CLASS ACTION SPECIALISTS

GCA Lawyers

UPDATE FOR PROPERTY OWNERS

EQC Retaining Wall Claims

Update September 2014

Introduction

1. We write to you as a property owner who has earlier indicated interest in possibly joining the proposed class action to force a change in EQC's approach to the settlement of retaining wall claims[1]. This *Update* is being sent to you as a courtesy and because you had earlier flagged your possible interest in obtaining some effective remedy but please note, the following does not constitute any form of legal advice as, in the absence of a contract with this firm, we are not acting for you in any fashion whatsoever.

2. The following will state why this firm will be taking no further steps at this time, but will also indicate some possible options for you given that the situation is very much worse following the adverse judgment in the Wellington High Court on the 17th September.

Recap on events to date

3. In early June this firm was approached by various retaining owners to see if it could assist with the position that has emerged with EQC handling of retaining wall claims. Various efforts were then taken to establish whether there would be sufficient interest among affected property owners and various networks were contacted with a view to gaining a fix on the degree of interest.

4. Inquiries showed that there are about 13,000 homes on the Port Hills and that the great majority will have a number of walls on their property. Further, on the early information flowing in, it was clear that many of these walls will require 6 figure sums to repair.

5. About 300 people were contacted and a preliminary meeting was arranged for 9 June. Expressions of interest prior to that meeting suggested there would be at least 100 owners willing to cooperate in protecting their mutual interests. GCA then produced a funding proposition that was directed at raising a fighting fund of $250,000 plus GST.

6. At the meeting, owners were informed that Dr Matthew Palmer QC had been engaged and that the fighting fund was required to not only address this firm's expected fees, but also Counsel's and experts' fees. Furthermore, and most importantly, it was already plain that the matter would have to be fought over three courts and that owners would have to expect that the matter would finally be resolved in the Supreme Court. This was plain because EQC had

[1] Clients of the firm will also receive a letter.

already declared that it would not be changing its policy as regards how to assess and settle wall claims.

7. Following that meeting the firm found there was insufficient interest to form a group of 100. A variety of discussions were then held with individual owners and with small groups of owners. We were assured that people were simply unsure of what to do and that as the gravity of their position became clearer, there would indeed be interest in moving forward collectively.

8. We were then asked to organise a second meeting and that was held at the Chateau on the Park on 6 August. About 80 people attended and we flew Dr Matthew Palmer QC down from Wellington so that owners could quiz him directly on the likely issues. Again, there were indications of solid support although one owner expressed concern that the fee per owner proposition had effectively gone up.

9. We advised the group that the fundamental equation had not changed in that a fighting fund of $250,000 plus GST was still required because the job to be done remained very much the same i.e. that court action in three courts would be required. Therefore, as we had already established that a group of 100 could not be assembled, we were now aiming at a group of 50. This simply meant the cost per owner was effectively going to be doubled and instead of paying a contribution of $2,500 plus GST per the first proposition, we now sought $5,000 plus GST per owner so that the fighting fund could be formed. (We also sought $250 as a contribution to disbursements).

10. The key issues were fully set out at the August meeting with the particular detriments in the status quo, being discussed:

    - Many properties are in unsafe condition because walls no longer perform their function;
    - Where safety is not an issue, hillsides / banks can nevertheless move because walls no longer perform their function;
    - In the majority of cases very substantial sums are required to fix such walls;
    - EQC has been paying out in accordance with its interpretation of how to fix 'indemnity value' and that seems to result in payments of about 15-25% of the actual repair/replacement cost.
    - Owners are at risk that they may not get further insurance once insurers discover sites are unsafe;
    - They may not get further mortgage assistance (unless it is to repair the wall) and risk banks seeking recovery of their security if the situation cannot be remedied;
    - Many will be unable to sell their properties as purchasers invariably seek building reports and prospective purchasers cannot get mortgages or insurance if significant retaining wall issues remain;
    - Sales on an 'as is where is' basis will generally mean a loss of all equity in the property and may leave owners owing money to their bank.

11. Therefore, the only path forward is for owner's to contest the legal position with EQC. This is the only path (other than accepting the above circumstances) because EQC has declared it will not change its approach and will not negotiate any change to the sum of money that it has determined will properly settle your claim.

12. If legal action is the only way forward there are two options. First, each owner can attempt to do this themselves. We think the sum sought from the group for the 'fighting fund' would be the sort of fund that a single owner may have to budget for as that owner would still have to traverse three levels of court by themselves. (This is to assume they elect to instruct Counsel with the expertise and experience to do the job properly for them).

13. Second, owners could elect to share costs in one action. With 100 people, that would mean each would contribute 1% to the overall costs. With 50 it would mean each would contribute 2% to the overall costs. We felt the merits of group action were clear.

14. During that meeting we also set out the need for concerted action despite the fact that a case on this issue had been argued in the Wellington High Court (the *Michalik* case). We advised owners that the *Michalik* case had necessarily been argued by way of judicial review (a purely legal argument). This was because the family trust concerned had limited assets and the amount of damage and the size of the EQC claim were very small.

15. On this firm's advice, and that of Dr Matthew Palmer, an action in Christchurch was urgently needed. In the absence of expert advice on key valuation, taxation/depreciation, and economic issues, the Wellington court was left with a limited window on the issues. Therefore, Christchurch owners could not assume that any Wellington judgment would be in their favour or, if it was, that it would be sufficiently robust to withstand appeal.

16. Following that meeting we sent out a *Meeting summary* and awaited owner's response. That response was surprisingly poor and by about 12 August we began to think that the firm would not take the matter further.

17. However, at that moment Grant Cameron was required to urgently travel to London on another class action issue and two other options emerged at the same time. First, immediately before departure on 16 August, GCA was approached by a party who believed they had a building company prepared to sponsor the proposed retaining wall class action. Simultaneously, the firm was approached by an engineering company with a similar proposition. Finally, we received advice that a major bank may have similar interest. Communications were set in train with those parties.

18. Second, Grant was meeting with various litigation funders in London and this presented the opportunity to present an overview of this case as well, and to test funder's appetite to support this case. (We had earlier established a lack of such appetite with Australian funders but felt the opportunity had to be explored in the UK).

19. Litigation funders were not particularly interested because the action itself would not produce any form of damages from which a fee could be taken. This meant that more elaborate contractual arrangements with prospective clients would be required but even then, no guarantee as to the timing of ultimate payment to a funder could be made. Therefore, they weren't interested.

20. On return to Christchurch, Grant pursued the bank (no longer interested) and the building company (similarly not interested) and entered discussions with the engineering company. Some interest remains so more of that in a moment. Grant also suffered a bout of pneumonia and so was temporarily out of action.

21. The firm has made thorough inquiries of many owners who had expressed interest in the action to ascertain whether there were any concerns with the proposition made. There were a couple of matters.

22. One related to GCA's proposition in regard to success fee. As can be seen from the *Meeting Summary* earlier circulated, the firm proposed capping such a fee at not being more than 5% of the final claim value. That methodology was adopted because it is more equitable to owners with smaller wall claims. It would mean that in the event of success, those with small claims would receive a small final bill. Those with large claims would receive a larger bill. The alternative would be to specify a fixed sum of money and, although that might inject certainty as to quantum for owners, it would be unfair for those with smaller claims albeit very advantageous to those with larger claims. In light of the position now reached, and if yet called upon (as discussed below), we may revert to the less fair methodology if owners prefer certainty.

23. Also, two other 'myths' seemed to have been circulating. One was that a complaint to the Ombudsman would somehow resolve this matter. That is a fiction. The Ombudsman can influence management of government departments in some circumstances, but they can never determine the law and direct that it be followed in a particular manner. That is a function of the courts. Therefore, if a complaint had been lodged to the Ombudsman, it could not have been acted upon while the very legal issues were before the court (as they were in the *Michalik* case). Now that the High Court has declared the law and has upheld the EQC position, there is nothing for the Ombudsman to do i.e. they have no role or function in such circumstances.

24. The other myth was that the Wellington case would resolve the issue and that owners need not spend money on their own action. As advised at the 6 August meeting, this was incorrect because the form of action in Wellington did not bring critical evidence before the court. This has now been shown to have had a devastating effect on the outcome. Further, to ensure that superior courts were given the best legal arguments in support of the owner's position, they had to file and argue their own case. Leaving it to others, where there were known problems and little prospect of a practical ability by that particular litigant to advance appeals, was a very weak strategy.

Position reached

25. In the absence of owner's agreement as to how they might want to protect their interests, GCA is unable to take the matter any further. It will refund all client monies received to date.

26. On 17 September Justice Williams delivered his judgment in *Michalik v Earthquake Commission*. The judgment completely endorses EQC's approach and rejects Paul Michalik's arguments. In these circumstances we understand it is highly unlikely that Paul will appeal.

27. This means that the position is now very much worse that it was for property owners at the meeting of 6 August. At that time, there was no clear case law on what indemnity value might mean in relation to retaining walls and EQC claims. Now there is a High Court judgment endorsing EQC's approach and so the law for the moment, wholly favours EQC.

28. At face value this makes the situation very much harder for Christchurch residents. As earlier advised, in this scenario residents can still file a case in the High Court in Christchurch but would have to do so using a different form of proceedings. This would enable the court to hear the expert valuers, tax people and an economist, who were so necessary to getting a different decision. Alternatively, residents could seek to intervene in an appeal but, as such an appeal seems very unlikely, the ball is back before Christchurch property owners in a most emphatic way.

29. We are not going to offer legal advice to owners but we make the following brief observations about the *Michalik* judgment.

30. At para 38 the court noted the EQC argument that *"there was no evidence that the wrong test applied."* This goes to the heart of GCA's and Dr Matthew Palmer's advice of 6 August. A judicial review often does not have 'evidence' being called in the normal way and Paul Michalik did not have any valuation, taxation or economic evidence before the court. A court is only required to make a decision on the evidence before it. Williams J accepted the EQC position because there was no evidence to the contrary. At para 48 he notes, *"Mr Michalik called no expert or other evidence in relation to these matters. I am left therefore with the evidence from the valuers – Patete and Townsend – both of whom say that 80 years is an appropriate estimate of the useful life of a wall."* Therefore, given the absence of critical expert evidence the court was left with no choice but to accept the EQC thesis.

31. Such 'expert' evidence is highly contentious and we suggest, could be shown to be incorrect. At para 16 Patete's evidence is noted as saying *"it was impossible to derive a valuation for [a wall] by assessing "the market"*. For wont of another viewpoint, Williams J had to accept that. Further, Patete is referred to again at para 47, where the Judge noted *"the inexorable conclusion is that EQC can only have followed Mr Patete's depreciated replacement cost approach to valuing the damage to the retaining wall. Mr Patete said this was the correct methodology for deriving indemnity value."* Put simply, in the absence of other evidence, the Judge felt he had to accept what that expert had to say.

32. Although Townsend was noted as accepting *"that there may be cases where a retaining wall is a large enough element in the value of a property, that it can be separately assessed: that is the market value of the property can be assessed with and without the retaining wall in situ, the difference being the value of the wall. […] in this case he said, the retaining wall was too small for that approach to be viable."* The court was here noting the other methodology (market value) which is provided for in the act but the particular expert was relying on the size of this wall to say that method was inapplicable. The court accepted that. Nevertheless, and as earlier advised, it is plain that this alternative method would be the critical method to resolve a majority of hill side situations in Christchurch i.e. the walls are significant proportions of property value. Although the court simply didn't have evidence about the market value approach before it (so accepted the depreciation approach) a Christchurch case would have addressed this critical facet with relevant experts.

33. Further, the court accepted (for wont of objection) the NZ Valuation and Property Standards Manual (see para 19).

34. We can advise our clients further as might be required but for the moment, the law had been declared and EQC has won the day. We simply observe that the same option exists for owners as it did before, and their own action may change this outcome.

Way forward

35. We know that a group of property owners with large claims are now moving to organise themselves. We are happy to support this initiative in the background but can't take formal steps unless instructed. **If you want to engage with this group you can contact Justin Prain on 021 998 855**.

36. Also, we will be assisting Justin in trying to finalise possible assistance from a specialist contractor. He anticipates that such contractor may assist with legal costs for those property owners who elect to use that contractor's services to eventually fix their walls. We are aware of the innovative and impressive solutions that the firm concerned is able to offer but owners would need to make their own judgment calls in that regard.

37. We understand the contractor will consider assisting individual owners who do not wish to or are unable to pay their share of any legal fees that may later be required, and that this will be in return for a commercial fee. That fee will be recovered from an owner's receipt of EQC funds (to cover engineering design and other costs). It is worth talking to Justin about the details, but he advises that the likely terms are that the company would require a down payment of $1,000, preferred contractor status for any eventual repair or rebuild of walls and would offer a 10% discount against cost of such repairs or rebuild. Also, the contractor would assist owners in properly defining, scoping and costing such work so as to enable interim discussion and negotiation with EQC.

38. Depending on the number of owners interested, this may develop into an effective alternative to the underwrite provision GCA has recently tried to obtain off shore. No doubt contractor assistance may be in whole or in part dependent on the nature and scope of the particular project and sufficient numbers participating and necessarily, assessment will be on a case by case basis.

Conclusion

39. Taking these circumstances together, it seems owner's options remain:

    a. *Do nothing* - this would be to accept life with broken walls.

    b. *Repair walls yourself* - this means arranging suitable funding and attending to repair/replacement without the benefit of further EQC input.

    c. *Join a group* – and seek to yet force a proper payment from EQC by sharing costs with others. (No doubt a decision on this will rest on the amount you feel you will have at risk with the group, versus the potential pay-off if the action succeeds).

    d. *Litigate yourself*

40. Please note, that if a group yet proceeds, those in the action will be seeking reassessment on a proper lawful basis, as the primary court remedy. The court must direct that and so those in the action will be reassessed first. EQC will then address others in the fullness of time as it might think fit. Given the very large number of claims before it, those in any such action must receive priority.