

Memorandum

To: Malcolm Ellis
cc: Jai Moss, Emily Walton

From: Associate Judge Osborne

Date: 11 June 2018

Re: Earthquake List – Experts

A meeting was held on 8 May 2018 between Judges involved on the Earthquake List and (by open invitation) practitioners involved on the List.

Attending from the High Court were Gendall and Whata JJ and Associate Judge Osborne, supported by Selma Kafedžić, the Judicial Support Adviser, and Jeremy Kaye (Case Officer). Approximately 30 practitioners attended.

The Judges are grateful to Emily Walton and Jai Moss who had suggested the meeting in the light of some issues which had arisen of general importance, especially around the expert conferral and reporting process. Those attending were informed that discussion was to be of matters of general application, with specific litigation not for discussion.

The meeting was an open forum chaired by Associate Judge Osborne. At the conclusion of the meeting, the Judges indicated that we would reflect on the matters raised and consider in particular whether any aspects of case management of the Earthquake List need to be modified.

Structure of expert conferral and reporting process

The issue raised was whether the current approach to expert conferral and reporting is working satisfactorily. The main issue related to whether there should be one or more sets of conferral/reporting. Other issues were as to the extent to which experts are or are not briefed as to the issues and the extent to which experts may be considering different standards.

Main issue – one or more sets of conferral?

The Court's usual approach has been this. When counsel file their first case management memorandum (or later memorandum if a delay in the expert reporting is warranted) there is almost always agreement between counsel as to a single site visit, a period of conferral and a date for the filing of a joint report (adopting the form of joint report attached to the protocols for Expert Conferral under the High Court Earthquake List). Because the directions sought by counsel are generally for a single process, it has been left to counsel and/or the experts to determine how best to go about the conferral process and the drafting of the joint report – the Court's impression has been that the process adopted will often be best determined by the

experts after the joint inspection has occurred and there is a better appreciation of the technical issues.

If, at that point or earlier a layering or sequencing (“sequencing”) of experts appears desirable (such as where geotechnical engineering opinion may be fundamental to structural engineering solutions), the Court is likely to see case management benefits in sequencing – the Court’s Minute in *Kristinsson v Southern Response Earthquake Services Ltd* [2017] NZHC 456 is an example of such an approach. That particular approach has proved to be exceptional in the List in the sense that it requires the demonstrated appropriateness of sequencing in the particular case – otherwise a series of separate conferrals and reports may cause unnecessary cost and delay.

Generally the Court will expect and adopt counsels’ joint recommendation as to a single inspection/conferral/reporting process but with the ability of counsel, promptly after the joint inspection, to file a memorandum requesting an amended conferral and reporting process if it transpires that amendment is appropriate.

As time passes and expert attendances take place pursuant to initial directions, it will become less likely that the Court will amend initial directions to require sequencing. The Court’s judgment in *Scotchbrook v Southern Response* [2018] NZHC 757 is an example of the Court’s refusing to amend directions which have been in place for a lengthy period notwithstanding that the Court may well have approved sequencing if sought earlier.

The Earthquake List Judges, with approximately 500 active cases at any given time, see a benefit to all involved with the List in maintaining as far as possible a uniform approach. In relation to the expert conferral process, we have determined that the approach will remain as follows:

1. The List Judges will expect to see and approve in most cases a request for a single inspection/conferral/reporting process;
2. The List Judges recognise that in some cases, either at the outset or soon after a joint site inspection, directions for a sequenced conferral and reporting process may be appropriate.

Second issue: the agenda for experts: the briefing of experts on issues

It appears from discussion by counsel that experts are often entering their conferral process without an agenda or briefing on the issues between the parties. This may be leading to some lack of focus or causing unnecessary difference of approach between the experts.

The Protocol (para 3a) contains an expectation that the parties (i.e. through counsel) will discuss and agree an agenda before the experts confer. This expectation was included in the Protocol precisely to focus the experts.

The Earthquake List Judges confirm that para 3a of the Protocol continues to state the Court’s expectation in all Earthquake List cases. Judges consider that the

provision of an agenda should be the default position with exceptional reasons required if counsel are not to provide the experts with an agenda.

Third issue: the applicable standard

Counsel's discussions indicated that issues have arisen in the experts' conferral process because experts are being asked by instructing counsel to work to different views of the policy standard.

Given that the correct policy standard (if there is disagreement) will ultimately be a trial issue, the Judges noted that a solution would be for the respective experts to identify the two competing positions and to provide their opinions on both alternatives. It was indicated in response that defendants would be reluctant to meet the additional cost of experts' dealing with the competing view of the policy standard where (in counsels' opinion) that view is plainly unsustainable.

The Earthquake List Judges consider it appropriate to break into two stages the treatment of any dispute as to the applicable standard:

- Stage 1 – in their agenda, counsel should clearly identify the definition of the standard which they say is applicable to repair etc in the particular case (with, in the case of a difference, the two different positions stated).
- Stage 2 – if the parties (through counsel) agree, the relevant experts should be asked in the agenda to express their opinion (as to solution etc) based on both competing standards.

Update on Christchurch Earthquake List numbers

Counsel may be interested to know the up-to-date figures relating to High Court proceedings on the List:

Disposed of:	631
Pending trial:	63
Active (not set down):	425
Total filed to date:	1119

The repair cases now account for 148 (13%) of the total filed to date.

Fresh figures will be provided at the 2018 Earthquake List Update (18 October 2018).

Next annual Earthquake List update

The Judges have agreed with Malcolm Ellis that this year's update will take place on Thursday, 18 October 2018. The Society will issue further details later.

