THE INSURANCE AND SAVINGS OMBUDSMAN:

CHALLENGING YOUR INSURER FOLLOWING THE CANTERBURY EARTHQUAKES

Richard Hargreaves, Law Clerk
(October 2012)

When choosing house insurance, you place your trust in the insurance company.

So when an earthquake damages your home, and the carefully-selected insurer does not respond in the way you expect, the financial loss, disappointment and frustration can be devastating.

The Insurance and Savings Ombudsman ("ISO") is set up to review complaints against insurance companies. It can deal with most aspects of insurance, and is free for policyholders to use. The ISO can consider claims where the amount in dispute is $200,000 or less. This figure is exclusive of any EQC payments which may have been made.

Prior to the Canterbury earthquakes, the ISO was not much in the public consciousness. However, post-quake, articles have appeared in the media, heralding the ISO as the organisation policyholders can use to challenge their insurance company's decisions and force the insurer to pay out.

Many of these articles infer the ISO is a knight in shining armour, defending policyholders against a Big Bad Insurance Company. Whilst perhaps an appealing image, this overlooks the fact that the ISO is an independent, non-partisan service. A realistic analysis of how the ISO is actually responding to policyholder's earthquake-related complaints may be of some assistance to anyone considering their options for challenging their insurance company's decision.

This article aims to provide a brief summary of the ISO's earthquake-related decisions by addressing four of the most common issues considered by the Ombudsman.

The insurer still isn't paying loss of rent cover for a rental property

Rental property insurance often includes cover for loss of rent caused by an unforeseen event, like an earthquake. Many landlords with loss of rent cover have had their claim for lost rent declined after the earthquakes. This has given rise to the most common complaint to the ISO.

Most rental property policies require the house to be let, leased, rented or tenanted at the time of an event (like an earthquake) for loss of rent cover to be triggered and paid.

If a rental property was damaged by one earthquake (eg. 4 September 2010) and the tenants moved out, then the insurance company will have to pay for loss of rent caused by that earthquake. However, if the property remained untenanted and there was another earthquake (eg. 22 February 2011) which delays repair or rebuild of the earthquake damage, the house will remain untenanted for longer. Many insurers will not pay for further loss of rent caused by the second earthquake, as the house was not tenanted at the time of the second loss.

The ISO has consistently applied a very black and white approach, applying the strict wording of the policy and supporting the insurance company's declinature of the February

loss of rent claim. If the policyholder was not receiving any rent at the time that the earthquake occurred, the earthquake cannot have caused any loss of rent.

Even where the insurance policy did not state specifically that the house had to be tenanted "*at the time of the event*", the ISO case managers have read this requirement into the policy.

One important thing to note is that this requirement for tenanting applies only to damaged residential properties. It does not apply to commercial premises, or to business interruption loss of rent claims.

The Insurer has got the details of the house wrong, and won't pay out the full value.

Most house policies require the insurer to repair or replace the earthquake damaged home up to a stated floor area. Rebuilds are normally costed by the insurance company applying a set cost per square metre. If the floor area is wrong, the policyholder will be not be able to rebuild their house as it was, even if this is what the policy requires. The same can be true if other key features of a house, such as custom-made staircases, are not listed on the policy and a settlement offer is too low to rebuild the house as it was.

In one complaint, a policyholder discovered his 160 square metre house had been described on his policy as only 130 square metres. It could not be established whether this mistake was a clerical error at the insurance company, or the policyholder had supplied the wrong information. No proof could be found that the insurer had knowledge of the mistake, and the ISO decided that the insurance company was only required to settle on the basis of a 130 square metre house.

This raises an interesting point about the fact-finding ability of the Ombudsman. The ISO has powers to appoint expert witnesses, convene on-site meetings between the parties, and take written submissions. However, the Ombudsman will not normally hold a hearing, and is unable to resolve conflicts of oral evidence, or to assess credibility of policyholders or witnesses.

Because of this limitation, ISO case managers rely chiefly on documentation in order to make their decisions. Without documentary proof of the insurer's mistake (which few policyholders will be able to produce, even if they have been able to salvage documents from their house), the ISO's powers may be limited.

Despite the ISO's position, Wynn Williams' Insurance Team has successfully negotiated settlement based on greater floor area than described in the policy documents.

The Insurer is not paying the right temporary accommodation costs

Temporary accommodation costs cover is designed to meet the cost of alternative accommodation if the insured house become uninhabitable.

Three complaints have been made to the ISO where an insurer has declined a second temporary accommodation claim when the insured house has been rendered unfit to live in by an earlier event.

The complaints all arose after the insurer paid temporary accommodation costs after the September earthquake damaged the policyholder's house. The February earthquake further damaged the houses and suspended repairs, delaying the date the policyholder could move back into their house. The policyholder then claimed more temporary accommodation costs for the second event, and the claim was declined because the house was not rendered "uninhabitable" by the second quake, as it was already uninhabitable.

None of the complaints have been upheld by the ISO. Again, the Ombudsman will not insert clauses into a policy retrospectively to help out a policyholder. If, on a strict reading of the policy, the house is not rendered unfit to live in following an earthquake (because it is already uninhabitable), then there is no cover under the policy.

This being said, the Ombudsman can consider any representations made by an insurance company about cover and temporary accommodation costs. Leaflets occasionally sent out to policyholders, especially after major events, do not replace the wording of policy documents, but will be relevant to interpretation of the policy.

Whilst the ISO has not yet considered any information leaflets to override strict policy interpretation, a legal challenge could be made under the Fair Trading Act on the basis of representations set out in correspondence from an insurer.

The Insurance Company's quote for repairs to my house is too low, and they won't reassess.

Problems relating to repairs are usually a matter of evidence; both of the damage caused and the cost of repairs.

However, this can be further complicated when the property has sustained further damage in a subsequent earthquake. This renders the repair quote for the original damage much too low.

It is important to remember that with most policies, the insurer is bound to repair any damage caused to a property to an 'as new' condition, or provide cash settlement of the cost of repairs. If the policyholder asks the insurer to repair the damage, the insurer must do that regardless of the cost, or with an acceptable cash settlement.

Where the policyholder elects to cash settle for the cost of repairs and considers the quote too low, the ISO will often act as an intermediary between the policyholder and the insurance company to help negotiate a compromise.

Conclusion

The ISO process, as far as it goes, provides a good means of independently reviewing insurance companies. The service is free, and for many people is seen as a 'last resort' to try and make an insurer reconsider their claim.

However, the fact is that most complaints are not upheld, and many people are left disappointed. It should be remembered that the Ombudsman is not a service to represent little policyholders against big insurance companies. Instead, the ISO is an independent, non-partisan body to review decisions; it does not take sides.

Despite this, any decision of the ISO is not binding on the policyholder. Even if the ISO has reviewed and not upheld a complaint, the courts can be used to challenge insurance companies further.

The Ombudsman's Terms of Reference, at clause 12.2, provide that the ISO must have regard to any applicable rule of law, alongside the principles of natural justice. Employing a lawyer could yield results when presenting a legal argument to the Ombudsman, or challenging an Insurance Company's decision after the ISO process.

If you are having trouble with any of the issues mentioned above, or you have been through the ISO complaint procedure and still feel dissatisfied with the outcome, Wynn Williams' Insurance Team would be more than happy to discuss your options.