

Flood Prone Properties – Who is liable? High Court Releases Decision on EQC Policy

As a result of the Canterbury Earthquakes, many areas of the province suffered damage resulting in "Increased Flooding Vulnerability," ("IFV") a phenomenon where as a consequence of the earth movements land levels changed becoming more prone to flooding and liquefaction.

The Earthquake Commission ("**the Commission**"), a body charged with administering insurance under the terms of the Earthquake Commission Act 1993, recently developed a policy which sought to clarify when compensation may be awarded to a claimant, where a property suffered from IFV ("**the Policy**").

The High Court decision in *Earthquake Commission v Insurance Council of New Zealand*¹ deals with the validity and implementation of the Policy.

Issues for determination

The Commission sought declarations from the High Court to:

- a) Resolve uncertain terms within the Policy including "increased flooding vulnerability;" and
- b) Confirm whether the Commission was lawfully entitled to implement the policy; and
- c) Clarify how an individual claimant may enforce the Commission's statutory obligation to meet lawful claims.

Decision of the High Court

In determining whether IFV constituted "natural-disaster damage," the Court looked to the Earthquake Commission Act 1993. Section 2(1) states that "natural disaster damage" is physical loss or damage, in relation to property, that has occurred as a result of a natural disaster.

The Court held that due to the number of earthquakes experienced by Christchurch since 2010, the levels of land had been affected. This meant that the land was more vulnerable to flooding. Because the main use of residential land is as a "platform for building", any land that has become more susceptible to flooding will be less fit for purpose. As a result, the Court found that a reduction in land levels will be "physical loss or damage" as required by the Act. The Court made a declaration in favour of the Commission to that effect. With the same reasoning, the Court also made a declaration which confirmed that "Increased Liquefaction Vulnerability" also constituted "natural disaster damage" for the purposes of the Act.

The Court also confirmed however that residential buildings have not suffered "natural disaster damage" where the land levels have changed because this does not change the materials or structure of the building. This was in keeping with the scope of the Act which puts an emphasis on the need to differentiate between physical loss or damage to a residential building and physical loss or damage to the residential land on which it is erected.

Further, the Court had to consider how the Commission would settle claims under the Policy. The Court made a declaration confirming the obligation of the Commission to insure residential land on an indemnity basis. As a result, the Commission may indemnify a claimant against IFV or increased liquefaction vulnerability by paying repair costs to land where repairs are technically feasible, or by providing payment for the loss of market value of the insured property. What remedy is applicable is at the option of the Commission.

The Commission had also sought a declaration barring claimants from bringing ordinary proceedings against it when the Commission allegedly implemented the policy incorrectly. This would leave claimants with the only option of judicial review. The Court declined to make such a declaration, with the effect that a claimant may challenge a decision of the Commission through ordinary proceedings, judicial review or both.

Conclusion

The High Court has confirmed that compensation will be available under the Earthquake Commission Act 1993 to property owners whose land has become more vulnerable to flooding and liquefaction as a result of the 2010 and 2011 earthquakes, but such compensation will not be available for any residential buildings upon such land. Compensation when awarded would be on an indemnity basis.

¹ [2014] NZHC 3138.

This High Court decision will have especially widespread implications for homeowner's within the Flockton Basin and other low lying areas of Canterbury.

If you have any questions about how this decision may affect you, please do not hesitate to contact a member of our specialist [litigation](#) team.

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