IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-1273
[2018] NZHC 56

BETWEEN	C & S KELLY PROPERTIES LIMITED Plaintiff
AND	EARTHQUAKE COMMISSION First Defendant
	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Second Defendant

Hearing:	21 December 2017 (On the Papers)
Counsel:	N R Campbell QC for the Plaintiff B A Scott and J Moran for the First Defendant C R Johnstone for the Second Defendant
Judgment:	07 February 2018

JUDGMENT OF MANDER J

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[1] The parties have made applications for costs based upon their respective claims of success in respect of this litigation. The defendants, the Earthquake Commission (EQC) and Southern Response Earthquake Services Limited (Southern Response), have additionally made an application for costs against the litigation funder, Claims Resolution Services Limited (CRS), and seek to resist the eligibility of the plaintiff, C & S Kelly Properties Limited (the Kellys), to receive costs as a result of its funding of the Kellys' proceedings. The costs issues arising from CRS's involvement in the litigation have been parked awaiting my determination of the ordinary assessment of costs as between the parties which is the subject of this judgment.

[2] The proceeding commenced with a five day hearing beginning on 29 September 2014. The plaintiff's evidence was not completed by the end of that week

and the trial resumed on 8 December for seven hearing days. Two days were taken for the presentation of submissions, commencing 3 March 2015, before judgment was delivered on 22 July.[1] After the Kellys elected to receive a monetary payment for the value of repair works, a quantum hearing occupied a further three and a half days, commencing 26 June 2017, with judgment delivered on 10 July 2017.[2]

[3] Because of the way the litigation unfolded, two discrete hearings were held which resulted in separate judgments being delivered by two different Judges. The issue of liability was determined by myself.[3] The subsequent quantum hearing was held before Faire J. A convenient summary of the background to the proceeding and Faire J's involvement is set out at the beginning of his judgment:

> **Background**
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> [1] The plaintiff company owns a home at 2B Vivian Street, Burwood, Christchurch. It was the home of the shareholders and directors Suzie and Cameron Kelly (the Kellys). They lived there until the 22 February 2011, the time of the second Christchurch earthquake. Southern Response Earthquake Services Limited (Southern Response) insured the Kellys' home. It was also insured by the Earthquake Commission (EQC) under the Earthquake Commission Act 1993 (the Act).
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> [2] The Kellys' home was damaged by the September 2010 and February 2011 Canterbury earthquakes. Disputes arose between the Kellys, EQC and Southern Response as to the extent of the earthquake damage and as to the appropriate scope and cost of reinstatement. There was also a dispute as to whether EQC was entitled to settle the Kellys' claim by undertaking reinstatement of the earthquake damage as opposed to making a payment.
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> [3] The Kellys commenced this proceeding. In it they sought a money judgment from both EQC and Southern Response. The proceeding was heard by Mander J who delivered a reserved judgment on 22 July 2015. He concluded that save for the cost of relevelling the floor the plaintiff is entitled to judgment for $53,768.50. He held that the dislevelment of the floor constituted earthquake damage for which EQC and potentially Southern Response were liable. He then established a formula with options to be exercised which were designed to conclude the remaining part of the case. No doubt that was on the understanding that he would be the Judge to conclude the matter.

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1 *C & S Kelly Properties Limited v Earthquake Commission* [2015] NZHC 1690.
2 *C & S Kelly Properties Limited v Earthquake Commission* [2017] NZHC 1583.
3 *C & S Kelly Properties Limited v Earthquake Commission* [2015] NZHC 1690.

> [4] A development occurred with a further earthquake in February 2016. That created a situation where his Honour for sound reasons determined that he must recuse himself from the completion of the issues requiring resolution in this proceeding.

[4] The outcome of the quantum hearing before Faire J was that he accepted the scope of works provided by EQC to remediate the contested earthquake damage and the cost of that repair in the sum of $73,084 (inclusive of a 10 per cent contingency). Faire J, at the conclusion of his judgment, set out the final result of the litigation:

> **Final judgment**
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> [159] Although it is not strictly part of the final result of my judgment, for the benefit of the parties I set out what I understand the position to be in the hope that agreement can be reached and a final judgment incorporating the results of both Mander J's judgment and my conclusion on the special question can be sealed.
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> [160] The position is summarised by Mr Scott as follows:
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> 1 The Kellys' house was deemed to be insured against natural disaster damage under the EQC Act for its "replacement value" to the amount of $115,000 (including GST) in respect of each of the 4 September 2010 and 22 February 2011.
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> 2 This amount is often colloquially referred to as the "EQC cap" for each natural disaster event. Once the "EQC cap" is exceeded, often referred to as "over-cap", liability for insurance monies payable over and above the "EQC cap" transfer to the private insurer under that police of insurance.
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> 3 The parties are agreed that the figure determined by this Court, once added to the Approved Scope of Works amount of $53,768.50 (incl GST), is to be apportioned between the two earthquake events as follows:
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> 3.1 12% to the 4 September 2010 earthquake; and
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> 3.2 88% to the 22 February 2011 earthquake.
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> [161] When $73,084 is added to the approved scope of works referred to in Mander J's judgment the total inclusive of GST becomes $126,852.50. $15,222.30 applies in respect of the 4 September 2010 earthquake and $111,630.20 applies in respect of the 22 February 2011 earthquake. The significance of this is that the monies payable do not exceed the EQC cap with the result that no monies are payable by [Southern Response].

[5] Because of the expiry of Faire J's temporary warrant shortly after he delivered his decision, he was not able to deal with the question of costs arising from that part of the litigation. As a result, it has fallen to me to determine costs across the entire proceeding.[4]

The parties' costs applications

[6] All three parties seek costs in relation to the substantive hearing, each claiming they were the successful party. EQC and Southern Response seek costs on the quantum hearing. Both the Kellys and EQC made various applications for costs in excess of scale and submissions regarding the correct categorisation of costs.

[7] Because the Kellys' claim was the subject of two hearings which necessarily involved two different Judges, the Kellys and EQC filed separate submissions on their respective positions regarding costs as they relate to the issues determined at each hearing. However, the overall result of the litigation must be the focus when determining which party, if any, should be liable to pay the other's costs. In making that assessment the primary principle is that the unsuccessful party should pay costs.[5]

The Kellys' application

[8] The Kellys seek costs against EQC and Southern Response in relation to the substantive hearing in respect of which, it submits, it was successful. They seek costs in the sum of $304,878 and disbursements of $110,440.99. The Kellys do not seek costs against EQC or Southern Response for steps associated with the quantum hearing.

[9] The Kellys submitted the central issue at trial was whether their house's floor dislevelment was the result of earthquake damage. Apart from two discrete areas of the dwelling, EQC and Southern Response disputed any material alteration to the floor levels was caused by the earthquakes. I found the floor dislevelment constituted earthquake damage.

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4 The plaintiff's objection to me determining the issue of costs arising from the quantum hearing was the subject of a separate ruling: *C & S Kelly v Earthquake Commission & Anor* HC Christchurch CIV-2013-409-1273, 21 December 2017.

5 High Court Rules 2016, r 14.2(a).

[10] The Kellys further submitted the defendants were unsuccessful in arguing they could not bring a private or monetary claim against EQC. I found the Kellys' monetary claim succeeded despite the absence of a challenge to EQC's election to repair. In the circumstances of this case, I considered it was appropriate to grant the Kellys the option of monetary relief in response to EQC's failure to make its election within a reasonable timeframe, and that its purported election to repair came too late and was therefore ineffective.

[11] The Kellys acknowledge they did not succeed in proving their claim that a Type 2A foundation was required. However, they submitted the award of $53,768.50, based upon the costed scope of works put forward by EQC for the uncontested earthquake damage to the house, and the further award for the foundation remediation, as determined by Faire J, of $73,084 (a total sum of $126,852.50), in the face of EQC's denial they were entitled to recover any monetary payment as a result of it having elected to repair the Kellys' house, renders them the successful party.

[12] In support of that proposition, Mr Shand on behalf of the Kellys referred to a settlement offer, made by the defendants shortly before the commencement of the September 2014 hearing, to pay $53,768.50 to settle the claim. This is identified by the Kellys as the best and only offer put forward by the defendants prior to the first hearing. Mr Shand submitted the defendants refused to participate in any mediation or settlement meeting "without onerous preconditions unsatisfactory" to the Kellys, and did not engage in any negotiation. For its part, the Kellys offered to settle the claim with EQC for $140,160, comprising a cap payment of $115,000 for the February 2011 earthquake event and $25,160 for damage incurred in the earlier September 2010 event. In the email to EQC it was explained the settlement offer was based upon a costing by Southern Response for a "jack and pack" repair of the piles of $185,072, apportioned between the two earthquake events.

[13] Mr Shand submitted the Kellys acted reasonably and sensibly in an attempt to resolve the dispute and were left with no option but to proceed to trial, based upon what he described in his written submissions as EQC and Southern Response's joint offer of $53,768.50.

[14] Mr Shand submitted EQC was liable for the entire amount of costs sought by the Kellys as the primary defendant in the proceeding. However, he submitted Southern Response "ran a joint case" together with EQC denying the earthquake damage had caused the floor dislevelment, and supported EQC in its stance the Kellys could not challenge EQC's election to repair the damage, and that no monetary judgment was obtainable. Mr Shand submitted Southern Response could have chosen not to involve itself in the issue of whether the foundations had suffered earthquake damage, reserving its position until it was determined whether the cost of the repairs were over the statutory cap. Having chosen to actively engage in that issue, upon which the Kellys succeeded, Mr Shand submitted Southern Response was liable to pay their costs.

[15] The Kellys contend that should costs be awarded in their favour they should be increased beyond scale because the allowances for various items are inadequate.[6] Further, that costs should be increased because of an unreasonable refusal on the part of EQC to accept a settlement offer.

[16] In response to EQC's application for costs, the Kellys emphasised that EQC in its supporting submissions ignored that it "walked away" from the position its experts had taken in the joint experts' report, that the damage to the floors and foundation was caused by the earthquakes. That change in position required the Kellys to prove the defects in the floor levels had been caused by the earthquake, and that it succeeded in doing so. The Kellys submitted this issue was the primary focus of the substantive hearing.

EQC's application for costs on the substantive hearing

[17] EQC maintains it is entitled to costs on the substantive hearing because, in its submission, "on any realistic assessment" it was the successful party. EQC sought scale costs in the sum of $92,106 and disbursements of $138,925.24. EQC

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[6] Claims were made that the maximum allowance for witness statement preparation under both Bands B and C were inadequate to prepare 18 witness statements and five in reply; 30 days were sought. Similarly, the maximum allowance for preparation of "issues, authorities, and bundles" was submitted to be inadequate under Band B, and 10 days were sought under Band C. A total of 30 days for hearing preparation was also sought beyond the respective three and five day allowances provided by Bands B and C.

submitted the Kellys failed on the ultimate question upon which its monetary claim was made, namely that the house essentially had to be rebuilt using a Type 2A foundation. Based on that allegation, the Kellys pleaded in their statement of claim they were entitled to recover the sum of $1,044,469.67.

[18] EQC submitted that in opening the Kellys candidly described their claim as being one of "all or nothing", based, as it was, on establishing that only a new Type 2A foundation system could remediate the earthquake damage to the house. Because the Kellys, on their own inadequate engineering evidence adduced at trial, failed to establish the need for this new foundation system, their monetary claim for the cost of that work failed.

[19] EQC acknowledged it did not succeed on every point en route to the Court's ultimate determination but submitted that, on a realistic assessment of the outcome of the proceeding, the Kellys' claim had failed and that it ultimately succeeded at trial. EQC's alternative scope of works for other earthquake damage ($53,768.50) was accepted by the Court and the parties were directed to implement the floor levelling strategy that had been agreed in the joint experts' report. It was noted the Kellys' engineering expert, Mr Rakovic, had agreed to that strategy but then inexplicably walked away after signing the joint report. EQC maintained the central issue of dispute between the parties, upon which it succeeded at trial, was the question of the appropriate remediation strategy. EQC submitted that, importantly, the additional amount it was required to pay as a result of the quantum hearing, over and above the repair work it had already scoped before the proceeding was issued, did not exceed the statutory cap on its liability (the statutory cap).

[20] In response to the Kellys' application for costs, EQC submitted the Kellys' success on a number of separate issues in isolation from whether those findings ultimately produced the result the Kellys' were seeking, namely the need for a Type 2A foundation at a substantially greater cost than the statutory cap, was disingenuous when all they had succeeded in achieving was a return to the joint experts' strategy to which EQC had earlier agreed.

[21] EQC contested the Kellys' claim they had tried to act reasonably to resolve the dispute, and in particular the effect of the September 2014 Calderbank offer, maintaining its only stipulation for negotiation was that it would not accept that a Type 2A foundation was required. Its stance in that respect was, it submitted, vindicated at trial. EQC also emphasised that the Kellys' offer was not made to EQC and to Southern Response but only to EQC alone. It was not premised on the basis the Kellys would settle against both defendants for the cost of relevelling based on a cost estimate by Southern Response, rather, it was submitted the sole purpose of the offer was to have EQC acknowledge the claim was over-cap in order to allow the Kellys to continue to pursue Southern Response for a Type 2A foundation rebuild.

[22] The proposal required EQC to enter into a confidential settlement under which it accepted the claim was over-cap and was for a greater amount than was ultimately recovered. EQC submitted it was reasonable for it to reject the offer having regard to the Court's subsequent finding which confirmed this was not an over-cap claim, let alone one which required the foundation to be completely replaced by a new structure.

[23] EQC rejected the submission that it refused to "meaningfully engage" with the Kellys regarding settlement. EQC accepted it was not prepared to negotiate on the basis that a foundation rebuild was required, but was prepared to negotiate on the basis that relevelling was needed. In that regard, it points to its conduct in continuing to try to settle the claim prior to the quantum hearing, which is an aspect to which I refer later in this judgment.

Southern Response's application for costs

[24] Southern Response seeks costs against the Kellys on the basis it was the successful party on the proceeding. That position is based upon the following propositions drawn from the Court's findings:

(a) the house and garage were economically repairable, and a new replacement Type 2A foundation or specific engineer-designed foundation was not required to reinstate the dwelling;

(b) the repairs as scoped and costed by EQC would repair the house and garage to the required standard of reinstatement under the Earthquake Commission Act 1993;

(c) the cost of the repair works under EQC's two scopes of works, accepted by the Court, is $126,852.50 including GST;

(d) that cost of repair does not exceed EQC's statutory liability, and payment in settlement of the Kellys' earthquake claims is not the responsibility of Southern Response;

(e) judgment has been entered for Southern Response on the Kellys' claim and it has no liability in respect of the claims made for earthquake damage, or for claims for external works outside the scope of EQC's statutory cover. The latter claims were settled separately in 2016.

[25] Southern Response submitted that it was "unquestionably" the successful party in this proceeding and no aspect of partial or mixed success arises as between itself and the Kellys. The Kellys achieved no positive outcome before the Court in respect of any aspect of its claim against Southern Response. As a result, Southern Response claims scale costs across the entire proceeding of $94,030.50, witness fees of $78,116.81, and disbursements of $784.06.

Analysis

[26] The question of who has succeeded in the litigation is a matter for the exercise of commonsense.[7] It requires consideration of which party won the primary contests of law or fact.[8] The need for a realistic assessment of the result has been emphasised in a number of cases. In *Fog v Frimley Estate Ltd* it was noted that:[9]

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7 *Bank of Credit and Commerce International SA v Ali (No 4)* [1999] 149 NLJ 1734.

8 *Pheonix Organics Ltd v RD2 International Ltd (No 2)* HC Auckland CIV-2005-404-005070, 21 December 2015.

9 *Fog v Frimley Estate Ltd (No 2)* [2016] NZHC 314.

> [3] The extent to which a litigant has succeeded must be viewed as a matter of substance, not form. It must be viewed through a realist's lens in "determining who in reality has been the successful party...".

And in *Lawrence v Glynbrook 2001 Ltd* the approach was explained in the following terms:[10]

> ... an assessment of which party was "successful" requires both a consideration of which party won the principal contests of law and fact and a realistic appraisal of the end result, rather than focussing on who initiated what step and the extent to which that step succeeded or failed.

[27] By reference to a number of decisions of cognate jurisdictions, the Kellys submitted that the Court can properly have regard to the fact that in many cases even the winner is likely to fail on some issues, and that it should be less ready to reflect that sort of failure in an eventual costs order, rather than the more fundamental failure by the opposing party to make an offer sufficient to meet the winner's true entitlement.[11] The Kellys submitted it is "undesirable" for a successful litigant to be deprived of a portion of its costs mainly because it did not succeed on all of the grounds or issues canvassed in the Court hearing.[12] However, I note that submission, particularly in the circumstances of the present case, is liable to cut both ways and begs the question as to who is the successful litigant who ought not be deprived of a portion of its costs.

[28] In the context of the present case, I consider Tipping J's observations, in *Packing In Ltd (in liq) v Chilcott*, are apposite:[13]

> [5] In a case such as the present, where in broad terms each party has had similar success, I do not consider it helpful to focus too closely on the question of which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all cost matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

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10 *Lawrence v Glynbrook 2001 Ltd* [2015] NZHC 1005 at [8], per Brown J.

11 *Budgen v Andrew Gardener Partnership* [2003] CP Rep 8 (CA) at [35]; *Goodwin v Bennetts UK Ltd* [2008] EWCA Civ 1658 at [13].

12 *Cretazzo v Lombardi* (1975) 13SASR 4 (SC) at 16.

13 *Packing In Ltd (in liq) v Chilcott* (2003) 16 PRNZ 869 (CA).

> [6] ... Success or failure in this context is better assessed by a realistic appraisal of the end result rather than by focussing on who initiated what step, and the extent to which that step succeeded or failed.

[29] The Kellys argued the prime issue at trial was whether floor dislevelment had been caused by earthquake damage to the foundations. They submitted this was the predominant focus of the hearing and took up the preponderance of the hearing time, submissions, and ultimately my judgment.

[30] Clearly, the issue of whether EQC was liable to remediate the floor dislevelment turned on whether, apart from the two discrete areas acknowledged by both defendants, there had been damage to the subfloor area as a result of the earthquakes. The Kellys were successful both on this factual issue and the legal issue upon which EQC contested their liability to pay the Kellys a monetary sum, with it having elected to repair the house rather than make a cash payment. Both EQC and Southern Response chose to take a different position from that taken by its experts in their joint report, that the house had suffered earthquake damage to its subfloor area. That may well have been as a result of the Kellys' expert having inexplicably resiled from the agreed repair strategy. Nonetheless, this is the position they took at trial and upon which they ultimately lost.

[31] However, the Kellys' pleaded claim was that the house was damaged effectively beyond economic repair. They formally claimed $1,044,469.67 based upon the need for a Type 2A foundation in order to repair the house to an "as new" condition. It was contended EQC was liable to pay $227,700, being the sum of two full cap payments relating to the September and February earthquake events, with Southern Response being liable for the balance.

[32] In opening at trial, the Kellys moderated their monetary claim and sought the sum of $590,995.48, although still based on the need for a Type 2A replacement foundation. Because of that stance, the Kellys continued to maintain the remediation costs exceeded the statutory cap. EQC's position that it did not would ultimately be vindicated. Judgment was entered after the substantive hearing for the undisputed cost of the balance of repair works in the sum of $53,786.50. The Kellys would receive a further sum of $73,084 for the value of relevelling works, based upon

EQC's scope of repairs which was accepted by Faire J. That outcome meant Southern Response had no liability.

[33] EQC, in defence of the Kellys' claim for costs against it, highlighted the way in which the Kellys' structural engineer, Mr Rakovic, on the same day he signed a joint report agreeing to a relevelling strategy filed with the Court, informed his instructing solicitor that it was "not worth the paper it is written on", and at trial continued to assert that a Type 2A foundation was the only possible solution. Mr Rakovic's evidence at trial was unsatisfactory. His evidence failed to establish the need for a Type 2A foundation. A considerable part of the Court's focus at trial concerned Mr Rakovic's thesis regarding the need for this type of foundation. His evidence was found to be flawed, and his conduct in having put his name to the joint experts' report only to have taken a contradictory stance when communicating with his instructing solicitor, at best, was unreasonable. That the Kellys proceeded to trial to recover over half a million dollars based upon Mr Rakovic's entirely inadequate opinion, against that unsatisfactory background, is a feature of this litigation.

[34] Notwithstanding the inadequacies of the expert evidence regarding the Type 2A foundation upon which the Kellys' case was based, their counsel presented their claim on their behalf expressly on an "all or nothing" basis. In opening, Mr Shand submitted that either the Kellys recover $53,000 (being the undisputed costs of repairs of the uncontested areas of earthquake damage to the house) or $590,996 plus interest and costs (the claimed costs of a rebuild with a Type 2A foundation). The Kellys set out to prove that only a new Type 2A foundation system could remediate the disputed earthquake damage to the house, and no intermediate position was presented.

[35] In identifying the nature of the dispute, I noted in my judgment on the substantive hearing that the Kellys' claim against EQC rested upon proof that the cost to repair the earthquake damage exceeded the statutory cap, and that they were claiming from EQC the sum of $115,000 (less excess) in respect of each of the earthquake events of September 2010 and February 2011. I further observed that on the case presented by the Kellys they must prove the present foundation was required to be replaced with a Type 2A foundation, and that in the absence of establishing the

need for such a remediation strategy its monetary claim against EQC would fail. It was not disputed the cost of replacing the present foundations with a Type 2A foundation, which would require lifting the house and the installation of a new foundation system, would exceed the statutory cap.

[36] The Kellys failed to establish that a Type 2A foundation was needed. That represented a significant failure of their claim. Arguably, and notwithstanding the Kellys having proven the subfloor area had suffered earthquake damage, the matter could have been left there. The Kellys adduced no evidence regarding any alternative repair strategy, nor any quantity surveying evidence as to the cost of any alternative. That was consistent with the approach they had taken that their claim proceeded on an "all or nothing" basis. However, such an outcome would have been unsatisfactory for the Kellys who had established the material floor dislevelment of their house had been caused by earthquake damage, but had failed to prove the repair strategy upon which their monetary claim was based, and had provided no other evidence of the cost of repairs.

[37] For that reason, I provided them the choice of two options in order to resolve their claim. Either a cash payout of $53,768.50 plus the additional costs associated with relevelling the floor in accordance with my findings (Option A), or alternatively, holding EQC to its purported election to undertake the repairs necessary to reinstate the house in accordance with my judgment (Option B). I noted that should the costs of repairs exceed the statutory cap, responsibility for the balance of the cost of repair would be for EQC and Southern Response to agree between themselves.

[38] The Kellys chose Option A. In reaching my conclusion that material floor dislevelment had been caused by the earthquakes, I held the parties needed to apply the "remediation framework proposed jointly by the experts in their report...",[14] and that my decision "effectively returns the parties" to the "consensus reached by the experts at the conclusion of the joint experts' report".[15] EQC submitted this outcome returned the Kellys to the position they were in before they had even issued

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14 At [378].
15 At [376].

proceedings because at that point EQC had accepted that relevelling work was required. That may be so, but that is not the basis upon which EQC ultimately chose to defend the proceeding at trial.

[39] The judgment at the conclusion of the substantive hearing provided the Kellys with the option of obtaining a monetary award based on a costed scope of works to achieve the completion of the strategy agreed to by the experts in the joint report. Had they proceeded on that basis, I would have accepted that on balance they had, if only by a modest degree, achieved the greater success on the litigation. However, that was not the basis upon which they proceeded after the delivery of my judgment after the substantive hearing. Similarly, had EQC and Southern Response maintained the position taken by their experts in the joint report recognising that floor dislevelment had occurred as a result of earthquake damage, they would have been considered the successful parties. However, that is not the stance they took at trial.

[40] I now turn to the respective success of the parties on the quantum hearing. However, I state from the outset of my analysis of this part of the proceeding that the outcome of the quantum hearing, and the approach taken by the Kellys to it, effectively nullifies the modest success they may have considered to have achieved at the substantive hearing.

The quantum hearing

[41] EQC submitted it was clearly the successful party at the quantum hearing, and that it succeeded on all the legal and factual findings, other than a relatively minor issue concerning a $6,000 contingency sum. The Kellys accept that were it not for Calderbank offers that EQC rejected, EQC would have to be regarded as the successful party on the quantum hearing. Their position is that by EQC rejecting the Calderbank offers its apparent success at the quantum hearing was reversed or nullified. That contention will be returned to shortly in this judgment. It is first necessary to set out the salient details of how the quantum hearing proceeded.

[42] Because of a concern the Kellys were attempting to relitigate issues that had been decided in my earlier judgment, Faire J was required to make rulings regarding

what had been determined in my substantive judgment and could not therefore be relitigated at the quantum hearing. His Honour ruled that the question that remained for him to determine was the scope of work and cost to return the floors to the condition required under the Act and/or Southern Response's insurance policy. The determination of the scope and quantum was to be within the remediation framework proposed jointly by the experts in their report of April 2014.

[43] In examining that issue, Faire J ruled the parties were estopped from leading evidence in respect of findings that had already been determined at the substantive hearing. Those findings were that the additional floor dislevelment was to be repaired applying the strategy advanced in the joint experts' report; that the test of whether any repair of the floor dislevelment meant the "when new" standard of repair required under the EQC's legislation and/or Southern Response's policy, was whether the repair would restore the "functionality, aesthetic quality, and amenity value of the house"; and that it was not necessary to construct a new Type 2A foundation and floor system in order to achieve the required standard of repair.

[44] EQC submitted the way the Kellys approached the quantum hearing demonstrated they refused to accept these rulings and is the basis for an application by it for increased costs. EQC argued that despite Faire J's rulings, the Kellys continued to lead evidence and make submissions at the quantum hearing, contrary to both my original findings and Faire J's rulings regarding the matters that had already been determined. EQC's contended position regarding the approach adopted by the Kellys at the quantum hearing is reflected in findings made by Faire J in his quantum judgment, that the Kellys essentially ignored his estoppel rulings:

> [134] I also find that the plaintiff's repair strategy ignores the estoppels that arise from Mander J's judgment. In my ruling above I held that the parties should be developing a scope of works applying the strategy advanced in the joint experts' report. In doing so, the Kellys cannot argue that it is necessary to construct a new Type 2A foundation and floor system in order to achieve the required standard of repair.
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> [135] Despite my direction, the Kellys have failed to apply the remediation framework or remediation strategy proposed by the joint experts' report.

[45] After referring to the emphasis I placed in my judgment on the importance of strict compliance with the joint experts' report, Faire J continued:

> [137] However, despite Mander J's judgment and my ruling on issues, the plaintiff has continued to seek a scope of works that relies on a new replacement foundation system. While strictly speaking the Kellys no longer seek a Type 2A foundation system, in substance the replacement foundation they seek attempts to achieve the same outcome as a Type 2A foundation.

[46] After referring to the evidence of the Kellys' expert called at the quantum hearing, which illustrates the point made by Faire J in the preceding passage, his Honour went on to hold:

> [138] I therefore find that the plaintiff has, to a large extent, failed to do what Mander J and I directed. The two strategies they have developed bear little resemblance to the "agreed strategy" contained in the joint experts' report. Instead, both strategies involve separating the entire house from its foundations, inserting metal beams from under it and lifting the house into the air. As demonstrated in my discussion below, I conclude that the two options formulated by the plaintiff ignore the conclusions reached by Mander J which were endorsed in my ruling and are no longer available to the plaintiff.

[47] I accept that the defendants were wholly successful in the quantum phase of the proceedings. Their view of the parameters of the remaining issues to be determined, the standard of repair, and the non-availability of a Type 2A foundation (or similar) to implement the remediation strategy approved in the joint experts' report, was accepted by Faire J. In all the primary factual and expert evidential issues in dispute at the hearing the defendants were successful. Apart from the inclusion of a contingency sum of $6,644, EQC's scope of works and costings were accepted by Faire J.

[48] The Kellys do not dispute that EQC was other than the successful party at the quantum hearing. However, they submit EQC achieved nothing more from the quantum hearing beyond the position that could have been achieved had it accepted earlier Calderbank offers. It is to that issue I now turn.

[49] The following rules are applicable:[16]

> **14.10 Written offers without prejudice except as to costs**
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> (1) A party to a proceeding may make a written offer to another party at any time that—

[16] High Court Rules 2016.

(a) is expressly stated to be without prejudice except as to costs; and

(b) relates to an issue in the proceeding.

(2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.

14.11 Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

...

(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that—

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[50] The effect on the issue of costs of an offer remains at the Court's discretion and does not afford automatic protection from costs in the event of a lower recovery, nor necessarily results in exposure to full costs if a higher sum is recovered. The procedure is said to encourage parties to make a realistic appraisal of their position, and enables costs to be sought where an offer has been rejected but a less beneficial result achieved by the party declining the offer.[17]

[51] The Kellys submitted the effect of EQC's rejection of two Calderbank offers made before each of the hearings is that EQC should not be regarded as having succeeded on the steps taken after the rejection of the offers and should not have costs nor disbursements for those steps, particularly as they relate to those taken since the substantive hearing.

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17 *Aldrie Holdings Ltd v Clover Bay Park Ltd* [2016] NZHC 1482.

Pre-substantive hearing Calderbank offer – 18 September 2014

[52] The Kellys offered to settle their claim with EQC by receiving the sum of $140,160 and not pursuing any costs or disbursements from EQC. The Kellys submitted that EQC achieved a worse result for itself by continuing with the litigation because:

(a) EQC proceeded to the substantive hearing and, in its submission, incurred substantial cost liability to the Kellys on the substantive hearing;

(b) additionally, EQC was found liable to pay $126,852 to the Kellys for earthquake damage.

[53] The Kellys submitted EQC's combined liability for costs, and the sum it was found liable to pay for earthquake damage exceeded their offer of $140,160. EQC cannot therefore be regarded as having been successful.

[54] I do not consider the Kellys' reliance on the September 2014 offer to be well-founded. The $140,160 sum was explicitly set out in the September letter as comprising a payment by EQC of its statutory cap of $115,000 for the February 2011 earthquake and an additional $25,160 for the September 2010 earthquake. It follows that acceptance of the offer would have represented a concession by EQC that the house was damaged so badly that the cost to repair was over EQC's cap. Based upon that concession, the "way would have been cleared" for the Kellys to continue with their claim against Southern Response for a Type 2A foundation. That repair strategy was rejected at the substantive hearing.

[55] The offer was to EQC alone and expressed to be privileged and confidential to EQC and the Kellys, with the Court "only being informed of the fact of the settlement and the amounts of the payments for each earthquake". EQC submitted for that reason alone it was reasonable for it to reject the offer. While I accept the Court's subsequent findings that the Kellys' claim was not over the statutory cap, nor one which required the type of foundation which would have produced such a result substantially diminishes the offer's influence, the fact remains the Kellys were at

least willing to settle with EQC for a comparable sum to that ultimately achieved. However, that observation ignores the wider picture of what the Kellys sought to achieve by the settlement offer to EQC and that at trial it failed in that objective.

[56] The Kellys contended EQC would have been in a more beneficial position had it accepted the offer. However, that argument is premised on EQC incurring "a substantial cost liability to the plaintiff at the substantive hearing" in addition to having to pay $126,852. I accept EQC's submission that r 14.11(3) of the High Court Rules is focussed on the judgment obtained as a result of the proceeding. It is not concerned with any issue of costs. Paragraph (a) deals with offers that involve sums of money, whereas paragraph (b) is concerned with other forms of consideration where an assessment is needed as to whether the offer was "more beneficial" than the judgment obtained. Where the judgment sought relates to a monetary sum, as is the position in the present case, it is not necessary to undertake any wider comparison, other than inquiring into whether the offer made is greater than the judgment obtained. That was not the outcome in the present case.

[57] Furthermore, the question of costs and where they may fall remains in issue. EQC is seeking costs for both the substantive and quantum hearings, and disputes its liability to pay costs to the Kellys. The purpose of a Calderbank offer is to encourage parties to make an accurate and realistic assessment of their likelihood of success should they go to trial. In the context of costs, the focus on any prior offer relates to the merits of the litigation and whether a party will succeed when measured against what is being offered to settle the dispute. The process does not anticipate a party having to take into account the consequential effect of costs, the assessment of which may be dependent on a raft of variable factors. Having regard to the ultimate outcome of the present litigation, I do not consider the Calderbank offer of September 2014 to be material.

Calderbank offer – 2 April 2017

[58] In April 2017, prior to the quantum hearing, the Kellys made a Calderbank offer to EQC, offering to settle for $130,681.82 on the basis that costs would be dealt with separately by agreement, or, failing agreement, by the Court. That offer

included interest already payable by EQC on the award of $53,768 made at the conclusion of the substantive hearing. The offer net of interest was therefore just over $128,000. The amount ultimately that EQC was found liable to pay was $126,152. However, the Kellys submitted the offer was one which, while not greater than the amount for which judgment was entered, was close to the value of the judgment obtained and therefore may be taken into account in fixing costs.[18]

[59] EQC submitted the April 2017 Calderbank offer was of no effect. Firstly, it pointed out the offer was made on the afternoon before the commencement of the original quantum hearing. EQC submitted that, following my judgment, its experts undertook considerable work, including the introduction of a specialist floor levelling company to inspect and assist in the scoping and pricing of the required work. Further and more detailed investigations of the subfloor area was undertaken to understand its state, method of construction, and the practical issues that arose from the floor level repair. A formal remedial strategy was developed which was costed by a quantity surveyor. EQC provided this material to the Kellys and their experts in February 2016 on the basis that it considered it met the requirements of the substantive judgment. The Kellys did not accept the proposed repair solution and, as already canvassed, continued to assert that a new Type 2A foundation (or similar) solution was required. EQC considered that, having incurred all these additional costs, the offer was simply made too late.[19] It noted the offer was not renewed after the abandoned quantum hearing in April which was necessitated by my recusal.

[60] EQC also repeated its earlier point that any acceptance of the offer would have amounted to a concession the claim was over the statutory cap and have allowed the Kellys to pursue its claim, based upon a Type 2A foundation, for rebuild costs which EQC was of the view was no longer available to the Kellys to argue. Additionally, acceptance of the offer would have been tantamount to EQC admitting the claim was over the statutory cap, with implications for the quantum hearing, but would also be inconsistent with the position it had taken at the substantive hearing

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18 *Craig v Donaldson* [2012] NZHC 3100.

19 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011, at [21](d).

where the Type 2A foundation had been rejected. Resiling from that position and accepting the offer could have had potential costs implications. Ultimately, EQC's positions regarding the issue of quantum and that the Kellys were estopped from reopening various issues determined at the substantive hearing, were confirmed by Faire J.

[61] Because of these considerations and the nature of the offer made in the letter of April 2017, I accept it can have no influence on the way costs should be assessed for the purpose of the quantum hearing. The offer was comparable to, although less than, that achieved by the Kellys. The core to EQC's defence of the Kellys' claim was that it did not exceed the statutory cap. The offer necessitated EQC resiling from that position, one which it had taken from the very outset and which may have had potential repercussions regarding the question of costs on the substantive hearing. Moreover, EQC could rightly be confident about the outcome of the quantum hearing having regard to the approach being taken by the Kellys, which essentially involved an attempt to re-litigate some of the central issues which had been determined at the substantive hearing. EQC's position in that regard was comprehensively vindicated, as it was regarding the scope and costing of the repairs required to remediate the earthquake damage.

[62] Because I have rejected the Kellys' arguments regarding the effect of the Calderbank offers, it follows that EQC was the successful party at the quantum hearing and would be entitled to recover its costs as they relate to that part of the litigation, as indeed would Southern Response. However, EQC seeks a 50 per cent uplift on scale costs for this part of the proceeding up until and including Faire J's estoppel rulings at the end of May 2017, and indemnity costs thereafter. In the alternative to indemnity costs, a 75 per cent uplift for steps taken after the estoppel rulings was sought.

[63] EQC submitted the Kellys contributed unnecessarily to the time and expense of the hearing in the way they approached that part of the proceeding.[20] In particular, EQC claimed the Kellys failed to comply with my directions in the substantive decision, ignored the estoppel rulings of Faire J, and pursued arguments that lacked

[20] High Court Rules, r 14.6.

merit. There is substance in these allegations, which is borne out in findings made by Faire J in his quantum decision, passages from which I have set out at [44]-[46]. Arguably, these are findings that the Kellys ignored or disobeyed the directions made by the Judge in his estoppel rulings. It is no answer, as was submitted by Mr Shand, that it was not a case of the Kellys failing to comply but a failure by their witness to understand his brief. I accept Mr Scott's submission that such a contention is unfair to the witness and inappropriate. A party and their counsel must take responsibility for the conduct of its case and the evidence it allows to be called in support of it.

[64] I also accept there are grounds which would warrant findings that the Kellys unnecessarily added to the time and expense of the quantum proceeding pursuing meritless arguments that could justify increased costs. Notwithstanding being estopped from advancing a new replacement foundation system outside the agreed remediation strategy, the evidence put forward by the Kellys was found to be flawed by Faire J. The Kellys' new expert failed to complete a specific design, or obtain geotechnical input, and he accepted that his proposal would not receive the necessary building consents. The inadequacies of the expert's evidence on the quantum hearing echo the failures of the earlier expert evidence called by the Kellys at the substantive hearing.

[65] EQC also relied on the alleged failure of the Kellys to accept a reasonable settlement offer as the basis for the award of increased costs. Mr Scott referred to two Calderbank offers. The first was made on 7 December 2016. EQC offered to settle with the Kellys for $111,000 on the basis the money would go to the Kellys and the parties, including the litigation funder, would bear their own costs. The Kellys declined and did not make a counter-offer.

[66] In June 2017, EQC together with Southern Response offered a settlement of $145,000 on the same terms. The counter-offer of $250,000 was made and rejected by the defendants. I also note the Kellys had previously made an offer of $325,000 plus costs of $150,000. As Mr Scott observed in his submissions, the defendants' second offer was significantly above the judgment sum of $127,000, which he maintains further justifies increased costs.

[67] EQC seeks scale costs for the steps taken in relation to the quantum hearing in the sum of $91,493. Based on its claim for increased costs, the claim for scale costs rises to $148,830. Disbursements are sought for this part of the proceeding in the sum of $89,086.40.

[68] In response, Mr Shand submitted that it is necessary when assessing the efficacy of the defendants' Calderbank offer to take into account the costs that had been incurred by that stage of the proceeding in order to realistically compare the offer with what was ultimately recovered by the Kellys. Mr Shand notes that EQC's offers were premised on the Kellys bearing their own costs and disbursements. In his submission, the Kellys by that time were entitled to costs from the substantive hearing in excess of the offer. Mr Shand also referred again to the settlement offer of 18 September 2014, which I have previously discussed. In reply, Mr Scott disputed the defendants would have been better off overall had these offers been accepted, and that Mr Shand's submission is dependent upon the outcome of the present costs issues.

[69] Mr Shand also referred to the defendants' later Calderbank offer of 2 April 2017. It was submitted the sum of just over $128,000 net of interest was proximate to the $126,852 ultimately awarded to the Kellys. Mr Shand submitted the defendants' refusal of this offer was unreasonable and the defendants' actions in declining the offer should be taken into account.[21]

[70] I have already discussed the April 2017 offer at [57]-[60]. In short, EQC maintains the same problems existed with this offer as with the Kellys' first offer. Accepting such an offer would have amounted to EQC conceding the claim was over the statutory cap and, in Mr Scott's submission, would have put EQC in "an impossible position on costs", because such a concession would have amounted to an acknowledgement that the Kellys were the overall successful party.

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21 High Court Rules, r 14.11(4).

Conclusion

[71] Having reviewed the respective positions and exhaustive arguments of the parties made in support of and in opposition to the various claims for costs, I have concluded each party should take responsibility for its own costs. As already observed, the success the Kellys achieved as a result of my acceptance that the floor dislevelment was caused by earthquake damage and that they could recover a monetary sum from EQC was significantly offset by their failure at the substantive hearing to prove the replacement remediation strategy upon which their monetary claim was based, or, indeed, to prove any remediation strategy, which was a necessary prerequisite to obtaining a monetary award.

[72] Having been afforded the opportunity to return to the agreed position of the experts, as set out in the joint report, which was unilaterally eschewed by their engineering expert, the Kellys only sought at the quantum hearing to relitigate the unfavourable findings I had already made at the substantive hearing. This necessitated estoppel rulings by Faire J, and ordinarily in the circumstances would likely have supported awards of increased costs against the Kellys, if not indemnity costs, after the Kellys persevered in their approach notwithstanding Faire J's rulings to the contrary.

[73] Had the defendants not put in issue the question of whether the material floor dislevelment had been caused by the earthquakes, costs would inevitably have been awarded in their favour on the litigation. That they did so, and then lost, negates their success in defending the balance of the Kellys' claim. Insofar as the legal issue of whether the Kellys could recover a monetary sum in the face of EQC's election to repair was resolved in favour of the Kellys, I would consider that issue largely immaterial to the question of costs. The Court received very limited assistance from the Kellys' counsel on the legal point, with the Court having to largely undertake its own research and analysis in assessing the position taken by EQC, which went beyond that argued before the full Court in *Earthquake Commission v Insurance Council of New Zealand Inc*.[22]

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[22] *Earthquake Commission v Insurance Council of New Zealand Inc* [2014] NZHC 3138, [2015] 2 NZLR 381.

[74] I have had pause to consider the position of Southern Response. The stark result of the litigation was that no liability attaches to it as a result of the proceedings. The Kellys' claim against Southern Response, based on the allegation the cost of remediating the earthquake damage would exceed the statutory cap, failed. Mr Johnson on behalf of Southern Response underlined the Kellys failure in that regard by reference to their original pleading that claimed Southern Response was required to pay them $814,069.67 plus interest and general damages for effectively a rebuild of the dwelling with a Type 2A foundation. In opening, the Kellys reduced their claim against Southern Response to one of $399,166. The ultimate award for the contested works, which amounted to $73,084, resulted in no liability being incurred by Southern Response. On this basis, Mr Johnson submitted there was no room to argue it had been the unsuccessful party and ought not be entitled to costs on the proceeding.

[75] I acknowledge there is force in Mr Johnson's submission. However, I do not consider in the circumstances of the present case it is appropriate to distinguish between the position of the two defendants. Southern Response actively defended the proceeding on the same basis that EQC denied liability. Southern Response took the same position that the material floor dislevelment was not the result of earthquake damage and supported EQC in its stance that the Kellys were not entitled to recover a monetary award in the wake of EQC's election to repair the damage. On both issues I found in favour of the Kellys. Southern Response chose to actively engage in these issues. It presented its own evidence regarding the causal source of the floor dislevelment and challenged the Kellys' evidence in support of that fundamental aspect of their claim.

[76] Insurance companies can be in a difficult position in earthquake cases. No liability arises unless or until EQC accepts the cost of remediation exceeds the statutory cap. Mr Shand emphasised the active approach taken by Southern Response in the litigation, and observed the insurance company could have taken a neutral "wait and see" approach rather than the partisan defence it put forward in opposition to the Kellys' claim. That may be so, but the bifurcated system of earthquake cover in this country leads almost inevitably to the involvement of insurance companies in proceedings when EQC defends a claim alleged to be in

excess of the statutory cap. Furthermore, Southern Response's position, which it shared with EQC, that the Kellys' claim was under the statutory cap, was vindicated.

[77] In the present case, Southern Response took the position that the Kellys were not entitled to receive any award beyond the discrete areas of damage accepted by both defendants to have been caused by the earthquakes. Had Southern Response chosen to remain neutral regarding the cause of the floor dislevelment but maintain the cost of remediation would not exceed EQC's statutory cap, then its position would have mirrored the outcome of the proceeding. However, Southern Response contested and lost on one of the central issues of the substantive hearing which was a necessary prerequisite to the Kellys being able to obtain the monetary award they achieved. As a result, I do not consider Southern Response can realistically be considered to be in a different position from that of its co-defendant, EQC.

Result

[78] The parties' respective applications for costs are dismissed. Each party are to bear their own costs. Because I have determined that costs are to lie where they fall, it does not appear the residue of issues arising from the involvement of the litigation funder, CRS, are any longer material. If the parties take a contrary view, they may file memoranda and a telephone conference will be convened.

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