NEW ZEALAND INSURANCE LAW ASSOCIATION CONFERENCE 2014

Reflections on the earthquake litigation

Miller J

Four years have passed since the first earthquake. A stocktaking is timely. Your conference supplies an opportunity for which I am grateful.

I must preface my remarks by saying that although reporting on earthquake litigation is business as usual for the judiciary, and has been so for several years, the timing of your conference makes the topic a sensitive one. Earthquake claims have become an election issue. It is no part of a judge's function to join that debate, and nothing that I say should be taken as support for one side or another. In the interests of caution, the organisers have agreed that this speech will be delivered today under Chatham House rules. It can be published in your conference proceedings, but not until after the election.

Also, I am not here to represent the judiciary at large. These are personal views.

With those formalities out of the way, I can turn to my topic.

The justice system should deliver results that are just, prompt and economical. I will take that objective as my theme. Has the justice system delivered access to justice in the aftermath of the quakes? Specifically: has it delivered quality results; has it delivered them as quickly as it might; and has it delivered them at reasonable cost?

When I speak of the justice system I include all the actors who work in it, including the parties and their lawyers; in other words, you. The judges do not work in isolation. Their influence on cost, for example, is indirect.

Having said that it is a shared responsibility, I will focus on the courts, because that is what I know. And I will confine myself to insurance issues.

I administered the Earthquake list in the High Court for some time. I assigned other Judges to the hearings, but I did sit on the

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Full Court in the *Earthquake Commission* case, and I decided a preliminary question in *TJK v Mitsui*. In the Court of Appeal I have been free to sit, and I have sat in several cases; *Skyward Aviation*, *Zurich* (the Salisbury Apartments case), *Wild South*, and now *Islington Park*.

While all of this has taught me quite a lot about earthquake litigation, I don't pretend to know all there is to know about my topic today. I have spoken to many homeowners and insurers and lawyers in the course of my work on the Earthquake List, but not for some time now. I have also conferred with the judges who administer the list. But I readily acknowledge that my knowledge is incomplete. You are experts some of whom are working in the field daily, and I am very interested in what you have to say on this topic.

The challenges

So, to the beginning. The earthquakes present the justice system with a combination of challenges that is both unusual and acute.

a) there is the scale of the problem; the enormous number of property owners affected.

b) there is the urgency experienced by the victims. For anyone who has not come to an accommodation with their insurer, the earthquakes are a disaster still in progress, with all the attendant financial, social and emotional costs.

c) there is the market structure, with EQC serving as insurer of first resort for homeowners and commercial insurers providing topup cover. That delays resolution to begin with, and can create problems later.

d) there is the collective action problem; many issues are common to some group of claimants, which means two things; first, the insurers will take such issues seriously, and second, many claimants will prefer to sit back and wait – to freeload, if you will – while the issues are resolved. The low mobility grout issue which was decided in *O'Loughlin v Tower* is but one example. The plaintiffs there appealed to the community for help funding their action.

e) there is the inequality of arms problem; most claimants have limited resources with which to fight, and the more the issue matters the more problematic is the disparity.

f) there is the complexity and occasional novelty of the issues.

g) finally, but by no means least, there is the impact on insurance markets. For better or for worse, our decisions shape the extent of natural disaster cover that will be offered in future, and its cost. A very recent example of that may be found in the *QBE v Wild South* judgment just issued in the Court of Appeal. It seems likely to affect the terms on which insurers offer reinstatement of cover on loss.

The courts' response

Most of you will know the Earthquake List, which is now run in the High Court at Christchurch by Wylie J and Kos J together with Robin Ashton in the registry there. I won't go into detail about it.

The central features are a problem-solving approach, active party involvement, early issue identification, close monitoring through the registry, early fixtures, and increased transparency through the public spreadsheet.

The list was set up because it was obvious that a lot of litigation was coming, and it would need managing.

We hoped that we could quickly isolate and decide questions of principle, allowing the parties to resolve otherwise intractable disputes without coming to court at all.

We hoped to achieve speed and economy by having separate questions argued.

We hoped that we would see class actions, or at least joint hearings, so that important issues affecting homeowners could reach trial, and once there get the hearing that they deserve.

The Court of Appeal has not needed to establish an earthquake list as such; it has seen only a small number of appeals. It has put most of them onto its fast track process.

The Supreme Court obviously deals with appeals only by leave. It has granted leave in all four of the Christchurch insurance

cases to reach it so far. (They are *Ridgecrest*, *Zurich*, *Canterbury University*, and *Skyward Aviation*.)

So, how well have we done?

What issues have been decided?

An impressive list of issues has been brought forward and decided at High Court level. Some of them await final resolution in the appellate courts.

The issues include, in no particular order:

a) first, whether cover reinstates immediately after each quake, or only on payment. This issue has been decided separately for EQC and now for several insurers.

b) next, the application of the indemnity principle to successive losses. One dimension of this, the application of the marine law merger doctrine, has now been decided by the Supreme Court.

c) next, whether a sum insured in a residential policy is inclusive or exclusive of EQC cover.

d) next, what is a dwelling for EQC purposes.

e) next, the extent of an insurer's obligation to replace a building "as new" using materials and methods "in common use".

f) next, whether an insurer under a reinstatement policy must pay indemnity value immediately on proof of loss, or only as the property is reinstated.

g) next, how the amount payable for full replacement is calculated when the insured may rebuild or replace elsewhere, on another site.

h) next, whether a s 124 Building Act notice prohibiting use of a house amounts to loss or damage for EQC purposes.

i) next, to what proportion of new building standard – 33% or 66% - must repairs be completed?

However, the courts can only decide the cases that people choose to bring, on the one side, and choose to fight, on the other. Despite a standing invitation from the courts to bring questions of law for decision, some seemingly important issues have not been decided; either they have not been litigated at all

or the cases have settled. I see this as a missed opportunity to resolve some issues that matter to the community.

One such issue is whether EQC cover extends to areas that are now flood prone but are otherwise undamaged. That issue seems now to have been resolved at a political level, as a result of actual floods. But it has been around for quite some time.

How quickly have the courts responded?

A glance at the High Court spreadsheet will show you that the cases took some time to arrive. The first few were a mixed bag; some broker negligence claims, and *Ridgecrest*, which was filed in February 2012. The list was set up in May that year. Residential cases did not begin to arrive in numbers until late 2012.

No doubt there were many reasons for this. One is that the quakes kept coming. Another is the time taken to process EQC claims.

Another is that insurers' claims handling processes have clearly been under pressure.

Claims handling processes matter enormously, in my opinion. Time and again, we hear from plaintiffs who say that they have had no real dialogue with the insurer, which is not interested in what they or their experts have to say. It does seem that often there has been no conversation with a decisionmaker, and no meeting of experts as equals.

Having said that, process failings are not one-sided. Sometimes plaintiffs file without having obtained their own QS report or engineering survey, and occasionally without having tried to engage the insurer in dialogue. In cases of that kind the proceedings inevitably experience delay, because both sides usually need to commission reports.

It is regrettable that these cases should come to court at all. But they do tend to settle quite quickly once they get there and once the expert reports have been obtained. The judicial forum offers an advantage over other forms of dispute resolution in that the parties and their experts meet as equals. A dialogue is mediated between the plaintiffs and the insurer, and the experts are required to discuss the scope of works, which is usually what divides the parties.

There have been 32 substantive judgments in List cases; not all of them are insurance cases. 21 separate questions have been decided, and 16 trials or final hearings held; that last number includes judicial reviews.

On average 168 days elapse between filing and judgment, and 211 days between filing and disposal. These are good numbers, I think, on any view of it.

The Court of Appeal has heard six insurance appeals and several others. I have prepared a table showing the statistics. I will leave it with the organisers for anyone who is interested. On average 232 days elapse between filing and judgment. Most of that time is accounted for in the pre-hearing period. Judgments come, again on average, 51 days after hearing.

This is not to say that you should expect cases to take 232 days in the Court of Appeal. The averages, with such a small pool, are significantly affected by a couple of cases that took some time to get to hearing. (One was held up while several appeals were consolidated, and another was never put on the fast track.) If those cases are excluded the average is 139 days. The table shows that the Court has given fixtures three months after filing. Counsel who are filing should make sure to ask the Registry to put their case on the fast track – it doesn't happen automatically - and also let the Court know of any special urgency.

As I said, the Supreme Court has granted leave in all four of the insurance cases to come before it. Typically four months elapse between the Court of Appeal judgment and the grant of leave. One case, *Ridgecrest*, has been decided.

How cost-effective have we been?

Affordability

359 cases have made their way onto the list. That is a substantial number, but it obviously represents only a small proportion of those affected by the quakes. It is clear that a significant number of claims remain to be settled. Just how many is unclear, but some estimates suggest 10,000. Four years on, it seems reasonable to ask why the people involved haven't sued.

There may be many reasons, but one obvious explanation is that insureds cannot afford to sue. Many homeowners will not be

eligible for legal aid but neither will they have the resources to fund litigation. The expense is not confined to legal fees. Claims of this sort cannot be resolved without expert help from quantity surveyors and engineers, and sometimes other experts too.

That leads me to remark that any system which aims to settle these claims depends critically upon qualified and independent experts. This is a digression, but justified because of its importance. An issue has arisen about the independence and quality of some of the expert assessments being prepared for the Earthquake List. A problem of this kind poses a threat to a system which aims to settle cases early. The only way to address it is to get it into the open by putting the people whose integrity is being challenged into the witness box, so the court can satisfy itself that they qualify as both expert and independent. That will inevitably come at a cost, in time, money and reputation, for the party which comes off second best in such a challenge.

Returning to the cost of coming to court, litigation funders have been not much in evidence, with a couple of exceptions. One is Risk Worldwide. The other is Earthquake Services Ltd, the firm associated with Mr Staples. It has filed, through one solicitor, a remarkably large number of cases. This fact points to a possible problem. I do not know what explains the apparent absence of other litigation funders who do business in New Zealand. It is a source of concern, for two related reasons. First, some people may need litigation funders if they are to get to court at all. Second, litigation funding is a market which, like any market, works well only if there is competition. The courts have a supervisory role to play here, of course.

ADR

Precedent-setting has been a major objective of the hearings. ADR works in the shadow of the law, because recourse to law is the alternative to agreement. When the law is settled, ADR should produce more settlements and the settlements should be principled, in the sense that they broadly reflect what a court would have decided.

How much ADR has there been? EQC runs an invitation-only mediation service, but it has been little used; it has handled only 71 cases to date. I am not aware of EQC engaging in private mediation or ADR.

The Residential Advisory Service run by CERA has had more success. Some 1400 property owners have used the service, and 750 cases have been closed, meaning resolved one way or another. The service apparently has access to engineers and quantity surveyors.

Some insurers and some legal practitioners appear to be pursuing mediation actively outside these channels. How extensive that practice is I cannot say. And of course many cases must have settled without any form of ADR. Experienced lawyers on both sides get to know the parameters quite quickly. The spreadsheet was intended to help here. Generally in litigation, judgments are transparent but settlements are not. The spreadsheet allows practitioners to liaise with one another about current cases, and it allows everyone to identify any pattern of settlements.

Joint hearings

There has been some co-ordination among counsel to join cases in a single hearing or to isolate a good test case for decision. Recently we heard three sets of appeals together in the Court of Appeal, for example. But it has happened to a lesser extent than I had hoped. The three appeals I have just mentioned were argued separately in the High Court, although they were heard within a space of a few months, and getting them into one hearing in the Court of Appeal cost the parties some delay.

Separate questions

Separate questions have been used a great deal, and with evident success, though I understand there is less call for them now. The number of judgments is significant, and they have been produced quickly.

Class actions

There have been no class actions. There has been publicity about two which may be getting under way. But inquiries of the solicitors indicate that they may be filed as separate but parallel proceedings, because of perceived risks associated with class actions.

In sharp contrast to other common law jurisdictions, New Zealand lacks a true class action regime.

The courts recognise that class actions are sometimes needed if a large group of people sharing the same interest are to secure access to justice. In an attempt to fill the gap left by the absence of legislation, the courts have developed a process using the representative proceedings rule in the High Court Rules.

But as the Chief Justice has said, the rule is being required to bear a weight for which it was not designed. By comparison with class action regimes elsewhere our mechanism is lacking in some respects.

In particular, its ad hoc nature encourages procedural disputes about the rules on which any given case will be conducted, as the *Feltex* litigation demonstrates so abundantly. As a result, it is likely to inhibit litigation funding by increasing litigation risk. All of this is unhelpful. What is needed in Christchurch is a robust mechanism for forming classes quickly around any given issue of the day.

Having said that, there may be other reasons for the absence of class actions. For example, it may be difficult to isolate issues which lend themselves to a collective approach. And there may be co-ordination problems among the potential plaintiffs.

Have we got the answers right?

I listed earlier some of the issues that the courts have been called upon to decide. It is important that we get the answers right, both for the immediate parties and for others who will rely upon the decisions.

I understand that other speakers here will survey the recent decisions. From my perspective on an intermediate appellate court, it is too soon – and perhaps unwise - to say much about them. Assessment must await the Supreme Court decisions to come.

The final judgment will be left to history. It is not a judgment to be made by lawyers alone. Other people are better equipped to assess the social costs of insurance disputes. Evaluating the impact of our decisions on the nature and cost of cover available to New Zealanders is a job for an industry insider, or perhaps an economist.

One thing I can say at this stage is that while the separate questions procedure is very valuable it does not work

everywhere. Trouble can happen when it turns out that important facts are not agreed after all. In the absence of trial court findings the facts become contestable on appeal. Consensus formed in the High Court about the facts, or for that matter the consequences of the Court's answer, may not survive the first instance judgment.

There are a couple of examples in which difficulties have arisen. *Ridgecrest* is one, *Zurich* another. In the *Wild South* appeals we were unable to answer one question because of a factual controversy which became apparent after the High Court hearings.

A good example of the kind of effort that needs to be put into separate questions may be found in *Islington Park*, a case argued recently in the Court of Appeal. In the High Court Kos J spent some time with counsel formulating the questions and the agreed facts in a robust way.

Conclusions

There is an old joke about lawyers which goes like this: It is untrue that lawyers do nothing: they get together and decide that nothing can be done.

The Earthquake List has not been like that. In my admittedly self-interested opinion, the High Court is making a good fist of the work that has come its way. For the most part, the lawyers involved have contributed well; they have bought into the co-operative spirit that the Court tries to engender.

The caseload is substantially larger than it was when I ran the list, and the Judges who run it now are very familiar with the issues. They are well supported in the registry; that is essential. Also, the success of the list is not to be measured only by the numbers of cases decided, or even the numbers settled. Its larger achievement will lie in its impact on claims that never reach the courtroom.

Some of the issues are difficult. It is easy to lose sight of this when we are dealing with a large number of cases. Not infrequently we are walking a path that is poorly lit by the authorities that have gone before. The cases sometimes require us to revisit insurance fundamentals. The *TJK* case was an example of that; it was about the insurer's obligation to pay

indemnity value on proof of loss. Another is the *Wild South* cases, in which the impact of the indemnity principle on successive losses was in issue.

When I was involved with the list I was impressed and sometimes humbled by the lay people involved, by which I mean the plaintiffs and the representatives of the insurers whom I encountered regularly. Plaintiffs have engaged constructively in the process and behaved with dignity despite all that has befallen them. They have been treated respectfully by the insurers' representatives. Many cases settle without much fuss and without the cost of a defended hearing.

It is quite evident, though, that barriers to justice remain. The very existence of a class of unsettled claims that have not found their way to court after all this time tells us that. The judges have done their best to lower these barriers, but we cannot eliminate them.

That brings me back to remarks I made at the start. I am not arguing here for a different system. I am not arguing that the system we have is meeting all the community's needs either. Rather, I am offering a report on experience; experience gained when trying to make the system we have work as well as it can.

One of the things I have learned is that co-operation matters a great deal. I am not speaking here of the minimum degree of co-operation required by the formal rules of court. I am speaking of a culture of active co-operation: co-operation in identifying the issues, in isolating questions the answers to which will permit settlements for the people involved, in settling the cases that should settle, and above all, in treating the claims with the respect and urgency that they continue to deserve.

I hope that a spirit of co-operation will survive. The judicial system is being tested in the aftermath, and the testing has some time to run. As lawyers, we are all participants in the system, and as participants we should all feel a responsibility to ensure that it performs well.

Thank you again for the opportunity to address this conference.

September 2014.