was now expected to be over EQC's cap - Sept 2017 plaintiffs commenced proceeding against insurer asserting rights as assignees of claims lodged with insurer - insurer asserted there were no remaining claims available to assign when plaintiffs came to own property - contended Jan 2013 telephone call with original owner amounted to waiver of rights in relation to EQC included claim - Court applied test in Watson v Healy Land Ltd - no evidence original owner was thinking of EQC included claim during Jan 2013 phone conversation - whether insurer entitled to summary judgment as beyond argument its waiver defence would succeed - **HELD**: summary judgment application dismissed - insurer had not satisfied test for summary judgment in relation to Watson v Healy Lands requirements of unambiguous representation and reliance - no clear and unequivocal representation original owner had abandoned both EQC excluded and EQC

	included claim - representation may have related to EQC-excluded claim only - costs reserved
STATUTES	High Court Rules 2016 R12.2(2)
CASES CITED	Watson v Healy Lands Ltd [1965] NZLR 511 ; Neylon v Dickens [1978] 2 NZLR 35 ; Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia [1977] AC 850, [1977] 2 WLR 286, [1977] 1 All ER 545 ; NZI Bank Ltd v Philpott [1990] 2 NZLR 403, (1990) 3 PRNZ 695 ; Miah v National Mutual Life Association of Australasia Ltd [2016] NZCA 590, [2017] 2 NZLR 241, (2016) 19 ANZ Insurance Cases 62-123
OTHER SOURCES	Laws of New Zealand Contract at [327], [328]-[332], [337]-[340], [341]-[349], [350], [352]
REPRESENTATION	SWM Corban, AL Parker, TD Grimwood
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	Oakes v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2017-409-000157
JUDG DATE	25 May 2018
CITATION	[2018] NZHC 1193
FULL TEXT	PDF judgment
PARTIES	AC Oakes and RC Oakes (plaintiffs), Earthquake Commission (first defendant), Tower Insurance Ltd (second defendant)
NOTE	High Court Earthquake List - Schedule 1 p attached
SUBJECT	COSTS - successful application by plaintiffs (insured) for costs against the first defendant (EQC) following discontinuance - insured's house damaged in Canterbury earthquakes - EQC made payments for repairs below statutory cap - Mar 2017, plaintiff issued proceeding against EQC and second defendant (insurer) - EQC denied further liability - 7 Jul 2017, EQC filed a scope of works stating the cost to remediate damage was $200,833 - agreed to make a cap payment to settle claim - insured discontinued proceeding against EQC - proceeding against insurer set down for trial - insured sought costs against EQC calculated at 75 percent of 2B calculation plus $7,964 disbursements - EQC did not oppose award of 50 percent of scale costs and disbursements - Court considered principles applicable where an insured discontinued their proceeding

	after EQC determined their claim exceeded the statutory cap - approach in Deo Gratias Development Ltd v Tower Insurance Ltd applied as to apportionment between a private insurer and EQC - whether the insured was entitled to 75 percent of scale costs and disbursements against EQC - **HELD**: insured awarded 50 percent of 2B costs and disbursements - $6,579 costs and $5,310 disbursements - not just on the facts of this case to require EQC to pay more than 50 percent
	INSURANCE
STATUTES	High Court Rules 2016 R14.3(1), R14.5(2)
CASES CITED	Deo Gratias Developments Ltd v Tower Insurance Ltd [2018] NZHC 767
REPRESENTATION	GDR Shand, DC Beissel, K Rouch
PAGES	5 p
LOCATION	New Zealand Law Society Library

NAME	Groen v Southern Response Earthquake Services Ltd
JUDGE(S)	Nicholas Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-009-001842
JUDG DATE	11 May 2018
CITATION	[2018] NZHC 1025
FULL TEXT	PDF judgment
PARTIES	Rick Paul John Groen and Anna Kate Groen (plaintiff), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - interim decision determining the defendant (insurer) had not waived legal privilege pursuant to s65(3)(a) Evidence Act 2006 - residential property owned by plaintiffs (insured) damaged in Canterbury earthquakes - claimed under insurance policy with insurer - insurer arranged for preparation of two Detailed Repair/Rebuild Analysis (DRA) - full and abridged version - both supplied to insurer - only abridged version supplied to insured - abridged version excluded some costs - insurance claim settled for $337,717 on basis of abridged version - insured obtained full version - alleged insurer deliberately concealed true rebuild costs - sued insurer for misleading and deceptive conduct, breach of duty of good faith in failing to give them copies of full DRA - substantive trial to start 21 May 2018 - insurer's General Manager, Legal and Strategy (GMLS)

	provided brief of evidence - stated insurer kept abridged and full versions of DRA for different purposes - that certain 'additional costs' were not payable by the insurer depending on which option insured elected - stated insurer adopted this interpretation of the policy after receiving legal advice - declined to discuss that advice on the basis it was privileged - Court considered differing New Zealand and Australian positions regarding waiver of legal privilege - found GMLS' brief of evidence seemed to align the receipt of legal advice with the good faith pleading - went no further - Court warned that not waiving privilege in respect of legal advice which contradicted the insurer's asserted evidential position of good faith dealings would constitute bad faith in itself - whether the insurer waived legal privilege by claiming legal advice was relevant to the assessment of insurer's good faith - **HELD**: legal privilege not waived - insurer to remove any reference to legal advice in the pleading and GMLS' brief of evidence so it would not figure in substantive proceedings at all, unless by the side door it was introduced in insurer's evidence
	INSURANCE
STATUTES	Evidence Act 2006 s65, s65(3)(a) - Fair Trading Act 1986 s43(3)(a) - Privacy Act 1993
CASES CITED	Avonside Holdings Ltd v Southern Response Earthquake Services Ltd [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040, [2015] Lloyd's Rep IR 653 ; McCullagh v Robert Jones Holdings Ltd [2015] NZHC 1462, (2015) 22 PRNZ 615 ; Turvey Trustee Ltd v Southern Response Earthquake Services Ltd [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965, [2013] Lloyd's Rep IR 552 ; Southern Response Earthquake Services Ltd v Shirley Investments Ltd [2017] NZHC 3190 ; Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152, (1998) 156 ALR 634 ; Shannon v Shannon [2005] 3 NZLR 757 ; B v Auckland District Law Society (ADLS) [2003] UKPC 38, [2004] 1 NZLR 326, [2003] 2 AC 736, [2003] 3 WLR 859, [2004] 4 All ER 269, (2003) 21 NZTC 18,221, (2003) 16 PRNZ 722 ; Ophthalmological Society of New Zealand Inc v Commerce Commission [2003] 2 NZLR 145 (CA), (2003) 16 PRNZ 569 ; Astrazeneca Ltd v Commerce Commission (2008) 12 TCLR 116 ; Botany Downs Secondary College, Re; Minister of Education v H Construction North Island Ltd [2017] NZHC 3147
REPRESENTATION	GDR Shand, NFD Moffatt
PAGES	15 p
LOCATION	New Zealand Law Society Library

NAME	Deo Gratias Developments Ltd v Tower Insurance Ltd
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-404-002088, CIV-2016-409-000722, CIV-2016-404-000984, CIV-2016-404-001786
JUDG DATE	23 April 2018
CITATION	[2018] NZHC 767
FULL TEXT	PDF judgment
PARTIES	Deo Gratias Developments Ltd (plaintiff), Tower Insurance Ltd (first defendant), Earthquake Commission (EQC) (second defendant/first defendant), KB Thorpe and another (plaintiffs), AA Insurance Ltd (second defendant), JE Frampton & another (plaintiffs), AS Auld and another (plaintiffs), IAG New Zealand Ltd (first defendant)
NOTE	High Court Earthquake List ; Appendix 2 p
SUBJECT	COSTS - successful applications for costs on discontinued proceedings against Earthquake Commission (EQC) - four sets of plaintiffs successfully sought orders for costs and disbursements against EQC as second defendant (behind each plaintiff's private insurer) - plaintiffs all sought 2B costs as well as disbursements including expert witnesses' and management fees - damage to homes following Canterbury Earthquake sequence - EQC made payments to each plaintiff below statutory cap - denied further liability - plaintiffs issued proceedings against private insurer and EQC - after proceedings commenced EQC made increased payments acceptable to plaintiffs - plaintiffs discontinued proceedings against EQC - EQC accepted each plaintiff entitled to costs and disbursements as successful parties - default rule for costs on discontinuance inappropriate - principles in Earthquake Commission v Whiting applied - DGDL sought 50 per cent of 2B costs against EQC - other plaintiffs sought 75 per cent of 2B costs - Court commented that awarding 50 per cent of scale costs against EQC and private insurer in earthquake litigation would usually be just where both actively defended proceeding - different approach may be justified where plaintiff and private insurer settled an aspect of a claim within a very short time after EQC accepted claim was over cap - Aulds settled with private insurer one month after EQC accepted claim was over cap - Framptons after six months - Thorpes after 11 months - DGDL after more than one year - Court lacked evidence regarding negotiations and settlement between plaintiffs and private insurers - unable to reliably determine whether two defendants bore different responsibility for continuation of proceeding - DGDL and Framptons claimed

	disbursements of $2,875 and $5,750 respectively for Independent Damages Assessment (IDA) - prepared some time before proceedings commenced - qualifications of report writer not set out in IDA - Aulds claimed $4,399 disbursement for costing by CES - obtained after issue of proceeding - never served on EQC - costing and IDAs did not form part of plaintiffs' initial disclosure - (1) whether any plaintiff entitled to more than 50 per cent of scale costs against EQC; - (2) whether cost of IDAs and CES costing reports were recoverable disbursements under R14.12(2) HCR - **HELD**: (1) EQC to pay 75 per cent of Aulds' 2B costs - inference drawn from timing of Aulds' settlement that order was just - all other plaintiffs awarded 50 per cent of 2B costs against EQC; - (2) IDAs and costing reports were recoverable disbursements - incurred for purpose of proceeding - reasonably necessary for conduct of proceeding and specific to conduct of proceeding - order made that EQC pay plaintiffs the following sums: DGDL 50 per cent of 2B costs ($7,582) plus $7,775 disbursements; - Framptons 50 per cent of 2B costs ($7,582) plus $8,291 disbursements; - Thorpes 50 per cent of 2B costs ($7,136) plus $4,731 disbursements; - Aulds 75 per cent of 2B costs ($12,042) plus $10,397 disbursements - EQC to pay each set of plaintiffs $5,910 costs in relation to these applications, plus one quarter share of disbursements reasonably incurred by plaintiffs' solicitors in relation to these applications and hearing - to be fixed by Registrar if not agreed
	INSURANCE
	NATURAL DISASTERS
STATUTES	Earthquake Commission Act 1993 s30(2) - High Court Rules R8.4(1), R8.4(1)(b), R14.1, R14.2(1), R14.2.1(a), R14.3(1), R14.5(2), R14.12, R14.12(1), R14.12(2), R14.12(2)(b), R14.12(2)(c), R15.12, R15.23
CASES CITED	Kroma Colour Prints Ltd v Tridonicatco NZ Ltd [2008] NZCA 150, (2008) 18 PRNZ 973 (CA) ; Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411 (CA) ; Van Limburg v Earthquake Commission [2014] NZHC 2764 ; Ryde v Earthquake Commission [2014] NZHC 2763 ; Oggi Advertising Ltd v McKenzie (1998) 12 PRNZ 535 (HC) ; Ramage v Earthquake Commission [2016] NZHC 2327 ; Zygadlo v Earthquake Commission [2016] NZHC 1699 ; Whiting v Earthquake Commission [2014] NZHC 1736 ; Driessen v Earthquake Commission [2016] NZHC 1048
REPRESENTATION	GDR Shand, M Hayes, KS Rouch
PAGES	18 p
LOCATION	New Zealand Law Society Library

NAME	Scotchbrook v Southern Response Earthquake Services ltd
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000791
JUDG DATE	20 April 2018
CITATION	[2018] NZHC 757
FULL TEXT	PDF judgment
PARTIES	Trudy Scotchbrook and Roger John Scotchbrook (plaintiffs), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List; Ruling on expert reporting
SUBJECT	EVIDENCE - decision determining how expert conferral and reporting should occur - plaintiffs' property damaged in Canterbury earthquakes - brought proceedings against defendant (insurer) - parties initially agreed experts would provide a single joint report - insurer now submitted four sequential reports by experts of different disciplines would be more appropriate - joint experts' site inspection carried out - Court did not know whether experts conferred with each other during inspection - considered experts should be able to convene by telephone or otherwise to raise all issues flowing from joint inspection and identify the best order in which to contribute to a joint report - could determine the best format for a joint report to assist parties and Court - should be reasonably possible for experts to work out most efficient layering of the repot - how should expert conferral and reporting proceed - **HELD**: experts to cooperate to achieve a single joint report - joint report to meet requirements in Protocols for Expert Conferral under HC Earthquake List - report to follow the approved form but with allowance for the layering of evidence from different disciplines - timetable directions made INSURANCE
STATUTES	High Court Rules 2016 R1.2, R7.4(2)
REPRESENTATION	J Moss, G Davis, EJ Walton, M McSparron
PAGES	7 p
LOCATION	New Zealand Law Society Library

NAME	Kilduff v Tower Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000344
JUDG DATE	17 April 2018
CITATION	[2018] NZHC 704
FULL TEXT	PDF judgment
REPORTED	[2018] Lloyd's Rep IR 621
PARTIES	Elizabeth Mary Kilduff and Veritas (2012) Ltd (plaintiffs), Tower Insurance Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - decision determining insurer's maximum liability under insurance policy; unsuccessful claims for breach of insurer's duty of good faith - plaintiffs (insured) were trustees of Family Trust - owned residential property on steep slope - architecturally designed - high standard of specifications and finish - damaged during 2010-2011 Christchurch Earthquake sequence - insured by defendant (insurer) - policy entitled insured to be indemnified for reasonable cost of repairing insured property to same condition and extent as when new, up to full replacement value - damage over EQC cap - parties agreed house was practically and economically repairable - Jun 2014 insurer made offer based on $317,600 estimated repair cost - based on information available to insurer at time - insured lost faith in insurer's investigation - obtained own reports - prompted insurer to conduct further investigations - scope of works and estimated repair cost increased - insurer elected to settle claim by making an indemnity payment - now claimed an $800,000 costing met policy standard - required scope of works and repair cost disputed - insured sought $980,000 repair costs - in correspondence with insurer, insured repeatedly asked for 'breathing space' to deal with family illness - insured refused to grant insurer's experts access to site Oct 2015 to Mar 2016 while insured's experts compiled reports - May 2016 insured filed proceedings - (1) where did burden of proof lie when establishing sum required to meet policy standard; - (2) what scope of work was required, particularly in relation to support for two internal walls; - (3) whether insurer's costing of necessary repairs reasonable; - (4) whether insured entitled to general damages as insurer breached its duty of good faith in presenting inadequate settlement offers; - (5) whether insured entitled to general damages as insurer breached its duty of good faith by unreasonably delaying its election and claim investigation; - (6) whether insured entitled to general damages for $24,339

consultants' fees incurred prior to Apr 2015 to assess inadequate scope of work and repair estimates provided by insurer (consultants' fees); - (7) whether insured entitled to an immediate lump-sum payment of repair cost as damages - **HELD**: declaration that maximum amount payable by insurer for repair of insured's house was $840,331, less $242,526 paid by EQC - in absence of agreement, memoranda invited on issues of interest and costs, disbursements and experts fees, including those before the Court and Consultants' Fees - (1) burden on insured to show insurer's costing insufficient to meet policy standard; - (2) additional underpinning proposed by insured's experts necessary to meet policy standard; - (3) maximum amount payable by insurer for repairs was $597,805, being $840,331 repair cost including GST, less $242,526 paid by EQC; - (4) no breach of duty of good faith in presenting settlement offers - not shown insurer acted other than in good faith based on information available at time; - (5) by fine margin, claim for general damages for delay dismissed - delay not solely attributable to insurer - claim viewed in context of 25,000 earthquake claims received by insurer - insured contributed to delay - complex case; - (6) claim for consultants' fees may be justified as proper disbursement in assisting insured in claim process and galvanising insurer into obtaining proper and reliable damage reports - counsel to provide further memoranda on issue; - (7) appropriate relief was declaration as to maximum amount insurer liable to pay to meet its policy obligations - policy required insurer to pay insured 'costs actually incurred' - not required to pay immediately after damage assessed

NATURAL DISASTERS

DAMAGES

STATUTES Evidence Act 2006 s7 - Judicature Act 1908 s87

CASES CITED O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, [2013] 3 NZLR 275 (extract), (2013) 17 ANZ Insurance Cases 61-966, [2013] Lloyd's Rep IR 458 ; Skyward Aviation 2008 Ltd v Tower Insurance Ltd [2013] NZHC 1856 ; Domenico Trustee Ltd v Tower Insurance Ltd [2015] NZHC 981 ; Tower Insurance Ltd v Domenico Trustee Ltd [2015] NZCA 372, [2016] Lloyd's Rep IR 277 ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341, (2014) 18 ANZ Insurance Cases 62-050, [2015] Lloyd's Rep IR 283 ; Myall v Tower Insurance Ltd [2017] NZCA 561, (2017) 19 ANZ Insurance Cases 62-163 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; Rout v Southern Response Earthquake Services Ltd [2013] NZHC 3262 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep

	IR 118
REPRESENTATION	CR Johnstone, H Bowering-Scott, MC Smith, SS McMullan
PAGES	33 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment

NAME	Robin v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001182
JUDG DATE	21 February 2018
CITATION	[2018] NZHC 204
FULL TEXT	PDF judgment
PARTIES	Suzanne Robin (plaintiff), IAG New Zealand Ltd (first defendant), Canterbury Reconstruction Ltd (second defendant), Orange H Management Ltd (formerly Hawkins Management Ltd) (first third party), Orange H Group Ltd (formerly Hawkins Group Ltd) (second third party)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application by insurer to join four defendants under R4.56 HCR - Dec 2014 plaintiff purchased residential property - previous owners assigned rights under insurance policy - previous owners insured by first defendant (insurer) - claimed for damage sustained during Canterbury earthquake sequence - insurer appointed first third party (OHML) to assess scope of works and monitor repairs - OHML appointed second defendant (CRL) to manage repairs - OHGL was guarantor of OHML - foundation repairs carried out by Foundation Specialist - building work completed by Builder - no contractual relationship between plaintiff and Foundation Specialist or Builder - plaintiff filed breach of contract proceedings against insurer - alleged defective repairs and failure to meet policy standard - sued CRL in tort on basis of a duty of care to ensure repairs were carried out to a good standard - insurer joined OHML and OHGL as third parties - pleaded that if plaintiff's claims were established, OHML breached contractual duties to insurer - insurer applied under R4.56 HCR to join as defendants OHML, Foundation Specialist, Builder and Council that issued a code compliance certificate (CCC) - submitted proposed defendants carried out or certified the work at issue whereas insurer was an intermediary - pleaded joinder would accommodate possible subrogation rights -

avoid need for subsequent trial dealing with same matters if insurer was found liable - plaintiff opposed joinder application - Court opined it was appropriate for plaintiff to sue insurer and insurer to pass any liability down contractual chain - indicated insurer was obliged to physically reinstate house - if insurer could not pass liability down contractual chain, it was simply left with its primary responsibility to insured and insured's assignee - held plaintiff did not have information she would require to competently present a case in tort against parties concerned - in contrast, each contracting party in chain possessed details it required to establish responsibilities of next contracting party - Court dismissed insurer's submission it was an intermediary - insurer was a contracting party with clear written obligations in policy document - as a matter of principle, insured should be able to turn to their insurer alone when repair work was inadequate - proceeding did not impact on Council's rights - if work not code compliant, contractor(s) responsible would be liable to OHML, and OHML to insurer - if it was code compliant but still substandard, Council would not be liable anyway - (1) whether plaintiff could have sued each of proposed four defendants alleging breach of duties of care owed to her; - (2) whether it was in interests of justice to join proposed defendants -
HELD: joinder application dismissed - not in interests of justice - (1) plaintiff could have sued each of proposed four defendants; - (2) interests of justice served by plaintiff suing her insurer and insurer passing liability down contractual chain - plaintiff, OHML and OHGL awarded 2B costs and disbursements

INSURANCE

TORT

STATUTES High Court Rules 2016 R4.3, R4.3(1), R4.56, R4.56(1)(b),

CASES CITED Fonterra Co-operative Group Ltd v Waikato Coldstorage Ltd (HC, Hamilton, CIV-2010-419-000855, CIV-2009-419-000614, CIV-2009-419-000615, 22 December 2010, Rodney Hansen J) ; Auckland Regional Services Trust v Lark [1994] 2 ERNZ 135 ; Paccar Inc & Ors v Four Ways Trucking Inc & Ors [1995] 2 NZLR 492, (1995) 8 PRNZ 423 ; Mainzeal Corporation Ltd v Contractors Bonding Ltd (1989) 2 PRNZ 47 ; Newhaven Waldolf Management Ltd v Allen [2015] NZCA 204, [2015] NZAR 1173 ; Beattie v Premier Events Group Ltd [2012] NZCA 257 ; Pegang Mining Company Ltd v Choong Sam [1969] 2 MLJ 52 (PC) ; Gurtner v Circuit [1968] 2 QB 587, [1968] 2 WLR 668, [1968] 1 All ER 328 ; Body Corporate 185960 v North Shore City Council (2008) 2 NZTR 18-032 ; Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council [2017] NZSC 190, [2018] 1 NZSC 278 ; Body Corporate No 207624 v

	North Shore City Council [2012] NZSC 83, [2013] 2 NZLR 297
OTHER SOURCES	McGechan on Procedure (looseleaf ed, Thomson Reuters) at [HR4.56.11]
REPRESENTATION	KJM Robinson, M Hills, N Gedye QC, O Collette-Moxon, DH McClellan QC, SD Galloway
PAGES	13 p
LOCATION	New Zealand Law Society Library

NAME	C & S Kelly Properties Ltd v Earthquake Commission (EQC)
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001273
JUDG DATE	15 February 2018
CITATION	[2018] NZHC 157
FULL TEXT	PDF judgment
PARTIES	C & S Kelly Properties Ltd (plaintiff), Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for review of interlocutory directions made without notice - dispute between plaintiff and first defendant (EQC) regarding enforcement of a $134,747 judgment debt - without notice interlocutory directions made on last sitting day of year - Court ordered EQC to pay $134,747 (funds) to Ministry of Justice Law Trust Account (Trust Account) - no enforcement steps to be taken once payment was made - interlocutory directions provided funds to be held in Trust Account pending release of costs decision - EQC paid funds into Trust Account - 7 Feb 2018 costs decision determined each party should bear their own costs - funds plus interest earned disbursed in accordance with plaintiff's instructions - plaintiff applied for review of interlocutory directions - submitted they should not have been made - no issue of public interest arose on plaintiff's application to review directions - whether to hear plaintiff's application to review interlocutory directions of 19 Dec 2017 - whether plaintiff entitled to costs against Crown as directions caused loss of use of funds paid into Court to which plaintiff was otherwise entitled - **HELD**: application dismissed - Court declined to hear application as interlocutory directions were no longer of any effect - costs to lie where they fell - no exceptional circumstances justifying costs award against Crown as a non-party - any loss arising from lack of access to funds arose from parties'

	dispute and related actions of Registrar and Sheriff - those issues now subject of a separate proceeding
STATUTES	High Court Rules R7.43, R7.49
CASES CITED	C & S Kelly Properties Ltd v Earthquake Commission (EQC) (HC, Christchurch, CIV-2013-409-001273, 19 December 2017, Mander J) ; C & S Kelly Properties Ltd v EQC [2018] NZHC 56 ; Hutchinson v A [2015] NZCA 214, [2015] NZAR 1273 ; Orlov v ANZA Distributing (NZ) Ltd (in liq) & Anor [2011] NZSC 28, [2011] 2 NZLR 721 ; Gordon-Smith v R [2008] NZSC 56, [2009] NZAR 721, (2008) 23 CRNZ 958 ; Team Clavel Motorsport v Neil Allport Motorsports Ltd (HC, Auckland, CIV-2010-404-002823, 1 June 2010, Miller J) ; Borowski v Canada (Attorney General) [1989] 3 WWR 97, (1989) 57 DLR (4th) 231, [1989] 1 SCR 342
REPRESENTATION	G Shand, J Moran, R Johnstone, A Powell (as interested party)
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	He v Earthquake Commission (EQC)
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001775
JUDG DATE	8 February 2018
CITATION	[2018] NZHC 67
FULL TEXT	PDF judgment
PARTIES	Xiaoming He (plaintiff), The Earthquake Commission (first defendant), Offshore Market Placements Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful costs application by first defendant (EQC) and second defendant (insurer) - plaintiff alleged his property was damaged in Canterbury earthquakes - brought proceedings against defendants for cost to repair damage - claims almost completely dismissed - plaintiff only revealed critical assumptions in his reply evidence - evidence evolved further during substantive hearing - defendants had to respond to new evidence on eve of trial and prepare additional briefs of evidence - evolving nature of plaintiff's case meant larger than normal amount of time needed to prepare for trial - plaintiff changed experts numerous times - they failed to engage constructively with defendants' experts in conferencing - plaintiff failed to admit facts - appeal against substantive

	judgment yet to be heard - what was the appropriate costs categorisation - whether EQC was entitled to a further uplift from the Band C categorisation under R14.6(3)(a) HCR - whether the defendants were entitled to increased costs under R14.6(3)(b) HCR - whether the plaintiff should cover the entire costs of the defendants' expert witnesses - whether the plaintiff should not be liable for travel costs of opposing counsel as the defendants unreasonably chose to instruct out of town counsel in the city where the defendants were based - whether costs should not be fixed until appeal rights were exhausted - **HELD**: EQC awarded $272,458, comprised of $90,601 costs with 50 percent uplift and $136,557 disbursements - insurer awarded $244,327, comprised of $76,401 costs with 50 percent uplift and $129,726 disbursements - awarded on 2C basis - no increase in time allocation under R14.6(3)(a) HCR as matters raised better dealt by uplift on costs - 50 percent uplift applied pursuant to R14.6(3)(b)(i), R14.6(3)(b)(iii) and R14.6(3)(b)(iv) - plaintiff to cover entire costs of defendants' expert witnesses - fees were reasonable - travel costs claimed for opposing counsel were reasonable - reasonable for defendants to instruct out of town counsel given the complexity of case and defendants' location
	INSURANCE
STATUTES	High Court Rules 2016 R14.5, R14.5(2)(c), R14.6, R14.6(3)(b), R14.6(3)(d), R14.12(2), R14.12(3), R14.12(5), pt14
CASES CITED	He v Earthquake Commission [2017] NZHC 2136 ; Holdfast New Zealand Ltd v Selleys Pty Ltd (2005) 17 PRNZ 897 ; Strachan v Denbigh Property Ltd (HC, Palmerston North, CIV-2010-454-000232, 3 June 2011, AJ Gendall) ; Commissioner of Inland Revenue (CIR) v Chesterfields Preschools Ltd [2010] NZCA 400, (2010) 24 NZTC 24,500 ; Holden v Architectural Finishes Ltd [1997] 3 NZLR 143, (1997) 10 PRNZ 675 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd (2017) 23 PRNZ 484 ; Russell v Taxation Review Authority (2000) 14 PRNZ 515 ; Commerce Commission v Bay of Plenty Electricity Ltd (HC, Wellington, CIV-2001-485-000917, 4 December 2008, Clifford J) ; He v Earthquake Commission [2017] NZHC 839 ; Duncan v Osborne Buildings Ltd (1992) 6 PRNZ 85 ; Keung v GBR Investment Ltd [2010] NZCA 396, [2012] NZAR 17
REPRESENTATION	PA Cowey, AJ Summerlee, BA Scott, GM Scott-Jones, RM Flinn, AW Moore
PAGES	19 p
LOCATION	New Zealand Law Society Library

NAME	C & S Kelly Properties Ltd v Earthquake Commission (EQC)
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001273
JUDG DATE	7 February 2018
CITATION	[2018] NZHC 56
FULL TEXT	PDF judgment
PARTIES	C & S Kelly Properties Ltd (plaintiff), Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - unsuccessful competing costs applications - plaintiff's house damage in Canterbury earthquake sequence - first defendant (EQC) and second defendant (insurer) disputed extent of earthquake damage and repair cost - EQC claimed it was entitled to settle claim by reinstating house as opposed to making a payment - plaintiff filed proceedings seeking $1.04M money judgment - contended new Type 2A foundation was required - submitted EQC was liable to pay two full cap payments totalling $227,000, insurer liable for $814,070 - litigation funding - claim proceeded on 'all or nothing' basis - plaintiff adduced no evidence regarding alternative repair strategy - shortly before substantive hearing, plaintiff made offer to EQC to settle for $140,160 - defendants made $53,769 settlement offer - at start of trial, plaintiff reduced claim to $590,996, including $399,166 against insurer - Court found plaintiff's expert's evidence flawed - expert's contradictory stance unreasonable - plaintiff succeeded in establishing EQC was liable to remediate floor dislevelment and pay a monetary sum despite its purported election to repair damage - Court dismissed plaintiff's contention a 2A foundation was required - awarded plaintiff $53,769 plus additional costs associated with floor re-levelling - Court held parties needed to apply remediation framework proposed in joint experts' report - directed quantum hearing to determine scope of work and cost to re-level floors - immediately prior to quantum hearing plaintiff made $130,682 Calderbank offer to EQC - at quantum hearing plaintiff attempted to relitigate unfavourable findings from substantive hearing - necessitated estoppel rulings against leading evidence in respect of matters already determined - plaintiff contravened rulings - continued to argue for replacement foundation - at quantum hearing, EQC's scope of works and costings were accepted apart from inclusion of $6,644 contingency - Court awarded plaintiff further $73,084 - ultimately achieved judgment for $126,853 inclusive of GST against EQC - $15,222 related to one earthquake, $111,630 to

	another - did not exceed EQC's statutory cap - no monies payable by insurer - all parties sought costs on substantive hearing on basis they were successful party - EQC and insurer sought increased costs on quantum hearing as plaintiff contributed unnecessarily to time and expense of hearing - (1) which party was successful at substantive hearing; - (2) which party achieved success at quantum hearing; - (3) whether plaintiff's Calderbank offers to EQC were material for costs purposes; - (4) whether insurer had to be viewed as a successful party entitled to costs as no liability attached to it as a result of proceedings - **HELD**: costs to lie where they fell - (1) plaintiff succeeded in establishing floor dislevelment was caused by earthquakes and that it could recover monetary sum from EQC - success significantly offset by failure to prove remediation strategy; - (2) defendants wholly successful in quantum hearing; - (3) plaintiff's Calderbank offers immaterial for costs purposes - offer necessitated EQC resiling from its position that claim was not over statutory cap - concession would have cleared way for plaintiff to continue claim against insurer for 2A foundation - what plaintiff sought to achieve by those offers was not achieved at trial; - (4) not appropriate to distinguish between position of two defendants - insurer actively defended proceeding on same basis as EQC, including on issues on which plaintiff succeeded
	INSURANCE
STATUTES	High Court Rules 2016 R14.2(a), R14.6, R14.10, R14.11, R14.11(3), R14.11(4)
CASES CITED	C & S Kelly Properties Ltd v Earthquake Commission (EQC) [2015] NZHC 1690 ; C & S Kelly Properties Ltd v Earthquake Commission (EQC) [2017] NZHC 1583 ; C & S Kelly Properties Ltd v Earthquake Commission (EQC) (HC, Christchurch, CIV-2017-409-001273, 21 December 2017, Mander J) ; Bank of Credit and Commerce International SA v Ali (No 4) [1999] 149 NLJ 1734 ; Phoenix Organics Ltd v RD2 International Ltd (No 2) (HC, Auckland, CIV-2005-404-005070, 21 December 2005, Cooper J) ; Fog v Frimley Estate Ltd (No 2) [2016] NZHC 314 ; Lawrence v Glynbrook 2001 Ltd [2015] NZHC 1005 ; Bugden v Andrew Gardener Partnership [2003] CP Rep 8 (CA) ; Goodwin v Bennetts UK Ltd [2008] EWCA Civ 1658 ; Cretazzo v Lombardi (1975) 13 SASR 4 ; Packing In Ltd (in liq) v Chilcott (2003) 16 PRNZ 869 (CA) ; Aldrie Holdings Ltd v Clover Bay Park Ltd (No 2) [2016] NZHC 1482 ; Craig v Donaldson [2012] NZHC 3100 ; Strachan v Denbigh Property Ltd (HC, Palmerston North, CIV-2010-454-000232, 3 June 2011, AJ Gendall) ; Earthquake Commission (EQC) v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381
REPRESENTATION	NR Campbell QC, BA Scott, J Moran, CR Johnstone

PAGES	26 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	18 December 2017
CITATION	[2017] NZHC 3179
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List ; Judgment reissued 12 February 2018
SUBJECT	COSTS - successful applications for wasted costs and costs against non-parties - Canterbury earthquake litigation - trial due to commence 31 October 2016 did not proceed - litigation funder had withdrawn and law firm terminated retainer just before trial - plaintiff did not appear in Court when case was called and Court entered judgment by default against plaintiff - plaintiff subsequently able to have that judgment set aside - Court ordered plaintiff to pay to EQC and insurer costs and disbursements of setting aside application - fresh trial date and directions made as to service of further briefs of evidence by parties - wasted costs incurred by three parties as result of trial not proceeding on scheduled date and judgment being entered by default - plaintiff incurred irrecoverable party to party costs in obtaining indulgence of the Court in setting aside of default judgment - EQC and IAG incurred attendances in relation to adjournment of trial - trial deferred 16 months later than scheduled - applications: (1) EQC and insurer applied for wasted costs orders against plaintiff; - (2) EQC applied for wasted costs orders against litigation funder as non-party for period 28-31 October 2016; - (3) insurer applied for wasted costs orders against both litigation funder and law firm as non-parties; - (4) plaintiff applied for order that litigation funder and law firm indemnify him for any wasted costs orders made against him in favour of EQC and insurer and for costs awarded on related setting aside application - Court noted leading NZ authorities as Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) in relation to costs against litigation funder and Harley v McDonald for costs against counsel and solicitors - discussion of whether recovery of wasted costs should be based on actual costs or scale -

HELD: litigation funder, law firm and plaintiff's combined conduct led to EQC and insurer incurring wasted costs in relevant period - also resulted in insurer's wasted costs of earlier preparation when trial subsequently deferred for 16 months - appropriate to apportion responsibility as 40 per cent to litigation funder, 40 per cent to law firm and 20 per cent to plaintiff - to extent plaintiff had costs thrown away through aborted trial, litigation funder and law firm bear responsibility of 40 per cent each - (1) plaintiff must accept liability for wasted costs occasioned by aborted trial whether or not litigation funder or law firm also had responsibility - awards for 28-31 October 2016 wasted costs for both EQC and IAG to be assessed on actual costs incurred - liability of plaintiff for wasted costs co-extensive with litigation funder - plaintiff and litigation funder liable to EQC in proportion of 20/40 - plaintiff to pay 33.3 per cent and litigation funder 66.7 per cent of costs; - (2) EQC entitled to wasted costs order against litigation funder for same reason order made in favour of insurer - (3) insurer entitled to recover wasted costs jointly from litigation funder and plaintiff - litigation funder had 40 per cent responsibility - Court found that for period of preparation for trial before 28 October 2016, 25 per cent of costs incurred would have been truly wasted and beyond that, work undertaken was likely to remain valuable for trial - while insurer's entitlement was to recovery of appropriate amounts of their actual costs Court had not been provided with sufficient material to confirm fees charged to insurer could be classified as "actual and reasonable" - order to include mechanism for determination of what were "actual and reasonable" fees to be subject of wasted costs order - insurer's claim against law firm to be considered under principles established in Harley v McDonald - conduct of law firm cannot be classified as simple mistake, oversight or a mere error of judgment - serious dereliction of duty owed to the Court to guard against there being an adjournment (or risk of default judgment followed by setting aside and new trial date) in circumstances where there was sufficient time to avoid a last-minute adjournment or abandonment of trial with all the costs implications and impact on Court resources - combined conduct of litigation funder and law firm in contributing to events of 31 October 2016 impacted on plaintiff no less than on EQC and insurer - just that ligation funder and law firm contribute to plaintiff's thrown-away costs in same proportion as they contribute to EQC and insurer with plaintiff left to bear his own degree of responsibility of 20 per cent - order for payment of plaintiff's wasted costs, together with a mechanism for confirming they were actual and reasonable

LAW PRACTITIONERS

STATUTES High Court Rules 2016 R14.1(1), R14.3(1), R14.5(2)

CASES CITED Bligh v Earthquake Commission [2016] NZHC 2619 ; Bligh v Earthquake

	Commission [2017] NZHC 995 ; Bligh v Earthquake Commission [2017] NZHC 2964 ; Hamilton v Papakura District Council (1997) 11 PRNZ 43 ; Raiser Developments Ltd v Trefoil Properties Ltd (HC, Auckland, CIV-2005-404-005883, CIV-2005-404-005859, 5 May 2008, Courtney J) ; Fu Hao Construction Ltd v Landco Albany Ltd (HC, Auckland, CIV-2004-404-006608, 23 May 2008, Venning J) ; Simpson v Hubbard [2012] NZHC 3020 ; Jeffreys v Morgenstern [2013] NZHC 1361 ; Secure Financial Services Ltd v Nguy [2017] NZHC 682 ; Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145, (2004) 17 PRNZ 115, [2004] 1 WLR 2807, [2005] 4 All ER 195 ; Hamilton v Al Fayed (No 2) [2002] EWCA Civ 665, [2003] QB 1175, [2003] 2 WLR 128, [2002] 3 All ER 641 ; Gore v Justice Corp Pty Ltd [2002] FCA 354, [2002] FCAFC 83, (2002) 119 FCR 429, (2002) 189 ALR 712 ; Harley v McDonald [2001] UKPC 18, [2002] 1 NZLR 1, [2001] 2 WLR 1749 ; Myers v Elman [1940] AC 282 ; Westpac New Zealand Ltd v Fonua [2010] NZCA 471 ; Vermeulen v Department of Health (HC, Whangarei, A 76-85, 6 December 1991, Thomas J)
OTHER SOURCES	McGechan on Procedure (looseleaf ed, Thomson Reuters) at [HRpt14.16A(1)]
REPRESENTATION	RJ Lynn, NS Wood, PM Smith, J Moss, GP Davis, PJ Napier
PAGES	41 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Bligh v Earthquake Commission [2018] NZHC 2392, [2020] NZHC 874

NAME	Southern Response Earthquake Services Ltd v Shirley Investments Ltd
JUDGE(S)	Thomas J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001230
JUDG DATE	18 December 2017
CITATION	[2017] NZHC 3190
FULL TEXT	PDF judgment
PARTIES	Southern Response Earthquake Services Ltd (Plaintiff), Shirley Investments Ltd (Defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE LAW - application for declarations regarding how the price for a replacement rental house is to be calculated - SI's house was damaged beyond repair in the Canterbury earthquakes - SI has elected to buy another house - if the house were rebuilt on the property SRE would have to pay demolition costs and

	the reasonable costs of ground improvement - discussion of previous similar cases on replacement insurance and rebuilding - **HELD**: under both the rebuild and buy another house options, SRE's financial obligation is to pay for the cost of rebuilding the house on its current site in an as new condition - that includes the use of construction methods in common use at the time of rebuilding - additional costs such as architect's or surveyor's fees or demolition are payable only if the qualification for them is met - demolition costs are specifically marked as additional - payment of demolition cost when SI has elected to buy elsewhere would be a windfall - the cost of enhanced foundations concerns work required to be carried out to the land - SRE would in such circumstances obtain a deed of assignment of the insured's claim against EQC and claim back the work done to the land from EQC - payment of those costs would also be additional to SRE's primary obligation - the cost of buying another house under the policy does not include payment for the land the house stands on - declarations made as requested
STATUTES	Declaratory Judgments Act 1908 s3 - Earthquake Commission Act 1993 - High Court Rules pt18
CASES CITED	Turvey Trustee Ltd v Southern Response Earthquake Services Ltd [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965, [2013] Lloyd's Rep IR 552 ; Avonside Holdings Ltd v Southern Response Earthquake Services Ltd [2013] NZHC 1433 ; Avonside Holdings Ltd v Southern Response Earthquake Services Ltd [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040, [2015] Lloyd's Rep IR 653 ; Southern Response Earthquake Services Ltd v Avonside Holdings Ltd [2015] NZSC 110, [2017] 1 NZLR 141, (2015) 18 ANZ Insurance Cases 62-079, [2016] Lloyd's Rep IR 210 ; Skyward Aviation 2008 Ltd v Tower Insurance Ltd [2014] NZCA 76, [2014] 2 NZLR 713, (2014) 18 ANZ Insurance Cases 62-031, [2014] Lloyd's Rep IR 565 ; Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341, (2014) 18 ANZ Insurance Cases 62-050, [2015] Lloyd's Rep IR 283 ; O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, (2013) 17 ANZ Insurance Cases 61-966, [2013] Lloyd's Rep IR 458, [2013] 2 NZLR 275 (extract) ; Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 18 ANZ Insurance Cases 62-044 ; Multi-Link Leisure Developments Ltd v North Lanarkshire Council [2010] UKSC 47, [2011] 1 All ER 175 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep IR 118
REPRESENTATION	DJ Friar, OM de Pont, NR Campbell QC, KJM Robinson
PAGES	37 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	4 December 2017
CITATION	[2017] NZHC 2994
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application under R5.45 HCR for security for costs - plaintiff's house damaged in Canterbury earthquake sequence - proceedings against first defendant (EQC) and second defendant (IAG) - 'no win, no fee' contract with litigation funder (CRS) - proceeding scheduled for seven day trial commencing 31 Oct 2016 - shortly before hearing CRS purported to cancel litigation funding contract - solicitor acting for plaintiff obtained leave to withdraw as his solicitor - consequently, plaintiff failed to appear in Court - 1 Nov 2016, defendants obtained default judgment - plaintiff successfully applied to set aside default judgment - new 10 day trial set to commence 19 Feb 2018 - plaintiff sought $839,004 - each defendant applied for $20,000 security for costs - well after close of pleadings and completion of exchange of briefs - plaintiff asserted he was impecunious - house at issue was his only asset house - $335,000 rating valuation - only income from WINZ support and income protection policy - plaintiff contended any surplus after living expenses went to service $42,000 credit card debt, $4,000 bank overdraft - R5.45 threshold met - plaintiff granted his current solicitors first mortgage security over house - protected by way of a caveat against title - mortgage secured payment of legal and experts' fees plus disbursements - unusual case in that plaintiff had not incurred legal costs to date - costs and disbursements absorbed by CRS and his previous solicitors - Court found plaintiff had ability to provide security in some form - ordering security would not deny access to justice - difficult to assess prospect of success - treated as neutral factor - observed security sought was at lowest end of appropriate range - not unjust to order security for costs in light of late application - Nikau Holdings Ltd v Bank of New Zealand distinguished - plaintiff's relevant financial circumstances only became known to defendants as a consequence of aborted

	trial - defendants justified in reconsidering security position when faced with inevitably increased cost of preparation for second trial date with the plaintiff's case redeveloped - whether it was in the interests of justice to order security for costs - **HELD**: plaintiff to provide $20,000 registrable mortgage security to each defendant - mortgage securities to be capable of registration but were to be protected pending trial by caveats against title - mortgage securities to be, at plaintiff's election, either a first mortgage security over plaintiff's house or a second mortgage security over house, behind a mortgage to plaintiff's solicitors limited in priority to a maximum of $100,000 - if security not provided by 18 Dec 2017 proceeding would be stayed - defendants awarded 2A costs plus disbursements fixed by the Registrar
STATUTES	High Court Rules R5.45, R14.3(1), R14.5(2)(a)
CASES CITED	Bligh v Earthquake Commission [2017] NZHC 995 ; Bligh v Earthquake Commission [2016] NZHC 2619 ; Reekie v Attorney-General [2014] NZSC 63, [2014] 1 NZLR 737, (2014) 21 PRNZ 776 ; Hamilton v Papakura District Council (1997) 11 PRNZ 333 ; Astro Enterprises Ltd & Ors v LJS Management (2000) Ltd & Anor (HC, Auckland, CP 139-02, 11 February 2003, M Lang) ; Oceania Furniture Ltd v Debonaire Products Ltd (High Court, Wellington, CIV-2008-485-001701, 27 August 2009, Clifford J) ; Coote v Murray [2012] NZHC 3399 ; Nikau Holdings Ltd v Bank of New Zealand (BNZ) (1992) 5 PRNZ 430, (1992) 6 NZCLC 67,939, (1992) 1 NZPC 1017
REPRESENTATION	RJ Lynn, NS Wood, PM Smith, J Moss, GP Davis, PJ Napier
PAGES	11 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	30 November 2017
CITATION	[2017] NZHC 2964
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List

SUBJECT	COSTS - successful costs application - plaintiff's house damaged in Canterbury earthquakes - brought proceedings against first defendant (EQC) and second defendant (IAG) - 'no win, no fee' contract with litigation funder (CRS) - proceeding scheduled for eight day trial commencing 31 Oct 2016 - shortly before hearing, CRS purported to cancel litigation funding contract - solicitor acting for plaintiff obtained leave to withdraw as his solicitor - consequently, plaintiff failed to appear in Court - 1 Nov 2016, defendants obtained default judgment under R10.8 HCR - plaintiff successfully applied under R10.9 HCR to have default judgment set aside - plaintiff conceded defendants were entitled to costs on setting aside application - in separate application, plaintiff sought orders against CRS and his former lawyer requiring them to jointly and severally pay any costs award against the plaintiff as a result of setting aside application and aborted trial - matter to be determined in later judgment - this judgment focused solely on costs between defendants and plaintiff - (1) whether costs should follow the event on the setting aside application; - (2) whether costs order should come into effect after Court determined whether there should be orders of contribution or indemnity against non-parties; - (3) whether to award costs on this application - **HELD**: plaintiff to pay each defendant 2B costs on the setting aside application plus disbursements fixed by the Registrar - (1) not appropriate for costs to follow the event - plaintiff obtained an indulgence - default judgment obtained by defendants in circumstances where they had not contributed to plaintiff's default; - (2) appropriate for costs order to speak immediately given plaintiff's primary liability; - (3) no costs order in relation to this application
STATUTES	High Court Rules R10.8, R10.9, R14.2(1)(a), R14.3(1), R14.5(2)
CASES CITED	Bligh v Earthquake Commission [2016] NZHC 2619 ; Bligh v Earthquake Commission [2017] NZHC 995 ; Cunningham v Butterfield [2014] NZCA 213, (2014) 22 PRNZ 521
REPRESENTATION	RJ Lynn, NA Wood, PM Smith, J Moss, GP Davis, PJ Napier
PAGES	4 p
LOCATION	New Zealand Law Society Library

NAME	Findlay v Findlay
JUDGE(S)	Nicholas Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2014-409-000780

JUDG DATE	15 November 2017
CITATION	[2017] NZHC 2797
FULL TEXT	PDF judgment
PARTIES	Anne-Marie Findlay (plaintiff), Scott Andrew Findlay (first defendant), Scott Andrew Findlay and HP Hanna & Co Trustees Ltd as trustees of the Scott Findlay Family Trust (second defendants), Scott Andrew Findlay and HP Hanna & Co Trustees Ltd as trustees of the WNHA Trust (third defendants), Scott Andrew Findlay and HP Hanna & Co Trustees Ltd as trustees of the JKST Trust (fourth defendants)
SUBJECT	CIVIL PROCEDURE - interim judgment - parties married for 17 years - separated Jul 2010 - claims brought under Property Relationships Act (PRA), Family Proceedings Act (FPA), Trustee Act and in equity - plaintiff asserted defendant controlled building companies to which she had made significant contributions directly and indirectly by her contribution to marriage - sacrificed her banking career, cared for family of 4 children and helped with preparation and sale of spec homes in which family lived - family relocated 17 times over 17 years - claimed post separation restructuring of companies and trusts undertaken to defeat her claims and rights - F Construction Ltd (FCL) family business since 1988 - Jul 2009 family home owned by Family Trust sold - sale proceeds advanced to FCL however FCL passed into voluntary liquidation Nov 2010 - corporate and trust structuring post separation - defendant formed SF Builders Ltd (SFB) - Family Trust trustees majority shareholders of SFB - defendant removed plaintiff as trustee and discretionary beneficiary of Family Trust Oct 2012 - transpired at late stage of proceeding that plaintiff remained as residuary beneficiary of Family Trust - defendant incorporated SFB(2012) Mar 2012 - arranged sale of SFB to SFB(2012) at book value Apr 2012 without consultation with plaintiff - created WNHA Trust which held shares in SFB(2012) - building company performance post separation in strong contrast to that of FCL at time of separation - SFB benefitted from new flow of building repair work as result of Canterbury earthquake sequence - contracted to Fletcher EQR Feb 2011 - between 2012 and 2015 defendant drew salary from SFB and then SFB(2012) of around $2.4M - extensive discussion of valuation methods - defendant's personal goodwill as "personal asset" - whether "fair value" or "fair market value" should be attributed - experts agreed on "Discounted Cash flow" valuation method and notional salary of $200,000 per annum to be credited to defendant - plaintiff brought relationship property claim against all property under defendant's control whether owned by him or held in trust and all corporate entities under his direction or otherwise including all profits derived from SFB and SFB(2012) - claimed division of property under s15 PRA economic disparity - alternatively

pleaded breach of trust and breach of fiduciary duty - included claim against exercise of power to remove beneficiary - whether Clayton powers - further breach of trust pleaded that transfer of business from SFB to SFB(2012) was not at "fair value" - sought spousal maintenance under FPA and resettlement of post separation Trusts under s182 FPA - claim in equity for remedial constructive trust pleaded in the alternative - whether order for constructive trust should be made

HELD: foundation for remedial constructive trust made out - plaintiff contributed directly and indirectly to business run by company owned by Family Trust - selling of family home part of supporting bank borrowing for business and ultimately kept business solvent - plaintiff had interest as discretionary beneficiary in trust which owned shares in company with comparatively little value at separation but which acquired value as result of earthquake repair contracts - increased value result of defendant's skills and reputation to which plaintiff had contributed, together with his own work which was considerable in order to achieve significant profits - those who had benefitted from stream of earnings (defendant and trusts) should yield something to plaintiff for fact she had an interest as discretionary beneficiary in trust which owned family business she helped build up - no basis for claim in relationship property or for potential resettlement under s182 FPA - s182 not engaged - with limited exception there was no relationship property after Family Trust owned family home and shares in building companies - company owned by Family Trust had little value at separation but by 2012 had value in which relationship history must be brought into account - "past" was an essential facet of springboard for Fletcher EQR contracts and profits that began to flow - while defendant did not have unfettered or "Clayton" powers he had power to remove plaintiff as trustee and discretionary beneficiary - plaintiff's interests best addressed in terms of constructive trust - no precision brought to exercise of quantum as information before Court not in evidential form nor tested at hearing - any award reflected expert evidence without acceptance of view of either expert as definitive - "fair valuation" as between parties correct way to approach matter - result: constructive trust upheld whereby plaintiff had an interest in assets held by defendants in sum of $500,000 - sum included any possible award of costs or interest - no other orders as sought on pleadings - all other issues not answered by this interim judgment or order to effect it, reserved

RELATIONSHIP PROPERTY

STATUTES Family Proceedings Act 1980 s64, s182 - Property (Relationships) Act 1976 s8, s15, s44, s44(2)(b) - Trustee Act 1956

CASES CITED Clayton v Clayton [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230,

	[2016] WTLR 955, (2016) 4 NZTR 26-002 ; Mosaed v Mosaed (1996) 15 FRNZ 15, [1997] NZFLR 97 ; Clayton v Clayton [2015] NZCA 30, [2015] 3 NZLR 293, [2015] NZFLR 233, (2015) 30 FRNZ 1, (2015) 4 NZTR 25-001 ; Gillies v Keogh [1989] 2 NZLR 327, (1989) 5 NZFLR 549, (1989) 5 FRNZ 490 ; Nuku v Taylor [2014] NZCA 312, [2015] NZAR 840, (2014) 3 NZTR 24-010 ; Prime v Hardie [2003] NZFLR 481, (2002) 22 FRNZ 553, (2002) 1 NZTR 12-008 ; ervoort v Forrest [2016] NZCA 375, [2016] 3 NZLR 807, (2016) 30 FRNZ 790, (2016) 4 NZTR 26-017 ; Selangor United Rubber Estates Ltd v Craddock (No 3) [1968] 1 WLR 1555, [1968] 2 All ER 1073, [1968] 2 Lloyd's Rep 289 ; Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, [1969] 2 WLR 427, [1969] 2 All ER 367 ; Fortex Group Ltd (in rec, in liq) v MacIntosh [1998] 3 NZLR 171, (1998) 6 NZBLC 102,535 ; Hawke's Bay Trustee Company v Judd [2016] NZCA 397, (2016) 4 NZTR 26-019
OTHER SOURCES	Fisher on Matrimonial and Relationship Property (LexisNexis, online looseleaf ed) at [4.49]
REPRESENTATION	AM Corry, TD Holton, DM Lester, BJ Callaghan
PAGES	53 p
LOCATION	New Zealand Law Society Library

NAME	Glasson v Earthquake Commission
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000343
JUDG DATE	13 November 2017
CITATION	[2017] NZHC 2778
FULL TEXT	PDF judgment
PARTIES	Peter Lloyd Glasson and Anne Marjorie Glasson and DRL Trustees Ltd as trustees of the Peter and Anne Glasson Family Trust (plaintiffs), The Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - orders vacating fixture and adjourning proceeding - earthquake damage claim - hearing set down for 13 Nov 2017 - Sept 2017, defendants applied for adjournment - engineer who was to be their primary expert no longer available - sought time to engage a new expert - Court declined application - anxious to see proceedings concluded - plaintiffs discontinued

	proceedings against first defendant - second defendant (insurer) engaged new structural engineer as expert - new expert came up with repair strategy and evidence regarding what damage was caused by the earthquake which differed from that of earlier expert - parties under intense pressure just before trial dealing with new theory - unable to strictly comply with timetable directions - plaintiffs served extensive evidence in response to insurer's evidence - significant portion related to new approach taken by insurer's engineer - new witnesses to be called who did not file original briefs - potential for the insurer to have to engage their own further experts or at least some limited evidence to deal with what was, in a sense, new evidence although it was by way of reply - further time required - Court reluctant to force plaintiffs to deal with case with on limited basis - whether to vacate the fixture and adjourn proceedings - **HELD**: fixture vacated - proceeding adjourned - counsel to assess all material and advise the Court of time required to deal with all matters - costs reserved
REPRESENTATION	DJC Russ, J Maslin, AR Tosh, AL Holloway
PAGES	5 p
LOCATION	New Zealand Law Society Library

NAME	Glasson v Earthquake Commission
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000343
JUDG DATE	9 November 2017
CITATION	[2017] NZHC 2749
FULL TEXT	PDF judgment
PARTIES	Peter Lloyd Glasson and Anne Marjorie Glasson and DRL Trustees Ltd as trustees of the Peter and Anne Glasson Family Trust (plaintiffs), The Earthquake Commission (first defendant), Southern Response Earthquake Services Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	DISCOVERY - unsuccessful application for leave to seek further discovery - earthquake damage claim - trial to commence 13 Nov 2017 - close of pleadings date was 22 Sept 2017 - 22 Sept, plaintiff (insured) filed first amended statement of claim - pleaded for first time that the second defendant (insurer) made an election to cash settle claim - contended insurer made election through press release, an announcement at annual public meeting, publication of a statement on

its website and in a booklet - in response to queries, insurer advised it received 295 claims over-cap, of which 28 cash settled - insured applied for leave to seek further discovery - sought all documents relating to 28 cash settled claims, documents relating to 267 other over cap claims, documents relating to the booklet including Board meetings, meeting minutes, agendas and internal correspondence, all documents relating to insurer's decision to alter its website to remove reference to cash settlement of claims notified as being over cap from 1 Dec 2016 (Documents) - 17 Oct, insurer filed amended statement of defence denying election to cash settle - insured recently discontinued claim against first defendant - Elders v Pastoral v Marr applied - leave would only be granted where it was in the interests of justice, would not significantly prejudice other parties or cause significant delay - Court noted test of whether and what election the insurer made was an objective one - documents as to what the insurer's Board, managers or other personnel may have thought or intended with regard to the possibility of cash settling other claims unlikely to be relevant to issue of election before the Court - insured was relying on public statements regarding claims notified as over-cap after 1 Dec 2016 - Documents unlikely to be relevant as insured's claim notified before 1 Dec 2016 - focus must be on communication between parties in the context in which they occurred - how insurer communicated with other claimants unlikely to be of any probative weight in proving communications between the parties - Court observed insurer was under considerable pressure preparing for trial - requiring it to discover all Documents sought would be unfair burden - Documents unlikely to assist parties or Court in determining proceedings - discovery would likely require insurer to disclose documents as to their dealings with other parties where those other parties were entitled to have their privacy respected - material such as Board minutes, meeting minutes, agendas and internal correspondence likely to be commercially sensitive -

HELD: leave application declined

CIVIL PROCEDURE

CASES CITED	Elders Pastoral Ltd v Marr (1987) 2 PRNZ 383, (1987) 1 NZPC 91
REPRESENTATION	DJC Russ, AR Tosh, AL Holloway
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	Fitzgerald v IAG New Zealand Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-404-000779
JUDG DATE	6 November 2017
CITATION	[2017] NZHC 2717
FULL TEXT	PDF judgment
PARTIES	Stephen Patrick Fitzgerald, Nicola Mary Fitzgerald and Hamish Alexander Scott (plaintiffs), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	EVIDENCE - reserved decision granting leave to offer supplementary brief of evidence - 2 November Court granted defendant leave to offer supplementary brief of geotechnical engineer - trial scheduled for November 2017 vacated - rescheduled for 2018 to allow plaintiffs time to consider and respond to new evidence - Court reserved its decision regarding supplementary brief of evidence of structural engineer - structural engineer engaged by defendant some time ago - provided a joint report with plaintiffs structural engineer - provided an initial brief of evidence - supplementary brief of evidence proposed to introduce a portion of the Council file regarding the house that was subject of litigation - related to a proposed addition to the house which did not proceed - proposed addition included foundation design - included producer statement from engineers relating to a foundation design - Council was prepared to issue the plaintiffs building consent for that particular design - defendant contended material was relevant and admissible - related to whether the foundation of the dwelling could be repaired or rebuilt - Court considered grant of leave would cause plaintiffs little prejudice - leave appropriate as supplementary evidence related to issues entirely within the plaintiffs knowledge and they had ample opportunity to reply - whether to grant leave under R9.8 High Court Rules 2016 for insurer to offer structural engineer's supplementary brief of evidence - **HELD**: leave granted - costs reserved CIVIL PROCEDURE
STATUTES	High Court Rules R9.8, R9.8(2)
CASES CITED	Western Park Village v Baho [2013] NZHC 1909
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR9.0.02]
REPRESENTATION	SP Rennie, R Harris, C Jamieson, M Gall
PAGES	5 p
LOCATION	New Zealand Law Society Library

NAME	Lee v IAG New Zealand Ltd
JUDGE(S)	Nicholas Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000764
JUDG DATE	26 October 2017
CITATION	[2017] NZHC 2626
FULL TEXT	PDF judgment
REPORTED	[2018] Lloyd's Rep IR 345
PARTIES	Shum Oi Lee (first plaintiff), Shum Oi Lee, Shirley Lee and Andrew Lee (second plaintiffs), IAG New Zealand Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - answers to two questions preliminary to trial - application of an insurance policy following earthquake damage to three storey commercial building built in 1880 - first plaintiff owned building insured by defendant insurer - building damaged in two separate Canterbury earthquake events in 2010 and 2011 - two insurance claims - first plaintiff made no repairs after Sept 2010 earthquake - building demolished Nov 2011 - insurer paid first plaintiff $41,388 for Sept 2010 event and $67,773 for Feb 2011 event - Jan 2013 paid $585,000 which it calculated was market indemnity value of building less policy excess of 2.5 per cent - Nov 2014 insurer offered to pay further $752,589 in full settlement - offer outside policy wording - calculated on basis of a single sum rather than adjusting for each event - if accepted, total pay out would amount to $1.499M sum insured for earthquake damage ex GST, net of excess - Apr 2014 first plaintiff resettled ownership trust in names of second plaintiffs - assigned rights under insurance policy - insurer not told of resettlement of first plaintiff in names of second plaintiffs - parties disputed policy entitlements - proceedings filed - discussion of "new for old" or "old for old" cover - clause C1 of policy provided 'this insurance will pay the amount of loss or damage or the estimated cost of restoring your business assets as nearly as possible to the same condition they were in immediately before the loss or damage happened, using current materials and methods' - clause C2 provided that 'where replacement cover has been selected (shown as R in the schedule) and following loss or damage you restore or replace the lost or damaged business assets this insurance will pay: (a) for buildings (i) where repairable, the cost of restoration of damage to the same condition when new, or (ii) if unable to be repaired because of such damage, the cost of replacement by an equivalent building which meets your

requirements at any site provided the insurer shall not pay more than the cost of replacement at the site stated in the schedule' - 'such restoration will use current materials and methods and include the cost of changes to meet the lawful requirements of any local authority or statute but not for work you have already been instructed to do prior to the loss or damage' - plaintiffs contended clause C1 obliged insurer to pay a 'provisional' sum so insured could commence reinstatement work - submitted 'top-up' cover was available under C2 to reimburse actual costs of replacement by an equivalent building, described as restoration using current material and methods under clause 2(a)(ii) - Court asked to address two preliminary questions relating to application of insurance policy - considered clauses C1 and C2 provided quite different forms of cover - C1 was orthodox indemnity insurance provision - questions: (1) how was 'the estimated cost of restoring your business assets as nearly as possible to the same condition they were in immediately before the loss or damage happened using current materials and methods' in clause C1 to be calculated; - (2) consequences of delay in payment - if there was a delay in payment due under clause C1 was insurer liable to pay interest as a result of that delay - if yes, when was interest to be calculated from -

HELD: - (1) clauses C1 and C2 must be interpreted as standalone provisions - cover under C1 was "old for old" to be calculated by finding estimated cost of restoring property to same condition as it was before the event which caused the damage or loss, with deduction for any betterment to insured because restored building would in whole or in part be in a new condition rather than old - clause C1 not a 'provisional payment' subject to top-up under clause C2 - under C2 plaintiffs were effectively "buying the betterment"- payment of betterment would only be made on reinstatement - plaintiffs made no repairs following Sept 2010 earthquake so their claim for that event must lie under C1 - two clauses provided different forms of cover and when they both applied the indemnity cover did not morph into a first stage or provisional payment under C2; - (2) Court discussed principles governing payment of interest where there had been delay in payment - observations assume delay in payment beyond date when insured 'should have been paid' - circumstances in which may trigger an award of interest - answer to question when interest was to be calculated from should be determined at trial - judgment goes no further than to make observations about the principles which applied to interest on a sum payable by an insurer - no universal or even common principle which dictated that interest was payable from the date of event which caused loss to insured - date of loss or damage to insured property was a starting point under an indemnity provision but not necessarily end point for assessing interest

	INSURANCE
STATUTES	Judicature Act 1908 s87
CASES CITED	Reynolds & Anor v Phoenix Assurance Co Ltd [1978] 2 Lloyd's Rep 440 ; Brkich & Brkich Enterprises Ltd v American Home Assurance Co (1995) 127 DLR (4th) 115 ; TJK (NZ) Ltd v Mitsui Sumitomo Insurance Co Ltd [2013] NZHC 298, (2013) 17 ANZ Insurance Cases 61-968, [2013] Lloyd's Rep IR 545 ; Ridgecrest NZ Ltd v IAG New Zealand Ltd [2014] NZSC 117, [2015] 1 NZLR 40, [2015] Lloyd's Rep IR 34 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZSC 158, [2017] 1 NZLR 352, (2016) 19 ANZ Insurance Cases 62-121, [2017] NZCCLR 1, [2017] Lloyd's Rep IR 175 ; Ridgecrest New Zealand Ltd v IAG New Zealand [2013] NZCA 291, [2013] 3 NZLR 618, (2013) ANZ Insurance Cases 61-977, [2014] Lloyd's Rep IR 48, [2013] NZCCLR 24 ; Castellain v Preston (1883) 11 QBD 380 ; QBE Insurance (International) Ltd v Wild South Holdings Ltd [2014] NZCA 447, [2015] 2 NZLR 24, (2014) 18 ANZ Insurance Cases 62-037 ; Keystone Properties Ltd v Sun Alliance and London Insurance Plc 1993 SC 494 ; Vintix Pty Ltd v Lumley General Insurance Ltd (1991) 24 NSWLR 627, (1991) 6 ANZ Insurance Cases 61-050 ; Vance v Forster (1841) Ir Cir Rep 47 ; Roumeli Food Stores (NSW) Pty Ltd v New India Assurance Company Ltd (1972) 1 NSWLR 227 ; Spina v Mutual Acceptance (Insurance) Ltd (1984) 3 ANZ Insurance Cases 60-554 ; Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341, (2014) 18 ANZ Insurance Cases 62-050 ; Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 18 ANZ Insurance Cases 62-044 ; Investors Compensation Scheme Ltd v West Bromich Building Society [1998] 1 WLR 896, [1998] 1 All ER 98, [1998] 1 BCLC 531 ; Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, [2009] 3 WLR 267, [2009] 4 All ER 677 ; Bank of Credit & Commerce International SA v Ali [2001] UKHL 8, [2002] 1 AC 251, [2001] 2 WLR 735, [2001] 1 All ER 961 ; Sans Souci Ltd v VRL services Ltd [2012] UKPC 6 ; Worldwide NZ LLC v New Zealand Venue & Event Management Ltd [2014] NZSC 108, [2015] 1 NZLR 1, [2014] NZCCLR 27 ; Day v Mead [1987] 2 NZLR 443, (1987) 2 NZBLC 102,873 ; Adcock v Co-operative Insurance Society [2000] Lloyd's Rep IR 657 (CA) ; Jefford v Gee [1970] 2 QB 130, [1970] 2 WLR 702, [1970] 1 All ER 1202 (CA) ; Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd (No 2) (1988) 5 ANZ Insurance Cases 60-844 ; Kuwait Airways Corp v Kuwait Insurance Co (No 3) [2000] 1 All ER (Comm) 972, [2001] CP Rep 60, [2000] Lloyd's Rep IR 678 ; Wilson & Horton Ltd v Attorney-General [1997] 2 NZLR 513, (1997) 6 NZBLC 102,245 ; BP Exploration Co (Libya) Ltd v Hunt (No 2) [1983] 2 AC 352, [1982] 2 WLR 253, [1982] 1 All ER 925 ; General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819, [1975] 2

	All ER 173, [1975] FSR 273 ; Blackley v National Mutual Life Association of Australasia Ltd (No 2) [1973] 1 NZLR 668 (HC) ; Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyds Rep 541 ; Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; Hellenic Industrial Development Bank SA v Atkin (The Julia) [2002] EWHC 1405 (Comm) ; Merrill Lynch International Bank Ltd (formerly Merrill Lynch Capital Markets Bank Ltd) v Winterthur Swiss Insurance Co [2007] EWHC 893 (Comm), [2007] 2 All ER (Comm) 846, [2007] 1 CLC 671 ; McLeod v SIMU Mutual Association (1987) 4 ANZ Insurance Cases 60,784 ; Kerr v State Insurance General Manager [1987] 4 ANZ Insurance Cases 60,781 ; Keefe v State Insurance General Manager (1988) 5 ANZ Insurance Cases 75,284
REPRESENTATION	PA Cowey, AJ Summerlee, RW Raymond QC, D Weatherley
PAGES	27 p
LOCATION	New Zealand Law Society Library

NAME	Sii v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-009-002314
JUDG DATE	9 October 2017
CITATION	[2017] NZHC 2469
FULL TEXT	PDF judgment
PARTIES	Ting Hua Sii (plaintiff), Earthquake Commission (first defendant), Tower Insurance Ltd (second defendant)
NOTE	High Court Earthquake List ; Appendix 1 p
SUBJECT	COSTS - successful costs application by insurer - plaintiff's home damaged in Canterbury earthquakes - 2013, plaintiff commenced proceeding against first defendant (EQC) in DC - 2015, proceeding transferred to HC - plaintiff formed view damage exceeded EQC's statutory cap - second defendant (insurer) joined as plaintiff - plaintiff alleged $733,243 repair costs - sought $402,474 from insurer plus $25,000 general damages for stress - claim based on advice of expert structural engineer (W) - insurer's statement of defence asserted house suffered minor damage that was under EQC's statutory cap - insurer complied with Court timetables - engaged surveying, geotechnical engineering, structural engineering and quantity surveying experts - reports prepared - conferral - joint reporting processes - as result of expert reporting process, W revised his opinion as to

	damage and reinstatement strategy - mid 2017, parties agreed damage was within EQC's cap - plaintiff estimated $77,605 repair cost, defendants estimated $33,000 - July 2017, plaintiff discontinued claim against insurer - parties agreed 2B costs were appropriate except in relation to costs for discovery/inspection - insurer provided no critique of W's original advice suggesting plaintiff or his solicitor should have appreciated from the outset W's advice was flawed - (1) whether costs for discovery and inspection should be calculated on 2A basis because discovery proceeded on an informal basis without production of formal lists; - (2) whether the insurer was entitled to increased costs pursuant to R14.6(3)(b) High Court Rules 2016 as the plaintiff's claim lacked merit; - (3) whether fees and expenses of expert witnesses claimed by insurer were recoverable in full in accordance with R14.12 High Court Rules 2016 - **HELD**: insurer awarded $12,042 costs plus $55,011 disbursements - (1) insurer awarded $11,150 costs for discovery and inspection of 2A and 2B basis respectively - comparatively small amount of time required for discovery - 2B costs for inspection as insurer's solicitors had to inspect full suite of documents built up between plaintiff and EQC over previous years; - (2) increased costs application dismissed - joinder of insurer did not lack merit; - (3) fees and expenses of expert witnesses recoverable in full - reasonable in amount and proportionate in the circumstances of the proceeding
	INSURANCE
STATUTES	High Court Rules R14.3(1), R14.5(2), R14.6(3)(b), R14.6(3)(b)(ii), R14.12, R14.12(2), R14.12(2)(b), R14.12(2)(c), R14.12(2)(d), R14.12(3), R15.23
CASES CITED	Smithkline Beecham (NZ) Ltd v Minister of Health (2002) 16 PRNZ 361; New Zealand Venue & Event Management Ltd v Worldwide NZ LLC [2016] NZCA 282, 2016) 27 NZTC 22-058; Air New Zealand Ltd v Commerce Commission [2007] NZCA 27, [2007] 2 NZLR 494, (2007) 18 PRNZ 406 ; Murray v BC Group (2003) Ltd (HC, Wellington, CIV-2007-485-000198, 3 August 2009, Joseph Williams J)
REPRESENTATION	MC Smith, SF Alawi, GDR Shand
PAGES	15 p
LOCATION	New Zealand Law Society Library

NAME	He v Earthquake Commission
JUDGE(S)	Dunningham J

COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001775
JUDG DATE	4 September 2017
CITATION	[2017] NZHC 2136
FULL TEXT	PDF judgment
PARTIES	Xiaoming He (plaintiff), The Earthquake Commission (first defendant), Certain Syndicates of Lloyd's of London severally subscribed to Coverholder Contract B0429CNG90466 (first second defendant), Certain syndicates of Lloyd's of London severally subscribed to Coverholder Contract B0429CNG110466 (second second defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - unsuccessful claim against EQC and insurer - whether damage pre-existing and not materially altered by earthquakes - plaintiff owned building around 80 years old - building in poor condition - some damage following three Christchurch earthquakes - insured by insurer at all relevant times - Sept 2010 earthquake damaged two brick chimneys - consequential damage to roof and hot water cylinder connections - neither chimney had functioning log burner prior to earthquakes - fireplaces could no longer be used due to Regional Council's rules - plaintiff signed written agreement to participate in EQC's Chimney Replacement Programme (CRP) - agreement stated plaintiff waived right to have chimney rebuilt - EQC installed heat pump in lieu of chimney repair - Court found plaintiff understood he was relinquishing his right to chimney rebuild - EQC made $5,089 payment for reinstatement of another chimney, reimbursed cost of removing chimney stacks to below roof line, mending roof and hot water cylinder connections - Jun 2011 further earthquake caused water pipe to burst - EQC paid for repair - EQC paid plaintiff $16,000 for repairs in total - plaintiff claimed property suffered $717,000 earthquake damage - claimed EQC must pay up to $100,000 statutory cap for each earthquake event with balance payable by insurer - Court criticised defensive stance taken by plaintiff's expert witnesses - prevented parties' structural engineers from producing joint statement - delayed proceeding - considered plaintiff was willing to do whatever he could to advance his claim, whether justified by facts or not - (1) what constituted damage for purpose of Earthquake Commission Act 1993 (Act) and insurance policies; - (2) whether pre-existing damage was barrier to claim for earthquake damage; - (3) what was the condition of building prior to earthquake sequence; - (4) what damage was suffered in Sept 2010 earthquake; - (5) whether EQC's obligation to reinstate damaged chimney to a 'condition substantially the same but not better, or more extensive than its condition when new' required it to rebuild chimney and provide an alternative heat source; - (6) whether EQC discharged its

	obligation to pay cost of rebuilding one of the chimneys by providing a heat pump under CRP; - (7) whether EQC discharged its obligation to pay for repair of Feb 2011 earthquake damage; - (8) whether EQC discharged its obligation to pay for repair of Jun 2011 earthquake damage; - (9) whether to award costs - **HELD**: EQC obliged to meet cost of repairing single foundation crack, a minor repair - claim against defendants otherwise dismissed - discharged their obligations under Act and insurance policies - insurer's liability to plaintiff was limited to interior repairs to garage which it already agreed to pay - leave reserved for parties to return to Court if issues of quantum could not be resolved - no need to award interest on plaintiff's claim as crack repair costs would be calculated at present time - (1) 'damage' required physical change more than de minimus as well as impairment to value and usefulness; - (2) pre-existing damage did not prevent earthquake damage claim but could be so extensive that minor additional damage made no material difference to value or utility; - (3) house suffered significant dishevelment prior to earthquakes due to inadequate foundations and adjustments made to respond to developing dishevelment - piles and weatherboards were rotting - exterior paint cracking and peeling; - (4) only damage caused by Sept 2010 earthquake was chimney and roof damage acknowledged by EQC; - (5) EQC only required to rebuild section of chimney which was damaged so that it looked and functioned as it did when new - obligation discharged by $5,089 payment - no obligation to provide alternative heat source - not aspect of chimney's functionality that was damaged; - (6) EQC discharged chimney rebuild obligation under CRP - plaintiff waived his right to rebuild - could not resile from agreement - no unconscionable bargain - no reason to override CRP agreement on public policy grounds; - (7) EQC discharged obligations except in relation to one foundation crack - obliged to plaster it, repaint length of strip foundation - all other exterior and foundation cracking caused by earthquake was so insignificant considering pre-existing condition of house that it did not constitute damage - some claimed damage pre-existing; - (8) no evidence of damage caused by June earthquake - pre-existing damage; - (9) costs submissions invited - defendants were successful parties - arguable case for increased costs
	NATURAL DISASTERS
WORDS CONS/DEF	"damage"
STATUTES	Earthquake Commission Act 1993 s2, s2(1), s4A, s5(1)(a), s18, Schedule 3 cl7
CASES CITED	Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, [2013] 3 NZLR 275 (extract), (2013) 17 ANZ Insurance Cases 61-966, [2013] 1 Lloyd's Rep IR 458 ; Kraal v Earthquake Commission [2015] NZCA

	13, [2015] 2 NZLR 589, (2015) 18 ANZ Insurance Cases 62-055 ; C & S Kelly Properties Ltd v Earthquake Commission [2015] NZHC 1690 ; Ranicar v Frigmobile Pty Ltd [1983] Tas R 113, (1983) 2 ANZ Insurance Cases 60-525 ; Sadat v Tower Insurance [2017] NZHC 1550, [2018] Lloyd's Rep 170 ; Myall v Tower Insurance Ltd [2017] NZHC 251 ; Curtis v Chemical Cleaning & Dyeing Co [1951] 1 KB 805, [1951] 1 All ER 631 ; Cash Handling Systems Ltd v Augusta Terrace Developments Ltd (1996) 3 NZ ConvC 192,398 ; Earthquake Commission v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381
OTHER SOURCES	John J Birds (ed), MacGillivray on Insurance Law (13th ed, Sweet & Maxwell, London 2015) at [21-009] ; Francis Bennion (ed) Bennion on Statutory Interpretation (5th ed, LexisNexis, London 2008) at 60-62
REPRESENTATION	PA Cowey, AJ Summerlee, BA Scott, GM Scott-Jones, RM Flinn, AW Moore
PAGES	63 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, He v Earthquake Commission [2017] NZHC 839

NAME	Xu v IAG New Zealand Ltd
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-404-001071
JUDG DATE	17 August 2017
CITATION	[2017] NZHC 1964
FULL TEXT	PDF judgment
REPORTED	(2017) 19 ANZ Insurance Cases 62-160
PARTIES	Ruiren Xu, Diamantina Trust Ltd (plaintiffs), IAG New Zealand Ltd (first defendant), Earthquake Commission (second defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - determination of preliminary question - assignment of insurance policy - whether plaintiffs had right to recover replacement benefit as opposed to indemnity value under assigned policy - plaintiffs purchased damaged residential property - deed assigned insurance policy and related claims for earthquake damage - vendor's policy contained insurance during sale and purchase clause (condition 2) - plaintiffs argued condition 2 entitled purchasers to full benefits of policy including replacement benefit - preliminary question for determination was whether fact that assignor did not and would not restore damaged property,

prevented plaintiffs from recovering full replacement value from insurer (Bryant v Primary Industries Insurance) - insurer submitted policy framed in clear terms that contract of insurance was with insured vendor personally - submitted that under principle of personal indemnity, assignment did not transfer fundamental indemnity benefit to assignee unless insurer had consented - submitted insurer was entitled to opportunity to assess whether to assume risk of indemnifying particular assignee in light of risks associated with policy - Court noted indemnity principles applied to contracts which were silent on or prohibited assignment and where assignment a purely unilateral act by assignor, unless contract permitted assignment without insurer's consent - whether principle of personal indemnity applied - Court commented that in all material respects except condition 2, material circumstances of case were the same as Bryant - house insured for replacement value - replacement benefit payable if and when reinstatement costs incurred - right to recover replacement costs personal to named insured - in both cases house badly damaged before sale and before right to claim replacement benefit assigned to purchaser - both cases assignee claimed right to recover reinstatement costs incurred by assignee - discussion of assignment of insured's right to receive proceeds of policy where proceeds of claim assigned as debt arising under policy and thus assignment of an ordinary thing in action so assignment of debt not assignment of insurance contact - however present case concerned assignment of rights to pursue vendors' claims under policy and to proceeds of claims -

HELD: vendors could not assign right to obtain indemnity for replacement costs on basis plaintiffs would incur those costs - based on principle of personal indemnity insurance policy was for benefit of insured personally, assignment of policy could not effectively transfer fundamental indemnity benefit to assignee unless insurer had consented - extent to which insurer widened scope of who might benefit from policy and circumstances benefit might be available under condition 2 was limited by wording of heading "insurance during sale and purchase" - temporal limits on application clear from use of word "during" - reasonable and properly informed third party would not have understood that condition 2, read as a whole including the heading, permitted a purchaser to take over all vendor's rights and entitlements in relation to events prior to sale and purchase or after settlement - Bryant v Primary Industries Insurance (CA) applied

SALE AND PURCHASE

NATURAL DISASTERS

STATUTES Insurance Law Reform Act 1985 s13, s13(1), s13(3)(a), s15(3)(a)

CASES CITED	Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 18 ANZ Insurance Cases 62-044 ; Bryant & Anor v Primary Industries Insurance Co Ltd [1990] 2 NZLR 142 ; Schneideman v Barnett [1951] NZLR 301, [1951] GLR 164 ; Soole v Royal Insurance Co Ltd [1971] 2 Lloyd's Rep 332 ; Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444, (2010) 9 NZBLC 102,874, [2010] NZCCLR 23 ; Farmers Mutual Group Association Ltd v Watson (2001) 11 ANZ Insurance Cases 61-510
OTHER SOURCES	Ian Enright and Robert Merkin, Sutton on Insurance Law (4th ed, Lawbook Co, Sydney, 2015) at [11.790], [11.820] ; Robert Merkin and Chris Nicoll (eds), Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at [9.1.11] ; Contracts and Commercial Law Reform Committee, Aspects of Insurance Law (2) (Govt Printer, Wellington, 1983) at 21-37
REPRESENTATION	N Campbell QC, J Moss, M Ring QC, C Laband
PAGES	18 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, SC judgment

NAME	Bligh v Earthquake Commission
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	10 August 2017
CITATION	[2017] NZHC 1900
FULL TEXT	PDF judgment
PARTIES	Derek Ricky Bligh (plaintiff), The Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for recusal - non-party cost applications brought against lawyer (S) - recusal application by S based on comments by Associate Judge (AJ) during case management telephone conference and extant complaint to Judicial Conduct Commissioner (JCC) - alleged AJ had pattern of making decisions contrary to interests of S's firm - comments referred to whether S displayed basic level of competence in handling of case - S argued comments had direct bearing on issue to be determined in non-party costs application - claimed comments appeared to show a view adverse

	to S had already been reached - in determining recusal application AJ noted a JCC complaint did not disqualify a Judge from hearing a case involving a complainant - comments had been made in light of knowledge of case - based on evidence already before Court and long experience in civil litigation - on costs application, S would have opportunity to present evidence that case was in fact properly presented - fair-minded observer would not consider comments in isolation - points referred to in comments may be considered in determining costs application but they were unlikely to be decisive - appeared to be number of other issues - issue: whether comments and JCC complaint might lead a fair-minded lay observer to reasonably apprehend a real possibility that the AJ may not bring an impartial mind to resolution of non-party costs application - **HELD**: recusal application dismissed
STATUTES	Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 s8(2)
CASES CITED	Saxmere Co Ltd v Wool Board Disestablishment Company Ltd [2009] NZSC 72, [2010] 1 NZLR 35; Dominion Finance Group Ltd (in rec and in liq) v Sade Developments Ltd (HC, Auckland, CIV-2009-419-001556, 6 October 2011, Whata J); Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 122, [2010] 1 NZLR 76 ; Slavich v Attorney-General [2013] NZSC 130
REPRESENTATION	RJ Lynn, NS Wood, JW Upson, PM Smith, J Moss (for Claims Resolution Service Ltd), PJ Napier (for Grant Shand)
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001511
JUDG DATE	11 July 2017
CITATION	[2017] NZHC 1599
FULL TEXT	PDF judgment
REPORTED	(2017) 23 PRNZ 484
PARTIES	Prattley Enterprises Ltd (plaintiff), Vero Insurance New Zealand Ltd (defendant)
NOTE	High Court Earthquake List; Appendix 6 p
SUBJECT	COSTS - determination on costs following complex trial; unsuccessful application for increased costs - insured's building damaged in Canterbury earthquakes - reached settlement with insurer - brought unsuccessful proceedings

against insurer for misrepresenting policy entitlement - insurer's counterclaim dismissed - plaintiff unsuccessfully appealed to CA and SC - insured's litigation funded by Risk Worldwide - both parties requested preliminary issues hearing - plaintiff subsequently amended its pleading - issues could not be confined in way originally envisaged - insurer did not wish to proceed - hearing abandoned - insurer offered to settle costs on without prejudice basis save as to costs basis - offer declined - insurer sought $298,254 schedule costs with 100 per cent uplift, $26,323 general disbursements and $446,477 expert witness fees - parties agreed proceeding was category 3 - (1) what was appropriate band for work done by insurer in defending claim - whether mixture of bands B and C appropriate; - (2) whether to allow insurer's extensive claims for discovery; - (3) whether plaintiff should pay costs for preliminary issues hearing; - (4) whether to award increased costs under R14.6(3) HCR - whether plaintiff contributed unnecessarily to time and expense of proceeding; - (5) whether there should be reduction in costs for insurer's unsuccessful counterclaim pursuant to R14.7 HCR; - (6) whether costs should be awarded for preparation of costs memorandum due to complexity; - (7) whether insurer should be certified for three counsel; - (8) whether to disallow insurer's claims for expert witnesses' travel costs as insurer should have retained local experts; - (9) whether costs of an expert witness should be reduced as 60 per cent of his invoice related to work done by others in expert's firm; - (10) whether to grant insurer leave to apply for costs directly against plaintiff's litigation funder -

HELD: insurer awarded $277,674 costs plus $467,572 disbursements comprised of $20,894 general disbursements and $446,477 expert witness fees - application for increased costs dismissed - leave reserved for insurer to apply for leave to seek costs directly from litigation funder within 12 month of this decision - (1) insurer's proposed mixture of bands C and B categorisations accepted - Band C applied to commencement of defence, responding to amended pleadings, answering plaintiff's interrogatories and memoranda for case management conferences; - (2) insurer's discovery claims allowed - plaintiff made number of requests to insurer beyond tailored discovery order and insurer complied - insurer not attempting to rely on its own failure to provide proper and comprehensive disclosure at outset; - (3) insurer entitled to costs on preliminary issues hearing - reasonable to abandon hearing due to change in circumstances of plaintiff's making; - (4) increased costs claim dismissed - not demonstrated plaintiff contributed unnecessarily to time and expense of proceeding; - (5) no reduction in costs due to unsuccessful counterclaim - very small claim relative to overall proceedings - plaintiff did little to oppose it - did not significantly increase plaintiff's costs; - (6) $3,300 awarded for preparation of costs memorandum as sought - award modest in light of time expended in preparing

	submissions - insurer's offer to settle costs not relevant as it exceeded amount of this costs award; - (7) claim for costs of third counsel dismissed - trial capable of being prosecuted by two counsel - third counsel appeared to have been instructed due to unavailability of insurer's senior counsel; - (8) expert witnesses' travel costs allowed - reasonably incurred - shortage of available local experts post-earthquake; - (9) no deduction from expert witness costs - no expectation all preparation work would be done by expert personally; - (10) leave reserved for insurer to apply for leave to seek costs directly from litigation funder - application must be made within 12 months of this decision - no need to grant leave at present
	INSURANCE
STATUTES	High Court Rules 2016 R14.2(a), R14.2(c), R14.2(g), R14.3(1), R14.5(2)(c), R14.6, R14.6(3), R14.6(3)(b), R14.7, R14.7(d), R14.12(2), R14.12(3),
CASES CITED	Prattley Enterprises Ltd v Vero Insurance Ltd [2015] NZHC 1444, (2015) 18 ANZ Insurance Cases 62-075 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67, [2016] 2 NZLR 750, (2016) 19 ANZ Insurance Cases 62-097, (2016) 10 NZBLC 99-722 ; Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZSC 158, [2017] 1 NZLR 352, (2016) 19 ANZ Insurance Cases 62-121, [2017] NZCCLR 1, [2017] Lloyd's Rep IR 175 ; Paper Reclaim Ltd v Aotearoa International Ltd [2007] NZCA 544, (2007) 18 PRNZ 743 ; Holdfast New Zealand Ltd v Selleys Pty Ltd (2005) 17 PRNZ 897 ; Air New Zealand Ltd v Wellington International Airport Ltd [2009] NZCA 259, [2009] 3 NZLR 713 ; Strachan v Denbigh Property Ltd (HC, Palmerston North, CIV-2010-454-000232, 3 June 2011, Associate Judge Gendall) ; Commissioner of Inland Revenue (CIR) v Chesterfields Preschools Ltd [2010] NZCA 400, (2010) 24 NZTC 24,500 ; Sanford Ltd v Chief Executive of the Ministry of Fisheries (HC, Wellington, CIV-2009-485-000379, 12 October 2009, Clifford J) ; Body Corporate Administrative Ltd v Mehta (No 4) [2013] NZHC 213 ; Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd (2001) 15 PRNZ 155 ; Commerce Commission v Bay of Plenty Electricity Ltd (HC, Wellington, CIV-2001-485-000917, 13 December 2007, Clifford J & Professor Richardson) ; Auckland Waterfront Development Agency v Mobil Oil New Zealand Ltd [2015] NZHC 470, (2015) 23 PRNZ 200 ; R v Nakhla (No 2) [1974] 1 NZLR 453 (CA) ; Re Victim X [2003] 3 NZLR 220, (2003) 20 CRNZ 194, (2003) 7 HRNZ 224
OTHER SOURCES	Andrew Beck, Principles of Civil Procedure (3rd ed, Thomson Reuters, Wellington, 2012) at [13.3.5] ; GE Dal Pont, Law of Costs (3rd ed, LexisNexis, Chatswood, Australia, 2013) at [17.34] ; Philip A Joseph, Constitutional and Administrative Law in New Zealand (4th ed, Brookers, Wellington, 2014) at

	[21.6.4]
REPRESENTATION	FMR Cooke QC, S Rennie, DJ Goddard QC, SWB Foote, CM Brick
LOCATION	New Zealand Law Society Library
RELATED DOCS	HC decision

NAME	C & S Kelly Properties Ltd v Earthquake Commission
JUDGE(S)	Faire J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001273
JUDG DATE	10 July 2017
CITATION	[2017] NZHC 1583
FULL TEXT	PDF judgment
PARTIES	C & S Kelly Properties Ltd (Plaintiff), Earthquake Commission (First Defendant), Southern Response Earthquake Services Ltd (Second Defendant)
NOTE	High Court Earthquake List
SUBJECT	NATURAL DISASTERS - jurisdictional ruling pursuant to R10.15 High Court Rules (HCR) - unsuccessful claim in scope and costs of releveling floor - plaintiff company brought claims against insurer, Southern Response Earthquake Services Limited (Southern Response) and the Earthquake Commission (EQC) after family home, a 100 year old house, sustained damage in the 2010 and 2011 Canterbury earthquakes and a dispute arose as to extent of the damage and appropriate scope and cost of reinstatement - HCJ issued a reserve judgment in July 2015 concluding that save for the cost of releveling the floor plaintiff entitled to judgment for $53,768.50; that the dislevelment of the floor constituted earthquake damage for which EQC and potentially Southern Response were liable; and established a formula for concluding the matter - following the 2016 Canterbury earthquake HCJ recused himself - as a preliminary issue, Court had to determine what issues remained to be determined at trial - defendants argued issue estoppel arose in respect of 6 issues - substantive issue concerned appropriate remediation approach for releveling the floor in the plaintiff's home - Court considered evidence of 3 expert witnesses - (1) whether plaintiff estopped from raising issues - (2) which repair strategy and scope of work discharged the defendants' obligation to repair the building as new under the relevant Act and/or policy - (3) whether and what contingency was required - **HELD**: (1) plaintiff estopped from leading evidence contrary to issues 1 to 4 but not issues 5 and 6 - reasons included: evident that HCJ's intent was for the EQC

	scope of work and the cost of repair to be assessed in light of the joint experts' report; the exact purpose for a subsequent hearing was to determine the cost of repairing the earthquake damage to the standard which the HCJ set, namely the standard of restoring the functionality, aesthetic quality, and amenity value of the house; plaintiff estopped from arguing for a Type 2A foundation - regarding issue 5, the Court found that the plaintiff was not estopped from arguing that the floors needed to be relevelled to a pre-prescribed measurement standard and that in order to satisfy whether the releveling would restore the functionality, aesthetic quality and amenity value of the house the Court must be open to hear evidence on the relevant building codes and guidelines - regarding issue 6, the Court was satisfied that the HCJ did not expressly rule out contingencies being taken into account when estimating the cost of the damage - (2) Court not satisfied on the balance of probabilities that the plaintiff's repair strategy and scope of works were appropriate to discharge the defendants' obligations to repair the building as new - Court accepted the scope of works provided by the first defendant - (3) Court accepted uncontested evidence that a contingency of 10% should be allowed to each of the scopes of work because it was standard quantity surveying practice to do so - result: the cost to remediate in terms of the first defendant's scope of work was $66,440 increased to $73,084 when applying the 10% contingency - Court noted that monies payable did not exceed the EQC cap with the result that no monies were payable by Southern Response - further telephone conference scheduled with counsel
	INSURANCE
	ESTOPPEL
STATUTES	Building Act 2004 s17, s112 - Earthquake Commission Act 1993 Schedule 3 cl7(1)(a), cl7(1)(b), cl7(3) - High Court Rules 2016 R9.44, R10.15, R14.9
CASES CITED	C & S Kelly Properties Ltd v Earthquake Commission (EQC) [2015] NZHC 1690 ; Talyancich v Index Developments Ltd [1992] 3 NZLR 28, (1992) 4 PRNZ 509, (1992) 2 NZPC 60 ; Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341, (2014) 18 ANZ Insurance Caes 62-050, [2015] Lloyd's Rep IR 283 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep IR 118 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; Southern Response Earthquake Services Ltd v Avonside Holdings Ltd [2015] NZSC 110, [2017] 1 NZLR 141, (2015) 18 ANZ Insurance Cases 62-079, [2016] Lloyd's Rep IR 210
OTHER SOURCES	Laws of New Zealand- Estoppel (online looseleaf, Lexis Nexis)

REPRESENTATION	NR Campbell QC, AJD Ferguson, BA Scott, NJ Bruce-Smith, CR Johnstone
PAGES	42 p
LOCATION	New Zealand Law Society Library

NAME	Sadat v Tower Insurance Ltd
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2014-409-000207
JUDG DATE	6 July 2017
CITATION	[2017] NZHC 1550
FULL TEXT	PDF judgment
REPORTED	[2018] Lloyd's Rep 170
PARTIES	Sayad Mostafa Sadat and Mastoreh Sadat (plaintiffs), Tower Insurance Ltd (first defendant), Earthquake Commission (second defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - unsuccessful claim against insurer and EQC for rebuild of family home following earthquake damage - plaintiffs insured home with first defendant (insurer) for 'sudden and unforeseen accidental physical loss or damage' - policy excluded insurer's liability for loss or damage arising from inherent fault in design, movement of land and subsidence - 2008 prospective purchasers arranged building inspection and report (2008 Report) - indicated significant subsidence of foundations - sloping floors - significant cracks in exterior cladding and foundations - sale did not proceed - Aug 2010 plaintiffs made insurance claim for damage caused by water leak - insurance assessor's report (Aug 2010 Report) noted extensive cracking to foundation, cladding and interior walls - recommended claim be declined on basis damage excluded from policy - noted gradual damage and damage from subsidence - Sept 2010 house damaged in earthquake - plaintiffs lodged claimed with insurer and second defendant (EQC) - Jan 2011 insurer cancelled insurance - considered property's condition made it a poor risk - EQC paid plaintiffs $43,000 - plaintiffs' expert estimated total repair costs of $864,214 - recommended rebuild as more economical option - plaintiff filed proceedings - sought $864,214 full replacement value of house and $50,000 general damages for anxiety and emotional distress against insurer - sought $70,263 plus $50,000 general damages against EQC - parties' structural engineers agreed the house suffered some damage in Sept 2010 earthquake - evidence of plaintiffs' experts heavily criticised - reflected a desire to justify

	plaintiffs' argument - issue whether plaintiffs' experts should have to personally contribute towards defendants' costs - evidence of defendants' experts preferred - significant pre-existing subsidence and structural damage - sub-ground conditions were not strong enough to bear load of house - inadequate foundations - (1) whether plaintiffs' home suffered damage as a result of Sept 2010 earthquake; - (2) whether plaintiffs proved Sept 2010 earthquake caused damage that would cost more than $43,000 to repair; - (3) whether Sept 2010 earthquake damage was material because it affected property's value; - (4) whether Sept 2010 earthquake damage was material because it rendered home uninhabitable; - (5) whether plaintiffs established property suffered material damage in 2010 earthquake which required insurer to meet costs of a rebuild - **HELD**: all claims against defendants dismissed - not established property suffered material damage in 2010 earthquake which required insurer to meet costs of a rebuild - not proved damage would cost more to repair than $43,000 already paid by EQC; - (1) likely Sept 2010 earthquake caused some damage to internal wall linings - may have been slight increase in floor dishevelment - likely further cracking to perimeter of foundation and further subsidence; - (2) not proven earthquake damage repair costs would exceed $43,000 already paid by EQC; - (3) any impact on property value not relevant when determining whether there had been material damage - home insurance policy did not cover pure economic loss; - (4) whether home was habitable was not the test as to whether damage was covered by policy - evidence established property remained habitable; - (5) not established that home suffered material damage - work required to remedy earthquake damage not materially different from that required to remedy problems that existed before earthquake
STATUTES	Building Act 2004 s8, s17, s400 ; Earthquake Commission Act 1993 s21, s21(1)(a), Schedule 2 ;
CASES CITED	O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, [2013] 3 NZLR 275 (extract), (2013) 17 ANZ Insurance Cases 61-966, [2013] 1 Lloyd's Rep IR 458 ; Kraal v Earthquake Commission [2015] NZCA 13, [2015] 2 NZLR 589, (2015) 18 ANZ Insurance Cases 62-055 ; Earthquake Commission v Insurance Council of New Zealand [2014] NZHC 3138, [2015] 2 NZLR 381 ; Earthquake Commission, Re [2011] 3 NZLR 695, (2011) 16 ANZ Insurance Cases 79,055 ; Arrow International Ltd v QBE Insurance (International) Ltd [2010] NZCA 408, [2010] 3 NZLR 857 (Note) ; Arrow International v QBE Insurance (International) Ltd [2009] 3 NZLR 650 ; Groves v AMP Fire & General Insurance Co (NZ) Ltd [1990] 2 NZLR 408, (1990) 6 ANZ Insurance Cases 76,500 ; C & S Kelly Properties Ltd v Earthquake Commission [2015] NZHC 1690 ; Body Corporate 326421 v Auckland Council [2015] NZHC 862 ; Wayne

	Tank & Pump Co Ltd v Employers' Liability Assurance Corporation Ltd [1974] QB 57, [1973] 3 WLR 483, [1973] 3 All ER 825, [1973] 2 Lloyd's Rep 237 ; New Zealand Fire Service Commission v Legg [2016] NZHC 1492, [2016] 3 NZLR 685, (2016) 19 ANZ Insurance Cases 62-114 ; Myall v Tower Insurance Ltd [2017] NZHC 251 ; Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Edwards v AA Mutual Insurance Co (1985) 3 ANZ Insurance Cases 60-668 ; Bloor v IAG New Zealand Ltd (2010) 16 ANZ Insurance Cases 61-845
OTHER SOURCES	Robert Merkin and Chris Nicoll (eds) Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at [8.1.5(2)]
REPRESENTATION	KT Dalziel, JR Pullar, MC Harris, SF Alawi, NS Wood, JW Upson
PAGES	85 p
LOCATION	New Zealand Law Society Library

NAME	Ritchie v Earthquake Commission
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000831
JUDG DATE	8 June 2017
CITATION	[2017] NZHC 1242
FULL TEXT	PDF judgment
PARTIES	James Matthew Ritchie and Sandra Jane Bushnell (plaintiffs), Earthquake Commission (first defendant), Lumley-General (NZ) Ltd (Second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful applications by EQC for strike out and further and better particulars - plaintiffs' house damaged by Canterbury earthquakes in 2010 and 2011 - insured with second defendant (insurer) - where plaintiffs chose to repair or rebuild, policy obliged insurer to pay costs actually incurred - EQC determined an apportionment of damage between two earthquakes - paid $4,422 for 2010 earthquake damage - determined damage from 2011 earthquake over $100,000 plus GST per event statutory cap in Earthquake Commission Act 1993 (Act) - paid plaintiffs accordingly - insurer disputed EQC's apportionment - plaintiffs yet to resolve balance of their claims with insurer - plaintiffs had not incurred repair or rebuild costs to date - no entitlement to sue insurer for specific sum - brought proceedings against insurer and EQC due to uncertainty regarding allocation of damage between events and

therefore whether EQC had discharged all liability for damage - sought declaration that work required to repair damage in accordance with Act and policy was as stated in scope of works - sought declaration as to apportionment of damage between earthquake events, consequential enquiry into amounts owing by EQC Act and insurer under policy - contended "uncertainty rule" in R4.3(4) HCR applied as doubt as to correct defendant - insurer's pleading reserved its right to contend for an apportionment that differed from that adopted by EQC - Court examined authorities and operation of the uncertainty rule in detail including Australian and UK authorities - must be read purposively - required plaintiff to have genuine doubt as to persons against whom it may be entitled to relief - plaintiffs' pleading regarding 2010 earthquake damage was that they observed cracking in ceiling, walls and foundation - did not give further particulars as to extent of damage because they had not undertaken measurements prior to next earthquake event - insurer did not formally support EQC application - signalled its support and had counsel appear at hearing - Court noted consequential costs issues which arise when plaintiff's claim against multiple defendants succeeded in relation to one but failed in relation to another - Sanderson or Bullock orders - (1) whether to strike out claim against EQC as plaintiffs had not pleaded material facts which would make out cause of action against EQC and/or because declarations and enquiry sought were not appropriate; - (2) whether to grant EQC's application for further and better particulars of damage alleged to have resulted from 2010 earthquake; - (3) whether plaintiffs entitled to costs -

HELD: interlocutory applications dismissed - (1) strike out application dismissed - plaintiff established genuine doubt as to persons against whom they may be entitled to relief under R4.3(4) - not possible to conclude relief sought by plaintiffs would be found unavailable at trial; - (2) application for particulars oppressive - pleading of nature sought would be an unreasonable burden - pleadings fully informed defendants of case they needed to meet as between plaintiffs and defendants; - (3) EQC to pay plaintiffs costs plus disbursements fixed by Registrar - amount reserved - plaintiffs' invoking of uncertainty rule entirely justified -increased costs may be available under R14.6(3)(b) as outcome of these applications inevitably flowed from plaintiffs' properly invoking uncertainty rule - EQC sought excessively refined pleadings - costs and disbursements as between the plaintiffs and insurer reserved

INSURANCE

NATURAL DISASTERS

STATUTES Earthquake Commission Act 1993 s2, s18 ; High Court Rules 2016 R1.2,

	R4.3(4), R14.6(3)(b) ; Interpretation Act 19990 s5(1) ; Magistrates' Courts Act 1908
CASES CITED	R v Connelly [1964] AC 1254, [1964] 2 WLR 1145, [1964] 2 All ER 401 ; Managh v Wallington (EmpC, Wellington, WEC 61-96, 1 October 1996, Chief Judge Goddard) ; Hummerstone v Leary [1921] 2 KB 664 ; Lipman v Fox & London General Omnibus Co (1911) (unreported), noted in Annual Practice, 1921, Vol 1 at 229; noted in Law Journal 2 December 2011 ; Captain & Owners of SS City of Naples v Gollin & Co Ltd [1927] NZLR 297 ; NZI Insurance Ltd v Hinton Hill & Coles Ltd (1996) 9 PRNZ 615 ; Broken Hill Proprietary Co Ltd v Waugh (1988) 14 NSWLR 360 ; Briggs v James Hardie & Co (1989) 16 NSWLR 549, (1989) 7 ACLC 841 ; Wake v Milne Ireland Walker & Anor (HC, Auckland, CP 253-95, 26 June 1997, Paterson J) ; Sanderson v Blyth Theatre Co [1903] 2 KB 533; ; Bullock v London General Omnibus Co [1907] 1 KB 264 ; Lane Group Ltd v DI & L Paterson Ltd [2000] 1 NZLR 129, (1999) 13 PRNZ 509; ; Dunedin Airport Ltd v Mount Cook Group Ltd (HC, Auckland, CP 34-96, 10 October 1996, M Venning) ; Platt v Porirua City Council [2012] NZHC 2445 ; BNZ Investments Ltd v Commissioner of Inland Revenue (CIR) (2008) 23 NZTC 21,821 ; Price Waterhouse v Fortex Group Ltd (CA 179-98, 30 November 1998) ; Malley & Co v Burgess [2015] NZHC 841 ; Body Corporate 74246 v QBE Insurance (International) Ltd [2015] NZHC 1360
OTHER SOURCES	Rosara Joseph, Inherent Jurisdiction and Inherent Powers in New Zealand (2005) Canterbury Law Review 220 at 232-237 ; BC Cairns, Australian Civil Procedure (11th ed, LawBook Co, Pyrmont, 2016) at 390 ; Sim's Court Practice (online looseleaf ed, LexisNexis, at [HCR14.1.6(a)] ; McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR4.3.05], [HR5.21.01]
REPRESENTATION	NS Wood, KS Rouch, JE Bayly, RC Harris, BJ Read
PAGES	29 p
LOCATION	New Zealand Law Society Library

NAME	Bligh v Earthquake Commission
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	16 May 2017
CITATION	[2017] NZHC 995
FULL TEXT	PDF judgment

PARTIES	Derek Ricky Bligh (plaintiff), The Earthquake Commission (first defendant), IAG New Zealand Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application under R10.9 to set aside judgment - judgment had been entered for defendants under R10.8 - proceedings brought against insurer in respect of claim for damage to home - Canterbury earthquake sequence 2010 and 2011 - proceeding dismissed after plaintiff failed to appear - plaintiff retired and suffered various serious medical conditions - week before trial plaintiff had received contradictory information about exposure to costs and perceived strength of case - litigation funder withdrew funding - counsel withdrew on first day of trial - whether miscarriage of justice or possibility of miscarriage of justice established and appropriate to set aside non-appearance pursuant to R10.9 - Russell v Cox applied - Paterson v Wellington Free Kindergarten Association factors considered - Court observed that activity orchestrated by plaintiff's then legal advisors in days leading up to trial appeared to be an entirely unsatisfactory way to prepare significant case for trial - **HELD**: arguable case established - not necessary for Court to be satisfied case any stronger than that - necessary to view plaintiff's actions on first day of proceedings in context of all that occurred in run up to trial and in context of serious health issues and consequent ability to cope under stress - necessary to consider events took place at very end of almost four year period during which advisors had been running case - context of events of morning of trial critical to assessment of plaintiff's non-appearance at court - even if solicitor told plaintiff he had to attend court, solicitor knew plaintiff was remaining at property to let engineer in - obvious given decision not to continue as counsel that plaintiff was critically at risk of case being struck out - arguably, proper course was for solicitor to explain that client was not in court, that he had instructions to seek leave to withdraw, to ask for an adjournment or that case be stood down for brief period until client arrived and to defer seeking leave to withdraw until his client's interests had been properly protected - R4.2 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (duty to complete retainer) noted - each of lawyers concerned required not to terminate retainer or withdraw from proceeding unless there had been due regard to fiduciary duties to plaintiff and had given reasonable notice so as to enable plaintiff to make alternative arrangements for representation - not necessary to be satisfied plaintiff had specific justification for not attending court - sufficient to take into account all that occurred - setting aside judgment would be to detriment of each defendant in sense of each having to face claim once more and being put to further expense in continuing to maintain defence - any adverse effect on either defendant could be

	cured by measure of costs directed at ensuring reinstatement of case after default judgment fairly compensated - neither defendant would suffer irreparable injury if judgment set aside and any adverse effect was more than outweighed by interests of plaintiff - miscarriage of justice had occurred - judgment of 2 Nov 2016 set aside - significant issues in relation to conduct of appointed litigation funder, solicitor and counsel whom that funder required plaintiff to instruct - those issues should not be subject of further comment at this stage as those involved must have opportunity to be heard on issues identified and other issues plaintiff may be advised to raise - costs reserved LAW PRACTITIONERS INSURANCE
STATUTES	High Court Rules 2016 R5.41, R10.8, R10.9 ; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 R4.2, R4.2.1(e), R4.2.3, R4.2.4
CASES CITED	Bligh v Earthquake Commission [2016] NZHC 2619 ; Russell v Cox [1983] NZLR 654 (CA) ; Mathieson v Jones (CA 198-92, 11 December 1992) ; Paterson v Wellington Free Kindergarten Association Inc [1966] NZLR 975 ; Vermeulen v Department of Health (HC, Whangarei, A 76-85, 6 December 1991, Thomas J)
REPRESENTATION	R Lynn, NS Wood, JW Upson, PM Smith
PAGES	24 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Bligh v Earthquake Commission [2016] NZHC 2619

NAME	He v Earthquake Commission
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001775
JUDG DATE	1 May 2017
CITATION	[2017] NZHC 839
FULL TEXT	PDF judgment
PARTIES	Xiaoming He (plaintiff), The Earthquake Commission (first defendant), Offshore Market Placements Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful application for wasted costs - defendants sought $21,526 wasted costs on 2B basis - plaintiff asserted only $7,836 should be awarded -

	Court considered quantum claimed by defendants was reasonable in light of conduct of plaintiff and his advisers - Court declined to determine defendants' application for further $26,429 wasted costs in relation to a particular judicial conference - matter could be taken into account by trial judge at substantive hearing - **HELD**: $11,209 wasted costs awarded to first defendant - $10,317 awarded to second defendant - amount not required to be paid by the plaintiff until disposal of this proceeding
REPRESENTATION	PA Cowey, BA Scott, RM Flinn, WA Holden
PAGES	4 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, He v Earthquake Commission [2017] NZHC 2136

NAME	Annex Developments Ltd v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000847
JUDG DATE	11 April 2017
CITATION	[2017] NZHC 706
FULL TEXT	PDF judgment
REPORTED	[2017] Lloyd's Rep IR 561
PARTIES	Annex Developments Ltd (plaintiff), IAG New Zealand Ltd (first defendant), Peter J Taylor & Associates Ltd (second defendant)
NOTE	High Court Earthquake List
SUBJECT	SUMMARY JUDGMENT - successful application by first defendant (insurer) for summary judgment - material damage and business interruption insurance policies - whether settlement agreement entered under mutual mistake, discharged all claims in respect of loss or damage by earthquakes - whether insurance policies provided that maximum cover was reinstated when interim payment ought to have been made and was not - whether a substantially unequal exchange of values when settlement agreement made - contract interpretation - plaintiff's buildings damaged in Canterbury earthquake sequence - material damage policy provided for reinstatement of insured property - did not apply until actual costs of reinstatement had been incurred - when circumstances requiring a reinstatement payment did not apply, insurer was obliged to indemnify - both policies stated that after a claim under the policy had been paid,

full maximum sum payable under each policy was reinstated for future events - policies provided insurer could make interim payments provided insured produced evidence to insurer's satisfaction of claim covered by policy - insurer made interim payments of $170,388 for temporary or emergency repairs under material damage policy, $59,358 for loss of rent under BI policy (Progress Payments) - Feb 2012, plaintiff and insurer entered settlement agreement - insurer paid $9.43M to discharge all claims to date of settlement under material damage and BI policies in respect of any loss or damage by earthquake events up to date of settlement - plaintiff acknowledged receipt of Progress Payments in release document - reinstatement was not available to plaintiff prior to settlement because actual costs of reinstatement had not been incurred at that point - at no relevant point did plaintiff produce evidence of a claim for indemnity value - right to an interim payment of indemnity value did not arise - plaintiff sought orders under s6 Contractual Mistakes Act 1977 (Act) - claimed settlement was entered under a mutual mistake about extent of cover under policies - contended both parties mistakenly believed maximum liability of insurer was total cover stated in policy schedule - submitted correct position was maximum sum payable under each policy was reinstated when the insurer paid, or ought to have paid, a claim under policies - contended insurer ought to have paid $539,726 interim payment claims submitted by plaintiff and $4.795M indemnity value of whole property once it was assessed on behalf of insurer in Apr 2011 - plaintiff sought to set aside settlement agreement so it could claim its full entitlement under policy - $19M reinstatement cost actually incurred - plaintiff's second cause of action alleged insurer failed in its contractual obligation to reinstate property - filed negligence proceedings against broker alleging it incorrectly advised plaintiff regarding its entitlement under policies - (1) whether policies provided reinstatement of maximum cover when payment of an interim nature ought to have been made but was not; - (2) whether parties entered settlement agreement under a mutual mistake about cover; - (3) whether parties' mutual mistake resulted in a substantially unequal exchange of value for purpose of s6(1)(b)(i); - (4) whether insurer satisfied Court that neither cause of action under Act nor breach of contract claim could succeed -

HELD: summary judgment entered for insurer - contract clause "after we have paid a claim under this policy, we will reinstate your sum insured" did not provide that maximum cover reinstated when interim payment ought to have been made - manifest uncertainty would surround establishing that date and therefore uncertainty over maximum sum insured - (1) full amount of cover not reinstated when claimed sum 'ought to have been paid' - reinstatement only occurred from dates payments were made by insurer; - (2) parties entered settlement agreement in mistaken belief that maximum sum for which insurer

	would be liable under each policy was as stated in policy schedule; - (3) no inequality in exchange of values - although parties mistakenly believed maximum sum for which insurer would be liable under each policy was as stated in policy schedule, settlement sum was reached on the basis of Progress Payments in addition to maximum sums - had same effect as proceeding to settle on basis of policies having been reinstated for those sums; - (4) claim under Act untenable - breach of contract claim must fail as it was barred by settlement agreement - costs reserved
	INSURANCE
STATUTES	Contractual Mistakes Act 1977 s6 - High Court Rules 2016 R12.2
CASES CITED	Auckett v Falvey (HC, Wellington, CP 296-86, 20 August 1986, Eichelbaum J) ; Telecom New Zealand Ltd v Sintel-Com Ltd [2007] NZCA 499, [2008] 1 NZLR 780, [2008] NZCCLR 18 ; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, (1977) 16 ALR 363, (1977) 45 LGRA 62, (1977) 52 ALJR 20 ; Firm PI1 Ltd v Zurich Australian Insurance Ltd (t/a Zurich New Zealand) [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 18 ANZ Insurance Cases 62-044 ; Gustav & Co Ltd v Macfield Ltd [2008] NZSC 47, [2008] 2 NZLR 735, (2008) 6 NZ ConvC 194,648 ; Attorney-General of Belize v Belize Telecom [2009] UKPC 10, [2009] 1 WLR 1988, [2009] 2 All ER 1127, [2009] 2 All ER (Comm) 1 ; Janus Nominees Ltd v Fairhall & Anor (2008) 23 NZTC 21,978; ; McKinlay Hendry Ltd v Tonkin & Taylor & Long International Ltd (HC, Wellington, CIV-1999-485-000078, 22 March 2004, Miller J) ; Westerman Realty Ltd v McKinstry (2007) 8 NZCPR 553 (HC)
REPRESENTATION	SD Munro, AL Davidson, CJ Hlavac, KA Muir
PAGES	18 p
LOCATION	New Zealand Law Society Library

NAME	Anderson v Earthquake Commission (Discontinued)
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-001012
JUDG DATE	20 March 2017
CITATION	[2017] NZHC 505
FULL TEXT	PDF judgment
PARTIES	Karen Marie Anderson (plaintiff), The Earthquake Commission (discontinued)

	(first defendant), Tower Insurance Ltd (second defendant), Bruce Verry t/a Verry Project Management (third defendant)
NOTE	High Court Earthquake List
SUBJECT	CONTRACT - successful claim for judgment by way of formal proof (R15.9 HCR) against third defendant (V) - breach of contract and consequential loss related to defective and incomplete building repairs - plaintiff's property significantly damaged in Christchurch earthquakes - plaintiff had opted-out of EQC Home Repair programme - insurance claim cash settled - builder (V) known to plaintiff through friends engaged to complete repairs - oral fixed price building contract entered into - repairs were to be undertaken according to EQC's and insurer's scopes of works - plaintiff submitted that despite payment of contract price invoices of $156,093.79 V had walked off job without completing work contracted to do and that work done was defective and inadequate - evidence from W (experienced independent builder and licensed building practitioner)as to poor quality of repairs undertaken by V - costing of work to properly reinstate house as should have occurred under original contract - V had taken no formal action of any kind to oppose this proceeding - whether appropriate judgment be entered against V - **HELD**: breach of contract established on evidence - uncontested cost to remedy breach of contract on part of V (as outlined in expert evidence) was $219,954.82 - direct causative link between conduct of V and loss suffered by plaintiff - claim for $25,000 consequential loss (wasted accommodation costs paid under plaintiff's insurance contract) justified given plaintiff's family would need to move out of house again for new repairs and work to be undertaken - clear loss directly attributable to breach of contract by V - uncontested claim for contribution towards plaintiff's legal 2B costs of $10,151.50 reasonable and should be met as direct cost of being required to bring this proceeding - judgment entered against V for sums set out above, including any reasonable disbursements claimed in addition to costs award (as approved by Registrar)
	NATURAL DISASTERS
STATUTES	High Court Rules 2016 R15.9, R15.9(4)
REPRESENTATION	N Hamid
PAGES	11 p
LOCATION	New Zealand Law Society Library

NAME	Young v Tower Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000222
JUDG DATE	16 March 2017
CITATION	[2017] NZHC 482
FULL TEXT	PDF judgment
PARTIES	Gregory Peter Young and Malley & Co Trustees Ltd (plaintiffs), Tower Insurance Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - substantially successful application for costs by plaintiffs - insurance claim relating to significant damage to plaintiffs' home as result of Canterbury earthquake sequence - substantive decision included declaration that house beyond repair in terms of insurance policy - maximum payable by defendant for rebuild was $1.62M, $500,000 less than amount plaintiffs claimed - "nominal" award of general damages of $5,000 also made - noted as ground-breaking claim for general damages - at issue were appropriate costs, disbursements and experts' fees (parties unable to agree) - Court noted generally accepted principle that common sense approach be taken in relation to which party in proceeding succeeded whether in whole or in part (Driessen v Earthquake Commission) - Paper Reclaim v Aotearoa International relevant - blanket approach to time banding not appropriate under High Court Rules (Paper Reclaim) - Court approval needed for expert witness costs under R14.12(2)(a)(i) - **HELD**: plaintiffs entitled to all reasonable costs as successful party - although quantum less than sought, it significantly exceeded settlement amounts put forward by defendant - claim by defendant that plaintiffs only entitled to 40 per cent of total trial costs flawed given plaintiffs' claim essentially involved one principal cause of action on which they succeeded - case involved range of complex issues - appropriate by fine margin to adopt differential time banding for trial preparation and related steps, given comparatively large amount of time properly required for hearing and in circumstances prevailing in terms of R14.5(2)(c) - accepted even category 2C assessment did not result in plaintiffs achieving two-thirds reimbursement of their actual legal costs - plaintiffs' claim for category 2C costs for trial preparation, completion of briefs and common bundle justified - otherwise costs on 2B basis appropriate - not accepted trial and related costs significantly increased in terms of R14.7(d) or otherwise as result of plaintiffs' erroneous claim regarding positioning of house which was made well before trial took place - quantum argument did not assist defendant in claim for reduced costs - no justification for large global 30 per cent costs reduction

	suggested by defendant because of unfounded allegations of wrongdoing made by plaintiff - however in advancing dishonesty and bad faith argument on part of defendant and its experts, plaintiffs had insisted on pursuing points and an argument the Court had found lacked merit therefore costs reduction appropriate in terms of R14.7(f)(ii) and R14.7(g) - these actions considered to have extended 11 day hearing by one full day so trial costs reduced to costs for 10 day hearing - majority of expert witness costs sought by plaintiffs properly claimable, except where an invoice related to advice witness S admitted under cross-examination was incorrect - claimed plaintiffs' expert surveyor C spent long periods in Court unnecessarily both before and after giving his evidence - this did not necessarily make his charges for resulting expert advice unreasonable - as an "independent" expert, issues of partisanship on part of C might arise at times, but was not raised - no independent evidence to support claims C's charges were excessive or exceptionally high - on material before Court, C's charges were reasonably necessary for conduct of proceeding - court fees and disbursements sought appropriate but with court fee reduced by one day - in all circumstances, not appropriate for an order for costs to be made against defendant on costs issue itself (Paper Reclaim Ltd) - defendant ordered to pay plaintiffs award of costs, disbursements and witness expenses totalling $188,723.91
	INSURANCE
STATUTES	High Court Rules 2016 R14.1, R14.2, R14.2(g), R14.2(1), R14.3, R14.4, R14.5, R14.7, R14.7(d), R14.7(f)(ii), R14.7(g), R14.12, R14.12(1), R14.12(1)(b), R14.12(2)(a)(i), R15.5(2)(c)
CASES CITED	Paper Reclaim Ltd v Aotearoa International Ltd [2007] NZCA 544, (2007) 18 PRNZ 743; Driessen v Earthquake Commission [2016] NZHC 1048; Rout v Southern Response Earthquake Services Ltd [2014] NZHC 1053 ; Jarden v Lumley General Insurance (NZ) Ltd [2016] NZHC 2820
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Thomson Reuters) [HR14.5.01], [HR14.12.01(4)(d)]
REPRESENTATION	PF Whiteside QC, HT Shaw, MC Harris, ATB Joseph
PAGES	23 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Substantive decision, Young v Tower Insurance Ltd [2016] NZHC 2029

NAME	Kristinsson v Southern Response Earthquake Services Ltd

JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000318
JUDG DATE	16 March 2017
CITATION	[2017] NZHC 456
FULL TEXT	PDF judgment
PARTIES	Hugo Kristinsson (plaintiff), Southern Response Earthquake Services Ltd (first defendant), Earthquake Commission (second defendant)
NOTE	High Court Earthquake List ; Ruling in Relation to Experts' Conference ; 3 p memorandum attached
SUBJECT	CIVIL PROCEDURE - successful application to amend direction regarding experts' conference - earthquake list proceeding - Court directed parties' experts to conduct joint review and reporting process (expert conferral direction) - joint review to identify areas of agreement and disagreement as to earthquake damage to residential building and appropriate repair strategy - parties' experts to file joint report - defendants objected to involvement of C in process - acknowledged C was qualified surveyor - claimed he lacked expertise regarding assessment of earthquake damage and repair strategies - Court considered that in a case management context, it was appropriate that those whose fundamental area of expertise was engineering should be the experts to confer in relation to causes of natural disaster damage and remedy - with C's report available to expert engineers, they would be able to take it into account and obtain further information from C if appropriate - whether to amend conferral direction to exclude C from conferral process - Court noted meeting of experts was privileged in the nature of a "without prejudice" privilege - benefits intended to be conferred by that cloak of privilege and freedom to discuss would potentially be impeded if experts of like disciplines were required to discuss their positions at initial conferral stage in front of experts of other disciplines - **HELD**: direction amended - parties' experts who attended joint inspection, with exception of C, directed to file a joint report identifying earthquake damage and appropriate repair strategy EVIDENCE
STATUTES	High Court Rules 2016 R7.4(2), R9.46,
CASES CITED	Young v Tower Insurance Ltd [2016] NZHC 2956, [2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605 ; Jarden v Lumley General Insurance (NZ) Ltd [2016] NZCA 193, (2016) 19 ANZ Insurance Cases 62-104 ; C & S Kelly Properties Ltd v Earthquake Commission [2015] NZHC 1690
REPRESENTATION	ACC Hooker, M Hills, BRD Cuff, NJ Bruce-Smith

PAGES	9 p
LOCATION	New Zealand Law Society Library

NAME	Myall v Tower Insurance Ltd
JUDGE(S)	Dunningham J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000230
JUDG DATE	23 February 2017
CITATION	[2017] NZHC 251
FULL TEXT	PDF judgment
PARTIES	Paul Geoffrey Myall (plaintiff), Tower Insurance Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	INSURANCE - substantially unsuccessful application by insured - sought declaration quantifying insurer's outstanding liability under policy - interpretation of policy - quantification of costs - alleged breach of policy obligations to pay full replacement value for earthquake damaged house - plaintiff owned heritage home built in 1885 - registered historic place - homestead damaged beyond repair in 2010-2011 Canterbury earthquake sequence - "Super Maxi Cover" full replacement policy - premium calculated on floor area of 650 square metres but actual floor area 799 square metres - policy did not detail number of rooms - insurer agreed to pay 'full replacement value' in event of loss - obliged to rebuild 'to same condition and extent as when new' - policy provided insurer would use 'building materials and construction methods commonly used at time of loss or damage' - qualified obligation - policy provided insurer not bound to reinstate house exactly to its previous condition, or pay cost of replacement 'beyond what was reasonable, practical or comparable with original' - house demolished pursuant to Christchurch Earthquake Recovery Authority's demolition order - parties disputed quantum of full replacement value - estimates more than $2M apart - insured resisting insurer's proposal to substitute cheaper modern specifications for some aspects of rebuild - (1) what were insurer's obligations under policy when costing rebuild of heritage property; - (2) whether insurer's proposed building materials and construction methods complied with its obligations under policy, particularly given heritage qualities of home; - (3) whether insurer's costings for materials, labour, preliminary and general costs, contractor's margins, professional fees and contingencies appropriate; - (4) whether insurer wrong to pro rata costs of

	replacing house insured on basis of 650 square metre house rather than 799 square metre area - **HELD**: insurer largely successful in defending claim it had not honoured policy obligation to pay full replacement value - (1) policy had flexibility to substitute modern construction methods and materials where original no longer available, no longer permitted, or unreasonably expensive - proviso that substitute proposed ensured equivalence to original condition of that element - requirement to rebuild 'to same condition and extent as when new' obliged insurer to pay for house of equivalent size, functionality and quality and which reasonably recreated character and appearance of original - required rebuild of something which was equal to, but no necessarily identical to, original building - where original specifications were not able to be used, or were significantly more costly or difficult to use than modern equivalent, insurer had expressly reserved right to use modern substitute if that achieved equivalent outcome; - (2) question of fact whether insurer's proposals complied with policy by recreating original house in size, functionality, relative quality and aesthetic appearance while not obligating it to incur unreasonable costs in doing so; - (3) appropriate costing by insurer for most disputed elements; - (4) insurer entitled to adjust calculated full replacement value of 799 square metre house on pro rata basis to reflect insured floor area of 650 square metres - no obvious injustice - Colonial Mutual General Insurance Co Ltd v D'Aloia distinguished - neither party had adequately scoped or calculated cost of exterior works - leave reserved to parties to file further evidence on that issue and seek Court's assistance in absence of agreement - Court unable to make declaration as to precise monetary sum insured entitled to - parties should be able to calculate sum based on this judgment - leave reserved to both parties to seek further relief if required - costs reserved
WORDS CONS/DEF	"to the same condition and extent as when new"
CASES CITED	Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2014] NZSC 185, [2015] 1 NZLR 341, (2015) 18 ANZ Insurance Cases 62-050 ; QBE Insurance (International) Ltd v Wild South Holdings Ltd [2014] NZCA 447, [2015] 2 NZLR 24, (2014) 18 ANZ Insurance Cases 62-037 ; Spina v Mutual Acceptance (Insurance) Ltd (1984) 3 ANZ Insurance Cases 60-554 ; Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 18 ANZ Insurance Cases 62-044 ; Colonial Mutual General Insurance Company Ltd v D'Aloia [1989] VR 161, (1988) 5 ANZ Insurance Cases 75,286 ; Turvey Trustee Ltd v Southern Response Earthquake Services [2012] NZHC 3344, (2013) 14 ANZ Insurance Cases 61-965, [2013] 1 Lloyd's Rep IR 552 ; Ludgate Insurance Company Ltd v Citibank NZ [1998] Lloyd's Rep IR 221 (CA) ; C & S Kelly Properties Ltd v Earthquake Commission [2015]

	NZHC 1690
OTHER SOURCES	Robert Merkin & Chris Nicoll (eds) , Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at [8.5.2]
REPRESENTATION	SP Rennie, AGM Whalan, MC Harris, SS McMullan
PAGES	30 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	SC judgment, CA judgment

NAME	Quake Outcasts v Minister for Canterbury Earthquake Recovery
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000050
JUDG DATE	19 January 2017
CITATION	[2017] NZHC 22
FULL TEXT	PDF judgment
PARTIES	Quake Outcasts (applicants), Minister for Canterbury Earthquake Recovery (first respondent), Chief Executive Canterbury Earthquake Recovery Authority (second respondent)
NOTE	High Court Earthquake List
SUBJECT	COSTS - successful costs application by respondents - respondents sought costs on 3B basis plus disbursements and certification for two counsel - applicants were 14 owners of uninsured land in Christchurch red zone - Crown made offer to purchase applicants' land - increased offer following development of new recovery plan and Minister's reconsideration of Court judgments - applicants accepted increased offers - filed judicial review proceedings - attempt to obtain increased financial benefit - Jul 2016, judicial review application dismissed - application for leave to appeal to CA and SC declined - respondent sought certification for two counsel, $55,605 costs on 3B basis and $2,349 disbursements - (1) whether costs should be fixed on 3B basis; - (2) whether to certify for two counsel; - (3) whether costs should not be awarded because there was public interest in testing the legitimacy of how the Minister exercised emergency powers; - (4) whether a costs award against the applicants would be unjust when their financial position had been affected by delay between creation of the red zone and the final offers they accepted - **HELD**: applicants to pay $55,605 costs plus disbursements fixed by Registrar, exclusive of GST - no basis to depart from general principle that an unsuccessful

	party should pay successful party's costs- (1) 3B categorisation appropriate - proceedings were complex because of constitutional issues raised, previous Court decisions and extensive evidential background; - (2) two counsel certified; - (3) no public interest that would justify declining costs application - applicants pursued civil proceedings for financial benefit - matter of conjecture whether decision in applicants' favour may have benefited others in red zone who accepted Crown offers; - (4) not unjust to make costs order
	JUDICIAL REVIEW
STATUTES	Court of Appeal (Civil) Rules 2005 R48(4), R53J - High Court Rules R14.7(e)
CASES CITED	Quake Outcasts v Minister for Canterbury Earthquake Recovery [2016] NZHC 1959; New Health New Zealand Inc v South Taranaki District Council [2014] NZHC 993, (2014) 21 PRNZ 766; Taylor v District Court at North Shore (HC, Auckland, CIV-2009-404-002350, 13 October 2010, White J) ; New Zealand Venue & Event Management Ltd v Worldwide NZ LLC [2016] NZCA 282, (2016) 27 NZTC 22-058, (2016) 23 PRNZ 260
REPRESENTATION	FMR Cooke QC, LE Bain, KG Stephen, PH Higbee
PAGES	6 p
LOCATION	New Zealand Law Society Library

NAME	Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000530
JUDG DATE	16 December 2016
CITATION	[2016] NZHC 3105
FULL TEXT	PDF judgment
PARTIES	The Southern Response Unresolved Claims Group (plaintiff), Southern Response Earthquake Services Ltd (defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful applications for leave to bring proceeding as a representative action, approval of litigation funding arrangement and associated orders; unsuccessful discovery application - plaintiffs were group of 41 residential homeowners - all insured by defendant (insurer) under the same or substantially similar policies on full reinstatement basis - all had unresolved

insurance claims relating to 2010 Canterbury earthquakes - plaintiffs obtained services of a litigation funder to fund representative action - signed litigation funding agreement (LFA) - all claimants in plaintiff group were of full age and capacity - insurer challenged plaintiffs funding arrangements - no concerns raised about funder's financial standing or repute - funder agreed to provide $150,000 security for costs for first stage of proceeding - not suggested funding arrangements gave the funder an impermissible amount of control over course of litigation - earlier application for leave to bring proceeding as a representative action declined - HC held the plaintiffs pleadings failed to allege a sufficient common issue - not satisfied the proposed representative action could achieve HCR's objectives of a "just, speedy and efficient determination" - HC granted leave to bring modified application under R4.24 High Court Rules 2016 - plaintiffs filed this new application - submitted the reformulated litigation claim provided the requisite common interest or "spine" - (1) whether the common interest pleaded by the plaintiffs, that the insurer deliberately engaged in a "strategy" designed to deceive policyholders and delay claims with a view to reducing financial liability the insurer might have to its policyholders, was a proper one for a R4.24 High Court Rules 2016 representative action; - (2) whether the Court should decline to approve the funding arrangements as misleading communications were made to plaintiff group members in advance of them signing the LFA; - (3) whether the Court should decline to approve the funding arrangements as remuneration payable to the funder under the LFA was unfair and unreasonable; - (4) whether the claimants received the required disclosure under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) as the LFA was a contract subject to that Act; - (5) whether to approve the plaintiffs litigation funding arrangements; - (6) whether to make an "opt-in" direction for there to be a period of three months for further claimants to opt-in to the representative action; - (7) whether to order the insurer to discover the names and contact details of all claimants with unresolved insurance claims - **HELD**: plaintiffs granted leave to bring representative action - litigation funding arrangements approved on the condition the funder provided an explanatory letter/memorandum to all existing and future plaintiff group members in terms approved by the Court, and gave a 21 day "cooling off" period notice - funder to provide $150,000 security for costs within 30 working days - parties counsel to confer and agree scope of common issues to be determined at first stage of representative proceeding - if agreement could not be reached or other matters arose, counsel could approach Registrar for directions telephone conference - discovery application dismissed - timetable directions - (1) by a reasonably fine margin, first amended statement of claim addressed concerns expressed by HC in relation to earlier application - common interest requirement in R4.24 met -

	substituted representative plaintiff was an appropriate representative of plaintiffs group; - (2) by a small margin, Court was satisfied group members may have been, to a limited extent, misled by some statements on class action website and elsewhere in material provided - comments may have contributed to a minor misunderstanding on the part of those who joined plaintiff group - could be remedied by way of further explanatory letter/memorandum - terms to be approved by the Court - provided to existing and future members of plaintiffs group - to give a further 21 day "cooling off" period to extract themselves from LFA; - (3) fee charged was fair and reasonable; - (4) Court did not determine whether CCCFA applied to LFA - if CCCFA applied, its significance would be that it gave plaintiff group members an additional right in their relationship with the funder; - (5) funding arrangements approved; - (6) opt-in direction made as sought; - (7) discovery application declined - discovery would breach confidentiality of individual policy holders - other possible plaintiff group members could be identified through public advertising campaign - costs reserved INSURANCE DISCOVERY
STATUTES	High Court Rules R1.12, R4.24, R7.52, R8.12
CASES CITED	Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 245 ; Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 ; Strathbos Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 ; Saunders v Houghton [2012] NZCA 545, [2013] 2 NZLR 652, (2012) 21 PRNZ 358 ; RJ Flowers Ltd v Burns [1987] 1 NZLR 260 ; Cooper v ANZ Bank New Zealand Ltd [2013] NZHC 2827 ; PricewaterhouseCoopers v Walker [2016] NZCA 338, (2016) 23 PRNZ 612
OTHER SOURCES	McGechan on Procedure HR4.24.01, HR4.24.04, HR4.24.16 ; Justice Miller, "Reflections on the Earthquake Litigation"(paper presented to New Zealand Insurance Law Association Conference, 2014)
REPRESENTATION	F Cooke QC, M Smith, M O'Brien QC, DJ Friar, NF Moffat
PAGES	40 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 245

NAME	Young v Tower Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000222
JUDG DATE	7 December 2016
CITATION	[2016] NZHC 2956
FULL TEXT	PDF judgment
REPORTED	[2018] 2 NZLR 291 (extract), [2017] Lloyd's Rep IR 605
PARTIES	Gregory Peter Young, Malley & Co Trustees Ltd (as trustees of the McAra Young Trust) (Plaintiffs), Tower Insurance Ltd (Defendant)
NOTE	High Court Earthquake List ; NZLR Editorial Note: Paragraphs [41] to [144] have been omitted, as it deals with principles relating to the interpretation of the policy, and the proposed rebuild.
SUBJECT	INSURANCE - successful application for declaration home damaged beyond economic repair - successful claim for general damages (in part); unsuccessful application for exemplary damages - insured owned multi-level, hillside home - damaged in Canterbury earthquake sequence of 2010 and 2011- insurance claim lodged in Mar 2011 - policy stated insured would only be entitled to rebuild if house was 'damaged beyond economic repair' - insured then entitled to elect between rebuild on same site, rebuild elsewhere or purchase of another property - policy required insurer to 'use building materials and construction methods commonly used at time of loss or damage' - plaintiffs' claimed house must be rebuilt because damaged beyond economic repair - Jun 2011 report commissioned by insurer recommended rebuild - report not provided to insured until Jan 2015 - insurer obtained further contractor's report recommending repair - insurer proposed repair strategy untried in NZ - insured sought rebuild - Dec 2013 insurer emailed insured to propose cash settlement - email expressly recorded insurer was not making any formal election under policy - insurer advanced single repair strategy before Court - $1.6M estimated repair costs was 79 percent of estimated rebuild cost - $330,000 difference between repair and rebuild costs - repair cost may be higher than estimated - proposed strategy novel and could encounter difficulties - Court outlined minimum requirements of insurer's duty of good faith implied in every insurance contract - (1) whether insurer's repair strategy commonly used at time of loss or damage; - (2) was damage economically repairable; - (3) whether insurer made an election under policy to cash settle insured's claim in Dec 2011 or in Dec 2013; - (4) whether insured entitled to exemplary damages as insurer chose repair strategy against

policy's express terms; - (5) whether insurer's duty of good faith implied in every insurance contract; - (6) whether insured entitled to general damages for non-pecuniary loss on basis loss was foreseeable consequence of insurer's breach of contract; - (7) whether insured entitled to general damages because insurer breached implied term of good faith by withholding Jun 2011 report with recommendation of rebuild; - (8) whether insurer breached duty of good faith by failing to respond quickly once notified insured's son suffered from earthquake anxiety; - (9) whether insurer breached duty of good faith by reversal of position from rebuild to repair, exerting unfair pressure on insured to be bound by report which incorrectly stated EQC assessed house as being under-cap, redaction of parts of evidence due to privilege claims, acted in an arrogant manner; - (10) whether settlement delayed -

HELD: declaration made that insured's house beyond economic repair in terms of policy - to be regarded as rebuild - maximum amount payable by insurer was $1.62M - cost insured would notionally incur in rebuilding their existing house at property to same condition and to same extent as when new - insurer to pay insured temporary accommodation costs not exceeding $25,000 contractual limit - $5,000 general damages awarded for breach of insurer's duty of good faith - award of exemplary damages not appropriate - no award of interest as no submissions made - costs reserved - (1) repair strategy not commonly used for steep hillside residential sites at time of damage - did not comply with policy obligations; - (2) proposed repair uneconomic due to uncertainty regarding true cost and outcome of repair strategy; - (3) no election to cash settle - no evidence of election in Dec 2011 - insurer's reservation of rights in Dec 2013 email negated any inference formal election made; - (4) exemplary damages claim dismissed - not available in context of contractual breach in NZ - insurer's conduct did not met requisite standard in tort; - (5) insurer's duty of good faith implied in every insurance contract; - (6) general damages not justified on basis loss was foreseeable as consequence of insurer's breach of contract - Bloor v IAG New Zealand and Edwards v AA Mutual Insurance Co distinguished; - (7) withholding report which recommended rebuild breached insurer's full and continuing disclosure obligation - nominal $5,000 damages awarded for breach as report extremely short, contradicted by another report received at same time and made little difference to outcome; - (8) no breach of good faith - insurer criticised for failure to respond in sympathetic and real manner - not reasonably foreseeable in policy for insurer to compensate health and well-being of occupants; - (9) duty of good faith not breached - cannot fairly be said there was reversal of insurer's position from rebuild to repair - insurer incorrect to state parties agreed to be bound by report recommending repair but there was no unfair pressure on insured to be bound by report - insurer's inaccurate statement

	house was under EQC cap an innocent mistake - insurer acted professionally; - (10) no unreasonable delay - plaintiffs unable to show on balance of probabilities insurer caused unreasonable delay to extent insurer liable for award of general damages based on delay - insured at least partly responsible for prolonged claim process
WORDS CONS/DEF	"commonly used"
CASES CITED	Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28, [1998] 1 WLR 896, [1998] 1 All ER 98, [1998] 1 BCLC 531 ; Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444, (2010) 9 NZBLC 102,874, [2010] NZCCLR 23 ; Trustees Executors Ltd v QBE Insurance (International) Ltd [2010] NZCA 608 ; Firm PI Ltd v Zurich Australian Insurance Ltd (t/a Zurich New Zealand) [2014] NZSC 147, [2015] 1 NZLR 432, (2014) 10 NZBLC 99-716, (2014) 18 ANZ Insurance Cases 62-044 ; Turvey Trustee Ltd v Southern Response Earthquake Services [2012] NZHC 3344, (2013) 14 ANZ Insurance Cases 61-965, [2013] 1 Lloyd's Rep IR 552 ; O'Loughlin v Tower Insurance Ltd [2013] NZHC 670, [2013] 3 NZLR 275 (extract), (2013) 17 ANZ Insurance Cases 61-966, [2013] 1 Lloyd's Rep IR 458 ; Rout v Southern Response Earthquake Services Ltd [2013] NZHC 3262 ; Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; C & S Kelly Properties Ltd v Earthquake Commission [2015] NZHC 1690 ; Parkin v Vero Insurance Ltd [2015] NZHC 1675 ; Ludgate Insurance Company Ltd v Citibank NZ [1998] Lloyd's Rep IR 221 ; Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd [2000] WASCA 102 ; Topline International Ltd v Cellular Improvements Ltd (HC, Auckland, CP 144-SW02, 17 March 2003, Venning J) ; Domenico Trustee Ltd v Tower Insurance Ltd [2015] NZHC 981 ; Skyward Aviation 2008 Ltd v Tower Insurance Ltd [2014] 2 NZLR 713, (2014) 18 ANZ Insurance Cases 62-021, [2014] Lloyd's Rep IR 565 ; Paper Reclaim Ltd v Aotearoa International Ltd [2006] 3 NZLR 188, (2006) 11 TCLR 544 ; Taylor v Beere [1982] 1 NZLR 81 ; Couch v Attorney-General (No 2) [2010] NZSC 27, [2010] 3 NZLR 149 ; Bloor v IAG New Zealand Ltd (2010) 16 ANZ Insurance Cases 61-845 ; Edwards v AA Mutual Insurance Co (1985) 3 ANZ Insurance Cases 60-668 ; State Insurance Ltd v Cedenco Food Ltd (CA 216-97, 6 August 1998) ; Pegasus Group Ltd v QBE Insurance (International) Ltd (HC, Auckland, CIV-2006-404-006941, 1 December 2009, Winkelmann J) ; State Insurance General Manager v McHale [1992] 2 NZLR 399
OTHER SOURCES	The Chambers Dictionary (11th ed, 2008) ; Robert Merkin and Chris Nicoll, Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at [4.8(4)], [8.5.2(2)] ; Paul Michalik and Chris Boys, Insurance Claims in

	New Zealand (LexisNexis, Wellington 2015) at 8.5
REPRESENTATION	PF Whiteside QC, HT Shaw, MC Harris, ATB Joseph
PAGES	62 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Costs decision, Young v Tower Insurance Ltd [2016] NZHC 2029

NAME	Jarden v Lumley General Insurance (NZ) Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001332
JUDG DATE	24 November 2016
CITATION	[2016] NZHC 2820
FULL TEXT	PDF judgment
PARTIES	David John Jarden, Joanne Jarden (Plaintiffs), Lumley General Insurance (NZ) Ltd (Defendant)
NOTE	High Court Earthquake list
SUBJECT	COSTS - successful application by insurer for increased costs - insured's home damaged in Canterbury earthquakes - insurer denied any liability to insured on basis cost of repairs were under EQC's statutory cap - Jul 2013 insured filed proceedings against insurer and EQC - sought declaration that insurer liable for up to $850,088 to remediate damage - sought further $51,000 from insurer for stress and general damages on basis insurer breached policy obligations by refusing to settle claims - Aug 2014 filed amended statement of claim seeking $659,653 damages against insurer - Feb 2015 trial commenced - insured settled with EQC at statutory cap - on second day of trial insured filed second amended statement of claim - sought $969,579 judgment against insurer or declaration of liability up to that sum - HC held most damage identified by insured was not earthquake damage - declaration made insurer's liability limited to cost of lounge floor and brick repairs - HC imposed 10 percent contingency - repairs unlikely to exceed $60,000 - insured only received better outcome at trial than was accepted by insurer before trial in relation to $17,701 lounge floor damage - general damages claim dismissed - CA upheld HC decision in all respects save one relating to breakdown of sum received from EQC - insured took claim for nearly $1M on manifestly inadequate evidence - intent on achieving rebuild of all or substantial part of house - insured received advice from insurer's independent professional advisers and their own advisers that claims were unsupportable -

	elected to press on with their claims - (1) who was successful party; - (2) whether insurer entitled to increased costs pursuant to R14.6 as insured pursued arguments that lacked merit and acted frivolously in continuing proceedings; - obiter: arguable that responsibility for decisions which led to insured's course of conduct may lie with insured's legal advisors - responsibility for way claim conducted may also lie with advisors - if so it was for insured to take such steps as may be open to them - **HELD**: insurer awarded 2B costs with 25 percent uplift, plus disbursements including witness expenses - (1) insurer was successful party - insured lost by far greater part of claim brought - imposition of contingency not material to overall outcome of case; - (2) increased costs justified - upon receiving expert advice their claim was unsupportable, insured should have scaled down claim - insured must take responsibility for actions of those who represented them
	INSURANCE
STATUTES	High Court Rules R14.6
CASES CITED	Jarden v Lumley General Insurance (NZ) Ltd [2015] NZHC 1427, (2015) 18 ANZ Insurance Cases 62-077 ; Jarden v Lumley General Insurance (NZ) Ltd [2016] NZCA 193, (2016) 19 ANZ Insurance Cases 62-104 ; Driessen v Earthquake Commission [2016] NZHC 1048 ; Widlake v BAA Ltd [2009] EWCA Civ 1256, [2010] 3 Costs LR 353, [2010] CP Rep 13 ; Fox v Foundation Piling Ltd [2011] EWCA Civ 790, [2011] 6 Costs LR 961, [2011] CP Rep 41 ; Hall v Stone [2007] EWCA Civ 1354, [2008] 3 Costs LR 450 ; Ritter v Godfrey [1920] 2 KB 47
REPRESENTATION	A Ferguson, J Moss, PJL Hunt, KJ Rowe
PAGES	13 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Substantive decision, CA judgment

NAME	Bligh v Earthquake Commission
JUDGE(S)	Clark J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001333
JUDG DATE	2 November 2016
CITATION	[2016] NZHC 2619
FULL TEXT	PDF judgment

PARTIES	Derek Ricky Bligh (Plaintiff), Earthquake Commission (First Defendant), IAG New Zealand Ltd (Second Defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application for dismissal of proceeding - hearing was set down for 2 week trial in October 2016 in relation to B's claim over earthquake damage to his home - B's litigation funder terminated its agreement with B - B's solicitor sought leave to withdraw - B did not attend the hearing despite counsel's advice that he must - **HELD**: proceeding has been on foot since 2013 - adjournment is not warranted - defendants are entitled to certainty - B's counsel given leave to withdraw - proceeding dismissed - defendants entitled to judgment
STATUTES	Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 R4.2.1, R10.8, R10.9
CASES CITED	Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91
REPRESENTATION	AJD Ferguson, JS Morriss, NS Wood, JW Upson, PM Smith, SJ Connolly
PAGES	6 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Bligh v Earthquake Commission [2017] NZHC 995

NAME	Ramage v Earthquake Commission
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001302
JUDG DATE	30 September 2016
CITATION	[2016] NZHC 2327
FULL TEXT	PDF judgment
PARTIES	John Ramage and Mary Ann Ramage (Plaintiff), Earthquake Commission (First Defendant), Southern Response Earthquake Services Ltd (Second Defendant)
NOTE	High Court Earthquake List ; Appendix 1 p
SUBJECT	COSTS - successful claim for costs on discontinuance - earthquake damage proceedings - plaintiffs' home damaged in Canterbury earthquakes - damage claims accepted by first defendant (EQC) and second defendant (insurer) - EQC contended repairs were under $100,000 statutory cap - insurer contended it had no liability except for EQC out of scope external works - plaintiffs filed proceedings seeking $113,850 from EQC, $676,936 plus $50,000 general damages from insurer - plaintiffs did not make formal claim to insurer on basis

	damage was over cap until shortly before commencement of proceedings - insurer unable to assess merits of over cap claim prior to commencement of proceedings - insurer filed statement of defence acknowledging liability for EC out of scope works but denying liability to remediate house damage - insurer inspected damaged house - internally concluded remediation cost was over cap but did not advise plaintiffs - externally conveyed claim was under cap - Court concluded this was litigation strategy - EQC then conceded repairs were over statutory cap - insurer acknowledged claim was over cap two years after its own assessment had reached that conclusion - proceedings against EQC discontinued - insurer accepted liability for all amounts exceeding EQC payment - amount disputed - Apr 16 mediation - plaintiffs accepted insurer's offer to pay $205,000 - agreed costs and disbursements to be fixed by Court - EQC paid $32,678 costs, 50 percent of reasonable 2B costs and disbursements - whether plaintiffs entitled to costs where proceedings had been discontinued by agreement - whether one of the parties had clearly been successful or had acted unreasonably **HELD**: insurer to pay costs of $6,094.25 and disbursements of $10,593.01 (25 per cent) - total sum of $16,687.26 - schedule of costs and disbursements annexed forms part of judgment - plaintiffs awarded further $1,673 costs on present application - both parties achieved measure of success - neither capitulated in their approaches - costs awarded due to insurer's unreasonable conduct up to when EQC accepted claim was over cap - once insurer's assessment showed claim was over cap it was unreasonable for insurer to say nothing to plaintiffs and simply accept EQC's position - extent of costs award mitigated by fact that once EQC accepted claim was over cap insurer moved swiftly to negotiate settlement
	INSURANCE
STATUTES	High Court Rules R14.2(g), R14.3, R15.23
CASES CITED	Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411 ; Kroma Colour Prints Ltd v Tridonicatco New Zealand Ltd [2008] NZCA 150, (2008) 18 PRNZ 973 ; Powell v Hally Labels Ltd [2014] NZCA 572 ; Uttinger v Basecity New Zealand Ltd [2008] NZCA 330, (2008) 19 PRNZ 54 ; Zygadlo v Earthquake Commission [2016] NZHC 1699 ; Driessen v Earthquake Commission [2016] NZHC 1048; Littlejohn v Southern Response Earthquake Services Ltd [2013] NZHC 1072 ; Thomson v Mossman Council [1999] NSWLEC 86 ; Edwards Madigan Torzillo Briggs Pty Ltd v Stack [2003] NSWCA 302 ; Aussie Red Equipment Pty Ltd v Antsent Pty Ltd [2001] FCA 1641 ; Jarden v Earthquake Commission [2015] NZHC 204
OTHER SOURCES	McGechan on Procedure (online looseleaf ed, Brookers) at [HRPt15.23.01] ; GE Dal Pont, Law of Costs (3rd ed, LexisNexis, Australia, 2013) at [14.64]

REPRESENTATION	AJD Ferguson, JS Morriss, BRD Cuff, SK Swinerd
PAGES	19 p
LOCATION	New Zealand Law Society Library

NAME	Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000530
JUDG DATE	20 September 2016
CITATION	[2016] NZHC 2224
FULL TEXT	PDF judgment
PARTIES	The Southern Response Unresolved Claims Group an incorporated body of persons suing by their representative Cameron James Preston (Plaintiff), Southern Response Earthquake Services Ltd (Defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for leave to be joined as interveners - plaintiff group applied under R4.24 for leave to bring representative action against defendant insurer - entered litigation funding agreement - defendant opposed R4.24 application on grounds including that plaintiff group members did not receive required disclosure under Credit Contracts and Consumer Finance Act 2003 (CCCFA) when entering funding agreement - two former members of plaintiff group (interveners) applied for leave to be joined as interveners - contended determination of whether CCCFA applied to funding agreement and whether its requirements were met directly affected their rights - plaintiff opposed intervention - argued interveners had no legitimate interest as they had elected to no longer be part of plaintiff group seeking leave to proceed with representative action - as interveners had chosen to leave plaintiff group highly improper for them to be able to intervene in leave application - CCCFA issue was factually and legally complex - plaintiff's leave application allocated one day - whether to grant interveners leave to be joined to proceeding - **HELD**: application dismissed - no real prospect Court would finally determine CCCFA issue when it determined R4.24 leave application - not appropriate for interveners to be joined in present proceeding - interveners would not assist Court - interveners' rights not directly or indirectly affected by R4.24 leave application - not prevented from arguing in different proceedings for definitive

	decision on CCCFA issue - costs reserved
STATUTES	Credit Contracts and Consumer Finance Act 2003 - High Court Rules R4.24, R4.56,
CASES CITED	Capital + Merchant Finance Ltd (in rec, in liq) v Perpetual Trust Ltd [2014] NZHC 3205, [2015] NZAR 228 ; Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331, [2010] NZCCLR 35, (2009) 20 PRNZ 215
REPRESENTATION	MS Smith, DJ Friar, DA Webb
PAGES	7 p
LOCATION	New Zealand Law Society Library

NAME	Young v Tower Insurance Ltd
JUDGE(S)	Gendall J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000222
JUDG DATE	30 August 2016
CITATION	[2016] NZHC 2029
FULL TEXT	PDF judgment
REPORTED	(2016) 23 PRNZ 702
PARTIES	Gregory Peter Young as trustee of McAra Yong Trust and Malley and Co Trustees Ltd as trustee of McAra Young Trust (plaintiffs), Tower Insurance Ltd (defendant)
NOTE	Appendix 4 p ; High Court Earthquake List
SUBJECT	EVIDENCE - partially successful application against admissibility of reply brief of evidence - whether party could give expert evidence under s25(1) or evidence of his opinion under s24 Evidence Act 2006 (Act) - insured qualified architect - insured owned multi-level, hillside home damaged in Canterbury earthquake sequence of 2010 and 2011- designed house, involved in construction and lived in house since built including after earthquakes - insured's reply brief comprised 60 pages - defendant challenged admissibility of reply brief on basis it contained inadmissible hearsay, inadmissible opinion evidence, argument, material in nature of submission, unsupported conclusory statements - contended insured attempted to qualify himself as an expert in proceeding - whether Y could give evidence as expert - whether Y could give evidence of opinion where inference and fact were not separable - **HELD**: insured could not give expert opinion evidence in terms of s25(1) as he lacked impartiality - entitled to give evidence as to what he saw by way of

	damage to his home - insured's professional expertise enabled him to express an opinion as to how and why that damage occurred under s24 - able to state an opinion as to what was required to remedy damage - to limited extent Court accepted submissions that evidence might be seen as opinion evidence - where insured's perceptions and statement of facts were conclusions in themselves or where mixture of inference and fact could not be separated - outstanding objections from insurer considered - where objection upheld that part of evidence to be removed as inadmissible - paragraphs to be removed detailed in schedule attached to judgment
	INSURANCE
STATUTES	Evidence Act 2006 s24, s25, s25(1), s26(2)
OTHER SOURCES	Richard Mahoney and others, The Evidence Act 2006: Act and Analysis (3rd ed, Brookers, Wellington, 2014) at [EV24.02]
REPRESENTATION	PF Whiteside QC, HT Shaw, MC Harris, ATB Joseph
PAGES	9 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Substantive decision, Costs decision

NAME	Quake Outcasts v Minister for Canterbury Earthquake Recovery
JUDGE(S)	Nation J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000050
JUDG DATE	22 August 2016
CITATION	[2016] NZHC 1959
FULL TEXT	PDF judgment
PARTIES	Quake Outcasts (Applicants), The Minister for Canterbury Earthquake Recovery (First Respondent), The Chief Executive, Canterbury Earthquake Recovery Authority (Second Respondent)
NOTE	High Court Earthquake List
SUBJECT	JUDICIAL REVIEW - unsuccessful judicial review application - offers to purchase uninsured residential properties and uninsurable bare land - Canterbury earthquakes 2010 and 2011 - zoning of damaged land authorised by Cabinet Committee - properties where repair considered likely to be prolonged and uneconomic "red zoned" - Crown purchase offers based on differential treatment between insured and uninsured or uninsurable properties - Sept 2012 decision by

	Minister and Chief Executive, CERA - Crown offers to purchase red zoned properties to be based on 2007 rating valuations - offers were: 50 per cent land value with 100 per cent improvement value for insured properties; 50 per cent land value for vacant land; 50 per cent land value but no payment for improvements on uninsured properties (50 per cent offers) - Supreme Court (SC) ordered 50 per cent offers were not lawfully made - SC directed Minister and Chief Executive to reconsider decisions in light of SC judgment (13 Mar 2015) - Jul 2015 new Crown offers made through Recovery Plan based on 2007/2008 rating valuations (decision) - purchase offers of 100 per cent land and improvements value for insured properties; 100 per cent land value for bare land; 100 per cent land value but no payment for improvements for uninsured properties - Court discussed extent to which SC views bound Minister in his decision and Court in determining issues in these proceedings - Court noted majority decision of SC uncontested - issues: whether Minister's decision was lawful - whether insurance status of properties relevant consideration in deciding Crown purchase offers - whether decision was reasonable having regard to Minister's obligations to respond to SC judgment and act within his powers under Canterbury Earthquake Recovery Act 2011 - **HELD**: judicial review application declined - neither Minister nor Chief Executive had acted unlawfully - decision reasonable - not established that relevant requirements of fairness were not met or that decision was not one that could reasonably have been made in exercising powers conferred by Parliament - Minister and Chief Executive entitled to take insurance status into account in deciding whether to make an offer for uninsured land - insurance status relevant - SC deliberately refrained from giving clear directions as to terms of new offers - no definite view given as to reasonableness or relevance of Minister's reasons for Sept 2012 decision - Minister had due regard to comments made by SC majority as to matters which could properly be taken into account - majority's comments as to merit of Minister's reasons for 50 per cent offers were binding on Minister and Court only to extent they determined with certainty issues on all fours with issues between the same parties in these proceedings - conclusions of SC had to be sufficiently final and certain to be binding - views expressed by majority as to Minister's reasons were not of that nature - proper regard had been given to fact that lack of insurance may not have been consequence of choice - due regard given to SC majority's discussion of moral hazard argument in increasing offer for uninsurable properties - costs memoranda invited
	NATURAL DISASTERS
STATUTES	Canterbury Earthquake Recovery Act 2011 s3, s6, s10, s10(1), s10(2), s19(2), S21(2), s53 ; Greater Christchurch Regeneration Act 2016 s14(4), s21 ;

	Judicature Amendment Act 1972 s4(5), s4(5)(b), s4(5B) ; New Zealand Bill of Rights Act 1990
CASES CITED	Quake Outcasts v Minister for Canterbury Earthquake Recovery [2015] NZSC 27, [2016] 1 NZLR 1 ; Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority [2013] NZHC 2173, [2014] 2 NZLR 54, (2013) 7 NZ ConvC 96-005 ; Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd [2013] NZCA 588, [2014] 2 NZLR 587 ; Quake Outcasts v Minister for Canterbury Earthquake Recovery [2014] NZSC 51 ; CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 ; R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed & Small Businesses Ltd [1982] AC 617, [1981] 2 WLR 722, [1981] 2 All ER 93 ; Petrocorp Exploration Ltd v Minister of Energy [1991] 1 NZLR 1 ; Whangamata Marina Society Inc v Attorney-General (2006) 18 PRNZ 565 ; Thompson v Treaty of Waitangi Fisheries Commission [2005] 2 NZLR 9 ; B v Commissioner of Inland Revenue (CIR) [2004] 2 NZLR 86, (2004) 21 NZTC 18,404 ; Diagnostic Medlab Ltd v Auckland District Health Board [2007] 2 NZLR 832 (HC) (extract) ; Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680, (1947) 63 TLR 623 ; Blackadder v Minister of Forests & Energy (HC, Greymouth, A 22-85, 12 October 1987, Tipping J) ; Secretary of State for Education & Science v Tameside Metropolitan Borough Council [1977] AC 1014, [1976] 3 WLR 641, [1976] 3 All ER 665 ; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935 ; R v Secretary of State for the Environment; ex parte Nottinghamshire County Council [1986] AC 240, [1986] 2 WLR 1, [1986] 1 All ER 199 ; Puhlhofer & Anor v Hillingdon London Borough Council [1986] AC 484, [1986] 2 WLR 259, [1986] 1 All ER 467 ; Van Gorkom v Attorney-General [1978] 2 NZLR 387 (CA) ; NZI Financial Corp Ltd v New Zealand Kiwifruit Authority [1986] 1 NZLR 159 (HC) ; New Zealand Association for Migration & Investments Inc v Attorney-General [2006] NZAR 45 (HC) (extract) ; Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd [1994] 2 NZLR 641, [1994] MCLR 370 ; New Zealand Fishing Association v Ministry of Agriculture and Fisheries [1988] 1 NZLR 544 (CA) ; Canterbury Regional Council v Independent Fisheries Ltd [2012] NZCA 601, [2013] 2 NZLR 57 ; Willers v Joyce (No 2) [2016] UKSC 44, [2018] AC 843, [2016] 3 WLR 534, [2017] 2 All ER 383 ; Joseph Lynch Land Co Ltd v Lynch [1995] 1 NZLR 37, (1994) 7 PRNZ 605 ; Fiordland Venison Ltd v Ministry of Agriculture & Fisheries [1978] 2 NZLR 341 (CA) ; Kim v Minister of Justice [2016] NZHC 1490. [2016] 3 NZLR 425 ; Bushell v Secretary of State for the Environment [1981] AC 75, [1980] 3 WLR 22, [1980] 2 All ER 608, (1980) 4 P&CR 51 ; Waitakere City Council v

	Lovelock [1997] 2 NZLR 385, [1997] NZAR 492 (CA) ; Minister of Energy v Petrocorp Exploration Ltd [1989] 1 NZLR 348, (1989) 2 PRNZ 192, (1989) 1 NZPC 359
OTHER SOURCES	HWR Wade and CF Forsyth (eds) Administrative Law (11th ed, Oxford University Press, Oxford 2014) at 26 ; PA Joseph, Constitutional and Administrative Law in New Zealand (4th ed, Thomson Reuters, Wellington, 2014) at 1004, n 66, 1005 ; Gerry Brownlee, Report on Decision Made in Approving the Residential Red Zone Offer Recovery Plan (27 July 2015) ; Laws of New Zealand, Courts (online ed) at [37] ; Canterbury Earthquake Recovery Authority, Authority Residential Red Zone Offer Recovery Plan: Preliminary Draft (May 2015) ; Canterbury Earthquake Recovery Authority, Residential Red Zone Offer Recovery Plan: Draft (June 2015) ; Chief Executive Canterbury Earthquake Recovery Authority, Briefing to the Minister, Draft Final Residential Red Zone Recovery Plan: Quantum and Construct of New Offers (15 July 2015)
REPRESENTATION	FMR Cooke QC, LE Bain, KG Stephen, PH Higbee
PAGES	55 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	Quake Outcasts v Minister for Canterbury Earthquake Recovery [2016] NZSC 166, Quake Outcasts v Minister for Canterbury Earthquake Recovery [2015] NZSC 27

NAME	Zygadlo v Earthquake Commission
JUDGE(S)	Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001363
JUDG DATE	26 July 2016
CITATION	[2016] NZHC 1699
FULL TEXT	PDF judgment
PARTIES	B Zygadlo, FA Zygadlo (Plaintiffs), Earthquake Commission (First Defendant) (discontinued), Southern Response Earthquake Services Ltd (Second Defendant)
NOTE	High Court Earthquake List
SUBJECT	COSTS - costs on discontinuance - earthquake damage proceedings - competing costs applications determined in favour of insured - insured's home damaged in Canterbury earthquakes in 2010 and 2011 - claims accepted by first defendant (EQC) and second defendant (insurer) in principle - both initially adopted position property repairable for an amount under Earthquake Commission Act

1993 statutory cap - insurer recognised claim was likely over cap - offered to assist insured by taking an assignment of insured's claim against EQC - insured declined - entered litigation funding agreement with Claims Resolution Services (CRS) - Aug 2013, commenced proceedings - Oct 2014, EQC formed view repairs were over cap - did not formally advise its position until 11 Aug 2015 - insured settled with EQC for $159,627 - 19 Aug 2015, discontinued proceedings against EQC - proceedings set down for five day trial beginning 7 Mar 2016 - insured sought $941,550 plus $50,000 general damages and interest - Oct 2015, insurer made $243,272 without prejudice offer - Mar 2016, $340,000 on top of amount paid out by EQC settlement reached - no allowance for general damages or interest - insured discontinued save as to costs - received $499,627 in total - Court recognised insurer's submission the following factors should be taken into account - insured had settled for less than a third of amount claimed - had failed to achieve a rebuild with upgraded foundation and abandoned two heads of claim - insured changed engineers four times - but noted it should be slow to downgrade a costs claim by plaintiffs who were working in an area of considerable uncertainty with differing expert views and needing to make very tough decisions about their home and future - (1) whether insured had been wholly or substantially unsuccessful in bringing and continuing proceedings; - (2) whether pursuant to R14.2(f) HCR insured should not be awarded costs because legal costs under litigation funding agreement; - (3) whether EQC should only be liable for 50 per cent costs incurred before 11 Aug 2015; - (4) whether presumption in R15.23 HCR applied so discontinuing insured not entitled to costs - (5)

HELD: - (1) plaintiffs justified in bringing proceedings to progress their claim - successful in bringing proceedings; - (2) no basis to deny costs - same costs principles applied however funded; - (3) EQC liable for two thirds of pre-Aug 2015 costs - insured incurred significant costs while EQC delayed, then failed to advise of its decision until Aug 2015; - (4) R15.23 HCR presumption did not apply - discontinuance was a function of plaintiffs agreeing to settlement on better terms than they would likely have received without bringing proceedings - EQC to pay $7,163 costs plus $5,047 disbursements - insurer to pay $16,326 costs plus $28,966 disbursements - plaintiff's conduct in unsatisfactory marshalling of expert position reflected in reduction in costs and disbursements, otherwise allowed - some experts' fees adjusted down as not reasonable and necessary to proceeding - defendants' costs applications dismissed - insurer's offer to assist insured by taking an assignment of EQC claim reflected in costs award

INSURANCE

	NATURAL DISASTERS
STATUTES	Earthquake Commission Act 1993 - High Court Rules R14.2(f), R14.7, R14.7(f), R14.7(g), R14.12, R15.23
CASES CITED	Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411; Driessen v Earthquake Commission [2016] NZHC 1048; Whiting v Earthquake Commission [2014] NZHC 1736 ; Van Limburg v Earthquake Commission [2014] NZHC 2764
REPRESENTATION	GDR Shand, JS Morriss, RM Dixon, CR Johnstone, RJ Hargreaves
PAGES	21 p
LOCATION	New Zealand Law Society Library

NAME	Emmons Developments New Zealand Ltd v Mitsui Sumitomo Insurance Co Ltd
JUDGE(S)	Associate Judge Matthews
COURT	High Court, Christchurch
FILE NUMBER	CIV-2016-409-000106
JUDG DATE	10 June 2016
CITATION	[2016] NZHC 1244
FULL TEXT	PDF judgment
PARTIES	Emmons Developments New Zealand Ltd (plaintiff), Mitsui Sumitomo Insurance Co Ltd (first defendant), Vero Insurance New Zealand Ltd (second defendant)
SUBJECT	COSTS - successful application by the defendants (the insurers) for costs following plaintiff's withdrawal of a summary judgment application - plaintiff was suing its insurers under the material damage section of a Business Package Policy issued by the insurers for the period 31 December 2010 to 31 December 2011 during which three buildings in Christchurch owned by the plaintiff were substantially damaged during the Christchurch earthquake sequence - plaintiff said that it had promptly withdrawn its application after receiving the insurers' notice of opposition and affidavits and that costs should be reserved and assessed after trial in accordance with the principle in NZI Bank Ltd v Philpott - onus on an applicant plaintiff for summary judgment is high and the time to assess whether the claim had real prospect of success was before the application was issued - fluidity of position between parties - plaintiff knew that its claim was under review - **HELD**: plaintiff was at fault in applying for summary judgment - to pay insurers costs for 4.3 days at the applicable daily rate plus disbursements and witnesses'

	expenses in the sum of $9,714 [PRELIM H/NOTE]
	SUMMARY JUDGMENT
STATUTES	High Court Rules R12.2, Schedule 3
CASES CITED	NZI Bank Ltd v Philpott [1990] 2 NZLR 403, (1990) 3 PRNZ 695 ; ML Paynter Ltd v Ben Candy Investments Ltd [1987] 1 NZLR 257, (1986) 1 PRNZ 180
REPRESENTATION	PJ Woods, L Taylor, G Macdonald, A Priaulx
PAGES	4 p
LOCATION	New Zealand Law Society Library

NAME	Driessen v Earthquake Commission
JUDGE(S)	Davidson J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001643
JUDG DATE	19 May 2016
CITATION	[2016] NZHC 1048
FULL TEXT	PDF judgment
PARTIES	HD Driessen (Plaintiff), The Earthquake Commission (First Defendant), Southern Response Earthquake Services Ltd (Second Defendant)
NOTE	Appendix 4 p, High Court Earthquake List
SUBJECT	COSTS - successful application for costs - costs on discontinuance - earthquake damage proceedings - plaintiff filed proceedings in Nov 2013 - settlement with insurer achieved immediately before trial set down for Feb 2016 - plaintiff's home damaged in Canterbury earthquakes - Aug 2012 Earthquake Commission (EQC) assessed its earthquake damage liability as $58,504 on basis most foundation damage was pre-existing - second defendant (insurer) initially asserted it was liable for $20,000 - Oct 2014, EQC changed its position that most foundation damage was pre-existing - May 2015, EQC acknowledged claim was over $100,000 statutory liability cap - Nov 2014, EQC settled for $153,422 excluding costs - settlement delayed until Nov while EQC and insurer agreed apportionment of liability - Dec 2015, insurer made $302,752 without prejudice settlement offer with no provision for costs or disbursements - 18 Feb 2016, insurer offered $321,120 - 26 Feb 2016, insurer offered $358,232 - 28 Feb, plaintiff accepted $358,232 offer - plaintiff was justified in issuing proceedings - settlements were less than plaintiff claimed but greatly exceeded defendants' initial positions - plaintiff's acceptance of insurer's settlement offer did not mean

	she abandoned her position there should have been a rebuild - settlement a sensible resolution for a homeowner bearing a disproportionate costs risk in litigation - Court rejected insurer's contention proceedings should not have been issued against it until the plaintiff settled with EQC - whether to order EQC to pay costs pursuant to R15.23 HCR - whether any costs award against insurer should be reduced under R14.7 HCR as it successfully resisted plaintiff's claim that new foundations were required, there was late acceptance of settlement offer due to plaintiff's late filing of geotechnical evidence - **HELD**: EQC to pay the plaintiff $9,006 costs plus $11,114 disbursements - insurer to pay plaintiff $24,421 costs plus $25,609 disbursements - delay in accepting insurer's settlement offer not relevant to quantum of costs - $7,500 deduction from costs payable by insurer as late filing of geotechnical evidence was an unnecessary late imposition on insurer - other large deductions sought by insurer rejected - costs awarded on 2B basis as issues were straightforward - reduced allowances for informal discovery and inspection - EQC liable for half of costs and disbursements up to point when its active participation ended in May 2015 - insurer liable for half of costs incurred up to May 2015 and balance of remainder
	INSURANCE
STATUTES	High Court Rules R14.2, R14.3, R14.4, R14.5, R14.6, R14.7, R14.8, R14.9, R14.10, R14.11, R14.12, R14.13, R14.14, R14.15, R14.16, R14.17, R15.23
CASES CITED	Body Corporate 97010 v Auckland City Council (2001) 15 PRNZ 372 ; Fox v Foundation Piling Ltd [2011] EWCA Civ 790, [2011] CP Rep 41, [2011] 6 Costs LR 961 ; Goodwin v Bennetts UK Ltd [2008] EWCA Civ 1658 ; Powell v Hally Labels Ltd [2014] NZCA 572 ; Earthquake Commission v Whiting [2015] NZCA 144, (2015) 23 PRNZ 411 ; Ryde v Earthquake Commission [2014] NZHC 2763 ; Whiting v The Earthquake Commission [2014] NZHC 1736 ; Van Limburg v Earthquake Commission [2014] NZHC 2764
REPRESENTATION	AJD Ferguson, N Evans, J Knight, AL Holloway, EB Sweet, KJ Clendon
PAGES	20 p
LOCATION	New Zealand Law Society Library

NAME	Gidden v IAG New Zealand Ltd
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch

FILE NUMBER	CIV-2015-409-000841
JUDG DATE	11 May 2016
CITATION	[2016] NZHC 948
FULL TEXT	PDF judgment
PARTIES	Francis Llewellyn Gidden, Barbara May Gidden (Plaintiffs), IAG New Zealand Ltd (Defendant)
NOTE	High Court Earthquake List
SUBJECT	SUMMARY JUDGMENT - successful application - declaration sought that insurer had entered into agreement that insured's house to be rebuilt - insured's property damaged in Canterbury earthquakes - operative policy was "State Home Comprehensive policy" - lengthy delay while insurer considered whether house was to be rebuilt or repaired - parties signed an agreement for conduct of multi-party meeting which provided that each party's representative would have full authority to settle matter and any settlement agreement would be binding - parties attended multi-party meeting and signed handwritten initial agreement - meeting facilitator typed agreement which parties signed - the Outcome Agreement (OA) - OA expressly provided that parties agreed to proceed in good faith and that principal issue to be resolved was "clarity around the proposal to rebuild the house" - insured elected cash settlement based on self-managed rebuild - insurer had indicated final cash settlement offer would follow soon - insurer's internal Cash Settlement Panel then decided to compare repair costs - insurer advised insured it was going to obtain repair estimates to determine whether a rebuild was economical - insurer claimed OA was an "agreement to agree, unenforceable as a contract and void for uncertainty" - insured claimed insurer was in breach of agreement by looking at repair costs rather than cash settlement on basis of a rebuild - claimed insurer unilaterally varied terms of OA - issues: whether OA was an "agreement to agree" - whether OA overrode contractual terms of policy - whether insured had right to elect to rebuild house in event of total destruction - whether rebuild could be at a different site - whether OA was subject to requirement (implied or express) of "fair and reasonable" costs (if costs of repair exceeded 80% of costs of rebuild) - whether objective criterion for assessment of fair and reasonable rebuild costs was by way of the application of quantity surveying principles - court noted close parallel with an agreement to buy and sell at a market price as - an objectively ascertainable price (Wellington City Council v Body Corporate 51702) - insured claimed interest for delay of settlement payment - **HELD**: OA was binding and enforceable - OA not an "agreement to agree" - agreement allowed determination of outcome by objective criteria - insured had right to elect to rebuild their home and subject to insurer's agreement, to rebuild

	their home at a different site - parties had expressly agreed that principal issue to be resolved was "clarity around the proposal to rebuild the house" - insurer had no arguable defence to insured's claim for judgment of $707,611 - but for Cash Settlement Panel's decision it was clear settlement offer for this amount would have been made to insured - no implied term regarding internal approval - insurer had not stipulated need for internal approval prior to entering into OA - BP Refinery (Westernport) Pty Ltd v Shire of Hastings applied - judgment for insured of $707,610.94 - interest of $37,416 based on current Judicature Act rate from date insurer ought to have offered insured cash settlement to date of judgment - insurer to pay costs on 2B basis with disbursements
	INSURANCE
	NATURAL DISASTERS
STATUTES	High Court Rules R12.2(1), R14.3(1), R14.5(2) - Judicature Act 1908 s87
CASES CITED	Haines v Carter [2001] 2 NZLR 167 ; Pemberton v Chappell [1987] 1 NZLR 1, (1986) 1 PRNZ 183, (1986) 1 NZPC 126 ; European Asian Bank AG v Punjab & Sind Bank (No 2) [1983] 1 WLR 642, [1983] 2 All ER 508, [1983] 1 Lloyd's Rep 611 ; Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd (1978) 29 ACTR 21 ; Attorney-General v Rakiura Holdings Ltd (1986) 1 PRNZ 12 ; Middleditch v New Zealand Hotel Investments Ltd (1992) 5 PRNZ 392 ; Jowada Holdings Ltd v Cullen Investments Ltd (CA 248-02, 5 June 2003) ; Bilbie Dymock Corporation Ltd v Patel (1987) 1 PRNZ 84, (1987) 1 NZPC 84 ; Rout v Southern Earthquake Services Ltd [2013] NZHC 3262 ; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, (1977) 16 ALR 363, (1977) 45 LGRA 62 ; Devonport Borough Council v Robbins [1979] 1 NZLR 1 ; Wellington City Council v Body Corporate 51702 (Wellington) [2002] 3 NZLR 486 ; Attorney-General v Barker Bros Ltd [1976] 2 NZLR 495 ; Money v Ven-Lu-Ree Ltd [1988] 2 NZLR 414 ; Money v Ven-Lu-Ree Ltd [1989] 3 NZLR 129 ; Worldwide NZ LLC v New Zealand Venue & Event Management Ltd [2014] NZSC 108, [2015] 1 NZLR 1, [2014] NZCCLR 27
OTHER SOURCES	J Burrows, J Finn and S Todd, Law of Contract in New Zealand (2nd ed, LexisNexis, Wellington, 2002) at [3.7.3]
REPRESENTATION	PJ Woods, IJ Law
PAGES	30 p
LOCATION	New Zealand Law Society Library

NAME	Body Corporate 78462 v IAG New Zealand
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2014-409-000124
JUDG DATE	1 March 2016
CITATION	[2016] NZHC 320
FULL TEXT	PDF judgment
PARTIES	Body Corporate 78462 (Plaintiff), IAG New Zealand (First Defendant), Earthquake Commission (Second Defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for joinder - R4.56 application to be joined as defendant - plaintiff was body corporate of residential apartments complex and tavern (complex) - 49 residential apartments and commercial building located in Sumner - applicant for joinder was unit owner of tavern constructed over basement - complex extensively damaged in Canterbury earthquakes - plaintiff argued complex including basement under tavern, required demolition and reconstruction - first defendant (insurer) disputed extent of reconstruction required, when damage had occurred and quantum generally - plaintiff filed proceedings for orders requiring insurer to reinstate complex or pay a sum equivalent to reinstatement - plaintiff also sued second defendant (EQC) regarding allocation of payments between events - applicant for joinder claimed basement was repairable and tavern need not be demolished - applicant obtained expert reports and costs estimates - provided to all parties - applicant could not bring separate proceedings against insurer as not party to insurance contracts - if joined as defendant, applicant's role would be akin to that of plaintiff pursuing a different outcome - may undermine plaintiff's claim - no evidence plaintiff failed to pursue insurance entitlements in accordance with Unit Titles Act 2010 (Act) - scheme of Act recognised individual unit holders may have to defer to majority decision - insurer had interest in ensuring Court determined damage and necessary repairs at lowest point appropriate in fact and law - applicant claimed prejudice in any future s74 Scheme application - could be regarded as a privy of plaintiff and estopped in any subsequent litigation from disputing or questioning judgment in current proceeding - Court noted plaintiff had expressly disavowed possibility that applicant would not be permitted to argue for different repair or reinstatement methodology in context of s74 scheme - discussion of Court's jurisdiction and discretion on joinder - Court assumed jurisdictional threshold was met but did not determine matter - if insurance

	monies were inadequate for plaintiff to effect reinstatement, unit plan could be cancelled - Court noted applicant's factual arguments already represented in proceeding - **HELD**: joinder application dismissed - neither just nor appropriate to join applicant as defendant - decision would not substantially affect advancement of reliable evidence by defendants that applicant able to produce - not issue estopped - Court would not impose an estoppel where party involved in litigation had expressly disavowed future reliance on estoppel - applicant to pay plaintiff 2B costs plus disbursements fixed by Registrar INSURANCE UNIT TITLES
STATUTES	Earthquake Commission Act 1993 - High Court Rules R4.56, R4.56(1)(b), R4.56(1)(b)(ii), R9.43, pt9 subpt5, Schedule 4 - Unit Titles Act 2010 s3b, s74, s88, s89, s90, s91, s92, s93, s94, s95, s96, s97, s98, s99, s100, s101, s102, s103, s104, s108(1), s108(2)(d), s113, s135(1), s137(1)(a), s183, s185(2)(b), pt4
CASES CITED	Newhaven Waldolf Management Ltd v Allen [2015] NZCA 204, [2015] NZAR 1173 ; Pegang Mining Co Ltd v Choong Sam [1969] UKPC 16, (1969) 2 MLJ 52 ; Gurtner v Circuit [1968] 2 QB 587, [1968] 2 WLR 668, [1968] 1 All ER 328 ; Byrne v Brown (1889) 22 QBD 657 ; McKendrick Glass Manufacturing Co Ltd v Wilkinson [1965] NZLR 717 ; Westfield Freezing Co Ltd v Sayer & Co (NZ) Ltd [1972] NZLR 137 (CA) ; Arklow Investments Ltd v Ngai Terangi Iwi Incorporated Society & Ors (CA 42-94, 1 June 1994) ; Beattie v Premier Events Group Ltd [2012] NZCA 257 ; Puredepth Ltd v NCP Trading Ltd & Anor [2010] NZCA 392 ; Capital + Merchant Finance Ltd (in rec, in liq) v Perpetual Trust Ltd [2014] NZHC 3205, [2015] NZAR 228
OTHER SOURCES	John Mitford, A Treatise on the Pleadings in Suits in the Court of Chancery (5th ed, V & R Stevens and GS Norton, London, 1847) at 190 ; McGechan on Procedure (online looseleaf ed, Brookers) at HR4.56.08, HR4.56.09, HCR4.56.10 ; Sims Court Practice (looseleaf ed, LexisNexis) at HCR4.56.7
REPRESENTATION	KJ Crossland, JS Langston, HC Matthews, AR Armstrong , NS Wood
PAGES	18 p
LOCATION	New Zealand Law Society Library

NAME	Southern Response Unresolved Claims Group v Southern Response Earthquake

	Services Ltd
JUDGE(S)	Mander J
COURT	High Court, Christchurch
FILE NUMBER	CIV-2015-409-000530
JUDG DATE	24 February 2016
CITATION	[2016] NZHC 245
FULL TEXT	PDF judgment
PARTIES	Southern Response Unresolved Claims Group suing by its representative Cameron James Preston (Plaintiff), Southern Response Earthquake Services Ltd (Defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - unsuccessful application for leave to bring representative action - plaintiff an unincorporated body (Group) comprised of 46 policy holders insured with defendant (insurer) - owners of residential properties damaged by Canterbury earthquakes - insured under the same or substantially similar full reinstatement policies with insurer - policy holders' insurance claims had been significantly delayed - various disputes with insurer - claims remained unsettled - statement of claim filed by Group's representative alleged insurer breached contractual obligations under insurance policy - breach of duty of good faith and policy holders' process rights - 39 issues raised - policy holders' circumstances differed significantly - Group sought to bring representative action on basis they shared common disputed issues concerning interpretation and application of policy contract - envisaged individual claims could be processed following resolution of generic issues - Group contended they could not afford to bring separate proceedings to resolve individual claims - representative action supported by litigation funder - Court noted that community of interest required by R4.24 was that persons had "the same interest in the subject matter of [the] proceeding" - this would be satisfied if there was a common interest in "the determination of some substantial issue of law or fact" - whether members had sufficient same interest in subject matter of proceeding for the purpose of R4.24 - **HELD**: leave application dismissed - threshold for commonality under R4.24 not met - fundamental requirement to clearly identify predominant central issues common to the Group's membership to justify proceeding under R 4.24 remained - further analysis or clarification of which discrete issues of interpretation and application of policy common to each member's claim and how resolution of those issues would advance that member's current dispute required - premature to proceed until Group had identified central issues common to its membership - given present diverse nature of litigation Court could not recognise Group as

	presently constituted, as having the same interest required under R4.24 - this ruling without prejudice to any modified application based on a reformulation of proposed proceeding which met concerns expressed in this judgment - costs reserved
	INSURANCE
	NATURAL DISASTERS
STATUTES	Corporation Regulations 2001 (Cth) - High Court Rules R1.2, R4.25, R10.15 - Limitation Act 1950
CASES CITED	Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 ; Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331, [2010] NZCCLR 35, (2009) 20 PRNZ 215 ; RJ Flowers Ltd v Burns [1987] 1 NZLR 260 ; Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 ; Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398, (1995) 127 ALR 76, (1995) 69 ALJR 206 ; Saxmere Company Ltd v The Wool Board Disestablishment Company Ltd (HC, Wellington, CIV-2003-485-002724, 6 December 2005, Miller J) ; Beggs v Attorney-General (2006) 18 PRNZ 214 ; Southern Response Earthquake Services Ltd v Avonside Holdings Ltd [2015] NZSC 110, [2017] 1 NZLR 141, (2015) 18 ANZ Insurance Cases 62-079, [2016] Lloyd's Rep IR 210 ; Medical Assurance Society of New Zealand Ltd v East [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074, [2016] Lloyd's Rep IR 118 ; Cooper v ANZ Bank New Zealand Ltd [2013] NZHC 2827 ; Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91
REPRESENTATION	FMR Cooke QC, MS Smith, N shah, MD O'Brien QC, DJ Friar, M Venning
PAGES	34 p
LOCATION	New Zealand Law Society Library
RELATED DOCS	CA judgment, Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 3105

NAME	Camelot Hotel Ltd v Square Holdings Ltd
JUDGE(S)	Associate Judge Osborne
COURT	High Court, Christchurch
FILE NUMBER	CIV-2013-409-001352
JUDG DATE	4 February 2016
CITATION	[2016] NZHC 82

FULL TEXT	PDF judgment
REPORTED	(2015) 23 PRNZ 121
PARTIES	Camelot Hotel Ltd (Plaintiff), Square Holdings Ltd (First Defendant), Minister for Canterbury Earthquake Recovery (Second Defendant)
NOTE	High Court Earthquake List
SUBJECT	CIVIL PROCEDURE - successful application by first defendant for security for costs - plaintiff operated a business at premises leased from first defendant - premises damaged in Canterbury earthquakes -premises unoccupied - plaintiff had ceased trading in Feb 2011 - May 2012, plaintiff disposed of chattels - Nov 2014, Crown compulsory acquired the property under Canterbury Earthquake Recovery Act 2011 - plaintiff sued first defendant for breach of lease obligations to repair and insure the building - first defendant became aware liquidation proceedings had commenced against plaintiff in Mar 2015 - Aug 2011, first defendant applied for security - plaintiff accepted threshold for ordering security under R5.45(1)(b) HCR was established - liquidation proceedings settled - plaintiff's director and shareholder (S) funding its litigation - S claimed to own approximately USD 20M assets - most in US - no evidence a substantial security order would prevent plaintiff from proceeding with litigation - S proposed to provide an undertaking to pay $50,000 costs if plaintiff was ordered to pay such sum - first defendant sought payment of secured sum into solicitor's trust account - likely to be at least three expert witnesses - no fee estimates from experts themselves - Court proceeded on general experience of past fees in comparable litigation - Court declined to follow Geddes v Brebner and Nikau Holdings Ltd v BNZ to the extent these cases might suggest plaintiff autonomy as to the type of security to be provided - whether first defendant's application should be regarded as significantly delayed as the likelihood of insolvency became obvious from Feb 2011 when plaintiff ceased trading - what form and quantum of security should plaintiff be ordered to provide - Court noted wording of r 5.45(3) required plaintiff to give, to the satisfaction of the Judge or Registrar, security for a particular sum **HELD**: plaintiff to provide $120,000 security, 75% of anticipated costs, disbursements and expert witness fees - security to be provided in two tranches of $60,000 by payment into plaintiff's solicitors' trust account on interest bearing deposit - first tranche due 26 Feb 2016, second tranche due 2 May 2016 - if either tranche was not paid when due, proceeding would be stayed save to extent that plaintiff (but not defendants) would still be required to complete any outstanding timetable obligations - first defendant's security application was pursued promptly once it became aware of specific circumstances indicating plaintiff might be insolvent - plaintiff's evidence fell short of establishing that a

	traditional form of security could not be offered or S's undertaking would inevitably result in prompt payment of any costs award - plaintiff to pay first defendant $8,751 costs and disbursements on this application COSTS
STATUTES	Canterbury Earthquake Recovery Act 2011 - High Court Rules R5.45, R5.45(1)(b), R5.45(3), R5.45(3)(a), R14.3, R14.5, R14.5(1) - High Court Rules R60, R263
CASES CITED	Jo v Johnston [2013] NZHC 552 ; Oceania Furniture Ltd v Debonaire Products Ltd (HC, Wellington, CIV-2008-485-001701, 24 April 2009, Clifford J) ; Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 ; Shalimar Supermarket Ltd v Toulis (HC, Wellington, CP 653-90, 15 May 1991, M Williams QC) ; Combined Logging Co Ltd v Crown Forestry Management Ltd (HC, Wanganui, CP 40-91, 30 September 1996, M Thomson) ; Nikau Holdings Ltd v Bank of New Zealand (BNZ) (1992) 5 PRNZ 430, (1992) 6 NZCLC 67,939, (1992) 1 NZPC 1017 ; Bell-Booth Group Ltd v Attorney-General (1986) 1 PRNZ 457, (1986) 3 NZCLC 99,639, (1986) 2 BCR 272
OTHER SOURCES	J Delany, Security for Costs (Law Book Company, Sydney, 1989) at 124-127, 174-175 ; McGechan on Procedure (online looseleaf ed, Thomson Reuters) at [HR5.45.08]
REPRESENTATION	SJ Caradus, LM Taylor, SE Rowe
PAGES	18 p
LOCATION	New Zealand Law Society Library