IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2014-409-000207
[2018] NZHC 2375

BETWEEN	SAYAD MOSTAFA SADAT AND MASTOREH SADAT Plaintiffs
AND	TOWER INSURANCE LIMITED First Defendant
AND	EARTHQUAKE COMMISSION Second Defendant

Hearing:	On the papers
Counsel:	K T Dalziel, J R Pullar and K L Wright for Plaintiffs M C Harris and S F Alawi for First Defendant N S Wood and J W Upson for Second Defendant J Moss for Claims Resolution Service
Judgment:	10 September 2018

JUDGMENT OF NATION J
AS TO COSTS

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[1] After a hearing that concluded on 7 April 2017, through a judgment of 6 July 2017, the plaintiffs (the Sadats) failed on their claim against the first and second defendants.[1] They had been unable to prove that their home suffered material damage as a result of the September 2010 earthquake that resulted in any liability on the first defendant (Tower) for the cost of repairs or a rebuild. They had not proved there was damage for which the second defendant (EQC) could be liable, in excess of the $43,000 EQC had already paid to the Sadats.

1 *Sadat v Tower Insurance Ltd* [2017] NZHC 1550.

[2] The trial of the proceedings was originally scheduled to begin on 20 March 2017. The Sadats' reply briefs were to be served by 10 March 2017 at the latest. The defendants sought urgent telephone conferences prior to trial because of difficulties they faced due to the Sadats' geotechnical engineer, Mr Thompson, serving an extensive brief of evidence with significant new material on 16 March 2017 and extensive further evidence from a structural engineer, Dr Wu, on 17 March 2017.

[3] As a result of conferences with counsel on 17 and 21 March 2017, various steps were taken by the Sadats' experts to enable the defendants' experts to deal with this new evidence. Certain modifications were made to the evidence to be presented by Dr Wu. On that basis, leave was granted for further evidence to be admitted but the start of the trial was delayed to 22 March 2017. In a minute of 21 March 2017, I noted that significant cost issues had arisen as a result of these developments but reserved those issues for consideration in due course.

[4] In my judgment of 6 July 2017, I noted the defendants would be entitled to costs. I said:[2]

> There may be an issue as to whether the Sadats' experts, Mr Thompson and Dr Wu, should have to personally make a contribution towards the defendants' costs, particularly so because of the new evidence they presented just prior to the hearing. Earthquake Services Limited was a litigation funder for these proceedings.

[5] Both then and in a later minute, I made certain directions for all parties to progress any costs applications and to respond to those that were made.

[6] All costs issues as between Tower and other parties have been settled.

[7] In a memorandum of 7 August 2017, EQC sought costs against the Sadats and Claims Resolution Service Ltd (CRSL). EQC also submitted there could be grounds for the Court to award costs as against Dr Wu and Mr Thompson.

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2 *Sadat v Tower Insurance Ltd*, above n 1, at [317].

[8] In a memorandum of 25 August 2017, counsel for the Sadats confirmed that Dr Wu, Mr Thompson and CRSL had received copies of the judgment and counsel would arrange for those people to be served with the costs applications.

[9] There were delays in the way the various parties responded to the claims that had been made. A memorandum was filed for the Sadats on 25 May 2018, for CRSL on 6 June 2018 and by counsel for Mr Thompson on 14 June 2018.

[10] No submissions had been made on behalf of Dr Wu. On being advised that Dr Wu may not have received copies of all memoranda or may not know that he could be ordered to pay costs personally, I allowed his recently instructed counsel further time to file a memorandum, which she did on 24 August 2018. EQC filed a reply memorandum on 27 August 2018.

[11] No party has requested a hearing. Consistent with my earlier indications, I thus deal with cost issues on the basis of the memoranda presented.

EQC's claim

[12] EQC seeks costs against the Sadats on a 2B basis ($66,007.50) but with an uplift of 25 per cent (to $82,509.38). EQC also seeks costs for an additional three hearing days, with a 50 per cent uplift of $15,052.50 for what it claims was the "late service of over 500 pages of evidence and attachments [which] was an egregious timetable breach and a highly distracting attempt to ambush the defendants and their experts".

[13] EQC submits the Sadats contributed unnecessarily to the time and expense of the entire proceeding because their claim lacked merit and had no prospect of success. It also referred to the Sadats' rejection of an offer made by EQC on 15 March 2017 for payment of $25,000, with costs to lie where they fell as between the Sadats and EQC. EQC submits it was unreasonable for the Sadats to have rejected that offer.

[14] EQC submits the late service of the evidence from Dr Wu and Mr Thompson required EQC to operate at "trial intensity" for three working days longer than would otherwise have been the case. With a 50 per cent allowance for second counsel, three days at category 2 would be $10,035. EQC sought an uplift of 50 per cent on this figure, making the claim for those three days $15,052.50.

[15] As to quantum, CRSL supports the Sadats in resisting a 25 per cent uplift on 2B costs. Mr Moss submitted that the reasonableness of a party's rejection of a settlement offer must be assessed with regard to the size and timing of the offer, the reasonable expectations of the party refusing the offer and the party's ability to assess the merits of the case at the time of the offer.[3] He submitted that, based on expert evidence they had faith in at the time, the Sadats had a reasonable expectation of a result well in excess of the offer that had been made.

[16] In reply submissions for EQC, Mr Wood submitted that, if the Sadats had reflected carefully on the absence of any cogent and credible expert engineering evidence supporting their case, it should have been apparent to them that EQC's offer gave them more than they were ever likely to obtain at trial.

Analysis

[17] There were some fundamental weaknesses in the expert evidence which should have been reasonably apparent to the Sadats and their advisers, particularly regarding Dr Wu's Richter scale basis for attributing most of the claimed earthquake damage to the earthquake that occurred on 4 September 2010. There was nevertheless a genuine conflict between the experts in their opinions and evidence. The Court preferred the evidence of the defendants' experts only after all expert evidence had been thoroughly tested through cross-examination and been the subject of extensive submissions. The defendants' experts did accept there was likely to have been some damage caused by the 4 September 2010 earthquake, so there was a real issue as to whether the Sadats could have succeeded in a claim for at least some of the damage their home suffered.

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3 *Sullivan v Wellsford Properties Ltd* [2018] NZHC 129 at [38].

[18] EQC's offer was made close to trial. It effectively required the Sadats to abandon their claim and not have it tested through Court proceedings. In the particular circumstances of this case, they should not be penalised for putting their claim before the Court for determination. There is no need for the Court to require them to pay increased costs as a sanction against pursuing or conducting litigation in an irresponsible or cavalier manner.

[19] Through failing in their claim and with their being liable in the normal way for the actual costs incurred by EQC with its engagement of experts, this is a demonstration of the risks that claimants face in pursuing a claim where a successful result is far from assured.

[20] There was not the sort of egregious conduct in relation to these proceedings as justified an award of increased costs in *He v Earthquake Commission*.[4]

[21] EQC also seeks increased costs through the claim for $15,052.50 as a result of the late presentation of extensive expert evidence.

[22] As to that, EQC says that counsel for EQC had to operate at "trial intensity" on Friday 17 March, Monday 20 March and Tuesday 21 March to ensure they and their experts were able to deal with the new evidence when the trial eventually started on 22 March 2017.

[23] For the Sadats, Ms Dalziel submitted that, if the late provision of evidence could justify an increase on normal costs, then the Court should have regard to the fact that EQC and its experts would have had to deal with all this further evidence even if it had been provided in a more timely way.

[24] In reply, EQC submitted that, because it was effectively new evidence rather than as purported reply evidence, EQC's experts should have been able to deal with it in their initial briefs of evidence rather than effectively having to deal with it in a second wave of evidence. It also said that, while, in the face of opposition to its admission, Dr Wu's ultimate supplementary evidence was significantly reduced,

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4 *He v Earthquake Commission* [2018] NZHC 67.

EQC's counsel and experts had to consider all his additional evidence as originally provided.

[25] Both the Sadats and CRSL, through counsel, accept that the late filing of the supplementary evidence would have caused issues for the defendants but say that a 50 per cent uplift on the costs EQC seek is not justified. They point out that there would be an increase on the normal allowance for preparation if EQC recovers costs for two counsel for three days as if it was part of the hearing. Mr Moss submitted that any costs allowance because of the late presentation of the supplementary evidence should be achieved through either uplifting the allowance for preparation or awarding costs for preparation on a band C basis.

[26] I bear in mind that the criticism being made of the Sadats' experts in this regard is not as to the substance of the experts' evidence but as to the time at which it was provided. I accept however that the late provision of expert evidence would have significantly increased the pressure on EQC's counsel and experts in preparing for the trial. To a large extent, the burden placed on EQC's experts will be reflected in their increased costs for which the Sadats and/or CRSL will be liable. However, EQC's counsel also had to carefully consider all the new evidence and the response of EQC's experts to it, to enable them to cross-examine the Sadats' experts effectively.

[27] The late presentation of expert evidence, so close to trial, is not conducive to the efficient and economical progression of Court proceedings in the way the High Court Rules seek to promote. It has the potential to derail proceedings and require the abandonment of a Court hearing, to the ultimate disadvantage of the parties, and is a waste of the Court's resources that have been made available to the parties to enable them to bring the proceedings to resolution. That is not fair on other parties who are having to wait for a hearing of their proceedings for their claims to be determined by the Court.

[28] I accept that, with the late filing of the Sadats' experts' supplementary evidence and with the start of the hearing being delayed to Wednesday, counsel would have been involved in three days' intense preparation for the hearing which

could otherwise have been avoided. An appropriate way to recognise this is to increase the allowance on a 2B basis for step 33 (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.

[29] EQC seek to recover disbursements of $96,201.58. These include $41,060 for the work done by EQC's structural engineering expert, and $39,635.88 for costs incurred for its geotechnical engineering expert. Of other disbursements claimed, there is a dispute raised by CRSL as to $505.74 and $1,081.55 for costs incurred by EQC's junior counsel in travelling to Christchurch from Wellington for preparation of EQC's briefs of evidence and by both counsel travelling to Christchurch for briefing of witnesses in preparation for trial.

[30] Mr Moss, for CRSL, submits that both the initial attendances on the drafting of briefs of evidence and briefing in preparation for trial could have been carried out effectively from counsel's office in Wellington and, if attendance on the witnesses in Christchurch was necessary, this could have been handled through Chapman Tripp's office in Christchurch.

[31] I accept the submission for EQC that there was nothing extravagant or unreasonable with counsel fully involved and conversant with the proceedings but based in Wellington travelling to Christchurch to both assist in the preparation of briefs and the actual briefing of witnesses prior to trial. To carry out both tasks effectively and efficiently, counsel would have to be fully conversant with the proceedings and what was likely to be at issue evidentially. The briefing of witnesses on a fully informed basis has to be done carefully. Face-to-face contact in doing so is justified. There would have been a significant duplication of effort and thus cost to EQC if a solicitor in the Christchurch office of Chapman Tripp had to be briefed on all the information required to carry out these tasks effectively. It was thus reasonable for Mr Upson and Mr Wood to travel from Wellington to Christchurch to perform these particular tasks. I therefore approve the amounts of $505.74 and $1,081.55 as disbursements which can be recovered by EQC as part of the costs award.

[32] EQC seeks an order that CRSL is jointly and severally liable with the Sadats to pay EQC's costs and reasonable disbursements.

[33] It seems that EQC did not seek a full disclosure as to whether there was a litigation funder and the identity of it until an email of 16 March 2017. However, parties to proceedings are under an obligation to disclose the existence and identity of a funder without enquiry.[5]

[34] After delivery of my judgment and as directed by me, counsel for the Sadats advised the other parties of the litigation funding agreement entered into by way of a "service agreement" executed in May 2013 between the Sadats and CRSL. Materially, it provided:

> **Claims Resolution Service Ltd** takes on the prosecution of the claim on a No Win No Pay basis for 10% of the **Final Settlement** plus all costs including, legal, quantity surveyor, independent reports and assessment costs. Costs are limited to a maximum of $10,000 any costs above this amount are borne by Claims Resolution Service Ltd.

[35] As Mr Wood submitted, on the face of that agreement, CRSL prosecuted the proceeding for the Sadats. CRSL is a related company to Earthquake Services Ltd which authored a 27 March 2013 report for the Sadats and to whom the 2013 Centraus Structural Consulting report was addressed. Mr Thompson confirmed that his fees were being met by CRSL. His geotechnical report was addressed to CRSL.

[36] EQC recognised that a Court will award costs against a non-party only in exceptional circumstances. The principles relevant to the exercise of a Court's discretion in this regard were set out by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2).*[6]

[37] Through counsel, CRSL accepts that "strictly for the purposes of this case", in principle, it is liable for any costs awarded against the Sadats. CRSL submitted that whether it has a liability as a non-party funder has to be assessed on a strictly

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5 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67].

6 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.

case-by-case basis so that its concession in this case should not stand as a precedent for imposing prima facie liability on CRSL in other matters.

[38] CRSL invites the Court to determine its liability on the basis that its involvement during the proceeding was limited to funding and that it otherwise took a backseat role in the Sadats' case.

[39] Given CRSL's concession that it is liable for costs in this case, it is not necessary for me to traverse all the circumstances of this particular case that would result in such a liability or for me to discuss the extent to which this case may or may not be a precedent for what should follow in other cases.

[40] Against that background, CRSL will be liable jointly and severally with the Sadats for the costs to which EQC are entitled.

Claim for costs against the Sadats' experts

[41] Mr Wood, for EQC, recognised that it is ultimately for the Court, acting effectively in a supervisory jurisdiction, to decide whether a costs order is appropriate to recognise the duty which experts have to the Court in giving expert evidence.

[42] Mr Wood submitted that relevant to the exercise of the Court's jurisdiction in this regard would be the fact that EQC was put to additional expense resulting from the further investigations carried out on the instructions of Mr Thompson and Dr Wu so close to trial and their extensive new evidence presented so close to trial. The expense incurred by EQC for the work their experts did over this period is included in their invoices covering the trial period for $17,165 and $16,684.50 respectively. In its submissions, EQC had sought $15,020.50 for additional costs, together with the experts' actual costs as disbursements. Based on what it was seeking to recover, EQC suggested a costs award of $15,000 for each of Dr Wu and Mr Thompson would be appropriate.

[43] EQC submitted that, the way in which Mr Thompson and Dr Wu belatedly arranged for or carried out further investigations, made further enquiries and then came up with new evidence, was in breach of their obligations as experts under the Code of Conduct for Expert Witnesses.[7] This Code includes the obligation to identify in their evidence whether any opinion they were expressing was subject to a qualification and if further research might have to be carried out or data obtained for them to reach an opinion. It was also submitted that the case management procedure, provided for in the earthquake list, aims to ensure that, where expert evidence is being relied on, there should be an early exchange of that evidence to enable the parties to determine areas of agreement and focus their evidence on those areas of disagreement which may have a bearing on the outcome of the case.

[44] EQC submitted that, although the defendants' briefs were served on or before 17 February 2017 and the Sadats' reply evidence was due by 10 March 2017 "at the latest", it was only on 6 March 2017 that Mr Thompson first advised counsel for the Sadats that he wanted to carry out further investigations. EQC submits the flurry of additional activity and investigations on Dr Wu and Mr Thompson's part in March 2017 is testimony to their failure, at an earlier stage, to carry out the work they considered necessary for forming their opinion in accordance with their duties as experts to the Court. It was that failure that put EQC's counsel and experts under additional pressure near the scheduled start of the trial and delayed the start of the trial.

[45] As Mr Wood for EQC acknowledged, the starting point is that a costs order against a non-party should be made only in exceptional circumstances.

[46] Mr Langstone, for Mr Thompson, submitted this was not such a case. He also submitted this was not a situation where there had been a "flagrant disregard of the expert's duties to the Court" or "a gross dereliction of duty or recklessness", as had justified an award of costs against an expert in *Phillips v Symes (No 2)*.[8]

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7 High Court Rules 2016, sch 4.

8 *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch).

[47] Mr Langstone submitted that Mr Thompson was justified in requiring further geotechnical examinations to be made because of a claimed change in the stance of EQC's expert, Mr McDowell, which he submitted had become apparent only when Mr McDowell's brief of evidence was provided on 20 February 2017. He submitted that, in the parties' joint report to the Court of 16 December 2016, it was Mr Thompson's view that earthquake-induced settlement had occurred. In that report, Mr McDowell said he considered it possible for foundations to have ratcheted into the ground during earthquake loading. Mr Langstone said there were comments in Mr McDowell's evidence consistent with this but, at the end of his brief of evidence, Mr McDowell had concluded that material earthquake damage had not occurred. Mr Langstone submitted it was as a result of that opinion that Mr Thompson considered it necessary to further investigate the potential degradation in bearing capacity of the ground in the south-west corner of the house. He asked Dr Wu to calculate earthquake loadings on the footings and arranged for Geotechnics to carry out further investigations. The last of those investigations was carried out on 15 March 2017. It was because of those delays that Mr Thompson's supplementary evidence was not provided until 16 March 2017.

[48] Mr Wood also submitted an order for costs could be made against Mr Thompson personally on the basis he had failed to comply with a fundamental duty of experts to assist the Court impartially on matters within their expertise and not to be advocates. He referred to the Court's findings that:[9]

- Mr Thompson had carried out further investigations immediately prior to trial and then reformulated geotechnical evidence to align with views expressed by the Sadats;

- It was likely that, in doing so, he made significant assumptions and judgments influenced by his wish to assist the Sadats with their claim rather than objectively and impartially assist the Court as an expert witness; and

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9 *Sadat v Tower Insurance Ltd*, above n 1, at [104] and [101].

- Mr Thompson had reached an opinion on a "highly theoretical" basis based on "inputs [with] significant potential for error or reasonable differences of opinion" and had made "unjustified assumptions" in significant respects.

[49] As to those submissions, Mr Langstone said Mr Thompson was very concerned at the suggestion that he did not act impartially and was motivated by advocacy, and that he was well aware of his obligations to the Court and his duty to be impartial. He submits that Mr Thompson was always endeavouring to assist the Court and it was with that aim he felt compelled to investigate the issue further and obtain more evidence. Mr Langstone submitted the mere fact the Court chose to prefer the evidence of another expert is not a reason to penalise Mr Thompson and to do so could discourage engineers from accepting engagements in earthquake related cases. He asked the Court to also bear in mind that Mr Thompson's evidence was based on information provided to him by the Sadats as well as the structural calculations provided by Dr Wu. He submitted it was not for Mr Thompson to disbelieve the Sadats' recollections of the state of the property before and after the earthquake. They were matters for the Court to adjudicate on.

[50] In summary, Mr Langstone submitted the way in which Mr Thompson gave evidence and proceeded was not exceptional and it would be unreasonable to make any order against Mr Thompson for costs payable to EQC.

[51] Mr Langstone submitted that it was significant that the Sadats had not asked for an order that Mr Thompson or Dr Wu personally contribute to any costs order. He suggested this was important as they were the party who had engaged Mr Thompson and who would ultimately bear the burden of the costs order.

[52] In reply, Mr Wood submitted it had not been adequately explained why it was only in March 2017 that Mr Thompson considered it necessary to require further geotechnical investigations to be carried out "to get to the right answer". He suggested there were some parallels with the observations the Court had made as to his evidence with the criticisms which were made of the expert in *Phillips v Symes*. He also submitted the obligation on an expert was to express an opinion based on his

specialised knowledge or skill rather than to rely uncritically on someone else's recollections. He submitted Mr Thompson should have reached an opinion based on the objective evidence relating to the house and land and then, to the extent necessary, assessed his opinion against the Sadats' anecdotal evidence.

[53] I do not consider there has been a satisfactory explanation for Mr Thompson so belatedly requiring further geotechnical examinations of the ground conditions to be carried out so close to trial. As recorded in my judgment, in their joint report to the Court, all geotechnical engineers, including Mr Thompson, were prepared to base their opinion on the summarised sub-ground profile referred to in a report of Engineering Design Consultants Ltd (EDC) of 12 August 2016.[10] The geotechnical engineers reached different conclusions as to the extent to which damage to the foundations could have resulted from the September 2010 earthquake given those ground conditions.

[54] Mr Thompson's justification for requiring further ground structure investigations to be carried out and then providing further detailed evidence based on the result of those investigations and new calculations made by Dr Wu, appears to be that the defendants' experts had, in their briefs of evidence, been firmer in expressing the opinion that the September 2010 earthquake was unlikely to have caused material damage to the foundations significantly in excess of the damage that had pre-existed the September 2010 earthquake. That does not adequately explain why, at the time of the joint report to the Court on 16 December 2016, Mr Thompson, like the other engineers, was willing to base his opinion on the summarised ground profile as referred to in the report of EDC of 12 August 2016 but later considered those investigations and that summary were no longer adequate.

[55] If there was a need for such further investigations, it should have been raised earlier, in time for it to be considered by all the defendants' experts and for it to be dealt with in a timely manner, to avoid the additional costs, delays and burden for the defendants' experts and counsel. The delay in requiring these further investigations and then producing new evidence based on those investigations also delayed the start of the trial and had the potential to make it impossible for the trial to proceed over

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[10] *Sadat v Tower Insurance Ltd*, above n 1, at [46].

the time the Court had made available for the hearing, a consequence that would have resulted in a waste of Court resources and unfairness to other litigants who had faced delays in obtaining a hearing of their proceedings. The Court could mark its concern over this through an award of costs against Mr Thompson personally.

[56] In my judgment, I made a number of criticisms as to the basis on which Mr Thompson had reached the opinions he conveyed as an expert. There were ways I consider his evidence was tailored to be consistent with the Sadats' claims and evidence as to what they considered to be earthquake damage caused to their home. Nevertheless, Mr Thompson was transparent in the way he did this, was honest in the evidence he gave and, as an expert, attempted to provide a theoretical justification for the opinions he reached. I do not consider that, with regard to his evidence and opinions, his conduct as an expert was of the sort that, of itself, justified an award of costs against him.

[57] In submissions for Dr Wu, Ms Hamid said this had been the first time Dr Wu attended Court as a trial expert witness. She suggested it was not uncommon for experts to provide supplementary evidence and claimed Dr Wu had not been adequately warned by counsel of the way late provision of his evidence could have put the trial in jeopardy. She also said that his new load bearing calculations had been carried out at the request of Mr Thompson and were done to ensure that Mr Thompson's evidence was complete. As to that, Mr Wood pointed out that Dr Wu's initial supplementary evidence went further than this and included new evidence, including numerous photographs of damage which were subsequently deleted.

[58] Ms Hamid argued that, although criticisms were ultimately made of his evidence, the mere fact that Dr Wu's opinions were not accepted by the Court should not necessarily be sufficient to show that he failed to demonstrate the independence and impartiality required of an expert witness.

[59] Dr Wu presented significant new evidence just prior to the hearing in ways that caused difficulties for EQC, as had Mr Thompson's new evidence. He had also assisted with Mr Thompson's new evidence through calculating the load bearing

capacity of the foundations in the house. The basis on which he did this and the shortcomings in his assumptions were discussed in my judgment.[11]

[60] I consider that, in making these calculations and coming up with new evidence so close to the trial, Dr Wu, like Mr Thompson, failed to meet the obligations he had as an expert giving evidence to assist the Court.

[61] I also consider Dr Wu did act as an advocate for the Sadats and adopted a position that did not adequately reflect the obligation he had to provide impartial and independent opinion evidence that could be rationally justified based on the expertise which enabled him to give evidence as an expert. I refer to the way in which his initial report of 15 May 2015 appeared to focus mainly on justifying why a rebuild was necessary rather than explaining why the damage to the house had to have resulted from the September 2010 earthquake.[12] I also refer to the way Dr Wu attempted to use the Richter scale as justification for an opinion that most of the damage would have resulted from the September 2010 earthquake rather than other earthquakes in the Canterbury earthquake sequence.[13] I also refer to the shortcomings in the way Dr Wu relied on a crack analysis and his identification of increased cracking, as against pre-existing cracking, to support his opinion that most of the damage to the foundations had resulted from the September 2010 earthquake.[14]

[62] The shortcomings in Dr Wu's evidence, as discussed in my judgment, do reflect so negatively on the way he performed as an expert witness that those criticisms could, of themselves, have justified the Court treating this as an exceptional case where a costs order could be made against him personally.

[63] The high threshold for an award of costs against expert witnesses has been met in this case but whether or not I make such an award remains a matter of discretion. It is important that expert witnesses understand the obligations they have to assist the Court as expert witnesses but it is also important that those who have the

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11 *Sadat v Tower Insurance Ltd*, above n 1, at [87]-[95].
12 *Sadat v Tower Insurance Ltd*, above n 1, at [197]-[202].
13 At [203]-[209].
14 At [210]-[213].

expertise to assist the Court not be deterred from doing so through a fear of their exposure to a costs order if their evidence is not ultimately accepted. That is particularly important with the earthquake cases in Christchurch where most of the litigation is with either EQC or insurers who have the means to more readily obtain expert evidence from major engineering firms. The Court recognises that, without those resources, it has not been as easy for some claimants to obtain the expert assistance they need to properly advance their case.

[64] This 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.

[65] For these reasons, I am not making any award for costs against Mr Thompson and Dr Wu personally.

Costs on the application for costs

[66] EQC has sought costs in respect of the application for costs in the sum of $3,000. No submissions were made for the Sadats in this regard. For CRSL, Mr Moss submitted the Court could make such order as it deemed appropriate if EQC was successful in the submissions it made for costs but, if not, costs should lie where they fall.

[67] It has been necessary for EQC to make extensive submissions in support of their claim for costs. It has been largely successful. To the extent EQC made submissions with regard to the potential liability for costs of Mr Thompson and Dr Wu, those submissions have largely been accepted.

[68] EQC is entitled to costs against the Sadats and CRSL jointly and severally on the costs application in the sum of $3,000. Mr Thompson and Dr Wu are not entitled to costs.

Conclusion

[69] The Sadats and CRSL are jointly and severally liable to pay costs to EQC on a 2B basis in the sum of $79,042.50, together with disbursements in the sum of $96,201.58.

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