

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 119/2019
[2019] NZSC 149**

BETWEEN

XIAOMING HE
Applicant

AND

EARTHQUAKE COMMISSION
First Respondent

CERTAIN SYNDICATES OF LLOYD'S OF
LONDON SEVERALLY SUBSCRIBED TO
COVERHOLDER CONTRACT
B0429CNG90466 AND CERTAIN
SYNDICATES OF LLOYD'S OF
LONDON SEVERALLY SUBSCRIBED TO
COVERHOLDER CONTRACT
B0429CNG110466
Second Respondents

Court: O'Regan and Ellen France JJ

Counsel: Applicant in person
M R Crotty and N L Walker for First Respondent
R M Flinn for Second Respondents

Judgment: 19 December 2019

JUDGMENT OF THE COURT

- A The application for an extension of time is granted**
 - B The application for leave to appeal is dismissed.**
 - C The applicant must pay costs of \$2,500 to be divided equally between the first respondent and second respondents.**
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REASONS

Introduction

[1] The applicant's property (a house with a shop attached) was covered for natural disaster damage under the Earthquake Commission Act 1993 (the EQC Act) at the time of the 2010 and 2011 Canterbury earthquakes. The property was also insured with the second respondents (collectively, OMPL¹) in respect of certain earthquake damage not covered by the EQC.

[2] The applicant's house was damaged in the earthquakes. He made claims to EQC for the damage. EQC paid about \$16,000 for repairs. The applicant considered EQC's liability was much greater. He also made claims to OMPL for damage but these were not accepted. He sued EQC and OMPL in the High Court. The claim was largely rejected by Dunningham J except for a minor claim against EQC for repairs to plaster damage on a part of the perimeter foundation of the house.² The applicant's appeal to the Court of Appeal was dismissed and he seeks leave to appeal to this Court.³

Background

[3] In the High Court various claims were advanced but by the time the case reached the Court of Appeal there were two main issues. The first of these issues was described by the Court of Appeal in this way:⁴

The High Court dismissed [the] claims in relation to damage caused by the February 2011 earthquake, other than the minor damage to the perimeter foundation ... The High Court held that Mr He had not established that there was any other damage to the house caused by that earthquake. Mr He challenges this factual finding. He says that the February 2011 earthquake caused material changes in the house's floor levels, in particular in the north-east corner. He claims that this damage should be remedied by replacement of the house's foundations.

¹ Offshore Market Placements Ltd (OMPL) is a company that acts as agent for the underwriters of the relevant insurance policies.

² *He v The Earthquake Commission* [2017] NZHC 2136.

³ *He v Earthquake Commission* [2019] NZCA 373 (Brown, Collins and Goddard JJ). An application for recall was dismissed on the basis it was "an attempt to re-litigate the factual findings made in the High Court, and confirmed by this Court": *He v Earthquake Commission* [2019] NZCA 526 at [5].

⁴ At [3(a)] (footnote omitted).

[4] On this issue, after reviewing the evidence, the Court of Appeal agreed with the Judge that the applicant had not shown material earthquake damage was caused by the 2011 earthquake in this respect.

[5] The second issue arose out of damage to two chimneys in the house in the September 2010 earthquake. The Court of Appeal considered Dunningham J was right to reject this part of the claim as well.⁵ This aspect is not pursued in the present application.

The proposed appeal

[6] The applicant wishes to argue the Courts below erred in relation to the issue of dislevelment. He seeks to rely on photographs he says prove a change in level post the February 2011 earthquake. He says in this respect, amongst other things, that a Google screenshot provided by EQC is not accurate and has been distorted, and that the original photograph of the house in 2008 has also been distorted.

[7] The proposed appeal would involve a further consideration of a matter on which there are concurrent findings of fact.⁶ No question of general or public importance or of commercial significance arises.⁷ Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice.⁸ The matters the applicant wishes to raise were carefully assessed by both Courts. In addition, as the respondents note, there was expert evidence about various photographs before the High Court which was part of the context in which the photographs were to be considered. Finally, both Courts placed some reliance on the evidence of the tenant in the house, preferring his evidence over that of the applicant and his wife in relation to dislevelment.

⁵ At [54].

⁶ *Perkins v Porea* [2010] NZSC 15, (2010) 19 PRNZ 666 at [6].

⁷ Senior Courts Act 2016, s 74(2)(a) and (c).

⁸ Senior Courts Act 2016, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

[8] The application is out of time. One possible explanation is that the delay reflects difficulties the applicant says he has had retaining a lawyer to represent him.⁹ The delay is not extensive and, in all of the circumstances, the application for an extension of time is granted but the application for leave to appeal is dismissed.

[9] The respondents filed a joint set of submissions. The applicant must pay costs of \$2,500 to be divided equally between the first respondent and second respondents.

Solicitors:

Russell McVeagh, Auckland for First Respondent

Wotton + Kearney, Wellington for Second Respondents

⁹ The applicant is now self-represented. The respondents submit an extension of time should not be granted because the applicant chose to seek a recall of the Court of Appeal judgment rather than pursue this application. The respondents accept they are not prejudiced by the delay.