IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2008-488-000563

IN THE MATTER OF	a claim under the Earthquake Commission Act 1993
BETWEEN	GRAEME JOHN DOYLE Plaintiff
AND	EARTHQUAKE COMMISSION Defendant

Hearing: 17 March 2009

Counsel: Roger Bell for Plaintiff
John Knight and Nicholas S Wood for Defendant

Judgment: 30 April 2009 at 4:00pm

RESERVED JUDGMENT OF HUGH WILLIAMS J.

This judgment was delivered by
The Hon. Justice Hugh Williams
on

30 April 2009 at 4:00pm

pursuant to Rule 11.5 of the High Court Rules
……………………………………………..
Registrar/Deputy Registrar

A. Section 36(2) of the 1991 Act and cl 3(b) of the Third Schedule to the EQC Act entitles EQC to decline to meet the cost of removing slurry from its place of rest following the rainstorm on 27-29 March 2007 but not of declining to indemnify Mr Doyle for damage suffered by his property whilst in motion. Mr Doyle's claim therefore succeeds in part and there is a Declaration in terms of para [63], quantum to be resolved by the parties with leave reserved for them to revert to the Court within two months of delivery of this judgment if agreement eludes them.

B. Application for judicial review dismissed.

C. **Mr Doyle would also appear to be entitled to costs on the quantum of the claim agreed or later ordered. Since the case had some features of a test case about it, costs on a scale higher than 2B may be appropriate. Again, the parties are to endeavour to agree.**

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Introduction

[1] Mr Doyle, the plaintiff, bought the steepish vacant section at 42 Oneroa Road, Russell, in 2000. Although he says he was unaware of it at the time and was not told of it by his then solicitor, the title, Identifier 88973 North Auckland Registry, bore the notation that a "building consent has been issued in respect of a building on the land that is described in s 36(2) Building Act 1991" (the "1991 Act").

[2] That certificate, which affected Certificates of Title 52B/4 and 52B/25, both of which were then in the name of a Mr Cone, Mr Doyle's vendor, relevantly reads:

> Pursuant to Section 36 (2) of the Building Act 1991 **THE FAR NORTH DISTRICT COUNCIL** ["FNDC"] hereby notifies you that a Building Consent has been issued in respect of a building on the land comprised in Certificate of Titles 52D/24 and 52D/25 which land is likely to be subject to inundation, erosion and avulsion.

[3] Mr Doyle obtained a building consent for a house on the land in May 2001 and built his New Zealand home on the site over the next year or so. He later installed retaining walls, gardens and generally developed the site.

[4] On 27-29 March 2007 a disastrous rainstorm hit the eastern coast of Northland. Nearby Opua received well over 300mm of rain during that period. It was said to be a "one in 150 year" event. Many properties suffered damage.

[5] Mr Doyle's was amongst the damaged properties. A slip started on the higher ground behind his house, slid down the hill, demolished a bathroom, caused internal damage including broken doors and left debris over the driveway and the lower part of the property.

[6] Mr Doyle's home was insured against fire at the time of the slip. It was accordingly insured against "natural disaster damage" under s 18(1) of the Earthquake Commission Act 1993[1] (the "EQC Act").

[7] EQC declined Mr Doyle's claim on 25 January 2008 saying:

> 3 Clause 3(d) of the Third Schedule to the Earthquake Commission Act 1993 allows EQC to decline a claim where the certificate of title for the land comprising the property, or on which the property is situated, contains an entry under section 36(2) of the Building Act 1991. The certificate of title to your client's property contains such an entry.
>
> 4 EQC considers that two of the matters relevant to the exercise of its discretion under clause 3(d) are:
>
> 4.1 whether the natural disaster event for which the claim is made is the same type of hazard as that which caused the local authority to issue the conditional building consent under section 36 of the Building Act 1991; and
>
> 4.2 whether the owner can reasonably be taken to have assumed the risk for loss flowing from that type of hazard.
>
> 5 In this case EQC considers that both issues can be answered affirmatively.

[1] It is convenient to adopt the Commission's contraction of its title to "EQC" even though earthquake is, of course, one word.

> 6 As to the first point, the local authority has confirmed ... that the building consent was issued conditionally because of the risk of landslips. As the Council records in its letter, "*Possible slips were the reason a Section 36 Notice was registered on this property in the first place"*. This natural disaster that damaged your client's property was, of course, a landslip.
>
> 7 As to the second point, the section 36 notice was placed on the previous certificates of title for the land in question in February 2000, before your client purchased his property. The notices have been on all subsequent certificates of title issued for this land ever since, and were there when your client became the registered proprietor of his property. In those circumstances, your client either did know or should have known of the existence of the section 36 notices and, therefore, of the hazards of which they advise.
>
> 8 Accordingly, EQC considers it appropriate in this case to decline the claim.

[8] Mr Doyle issued these proceedings seeking an order requiring EQC to indemnify him under the EQC Act and for judicial review. The sum claimed is $91,460.77, the net cost to Mr Doyle of the repairs to his property.

[9] The judicial review cause of action asserts that in the solicitor's letter of 25 January 2008 and a further letter of 16 June 2008 show EQC took into account irrelevant matters in declining Mr Doyle's claim, particularly that the original notice under s 36(2) of the 1991 Act related to the building on Mr Cone's property not for Mr Doyle's home and it was a "natural landslip" which damaged the plaintiff's house, not "inundation, erosion and avulsion".

[10] The solicitors' letter of 16 June 2008 relevantly said:

> 9 EQC has also considered your suggestion that the type of hazard that occurred is not the same as those identified in the entry under s 36(2) because the entry refers only to "*inundation, erosion and avulsion*", and not expressly to "*land slippage*". EQC disagrees with that proposition. The word "*inundation*" is commonly used to refer to the situation where a lower-lying area of land has been covered by falling debris from a higher area of land. It is not limited to flood effects. Nor do you suggest that Mr Doyle in fact relied on some more limited meaning for the term.
>
> 10 In any event, given the existence of the entry and the material on the territorial authority's file, EQC remains inclined to the view that it is appropriate in this case for it to decline to accept the risk of providing cover for the damage that has occurred to your client's property, and does not currently see any reason to change its

previous decision to exercise its discretion to decline Mr Doyle's claim.

[11] EQC's defence admits the damage to Mr Doyle's property was "natural disaster damage" by way of "natural landslip" as defined, but asserts cl 3(d) of the Third Schedule to the EQC Act entitles it to decline the claim.

Relevant statutory definitions

[12] Statutory definitions in the EQC Act relevant to this claim include:

> "Natural disaster" means –
>
> (a) An earthquake, natural landslip, volcanic eruption, hydrothermal activity, or tsunami; or
>
> (b) Natural disaster fire; or
>
> (c) In the case only of residential land, a storm or flood.
>
> "Natural disaster damage" means, in relation to property, -
>
> (a) Any physical loss or damage to the property occurring as the direct result of a natural disaster; ...
>
> "Natural landslip" means the movement (whether by way of falling, sliding, or flowing, or by a combination thereof) of ground-forming materials composed of natural rock, soil, artificial fill, or a combination of such materials, which, before movement, formed an integral party of the ground; but does not include the movement of ground due to below-ground subsidence, soil expansion, soil shrinkage, soil compactions or erosion.
>
> "Physical loss or damage", in relation to property, includes any physical loss or damage to the property that (in the opinion of the Commission) is imminent as the direct result of a natural disaster which has occurred."

[13] Section 27(a) of the EQC Act provides that insurance of residential buildings, land or personal property under ss 18-20 is subject to the conditions in the Third Schedule:

> **THIRD SCHEDULE**
> **CONDITIONS APPLYING TO INSURANCE UNDER THIS ACT**
>
> ...
>
> **3. Circumstances where Commission may decline claim** – The Commission may decline (or meet part only of) a claim made under any insurance of any property under this Act where –

...

(d) The certificate of title for the land comprising the property, or on which the property is situated, contains an entry under section 36(2) of the Building Act 1991 or an entry under section 74 of the Building Act 2004. [the "2004 Act"].

Facts

[14] Mr Cone bought the two lots, one of which became 42 Oneroa Road, in 1985 and obtained a building consent to build a house on one in January 2000. On granting the consent, FNDC registered the s 36 notice against both titles though Mr Cone's house is entirely on the lot he retained, not on that he sold Mr Doyle. A subdivision consent for a boundary readjustment was granted in February 2000 and two new titles issued. FNDC's subdivision consent raised no issue about land erosion or slippage. Mr Cone then sold Mr Doyle the lot he now owns. There was a further boundary adjustment in August 2003 with the two present titles being issued for the land owned by Messrs Cone and Doyle respectively and with the s 36 notices registered against each.

[15] After Mr Doyle's claim was lodged, his then solicitors sought to have the s 36 certificate removed from his title on the basis it was erroneously entered and should only have been registered against Mr Cone's title. That request was declined on 3 October 2007. Copies of relevant correspondence were sent to EQC as part of its investigation into Mr Doyle's claim.

[16] A FNDC letter of 25 October 2007 said the s 36 certificate had been registered "due to Mr Doyle's and most of the properties around the Russell Heights and Oneroa Road area being marked as slippage and suspect ground areas". A number of those properties suffered slips in the rainstorm. On the same day FNDC issued a notice to Mr Doyle under s 124 of the 2004 Act requiring him to employ an engineer and make the property safe as soon as possible and in any event by 25 February 2008.

Expert opinion.

[17] Though accepting it is ultimately for the Court to decide whether Mr Doyle's claim is excluded by the EQC Act and, in particular, cl 3(d) of the Third Schedule, both parties filed affidavits on the topic:

a) Mr Booth, EQC's claims manager and an experienced loss adjuster, said EQC accepts Mr Doyle's property sustained "natural disaster damage" as a result of the rainstorm but EQC was entitled to decline Mr Doyle's claim under cl 3(d) of the Third Schedule and the wording of the s 36(2) certificate because "inundation is commonly used to refer to a particular type of landslip where debris from a higher area of land falls down and covers the affected property".

b) Mr Leeves, a geotechnical engineer, said what occurred on Mr Doyle's property as a result of the rainstorm amounted to "inundation":

> "In the context of engineering, and specifically conditional building consents or other notices issued under section 36 of the Building Act 1991, I use and understand the word "inundation" to refer to both floodwater and landslip material, the latter where material from higher-lying land moves onto lower-lying land. Correspondingly, the term "inundated" is often used, in my experience, to refer to land that has had landslip material (debris) fall onto it.

c) Mr Geddes, a consulting engineer for Mr Doyle, said:

> "8. In general, engineers and engineering geologists use "*inundation*" in the same way as other people, that is, to refer to flooding by water. In the past, they have also used "*inundation*" to refer to situations where debris from a higher area of land falls down and covers a lower area. I associate this with a statutory provision, section 641A of the Local Government Act 1974, which used the expression "*erosion, subsidence, or slippage, or inundation arising from such erosion, subsidence, or slippage*". Engineering reports made for the purpose of section 641A did use "*inundation*" to

describe debris from a higher area of land falling down on to another area of land.

9. Section 36 of the Building Act 1991 replaced section 641A of the Local Government Act 1974. The natural hazards referred to in section 36 of the Building Act 1991 are: "*erosion, avulsion, alluvion, falling debris, subsidence, inundation and slippage*". Since the Building Act 1991, engineers have continued to use "*inundation*" to describe debris from a higher area of land falling down to a lower area. However, because section 36 makes separate provision for that hazard, namely "*falling debris*", there was a trend to qualify inundation in a manner such as inundation from "*falling debris*" or inundation from "*slip debris*".

10. Since the Building Act 2004, it has not been common for engineers to use "*inundation*" to refer to slip debris falling down on to a lower area of land. The natural hazards referred to in section 71 of the Building Act 2004 are given a specific definition in that Act:

    a. "*Erosion (including coastal erosion, bank erosion, and sheet erosion)*

    b. *Falling debris (including soil, rock, snow and ice)*

    c. *Subsidence*

    d. *Inundation (including flooding, overland flow, storm surge, tidal effect, and ponding)*

    e. *Slippage*"

    Specifically, where soil from a slip descends from a higher area to lower land, that is best described as "*falling debris*".

11. In my experience, the use of "*inundation*" to describe the situation where debris falls down and covers a lower area is no longer common or correct."

Submissions

[18] For Mr Doyle, Mr Bell submitted the s 36 notification should never have been entered on Mr Doyle's title as it applied to a different house and a different hazard. He submitted Mr Doyle did not assume the risk of landslip damage under s

36 of the 1991 Act or its substitute, s 72 of the 2004 Act. He made the point that when FNDC issued Mr Cone's subdivision consent for the boundary change, it did not exercise the powers it then had under s 106 of the Resource Management Act 1991 to refuse consent if the land involved was likely to be subject to damage by inundation and other matters similar to those listed in s 36. Nor did FNDC impose any condition in respect of possible damage from inundation or similar occurrences. As FNDC's obligation was to refuse subdivision consent unless such matters were addressed, Mr Bell submitted it must have decided the land was not subject to such risks. Similarly, Mr Doyle's building consent did not require a s 36 certificate to be registered against the title. He therefore submitted the titles issued to Mr Doyle after the subdivision and boundary adjustments should not have had the s 36 certificate noted on them.

[19] He submitted EQC operates a statutory scheme of insurance for natural disaster damage with claims being made under the scheme, not as if made under a policy. Hence a number of principles relating to insurance contracts are inapplicable (*Earthquake Commission v Disputes Tribunal* [1997] NZAR 115, 116, *Coughlan v Earthquake Commission* [2007] NZAR 533, 539-541). Mr Bell emphasised the phrase "be deemed to be insured" in ss 18, 19 and 20 and the obligation on EQC to settle claims to the extent it is liable (s 29(2)). He made the point the statutory scheme leaves EQC with little discretion as to the risks it covers. Its actions can be constrained by actions of others such as territorial local authorities.

[20] For the purposes of this case, Mr Bell said the plaintiff was prepared to treat the s 36 certificate as a notice under s 74 of the 2004 Act by dint of s 434 of that Act. Section 74 notices are provided for in Part 2 Subpart 3 of the 2004 Act. He pointed to the definition in s 71 of "natural hazard" as meaning any of the occurrences listed by Mr Geddes.

[21] Section 71 requires refusal of building consent if the land on which the building is to be erected is subject to natural hazards. Section 72 overrides that provision and requires the grant of a building consent if the work will not worsen the natural hazard and it is reasonable to grant a waiver or modification of the Building Code in respect of it. In those situations s 73 requires consent to be notified to,

amongst others, the relevant District Land Registrar ("DLR"). The notification must identify the natural hazard and the DLR must then record the notification on the title with a copy of the relevant "project information memorandum". Compliance with that procedure, Mr Bell pointed out, gives the building consent authority immunity under s 392 of the 2004 Act. The procedure also gives owners a choice whether to undertake the work sanctioned by the consent knowing of their inability to sue the building consent authority if damage results from the nominated natural hazard.

[22] Mr Bell provided a number of examples of operation of the procedure in practice. He also relied on observations by Lord Reid in *Slough Estates Ltd v Slough Borough Council (No.2)* [1970] 2 All ER 216, 218 that construction of a public document cannot proceed by admitting evidence of the facts known by the agency concerned. Interpretation of public documents proceeds on the basis they speak for themselves and are not subject to varying interpretations derived from extrinsic evidence (*Opua Ferries Ltd v Fullers Bay of Island Ltd* [2003] 3 NZLR 740, 749-750 para [20], *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402, 407-408 paras [16]-[23). He made the point that notations on titles under the Land Transfer Act are construed on their face and need not be the subject of enquiry (*Fels v Knowles* (1906) 26 NZLR 604, 620).

[23] Mr Bell submitted his examples showed that when a building consent authority utilizes its powers under s 74 of the 2004 Act it ensures the owner carries the risk of a building incurring natural hazard damage. He submitted that, notwithstanding s 392 of that Act, Mr Doyle could sue FNBC.

[24] He went on to submit EQC cannot use cl 3(d)of the Third Schedule to require an insured to assume a more extensive risk than under the 2004 Act, a submission he also buttressed with examples. He submitted:

> ... The risk a building owner assumes when he builds under a consent subject to a notice under s 74 is the risk of a natural hazard under the Building Act stated on the notice, not other risks. It is a mistake of law to use clause 3(d) to decline a claim for damage caused by a hazard outside the Building Act and outside the s 74 notice. That is, the purpose of clause 3(d) is not to relieve the Commission generally from claims for any sort of natural hazard, but only from hazards specified on the s 74 notice. The Commission cannot claim that its power to decline claims under clause 3(d) is more extensive than a consent authority's defence under s 392 of the Building Act 2004.

> Such an argument overlooks the particular risks transferred and assumed under a s 74 notice. Clause 3(d) is part of an insurance scheme, under which risks of property damage are transferred. It is to be applied only to risks assumed under the s 74 notice. Under the Earthquake Commission Act the Commission has responsibility for insurance for buildings suffering natural disaster damage, including damage by earthquake. It cannot avoid that responsibility by using clause 3(d), when the owner has taken the risk for some other head of hazard.

[25] By reference to the other provisions in cl 3 of the Third Schedule, Mr Bell submitted cl 3(d) was not to be applied where an insured is entirely innocent in respect of the damage and when he has not assumed the risk of the damage which occurred.

[26] Applying those principles to the facts, Mr Bell submitted that, because there was no building on Mr Doyle's land when he bought it, the s 36 certificate was inapplicable. The time for FNDC to decide whether there should be such a notice on the title was when Mr Doyle applied for building consent. It did not use its powers under s 36 at that point and accordingly, he argued, Mr Doyle's house is not subject to a s 74 notice and EQC could not decline cover for the rainstorm damage because the notice on the title did not apply to Mr Doyle's house and he did not assume the risk of natural disaster damage under either Building Act or the EQC Act. That, he argued, amounted to an error of law.

[27] He also argued the hazards for which the s 74 notice was issued were irrelevant because the damage occurred as a result of a "natural landslip" or, alternatively, "slippage" in terms of s 71(3)(e) of the 2004 Act. It did not result from "inundation, erosion and avulsion". "Inundation" means flooding by water, he submitted, in reliance on dictionary definitions. He submitted the definition of "inundation" in s 71(3)(d) of the 2004 Act was inapplicable: it referred only to damage by water. The Commission's definition of "inundation" – the covering of land by slip debris – was only supported by the former s 641A of the Local Government Act 1974 cited by Mr Geddes, but that definition, Mr Bell submitted, was inapplicable to Mr Doyle's case because of the statutory qualifications. The extended hazards in s 36(1) of the 1991 Act should be similarly interpreted. He submitted any meaning of a term which requires to be explained by evidence was neither common nor ordinary (s 128 Evidence Act 2006).

[28] Even if the Commissions' interpretation of "inundation" were accepted, it still only gave EQC a partial defence since the engineer's report showed damage which could not have stemmed from that cause.

[29] He classed as hearsay and inadmissible the statements cited by Mr Booth of FNDC's reasons for giving the s 36 certificate.

[30] All of the above, Mr Bell submitted, demonstrated an error of law sufficient for Mr Doyle to succeed on his judicial review claim. The claim under the EQC Act was also made out. Accordingly Mr Doyle should succeed on one or both claims and be given judgment for his repair costs, quantum not being challenged.

[31] The written submissions of Mr Knight, leading counsel for EQC, began with an overview of the Act but he did not pursue that aspect of the submissions orally as he agreed with Mr Bell's analysis of EQC's functions, the types of property deemed insured, that Mr Doyle's property had sustained "natural disaster damage" and EQC had a resultant obligation to determine Mr Doyle's claim under s 29(2) unless excluded.

[32] He traversed the factual background already recounted, principally from Mr Booth's affidavit. He accepted EQC's decision to decline the claim under cl 3(d) was justiciable as a statutory power of decision but submitted cl 3(d) of the Third Schedule gave EQC a wide discretion without express limitation and did not list factors required to be taken into account in reaching the decision. Accordingly, the discretion should be exercised so as to promote the policy and objects of the Act discerned from construing the Act as a whole (*Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997, 1030).

[33] Because it was a statutory scheme of insurance, EQC did not negotiate the scope of cover but simply administered the scheme within the ambit of the Act and cl 3 empowered EQC to manage the risk when claims were made, not when the risk was assumed. He accepted that most of cl 3 provisions required demonstrated fault or, irrespective of fault, an identifiable risk of damage. Clause 3(d) did not require fault or risk taking by an insured. What it required was consideration as to whether

the insured asset presented an identifiable risk of damage through nominated hazards as a result of identification of the particular risk by the territorial local authority. Thus, cl 3(d) allowed EQC to decline claims where the territorial local authority decided the land is subject to one or more specified natural hazards and publicly notified that risk by entry of the requisite certificate on the title. EQC was permitted to make whatever inquiries it considered proper in that regard. Knowledge of the hazard by the insured was irrelevant.

[34] Mr Knight argued the s 36 notification procedure was appropriate in Mr Doyle's case as when the certificate was entered on the title it focused on the land not the buildings on the land. He made the point s 36(2) did not require the territorial local authority to identify the hazards with which it was concerned in its notification to the DLR, and the DLR was obliged only to make an entry that the building consent had been issued in respect of land subject to certain specified hazards. Indeed, Mr Knight said s 36 and s 74 certificates often omit all specification of hazards or list every one in the statute.

[35] He submitted the immunity under s 364 of the 1991 Act arose on compliance with the procedure and later damage to the building from any listed risk, not just those specified in the s 36(2) certificate.

[36] Mr Knight submitted there was no need to analyse s 74 of the 2004 Act for the purpose of determining this claim. He suggested Mr Bell's examples were unhelpful and unworkable in relation to s 36(2) certificates. Were they correct, Mr Knight submitted the interpretation on Mr Doyle's behalf which resulted would effectively remove from EQC the flexibility to do justice in individual cases consistent with statutory policy. He said if EQC were bound by the contents of the certificate and unable to investigate further, it would be obliged to decline if the listed hazards were mistaken or all hazards were listed because the territorial local authority had not focussed on the likely source of risk or whether there was a good reason for including the listed hazard in the notice.

[37] He said EQC accepted the s 36(2) entry on Mr Doyle's title came about as a consequence of the building consent granted to Mr Cone, but that occurred because

part of each of Mr Cone's two original lots became Identifier 88973. That notwithstanding, he again submitted the s 36(2) certificate applied to the land, not to the building. The certificate on the title was not only to warn of the territorial local authority's immunity from suit (with its attendant limitation period) but as a general notification to persons interested in the land of the risk to it of one or more specified natural hazards.

[38] The terms of the s 36(2) certificate were a matter which EQC could – and did – take into account in considering whether to accept Mr Doyle's claim.

[39] EQC's response to the argument that the hazards for which the certificate was issued were irrelevant to the natural disaster damage that occurred was, as with the former argument, that the hazards in the notice were not determinative because there was no requirement under s 36 for territorial local authorities to specify hazards.

[40] Mr Knight also submitted the rainstorm damage amounted to "inundation" of Mr Doyle's property referring to the expert evidence that inundation can include landslips where debris covers affected property. He pointed to s 36(4) of the 1991 Act as supporting an interpretation that inundation could arise from any of the listed hazards and the similar terminology of the former s 641A of the Local Government Act 1974. In light of that "inundation" was apt to describe the damage suffered by Mr Doyle's property.

[41] He met the hearsay assertion by saying the material taken into account by EQC was not adduced to prove the truth of its contents but was relevant to the judicial review cause of action as showing the steps EQC took and the material relied on in the exercise of its discretion.

[42] Mr Knight submitted it would be unusual for judicial review proceedings to result in a "money" judgment but accepted the Court could grant an order setting aside EQC's decision to decline Mr Doyle's claim. There was, he submitted, no jurisdiction to grant monetary compensation when a public body performing its public functions breaches a ground of judicial review (Woolf et al *de Smith's Judicial Review* 6th ed 2007 para 19-025 p 922).

Discussion and Decision

[43] Section 36 of the 1991 Act read:

> **36 Building on land subject to erosion, etc**
>
> (1) Except as provided for in subsection (2) of this section, a territorial authority shall refuse to grant a building consent involving construction of a building or major alterations to a building if—
>
> (a) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
>
> (b) The building work itself is likely to accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property—
>
> unless the territorial authority is satisfied that adequate provision has been or will be made to—
>
> (c) Protect the land or building work or that other property concerned from erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
>
> (d) Restore any damage to the land or that other property concerned as a result of the building work.
>
> (2) Where a building consent is applied for and the territorial authority considers that—
>
> (a) The building work itself will not accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property; but
>
> (b) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; and
>
> (c) The building work which is to take place is in all other respects such that the requirements of section 34 of this Act have been met—
>
> the territorial authority shall, if it is satisfied that the applicant is the owner in terms of this section, grant the building consent, and shall include as a condition of that consent that the territorial authority shall, forthwith upon the issue of that consent, notify the District Land Registrar of the land registration district in which the land to which the consent relates is situated; and the District Land Registrar shall make an entry on the certificate of title to the land that a

> building consent has been issued in respect of a building on land that is described in subsection (1)(a) of this section. In any such case it shall not be necessary for the Registrar to record the like entry on the duplicate of the certificate of title.
>
> (3) Where the territorial authority determines that the entry referred to in subsection (2) of this section is no longer required, it shall send notice of the determination to the District Land Registrar who shall amend his or her records accordingly. [In any such case it shall not be necessary for the Registrar to record a like entry on the duplicate certificate of title unless that duplicate had had an entry recorded on it pursuant to subsection (2) of this section or pursuant to section 641A of the Local Government Act 1974.]
>
> (4) Where—
>
> (a) Any building consent has been issued under subsection (2) of this section; and
>
> (b) The territorial authority has notified the District Land Registrar in accordance with subsection (2) of this section that it has issued the consent; and
>
> (c) The territorial authority has not notified the District Land Registrar under subsection (3) of this section that it has determined that the entry made on the certificate of title of the land is no longer required; and
>
> (d) The building to which the building consent relates later suffers damage arising directly or indirectly from erosion, subsidence, avulsion, alluvion, falling debris, inundation, or slippage, or from inundation arising from such erosion, subsidence, avulsion, alluvion, falling debris, or slippage—
>
> the territorial authority and every member, employee, or agent of the territorial authority shall not be under any civil liability to any person having an interest in that building on the grounds that it issued a building consent for the building in the knowledge that the building for which the consent was issued or the land on which the building was situated was, or was likely to be, subject to damage arising, directly or indirectly, from erosion, subsidence, avulsion, alluvion, falling debris, inundation, or slippage or from inundation arising from such erosion, subsidence, avulsion, alluvion, falling debris, or slippage.

[44] Under s 36 the obligation of the territorial authority was to refuse to grant a building consent if the land on which the work was to take place was prone to damage from a listed hazard without adequate provision being made to protect the work or land from that hazard, but the authority was required, if it granted the consent, to include as a condition a notification to the DLR "that a building consent has been issued in respect of that land". That provision was notable, as Mr Knight

submitted, for not requiring s 36 certificates noted on titles to nominate the hazards which concerned the territorial authority and led the authority to issue the s 36 certificate in the first place.

[45] However, where, as here, the territorial authority nominates the hazard which it considers affects land in respect of it has issued a building consent, on ordinary principles of statutory and documentary interpretation the territorial authority must be taken to have limited its concerns to the nominated hazards. Further, the certificate having been noted on the relevant title and thus incorporated within it, the notification which the entry of the certificate furnishes to all who are interested in searching the title must similarly be limited to the hazards nominated in the certificate. True, the certificate registered against the title is not required by ss 36 or 74 to identify the hazard or hazards considered likely to affect the land. That may require persons interested to make inquiry of the territorial authority, but the necessity for that further inquiry does not affect the validity of registration of the certificate.

[46] It cannot be correct, despite Mr Knight's submissions, that registration of a s 36 certificate containing nominated hazards entitles EQC to decline indemnity if the property against which the certificate is registered is damaged by another risk or hazard listed in the statute. The territorial local authority knows the land. It knows which hazards listed in s 36 of the 1991 Act and s 71 of the 2004 Act are those to which the land might be subject. It is for it to nominate which of those hazards in ss 36 or s 72 should be listed in its building consent if for no other reason than it alerts owners, possible purchasers and others with an interest in te property – e.g. mortgagees - to the risk of damage from those hazards. Doubtless, s 36 or s 72 certificates registered against titles affect the value of the land to which they relate. That provides further reason for confining ss 36 and 72 certificates to the hazards they list or to those in territorial authority files which gave rise to the certificates following presentation of a building consent application.

[47] While if, as Mr Knight submitted, some territorial local authorities fail to list any of the statutory hazards on their s 36 or s 72 certificate, they would not appear to be failing in their statutory duty since the sections do not require identification of the

risks. However, they might be breaching their statutory duty if their processing of the prerequisite building consent application did not consider and identify to which of the statutory risks the land is thought to be subject. On the other hand, if they list all hazards, they may also be failing in their statutory duty since such would indicate they have failed to identify the appropriate hazard and have taken action which might affect the value of the land without proper consideration of what hazards may affect the building or the land to which the consent application relates. In judicial review terms, territorial authorities may be vulnerable if they list all the hazards appearing in the statute since it may give an indication they have failed to give proper weight to relevant considerations or have taken irrelevant considerations into account or their decision is unreasonable.

[48] It cannot be the case, despite Mr Bell's submissions, that the s 36 certificate inappropriately appears on Mr Doyle's title. Once a territorial authority has identified to which of the listed hazards the land the subject of the building consent application is prone, the resultant certificate does not merely apply to the land within the curtilage of the building for which consent is given. It applies to all the land – at least within the boundaries of the title against which the s 36 or s 72 certificate is registered – which is prone to the hazard.

[49] It is not to the point that the s 32 certificate on Mr Doyle's title was entered following FNDC's grant of Mr Cone's building consent and prolonged through the subsequent boundary adjustments and new titles. This is because s 36 required FNDC to undertake several steps before issuing such certificates. It had to receive an application for building consent in terms of s 36(1). It was required to refuse consent if the land on which the work was to take place was subject to the hazards listed in s 36(1)(a) (b) unless it was satisfied adequate provision had been made to protect the land or work from those hazards. If so satisfied, it was obliged to grant the consent on the condition the appropriate DLR be notified of the consent, whereupon the DLR was obliged to note on the title to the land that a building consent had been issued in respect of a building on land described in s 36(1)(a). That analysis makes clear, as Mr Knight submitted, that while consideration of the pre-conditions to the issue of a building consent could only be triggered by an application for such consent, the risk assessment was required to relate to the land,

the hazards to which the land was or was likely to be subject and the effect on the land of the building work.

[50] In Mr Doyle's case, FNDC's letter of 25 October 2007 made clear the land he bought from Mr Cone (and most of the adjacent area) was known to be suspect ground subject to the hazards listed in s 36(1)(a) (b). Unless FNDC was satisfied adequate provision had been made to protect the land or work from those hazards, it was obliged only to grant the consent on condition the appropriate DLR be notified of the consent and the DLR was obliged to note on the title to the land that building consent had been issued in respect of the building on land described in s 36(1)(a). What did not appear from the evidence was why the s 36(2) certificate did not mention "slippage" as a ground when that term appears in s 36(1)(a) and was identified by FNDC as the hazard to which the area was subject most likely to cause damage.

[51] Therefore, once Mr Cone's building consent application provided a trigger for FNDC's consideration of the state of the whole of his land in terms of s 36(1), and once the nature of the ground had been determined and a s 36(2) certificate issued, it applied to all the land in respect of which the assessment had been undertaken and the certificate was issued.

[52] Mr Knight contended that once a certificate under s 36(2) of the 1991 Act (or under s 74 of the 2004 Act) was entered on a title EQC was entitled, in assessing any subsequent claim for damage to the land in that title, to consider whether any of the hazards listed in those sections was operative, not just hazards listed in the certificate. Some territorial authorities, he said, list none. Some list all.

[53] With respect, that argument does not seem to be correct. EQC's obligation under the statutory scheme is to meet all claims which fall within the ambit of the Act, its policies and its principles. That includes consideration of certificates on titles issued under s 36(2) of the 1991 Act (or s 74 of the 2004 Act). It is not for EQC, in effect, to reconsider whether the land the subject of the claimed damage might have been subject to risks other than those listed in the certificate. That would mean EQC was in effect repeating the task of the territorial authority which issued

the certificate or re-evaluating whether the authority's assessment was correct and effectively retrospectively re-casting the terms of the certificate and declining claims on grounds never considered as being required by the territorial authority and never notified to land owners whether present or past.

[54] Thus, EQC is bound by the terms of the s 36 or s 72 certificate registered against land which suffers damage for which the Commission is bound to indemnify the owner, much as a property insurer is bound by the terms of a policy written by an agent. It would not be within the policy of the EQC Act for it to be able to decline damage arising from hazards other than those nominated in the s 36 or s 72 certificates by the territorial local authority or identified in the appropriate building consent application file. Such would appear to be an improper seeking for reasons to decline liability under a statutory scheme intended to provide widespread and comprehensive cover.

[55] It is unhelpful to assess the correctness of EQC's stance in this case by reference to s 74 of the 2004 Act or to the definitions in the former s 641A of the Local Government Act 1974. Not only are those definitions in different terms, they have different qualifiers and thus were enacted for purposes different from s 36 of the 1991 Act and the EQC Act.

[56] Mr Bell's examples were found unhelpful, dealing as they did with factual situations distinct from the present. And it was similarly found unhelpful to treat the s 36 certificate affecting Mr Doyle's land as if it were made under s 74 of the 2004 Act. Further, whether or not Mr Doyle could sue FNDC is also not to the point given Mr Doyle did not name it as a defendant in this proceeding.

[57] At bottom, however, the crucial assessment is whether the March 2007 rainstorm was a "natural disaster" under the EQC Act which inflicted "natural disaster damage" to Mr Doyle's property – both of which EQC admits - and whether EQC's liabilitiy to indemnify Mr Doyle for that damage was avoided by "inundation, erosion or avulsion" by the combined effect of the s 36(2) certificate registered against his title and cl 3(d) of the Third Schedule to the EQC Act.

[58] In this case, the hazards listed are "inundation, erosion and avulsion". There was no suggestion the rainstorm damage to Mr Doyle's property could have been "erosion" as defined or "avulsion" within any dictionary definition.

[59] The critical question therefore becomes whether the rainstorm damage to Mr Doyle's property could, in accordance with the normal principles of statutory and documentary interpretation, be said to amount to "inundation".

[60] The *Oxford English Dictionary* (2nd ed Vol VIII p 33) defines "inundate" as "to overspread with a flood of water; to overflow, flood" and "inundation" as "the action of inundating; the fact of being inundated with water; an overflow of water; a flood". Other dictionaries contain similar definitions including "to overwhelm with water; to swamp" (*Chambers 21st Century Dictionary* p 714) and "to overspread as in or with a flood; deluge; overwhelm" (*Random House Dictionary of the English Language* p 748).

[61] But, while those definitions focus on inundation by water – it being by far the most ubiquitous and plentiful fluid on the globe – they should not necessarily be regarded as confined to inundation by that means. The word "inundation" is used metaphorically as, for example, speaking of inundation through numerous responses to an invitation. "Inundation" comes from the Latin verb "inundare" meaning "to flow over" and accordingly the submergence or flooding of something by a fluid other than water might be correctly regarded as amounting to "inundation". Thus, a spill from a concrete mixer or its spreading its load in its designated location could, without violence to the word, be regarded as inundation of the ground which the concrete covers. A similar description could be given to a spill from a milk tanker – admittedly largely water – or a leakage of heavier-than-air gas into a cavity.

[62] However, what is common to all the dictionary definitions and to engineers' usage as shown by the expert evidence is that "inundation" is a static state. It is a covering of lower property, or a falling of material onto property. "Inundation" is, usually, the result of water or other fluid or gelatinous material flowing from one point and coming to rest in another. The mechanism by which inundation results is

usually slippage, falling debris or water (or other labile or motile material) moving across land and coming to rest.

[63] Seen in that light, the slurry of rainwater, dirt and vegetation which slid down Mr Doyle's land, destroyed part of his house, damaged part of his property and came to rest against the house and settled on top of the lower part of his land, should be regarded as "slippage" or "falling debris" whilst in motion but only became "inundation" when it came to rest. On that basis, s 36(2) and cl 3(b) of the Third Schedule to the EQC Act would entitle EQC to decline to meet the cost of removing that slurry from its place of rest but not of declining to indemnify Mr Doyle for the cost of repairing the damage suffered by his house and property whilst in motion.

[64] Unfortunately, the photographs in evidence were photocopies of photographs and both they and the plans were also indistinct. It is thus impossible on the evidence as at present to do more than hazard a guess at how the quantum of the claim should be divided. But it should now be possible for the parties to proceed with that exercise in light of this judgment.

Result

[65] On that basis, Mr Doyle's claim succeeds in part and the appropriate course would be to make a declaration in terms of para [63] and leave it to the parties to resolve quantum. Leave is reserved for them to revert to the Court within two months of delivery of this judgment if agreement eludes them.

[66] The judicial review cause of action requires to be dismissed. The evidence falls short of demonstrating that EQC failed in its duty by taking irrelevant considerations into account, failing to take account of relevant considerations, reaching a decision for which there was no evidentiary foundation or was wrong.

[67] Mr Doyle would also appear to be entitled to costs on the quantum of the claim agreed or later ordered. On the other hand, he has failed on the judicial review cause of action and EQC may be entitled to costs in that regard.

[68] In those circumstances and since the case had some features of a test case about it, costs on a scale higher than 2B may be appropriate. Again, the parties are to endeavour to agree in accordance with the timetable earlier set out.

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HUGH WILLIAMS J.

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