IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA466/2019
[2020] NZCA 395

BETWEEN	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Appellant
AND	KARL GREGORY DODDS, ALISON ROMA JACQUELINE DODDS AND ST MARTINS TRUSTEE SERVICES LIMITED AS TRUSTEES OF THE MATTSON TRUST Respondents

Hearing:	26–27 May 2020
Court:	Miller, Clifford and Goddard JJ
Counsel:	T C Weston QC, D J Friar and N F D Moffatt for Appellant N R Campbell QC, P J Woods and T D Grimwood for Respondents
Judgment:	7 September 2020 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The damages awarded to the respondents in the High Court are reduced by $10,656.44.

B The appeal is otherwise dismissed.

C The cross-appeal is dismissed.

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REASONS OF THE COURT

(Given by Goddard J)

[1] Mr and Mrs Dodds lived in a house in the Port Hills in Christchurch. The house was owned by them and St Martins Trustee Services Ltd as trustees of a Family Trust. The Dodds insured the house on a replacement basis with the appellant, Southern Response Earthquake Services Ltd (Southern Response), which was then called AMI Insurance Ltd. The house was damaged beyond economic repair by the 2010/2011 Canterbury earthquake sequence — in particular, the February 2011 earthquake. Under their insurance policy, the Dodds had a number of options for settlement of their claim. The option they chose was to buy another house. The policy provided that if they chose the "Buy Another House" option, Southern Response would pay the cost of buying that other house, capped at the cost of "rebuilding your house on its present site".

[2] In order to quantify that cap, an estimate needed to be made of what it would cost to rebuild the house on its existing site. The Dodds were provided with a report prepared by Arrow International Ltd (Arrow) which was headed "Detailed Repair/Rebuild analysis" (the Abridged DRA). The total figure shown in the Abridged DRA, which was described as "House & Outside EQC Scope (including GST)", was $895,937.78. Southern Response advised the Dodds that if they chose the Buy Another House option, the maximum amount available to them would be $894,937.[1]

[3] The Dodds entered into a Settlement Agreement with Southern Response under which they settled their insurance claim on the basis that a "fair and reasonable estimate for the rebuild cost of the insured property, and the sum insured under the policy, is $907,321". This figure was based on the figure shown in the Abridged DRA, with some adjustments that are immaterial for present purposes.

[4] The Dodds subsequently discovered that a more extensive DRA had been prepared by Arrow for Southern Response (the Complete DRA). The Complete DRA set out a number of additional costs that Arrow estimated Southern Response would

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[1] The figure in the Abridged DRA less two excess amounts of $500 per event.

incur if the house was rebuilt on its existing site, including allowances for professional fees and contingencies. Those additional costs amounted to approximately $205,000.[2] The figure in the Abridged DRA represented Southern Response's view, which it held in good faith, of the maximum amount that the Dodds were entitled to be paid under the Buy Another House option. That figure was some $205,000 less than Southern Response's estimate of what it would actually cost to rebuild the house on its existing site. Southern Response did not disclose the Complete DRA or the estimate it contained to the Dodds before they entered into the settlement agreement. Nor did Southern Response tell the Dodds that the figure in the Abridged DRA excluded certain items of cost that would in fact be incurred if the house was rebuilt on its existing site, or explain why it considered that those items were not relevant when determining the maximum payable under the Buy Another House option.

[5] The respondents (the Dodds and St Martins Trustee Services Ltd) brought proceedings against Southern Response seeking to recover the approximately $205,000 difference between the figure in the Abridged DRA and the rebuild cost estimate figure in the Complete DRA. They say they entered into the Settlement Agreement as a result of misrepresentations made by Southern Response, misleading and deceptive conduct on the part of Southern Response in breach of the Fair Trading Act 1986 (FTA), and breach of a duty of good faith owed to them by Southern Response. Mr and Mrs Dodds also claimed general damages of $15,000 each for inconvenience and stress.

[6] The claim to recover the difference between the two figures was successful in the High Court.[3] Gendall J found that Southern Response had represented that Southern Response's estimate of the cost of rebuilding the house on its present site was $895,937.78. The Judge found that this representation was false: the estimate of rebuilding costs provided to Southern Response by Arrow, including professional fees and contingencies and certain other costs, was some $205,000 higher. Southern Response had also made an implicit representation to the Dodds that the Abridged DRA was the complete and only report received from Arrow. That also was not correct. Southern Response had induced entry into the Settlement Agreement

2 All figures referred to in this judgment are inclusive of GST unless otherwise stated.
3 *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016 [High Court judgment].

by making these misrepresentations. Southern Response had also engaged in misleading and deceptive conduct in breach of the FTA. The Judge did not express a definitive view on whether Southern Response had breached any duty of good faith. The Judge awarded damages representing the difference between the two figures: $205,000 approximately.[4]

[7] The claim for general damages failed. The Dodds had not established that they suffered the degree of inconvenience and stress required to found such a claim as a result of the relevant breaches.

[8] Southern Response appeals to this Court from the finding that it is liable in misrepresentation and for breach of the FTA. The Dodds seek to uphold that decision on the additional ground that there was a breach of a duty of good faith. The Dodds cross-appeal the refusal of general damages.

[9] We consider that the Judge was right to find that Southern Response had made misrepresentations about its estimate of the cost of rebuilding the house, and about the absence of any other report from Arrow setting out a different rebuild cost. The Judge was also right to find that by making these misrepresentations, Southern Response breached the FTA.

[10] We agree with the Judge that the loss suffered by the Dodds in this case is the difference between the true value of their rights under the policy, and the sum they were persuaded to take in exchange for a surrender of those rights. That loss is recoverable under both the CCLA and the FTA.

[11] Because the Dodds have succeeded under the CCLA and the FTA, it is unnecessary to determine the claim for breach of a duty of good faith.

[12] We also consider that the Judge was right to dismiss the claim for general damages. The cross-appeal on that issue is dismissed.

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4 This figure includes an adjustment for GST made by the Judge in a subsequent judgment: *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2741. The appropriateness of making any award on a GST-inclusive basis was not challenged on appeal.

Background

[13] The question at the heart of this appeal is what the communications by Southern Response to the Dodds about their insurance claim would have conveyed to a reasonable person in the Dodds' position. It is therefore necessary to set out in some detail the history of those communications, and the context in which they occurred. There was no challenge to the factual findings of the High Court Judge. The account we set out below is largely drawn from the High Court judgment.

The policy

[14] The Dodds' house was insured for full replacement cover under a policy described as an "AMI Premier House Cover" policy. The policy provides "top up cover" for earthquake damage over and above the amounts payable by the Earthquake Commission (EQC). It states under a section headed "cover for your house" that if the insured house is damaged beyond economic repair, which both parties accept was the case here, the insured can choose between four insurance options. This section goes on to describe what the insurer will do for each such option:

> (i) **to rebuild on the same site**. We will pay the full replacement cost of rebuilding your house.
>
> (ii) **to rebuild on another site**. We will pay the full replacement cost of rebuilding your house on another site you choose. This cost must not be greater than rebuilding your house on its present site.
>
> (iii) **to buy another house**. We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your house on its present site.
>
> (iv) **a cash payment**. We will pay the market value of your house at the time of the loss.

[15] A separate section in the policy provides "cover for additional costs". It outlines certain "additional costs" that the insurer will meet:

> **1. Professional fees** a. We will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild your house. These expenses must be approved by us before they are incurred
>
> **2. Demolition and debris removal** a. We will pay the reasonable cost of demolition and debris removal. These expenses must be approved by us before they are incurred.

> **3. Removal of household contents** a. We will pay the reasonable cost of removing your household contents from your house when this is necessary to carry out repair or reinstatement of your house.
>
> **4. Compliance with building legislation and regulations** a. If additional work is required, we will pay the reasonable costs for compliance with building legislation and rules …

Out of policy options

[16] Southern Response also offered policy holders a number of alternative options which were outside the terms of the policy. One of these was called "Build to Budget". Southern Response developed this option because its policy only allowed customers to rebuild their original house, and many customers wanted to use the payment they would receive under their policy to build a house with different features. This option enabled the customer to take the rebuild cost cap that applied under the Buy Another House option, and use this as a budget for building a different house (with certain restrictions). In some circumstances, the customer could also choose to contribute more to the cost of the new house out of their own funds. This might happen where the customer wanted to build a bigger house or a house with higher specifications than the original house.

[17] Southern Response's communications with customers at the relevant time contrasted this "Build to Budget" option with its obligations under the AMI policy by describing the policy rebuild options (outlined at [14] above) as "Replicate to Policy".

[18] Two other out of policy options were available if a customer decided to buy another house:

(a) Buy and renovate: If a customer bought another house at a price less than the cost of rebuilding the original house, the policy did not allow the customer to keep the difference as a cash payment. However, in many cases where the purchase price was less than the estimated rebuild cost, Southern Response allowed the difference to be paid to the policy-holder in cash up to certain limits. Initially, Southern Response required the cash to be used to renovate the new house, but this requirement was later relaxed.

(b) House and land package: Under the policy, a customer was able to use the "Buy Another House" sum to buy a new house, but not the land on which the house sat.[5] However, under the house and land package, Southern Response did allow customers to use the buy another house sum towards the purchase of a house and the land on which it stood.

The DRA

[19] Southern Response contracted with Arrow, a large construction and quantity surveying company, to carry out earthquake damage assessments and project manage repairs and rebuilds. Arrow assessed the earthquake damage to the Dodds' house and provided an initial report headed "Detailed Repair/Rebuild Analysis" which recorded the features of the house and the damage. Arrow sent this initial report to the Dodds for comment. The covering letter advised the Dodds that it was being sent to them prior to being costed to enable them to review the detail included. Any comments and changes they sought "will be included … in the final costed DRA report that you will receive from AMI".

[20] Arrow then prepared a costed Detailed Rebuild/Repair Analysis, the Complete DRA, which it sent to Southern Response on 15 November 2011. Arrow recommended a rebuild, as it considered the dwelling was not capable of being economically repaired. Under the heading "Re-build budget" the Complete DRA estimated the cost of materials and labour required to rebuild the house at a figure of $895,937.78. A further section was included at the end of the Complete DRA under the heading "AMI Office Use" (the Office Use Section). In this section Arrow listed and costed a number of additional items:

(a) "Internal Administration" totalling $23,000 (excluding GST);

(b) "Demolition" totalling $64,634.50 (excluding GST);

(c) "Design Fees" totalling $50,716.30 (excluding GST); and

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5 This interpretation of the policy was confirmed by the High Court in *Southern Response Earthquake Services Ltd v Shirley Investments Ltd* [2017] NZHC 3190.

(d) a "Project Contingency" totalling $114,678 (excluding GST).

[21] These additional "AMI Office Use" figures came to a total of $253,028.80 excluding GST, or $290,983.12 including GST. These costs were added to the $895,937.78 to produce a figure of $1,186,920.75 that was described in the Complete DRA as "Grand Total House (including GST)".

Southern Response's decision to provide Abridged DRA to customers

[22] Southern Response says the Office Use Section was only for internal use, to assess the potential liability of Southern Response if the insured chose the first option in the policy: a rebuild on the same site. Southern Response did not consider the Dodds were entitled to be paid more than $895,937.78 under the policy if they chose the Buy Another House option, as they considered that the cap for this option was based on a "notional rebuild" under which certain costs would not be incurred and therefore should not be taken into account. In particular, Southern Response considered that design fees and contingencies were not relevant to the cap for the Buy Another House option as they would not actually be incurred if the existing house was not rebuilt.

[23] Southern Response's evidence at trial explained that in light of this interpretation, around May 2011, Southern Response senior management made a decision that Arrow's estimates of those costs would not be given to claimants as "they were confusing". Previously, the Complete DRA document prepared by Arrow, which included that information, was sent to claimants. From May 2011, only the Abridged DRA was provided to claimants.

Abridged DRA provided to the Dodds

[24] In February 2012, Southern Response provided the Abridged DRA to the Dodds. Consistent with the May 2011 management decision referred to above, Southern Response did not provide the Complete DRA to the Dodds. Southern Response did not explain to the Dodds that the Abridged DRA excluded certain costs that Southern Response expected to incur if the Dodds chose to rebuild

their house on its present site. Southern Response's view was that it did not need to do so.

[25] The Dodds had been told to expect a costed version of the DRA from Arrow. The Abridged DRA appeared to be a cost estimate for rebuilding the house, with a total figure of $895,937.78 that (as noted above) was described in the document as the "House & Outside EQC scope (including GST)". The table which concluded with that figure was followed by what appeared to be a concluding sign-off for that DRA: "*Reviewed by: TS Date: 9.11.11*". There was no reference in the Abridged DRA to the additional costs which had been included in the Complete DRA.

[26] The Dodds were therefore unaware that Southern Response had received from Arrow a separate estimate in the Complete DRA of the cost of rebuilding their house on its current site which included the sums shown in the Office Use Section, and which concluded with a total figure including all of the listed costs that was some $290,000 greater than the total figure shown in the Abridged DRA.

The election process — the 26 September 2012 letter

[27] On 26 September 2012 Southern Response sent a detailed letter to the Dodds which enclosed a further copy of the Abridged DRA.

[28] The 26 September 2012 letter explained that the DRA received from Arrow had advised the property was "beyond economic repair". It went on to say that the claim was likely to exceed the EQC cap, and explained the process if EQC made this determination. The letter set out the options available to the Dodds for settlement of their claim, including rebuilding their house on its present site or buying another house. The letter enclosed what was described as a "House Claim Pack".

[29] The letter set out, and explained, the four settlement options under the policy listed at [14] above. It said that for option (i), the "rebuild on the same site" option:

> "Southern Response will rebuild your house to an 'as new' condition on its present site".

[30] The letter added:

> As Southern Response will complete the work to rebuild your house, regardless of any inflation in building costs that may occur over time, this option is not costed out in your decision pack.

[31] For option (ii) (the rebuild on another site option), Southern Response said in the letter it would:

> … rebuild your house on another site provided by you. The cost … under this option should not exceed what it would have cost to rebuild your house on its present site.

[32] The letter said that if the Dodds chose to purchase another house under option (iii) (the Buy Another House option):

> Southern Response will pay the cost of buying another house *up to the maximum it would have cost to rebuild your house on its present site*.
>
> (Emphasis added).

[33] The letter went on to say the "maximum amount available if you take this option will be **$894,937**" (emphasis in the original). It then reiterated, further down the same page, that:

> The most Southern Response will pay is *the amount it would have cost us to rebuild your house on its present site*.
>
> (Emphasis added).

[34] We interpolate that the section of this letter explaining the Buy Another House option would in our view lead a reasonable recipient to understand that the figure of $894,937 was Southern Response's estimate of the amount it would cost them to rebuild the house on its present site, as assessed by Arrow. That is how the Dodds say they read the letter. That is also how we read the letter.

[35] After outlining the four settlement options under the policy, the letter went on to state, under the heading "Key policy conditions on these anticipated settlement options":

> Your Premier House policy provides for the cost to reinstate your house to an 'as new' condition. It also provides that we will use building materials and construction methods in common use <u>at the time of rebuilding</u>. These are not

> necessarily the materials and methods that were in common use at the time your home was built or modified prior to the current damage.
>
> Arrow International has taken these issues into consideration and also the quality of your house's construction *in its estimation of the replacement cost under option (iii)* above.
>
> (Emphasis in italics added).

[36] The letter also attached a further copy of the Abridged DRA showing the total figure of $895,937.78.

[37] In the letter Southern Response asked the Dodds to contact them if the Dodds had any questions, and recommended to the Dodds that they obtain their own independent advice about their claim. In particular, the letter went on to state:

> Southern Response cannot offer you financial advice, or discuss the appropriateness of any decisions you may make regarding your insured property. We encourage you to obtain your own independent advice regarding your claim/s.

[38] The Dodds confirmed in their evidence at trial that after they received this letter they did in fact obtain legal advice from their solicitor in relation to their settlement options.

Information sheets

[39] Southern Response provided further material described as 'Information Sheets" to the Dodds. This material was provided either with the 26 September 2012 letter or at a later date. Either way, it is clear the Information Sheets were received before the Dodds finally made their election under the policy. Southern Response says these Information Sheets explain the basis on which the rebuild cost had been calculated in the DRA for the purposes of the Buy Another House option.

[40] For the Buy Another House option, under the heading "Quick summary" the Information Sheets stated:

> Southern Response will pay the purchase price of the house you buy *up to the maximum it would have cost to rebuild your house on the current site*, less any EQC payments and any excesses you are responsible for. We may also deduct

> any previous payments AMI and/or Southern Response has made to you for damage to your house.
>
> (Emphasis added).

[41] The Information Sheets set out (twice) the following question:

> How much will I have available to spend on a new house?

The answer given to this question was:

> The amount stated in the attached letter is the total amount available, including payments EQC have made or committed to make to you, and any excesses you are responsible for and any previous AMI and/or Southern Response settlement payments to you for damage to your house.
>
> (Emphasis original).

[42] Next, under the question:

> What if the purchase price of my new house is less than the total rebuild cost?

the answer was given as:

> If the purchase price is less than the rebuild cost then the difference will not be paid to you. However, the difference can be used towards approved legal and associated fees incurred.

[43] Then, under the question:

> What if the purchase price of my new house is more than the total rebuild cost?

the answer was:

> You will be responsible for the difference between the cost of purchasing your replacement house and *what it would have cost to rebuild your house on its present site* (i.e. the maximum amount payable by Southern Response) taking into account EQC payments and any excesses you are responsible for.
>
> (Emphasis added).

[44] Later in the Information Sheets there is a page headed "Detailed Repair/Rebuild Analysis (DRA)". Rather confusingly, as discussed in more detail at [119] below, one of the questions in this section read:

> Why does the amount in my DRA differ to the amount in my letter?

[45] The answer given to this question by Southern Response was:

> In the letter, Southern Response settlement Option (iii) - buy another house is costed for you. This amount is calculated as follows:
>
> > Sub total house
> >
> > + consent fees
> >
> > + P&G (see overleaf for details)
> >
> > + out of scope amount
> >
> > + GST
>
> …

[46] This page contained a further question:

> Why are some of the other fees not included?

[47] The answer given by Southern Response to this question was:

> Fees such as design fees and Arrow fees are not included as they are not incurred if you choose Option iii- buy another house.

[48] The final question on this page of the Information Sheets was:

> What are design fees and consents?

[49] The answer given by Southern Response was:

> These costs may be incurred by Southern Response when we are rebuilding your house on another site.
>
> If you select Southern Response settlement option iii – buy another house, then there are no design fees incurred and only consent fees are included in the settlement figure.

[50] As noted above, the amount specified in the Abridged DRA given to the Dodds was $895,937.78. That amount differed by $1,000 from the figure given in the 26 September 2012 letter from Southern Response for option (iii) Buy Another House, which was $894,937. It appears this difference represents two excesses of $500 each, as the claim related to two earthquake events. But that explanation is not set out in the letter or in the Information Sheets. The Information Sheets proceeded on the basis

that there would be a difference between the DRA and the letter, but the difference was a modest amount that had nothing to do with design fees, Arrow fees or any other fees. The explanation offered for the difference quoted at [45] above was irrelevant and wrong. The question about "other fees" not being included made no sense.

January 2013 meeting(s), the MOU and Build Decision documents

[51] In November 2012 the EQC agreed that the earthquake damage to the property was overcap. That allowed the parties to move toward settlement. The Dodds say that several times during January 2013 they met with Southern Response to discuss the options to settle their claim. They say that at these meetings Southern Response emphasised that the Abridged DRA provided their maximum entitlement for the "rebuild on another site" and the Buy Another House options.

[52] At a meeting between the Dodds and Southern Response around 15 January 2013, Southern Response provided them with two further documents. One was a Memorandum of Understanding (the MOU) and the other was a document headed "Making Your Southern Response Build Decision" (the Build Decision document). Both of these documents explained the process that would be followed if Southern Response undertook the building work to replace the Dodds' house for them. In particular, these documents explained the difference between what was described as the replicate to policy options and the build to budget out of policy options which Southern Response was offering.

[53] In the MOU Southern Response recorded on the first page under a heading "**1. DRA (Detailed Repair / Rebuild Analysis) preparation**" the following:

> Arrow will have completed a DRA on behalf of Southern Response. The DRA records a description of your house and the damage to it. It also identifies the building work required based on the cover under your insurance policy.
>
> *The DRA is an important document.* …
>
> (Emphasis added).

[54] Then paragraph three of the MOU states:

> **3. Choosing to replace your previous house under the terms of the policy or building something different.**
>
> If your house is 'beyond economic repair' and you have decided that you want Southern Response and Arrow to manage the building work, you have two options regarding build and design decisions:
>
> - Replicate to Policy: Under this option you can choose to have your house rebuilt to its previous characteristics, using building materials and construction methods in common use today based on the terms of the policy.
>
> - Build to budget: Under this option you can take the *cost to rebuild your previous house determined by using information from the DRA to form a budget*. You can then apply that budget to build a new house that may differ from your previous house (for example you may choose to change the layout of your house).
>
> In some circumstances you can also choose to contribute more to the cost of your new house than the budget. …
>
> (Emphasis added).

[55] The importance of the DRA which had been provided to the Dodds is emphasised at paragraph four of the MOU:

> **4. Using the DRA to establish the scope of the rebuild**
>
> The DRA is important for both of the rebuild options outlined above.
>
> If you choose to have your house replicated to policy, the DRA and the insurance policy wording will be the guiding documents to define the type of house that will be rebuilt …
>
> If you choose the Build to Budget option the DRA and the insurance policy wording will still be used to define your previous house. Additions made by you which push the building cost over that budget will need to be paid for by you …

[56] Up to the end of January 2013 the Dodds were still considering their various options under the policy, including out of policy options such as the build to budget option.

Settlement Election Form

[57] On 11 February 2013 Southern Response sent the Dodds a further document called a 'Settlement Election Form'. This form set out the Dodds' options and

the settlement arrangements for each option in table form. The entry for the Buy Another House option read as follows (emphasis added):

option	what we will pay	considerations	settlement
Buy another house	• We will pay the purchase price of another house, including necessary legal and associated fees, *up to the cost of rebuilding your house on its present site*. …	• We will not pay for any difference between the cost of buying your replacement house and *the cost of rebuilding your house on its present site*. …	…

[58] Mr Dodds sent an email to Southern Response seeking clarification about this option. The email said "The cost of re-building/replacing our home is $894137", and went on to ask if the cost of demolition of their existing house would come out of that sum. Southern Response replied the next day and advised that the demolition costs "are not part of the 'Buy another House' settlement. Those costs are not taken from the $894,137.00 as they are a cost we incur." The email from Southern Response did not comment on Mr Dodds' statement that the cost of rebuilding was $894,137.[6]

[59] On 5 March 2013 the Dodds informed Southern Response of their election to proceed with option iii, the Buy Another House option.

[60] Six weeks later, on 16 April 2013, the Dodds signed the Settlement Election Form. Southern Response informed them that they could proceed to buy another house. The Dodds contracted to buy that other house and on 18 April 2013 they provided Southern Response with the Sale and Purchase Agreement. It seems Southern Response did not itself sign the Settlement Election Form until some time later, on 19 September 2013, but nothing turns on this.

6 It is not apparent why the figure in the email differs by $800 from the figure used in the September 2012 letter — this may simply have been a typographical error on the part of Mr Dodds.

The settlement

[61] The Settlement Agreement was signed in December 2013.[7] Paragraph 4 of the Settlement Agreement provided:

> 4. A fair and reasonable estimate for the rebuild cost of the insured property, and the sum insured under the policy, is $907,321 …

[62] This figure was based on the $894,937 figure with an adjustment for the cost of rebuilding a block wall.

[63] The parties to the Settlement Agreement were the Dodds as policy holders, St Martins Trustee Services Ltd as joint owner of the property, and Southern Response.

[64] Around 23 December 2013, the Dodds received a cash settlement in respect of their house claim.

[65] In 2015, following the *Avonside Holdings* litigation described below, the Dodds made a Privacy Act 1993 request to Southern Response and obtained a copy of the Complete DRA. They saw that the Complete DRA contained the Office Use Section which set out additional costs not included in the Abridged DRA, including demolition costs and some $200,000 additional estimated costs associated with rebuilding the house including design fees and a contingency allowance. The Dodds took the view they had been misled into settling in December 2013 for a sum that did not reflect the true cost of rebuilding their house.

The Avonside Holdings decisions

[66] The resolution of the Dodds' claim for the additional costs set out in the Complete DRA took place against the backdrop of the conclusions reached by the courts in the *Avonside Holdings* proceedings concerning the entitlements of AMI policy holders who chose the Buy Another House option. The issue in those proceedings was whether the maximum amount payable under this option, which is defined by reference to the cost of rebuilding the house on its present site, should take

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[7] The Settlement Agreement expressly excluded the Dodds' claim in relation to the swimming pool on the property. A separate settlement was entered into in relation to the swimming pool in November 2014.

into account, among other items, costs of demolition, professional fees and a contingency allowance.

[67] Southern Response argued that these items should be disregarded as the cap should be assessed on the basis of a notional rebuild in which these costs would not in fact be incurred. The High Court substantially upheld Southern Response's approach.[8] In his decision delivered on 11 July 2013 MacKenzie J said:

> [24] I consider that it is not appropriate to include a contingency allowance in calculating the cost of a notional rebuild. … In a notional rebuild, there can, by definition, be no unexpected items. … There is no need to add a contingency sum to reflect possible contingencies which will never be encountered.

[68] MacKenzie J accepted Southern Response's approach to professional fees, which included in the cap the cost of applying for a building consent, but did not include any other allowance for professional fees.[9]

[69] MacKenzie J also accepted Southern Response's argument that the cost of rebuilding did not include the cost of demolishing the existing house. That cost might be payable as an additional cost under cl 4 of the policy. But it was not part of the cost of rebuilding under cl 1.[10]

[70] This Court reversed the decision of the High Court in a judgment delivered on 1 October 2014.[11] The Court said:

> [49] The approach contended for by Southern Response means that costs for contingencies and professional fees that would be incurred where the rental house was actually rebuilt on the same site, whether as part of "the full replacement cost" or as part of "additional costs", are excluded from the calculation of the cost of rebuilding under the "to buy another house" option. The rationale for that exclusion is that because the exercise is a notional and not an actual one, contingencies that would as a result not be incurred need not be included. Southern Response argues this is the correct interpretation of the Policy.

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8 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433.
9 At [30]–[31].
10 At [36]–[37].
11 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483.

> [50] We do not agree with that approach to interpreting the terms of the Policy. Clause (c)(ii) of "What we will pay" does not refer to "the full replacement cost". What it says is that:
>
> > We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your rental house on its present site.
>
> [51] The cost of rebuilding the rental house on its present site involves both the full replacement cost and additional costs, encompassing contingencies and professional fees. That is the amount the insurer would be liable for where the insured chose the "to rebuild on the same site" option. We are satisfied, therefore that it is an amount equivalent to the sum of both of replacement and additional costs, and not the lesser amount of solely "the full replacement cost", that is to be paid by the insurer to the insured when the insured elects the "to buy another house" option. In our view, if the Policy had intended any limit to "the full replacement cost" to apply in cl (c)(ii), it would have said so.
>
> [52] We agree with Mr Campbell's general submission that it is irrelevant in the present context that rebuilding will not take place: what is required is an assessment of the costs that would be incurred if rebuilding were actually to occur. As Mr Campbell submitted, costs cannot be excluded merely because the rebuild is not going to happen and costs will not be incurred.
>
> ...
>
> [58] … the cost that is payable as part of the required notional exercise [under the Buy Another House option] is the cost that would actually be incurred (whether as a component of full replacement cost or in terms of matters covered by additional costs) to rebuild the house on the existing site. Thus items such as contingencies and professional fees cannot be excluded on the basis that they will not, in fact, be incurred because it is a notional cost that is being calculated.

[71] Southern Response appealed to the Supreme Court. The appeal was dismissed.[12]

[72] The Supreme Court began by addressing the relationship between the cost of rebuilding for the purposes of the cap on the Buy Another House option, and the additional costs referred to in cl 4 of the policy.[13] Avonside said that its claim did not depend on whether cl 4 costs were included in the cost of rebuilding. Its claim was made on the basis that contingencies, and professional fees that are necessary for a rebuild, are included in the cl 1 costs. Professional fees required for the purpose of

12 *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141.

13 At [19]–[21].

rebuilding the existing house came within cl 1(c)(ii). They were not additional costs that came within cl 4. The Supreme Court accepted this submission.[14]

[73] The Supreme Court upheld this Court's approach to contingencies:

> [38] The amount payable under the policy can be no more than the cost of rebuilding the house on its present site. The exercise that is required is to estimate the actual cost of rebuilding the house on the site.
>
> [39] Mr Harrison, in accordance with what is agreed to be standard quantity surveying practice, included a sum of 10 per cent for contingencies. Southern's witnesses both agreed that there were "unknowns" in any building project, including in a rebuild of this type (existing house in an existing location).
>
> [40] We accept Avonside's submission that the fact that this is a notional, rather than actual, rebuild does not affect the inclusion of an allowance for risks generally encountered. Such risks are relevant to estimating the cost of an actual rebuild and, as noted above, it is the actual cost of rebuilding that must be estimated. The Court of Appeal was thus correct to accept the inclusion of an allowance for contingencies.
>
> (Footnotes omitted).

[74] The Supreme Court also upheld this Court's approach to the issue of professional fees:

> [49] As mentioned earlier, the exercise that is required is to estimate the actual cost of rebuilding on the site. Mr Harrison did this, while Mr Farrell's approach was based on his erroneous assumption that a different approach was required for a notional rebuild. Mr Harrison's allowance for professional fees was based on orthodox quantity surveying practice. Contrary to MacKenzie J's view, the estimate was based on the use of an architectural draftsperson and not an architect and took full account of the fact that the notional build was a rebuild on an existing site with existing plans. The percentage Mr Harrison used was also very similar to the percentage (nine per cent) used by Arrow in its estimate of what it would actually cost to rebuild. We thus accept Avonside's submission that the Court of Appeal's approach to this issue was correct.
>
> (Footnote omitted).

[75] Southern Response subsequently decided to backdate the approach to calculation of the cap approved in the decisions of the appellate courts in *Avonside Holdings* to all settlements entered into after the date of this Court's decision: 1 October 2014. But it decided not to pay any additional amount to

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[14] At [40] and [49].

customers who settled before that date. Southern Response says it settled with those customers in good faith, on the basis of its genuinely held view about their entitlements under the policy, and there is no reason to reopen those settlements.

The claim

[76] The Dodds issued proceedings seeking to recover the difference in estimated rebuild costs, which they quantified as approximately $217,000.[15] They claimed interest on that amount. They also claimed general damages of $15,000 each. As noted above, they say that:

(a) Southern Response made misrepresentations that induced them to enter into the Settlement Agreement. They claim damages under s 35 of the Contract and Commercial Law Act 2017 (CCLA).

(b) Southern Response engaged in misleading and deceptive conduct in breach of s 9 of the FTA. They claim compensation under s 43 of the FTA.

(c) Southern Response owed them an implied duty of good faith in connection with resolution of their claim under the policy. Southern Response breached that duty by failing to disclose information that was material to the settlement of their claim, and failing to act reasonably, fairly and transparently in dealing with and settling the claim. They claim damages for breach of that duty.

[77] Southern Response denied that it made any misrepresentations. Southern Response pleaded that it had provided good faith estimates of the Dodds' entitlement under the policy. These were statements of opinion. The opinion was genuinely held by Southern Response. Indeed it was supported by High Court authority. There could be no misrepresentation in circumstances where the statements Southern Response made were statements of opinion, the opinions were genuinely

[15] The sum claimed was based on the Office Use Section costs of $290,983.12 less the demolition costs of $74, 329.68 which Southern Response had met.

held by Southern Response, and there was a reasonable basis for those opinions. For essentially the same reasons, there was no breach of the FTA.

[78] Southern Response denied that there was any duty of good faith owed by it as an insurer to the Dodds in connection with the resolution of their claim under the policy. If there was a such a duty, it had not been breached.

[79] Southern Response said the Dodds had no claim for general damages as, even assuming such a claim is available for breach of an insurer's obligations under an insurance policy, the Dodds had not suffered any relevant loss in this case.

[80] Southern Response also argued that the Dodds' claims were precluded by the full and final settlement clauses in the Settlement Agreement.

High Court judgment

Which costs came within the cap?

[81] Before turning to the claims made by the Dodds, the Judge considered which costs would properly have been included in calculating the cap that applied to the Buy Another House option, in light of the *Avonside* appellate decisions.

[82] The Judge considered that the cap should not include demolition costs, as Southern Response would incur those itself in any event.[16] The Arrow project manager costs and Arrow DRA costs were costs incurred irrespective of whether or not a rebuild occurred, and also should not be included in the cap.[17]

[83] In accordance with the *Avonside* decisions, however, the cap should include an allowance for contingencies and professional fees.[18]

[84] The Judge considered that applying the reasoning of the appellate Courts in *Avonside*, Arrow contract costs should also be taken into account. These are variable claim management costs incurred by Arrow in working with architects, designers and

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16 High Court judgment, above n 3, at [65].
17 At [67] and [68].
18 At [64] and [71]–[73].

builders in developing and finalising a build contract for a specific house. They are directly incurred as a result of the rebuild, along with professional fees.[19] For the same reasons, the Arrow construction management costs should be taken into account as costs of rebuilding. These are the fees that Arrow charges Southern Response for its work in managing construction work for repairs or rebuilds, including supervising the builder undertaking the works. They are directly incurred as a result of a repair or rebuild.[20]

[85] However as the Judge noted, by the time this Court released its decision in *Avonside* the parties had entered into their Settlement Agreement. All of the representations that the Dodds relied on had been made.[21] Southern Response contended that there was no misrepresentation at the time the Dodds' house claim was settled in December 2013, and subsequent decisions could not retrospectively create one.[22]

Claim One: Misrepresentation

[86] The Judge found that Southern Response represented generally that its estimate of the cost of rebuilding the Dodds' house on its present site was the amount set out in the Abridged DRA, and that this represented the complete and (at least by implication) only report received from Arrow. There was also a collateral representation that the Dodds' entitlement under the Buy Another House option was to buy a house and land up to the same amount, and that amount and the Dodds' settlement represented Southern Response's full estimate of the rebuild cost set out in the Abridged DRA. The Judge said he had no difficulty in concluding that these representations were statements of fact which were capable of being seen as misrepresentations for the purposes of s 35 of the CCLA.[23]

[87] The Judge did not accept Southern Response's argument that the statements it made were simply expressions of its honest opinion about the operation of the policy,

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19 At [69].
20 At [70].
21 At [73].
22 At [74].
23 At [81].

and about the Dodds' entitlement under the Buy Another House option. They were representations of fact about Southern Response's estimate of the rebuild cost.[24]

[88] The Judge accepted the Dodds' submission that these representations were false and misleading:

> [85] The Dodds maintain too that these representations were false and misleading. In my view, it is hard to reach any other conclusion. Even on its own evidence, Southern Response seemed to accept this. Southern Response's sole witness before me, Ms Fife, acknowledged in her evidence that the $894,937 figure was not Southern Response's estimate of the cost to rebuild the Dodds' house on their existing site. Instead, she maintained the $894,937 was a lower sum reflecting Southern Response's interpretation of what policyholders (in this case the Dodds) were entitled to under the Buy Another House option. Ms Fife confirmed that in circumstances such as those prevailing here, Southern Response "did not provide customers with its estimate of the cost of rebuilding on the same site". Rather, the cost estimate in the DRA was "Southern Response's calculation of the rebuild cap available to the customer under the Buy Another House Option".

[89] The Judge found that the misrepresentations induced the Dodds to enter into the Settlement Agreement. Because inducement is challenged on appeal by Southern Response, we set out the Judge's findings in full:

> [97] The Dodds claim they were induced to enter into the Settlement Agreement by the misrepresentations that were made. In the settlement negotiations which formed the context of the representations, the Dodds and Southern Response were working towards agreeing on a value that the Dodds could use to assess what option under their policy they would elect. No election under the policy was made for over two years from February 2011 when the Dodds initially lodged their claim. Finally, the Dodds made this election on 5 March 2013. It was one to exercise the Buy Another House option.
>
> [98] Importantly, the policy entitlement of the Dodds under this option was to purchase another house up to the value of the cost of rebuilding their house on its present site. The Dodds say they considered their entitlement was tied to the actual estimated rebuild costs. Mr Dodds' evidence was that he relied on the Abridged DRA in ascertaining those rebuild costs. Accordingly, the Dodds contend the rebuild figure that was provided induced them into settling at that figure.
>
> [99] In cross-examination at trial, Mr Friar for Southern Response asked Mr and Mrs Dodds to speculate as to what they would have done had Southern Response disclosed the complete DRA figures. Mr Dodds conceded in cross examination that, even if Southern Response had provided the Office Use Section to him, he did not know what he and his wife would have

[24] At [83].

done. He suggested the question was simply academic. Mrs Dodds did not disagree with this evidence, and she said too that she did not know what they would have done.

[100] In my view, it is entirely speculative as to whether the Dodds might have settled for the same or a higher amount under the Buy Another House Option if the internal Office Use Section had been provided to them. By Southern Response misrepresenting the basis for the settlement figure offered, the Dodds lost their ability to negotiate their entitlement to the Office Use Section amounts, or even to approach the Court for a ruling, as occurred in *Avonside*. They also lost any ability to consider other options, such as the possibility no matter how vague, of taking the increased figure to rebuild on the same site or another site, to build on an out of policy build to budget basis, or even to negotiate further.

[101] I accept that when the Dodds entered into the Settlement Agreement to purchase another house they did so on the basis that the $894,937 figure was the total estimated cost of rebuilding. The failure by Southern Response to disclose that this figure omitted certain costs was an important factor influencing them to enter into the Settlement Agreement at the figure they accepted. I am satisfied that Southern Response's misrepresentation produced a misunderstanding in the minds of the Dodds as to the true rebuild cost of their house, they relied on this, and it was one of the reasons which induced them to settle their policy claim at the figure they did and to enter into the settlement contracts.

[90] The Judge also found that Southern Response intended the Dodds to rely on the Abridged DRA when making their settlement election, and as the basis for the Settlement Agreement. As the Judge recorded, the Dodds made their settlement election on 5 March 2013. They then purchased a house and entered into the Settlement Agreement.[25]

[91] The Judge held that it was reasonable for the Dodds to rely on the statements made by Southern Response. In particular, it was reasonable for them to rely on the statement that the figure of $895,937 was the complete cost of rebuilding estimated by Arrow and Southern Response.[26]

[92] The Judge then turned to assess the damages to which the Dodds were entitled under s 35 of the CCLA. Section 35 provides that they could recover damages "in the same manner and to the same extent as if the representation were a term of the contract that has been breached".

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25 At [106].
26 At [115].

[93] The Dodds sought to recover "what Southern Response should have told them they could use as the true ceiling amount to buy another house as a rebuilding cap, which was Arrow's total rebuild cost estimate".[27] Southern Response argued that even if there had been a misrepresentation, the Dodds had not proven that they suffered any loss as a result. The Judge was satisfied that the Dodds had established that they had suffered a loss "in that they have not received the full value of their promised benefit under the contractual settlement". A shortfall on this full entitlement occurred.[28]

Claim Two: Misleading and deceptive conduct under the FTA

[94] The Judge applied the two-stage approach to FTA claims approved by the Supreme Court in *Red Eagle Corp Ltd v Ellis*:[29]

> (a) First stage: Has the claimant proved a breach of s 9 by the defendant?
>
> (b) Second stage: Was the defendant's conduct the effective cause, or an effective cause, of the claimant's loss or damage?

[95] It was common ground that Southern Response was acting in trade. So the first issue was whether a reasonable person in the Dodds' situation would likely have been misled or deceived by Southern Response's conduct. The Judge answered this question in the affirmative:

> [138] For the reasons I have set out above, in my view, a reasonable person, reading the Abridged DRA along with the various letters, the Information Sheets and the other material provided to the Dodds would have thought that the $894,937 was Southern Response's estimate of the actual cost of rebuilding the Dodds' house.
>
> [139] Again, while one Information Sheet addressing the Buy Another House Option did state that "Fees such as design fees and Arrow fees are not included" (but, in any event, was silent on the question of "a contingency") in my view it did not clarify the position of Southern Response in a satisfactory way. As I see it, a reasonable person in the Dodds' situation would likely have been misled or deceived.
>
> [140] It is clear from the evidence of Mr and Mrs Dodds that they were misled and deceived by Southern Response's conduct. They understood at the time that if they selected the Buy Another House option, they would receive the equivalent of a professional estimate of what it would cost to rebuild their house, and that was $894,937. I am satisfied the Dodds made their election

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27 At [122].
28 At [123].
29 At [129] citing *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28]–[29].

> and entered into the Settlement Agreement based on that understanding. In doing so they exchanged their rights under the policy for the settlement payment they received.

[96] The Judge went on to find that Southern Response's conduct was an effective cause of the Dodds' loss or damage. It was unclear what would have happened if the Complete DRA had been disclosed. The Judge identified a number of possibilities, all of which he described as "speculative".[30] The Judge summarised his views as follows:

> [145] What seems clear to me though, is that at the very least, the Dodds have lost the chance either to consider other options or to achieve a higher settlement by not having access to the actual estimation of Southern Response's rebuild costs. Southern Response's conduct was an operating cause of the Dodds entering into the particular Settlement Agreement, and was therefore an operating cause of the loss the Dodds suffered by virtue of their doing so.

[97] The Judge noted that damages under the FTA are assessed on the tort measure rather than the contractual measure. But the Judge considered there was little difference in outcome in this case. The Dodds were entitled to recover the difference between the true value of their claim under their insurance policy and the value they received through the payments under the Settlement Agreement.[31]

Claim Three: Common law breach of the duty of good faith

[98] The Judge considered that given his findings on the misrepresentation and breach of FTA causes of action, there was little utility in analysing at length the alternative claim that Southern Response had breached an obligation of good faith under the policy. But he went on to make some observations on that issue.[32] The Judge adopted the same approach that he had previously adopted in *Young v Tower Insurance Ltd*.[33] In that case Gendall J held that a duty of good faith on the part of the insurer must be implied in every insurance contract. That duty requires the insurer, at a minimum, to:[34]

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30 At [144].
31 At [150] and [151].
32 At [152].
33 *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291.
34 At [163].

(a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;

(b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and

(c) process the claim in a reasonable time.

[99] The Judge considered that these conclusions were supported in the present case by cl 2 of the Dodds' policy, which provided:[35]

> **2 Your rights**
>
> a. You [the insured] are entitled to:
>
> **i** have your claim acknowledged and dealt with in a professional and efficient manner, and
>
> **ii** receive a fair settlement of your claim, as quickly as circumstances allow …

[100] The Judge also referred to the Fair Insurance Code promulgated by the Insurance Council of New Zealand, of which AMI was a member.[36] It read:

> We will act fairly and openly in all our dealings with you.

[101] The Judge considered that Southern Response had breached its duty of good faith by failing to disclose certain material facts which it possessed in relation to the claim, providing what was in effect a redacted figure, and accordingly misrepresenting the true position.[37] The Judge said he needed to make no orders as to the breach of the duty of good faith, given the conclusions he had reached on the other causes of action. But he would have found for the Dodds under this alternative cause of action.[38]

Effect of full and final settlement clause

[102] In the High Court Southern Response argued that even if the claims against it were made out, its liability was excluded by the settlement clauses in the

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[35] High Court judgment, above n 3, at [156].
[36] At [157].
[37] At [168].
[38] At [170].

Settlement Agreement. The Judge did not accept this argument. It has not been pursued before us. We say no more about it.

Damages calculation

[103] The Judge made an order that Southern Response pay to the Dodds the sum of $178,894.30. He explained his calculation of this sum as follows:

> [204] I have found that Southern Response wrongly represented the total cost of rebuilding the Dodds' house initially at $895,937.78 (and then revised to $894,937.00) and wrongly represented that it was settling at this total rebuilding estimate figure of $894,937.00. Accordingly, the Dodds are entitled to what was the true reasonable estimate at the time of the amount Southern Response would have paid to rebuild (known by Southern Response as $1,186,920.75 in accordance with the complete DRA it was holding from Arrow), with certain adjustment that I note below.
>
> [205] The figure needs to be adjusted as it would not have included demolition costs of $64,634.50 (already paid by Southern Response) and Arrow [project manager] costs of $6,000 and Arrow DRA costs of $3,500 for which the Dodds would have suffered no loss as they are items that they would never have received compensation for.
>
> [206] It includes however the contingency amount estimated at $114,678.00, architects' and design fees of $50,716.30, Arrow Contract costs of $6,000 and Arrow construction costs of $7,500. The shortfall difference totals $178,894.30, and represents the Dodds' loss here, being the difference between the true value of the Dodds' claim under their policy (which would have triggered their rights to negotiate further and to properly reconsider their election decision options) and the $772,948 settlement payment they actually received (taking into account the EQC payment they had already obtained).
>
> (Footnote omitted).

[104] Following delivery of the High Court judgment, counsel for the plaintiffs filed a memorandum seeking that the judgment be corrected to address an error in the calculation of the damages awarded. The figure calculated by the Judge was GST exclusive, when what the plaintiffs had claimed was the GST inclusive amount. The Judge accepted that GST ought to have been included in the damages awarded, and that this was an error arising from an accidental slip that could be corrected under r 11.10 of the High Court Rules 2016. The Judge ordered that "plus GST" be added to the references in the High Court Judgment to the judgment sum of $178,894.30.[39]

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[39] *Dodds v Southern Response Earthquake Services Ltd*, above n 4, at [15].

[105] The Judge awarded interest under the Interest on Money Claims Act 2016 on the judgment sum from the date the Dodds became entitled to receive the initial settlement payment from Southern Response up to the final date for payment.[40]

[106] Finally, the Judge addressed the Dodds' claim for general damages of $15,000 each. The Judge said that the threshold for such claims is a high one.[41] The Judge did not consider that threshold was met:

> [223] Whilst I clearly have some sympathy for the position which the Dodds have found themselves in relating to this matter, it is my view that the reasonably high threshold which exists for general damages claims in cases such as the present has not been reached here. The Dodds were effectively cash-settled ultimately to enable them to buy a replacement home of their choice. Their policy claim did not involve what is often seen as a long drawn out repair versus rebuild case. There was some evidence before me of reasonable physical inconvenience but I need to say that there was no major evidence that the Court could consider of significant mental distress here. And, as I see the position, the present case differs somewhat from the position that prevailed in *Young v Tower Insurance* where an award of nominal damages was made.
>
> (Footnote omitted).

Issues on appeal

[107] The appeal raises the following issues, which we address in turn below:

Misrepresentation claim

(a) What representations (if any) did Southern Response make to the Dodds?

(b) Were those representations false?

(c) Were the Dodds induced to enter into the Settlement Agreement by those representations?

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40 High Court judgment, above n 3, at [212].

41 At [215].

(d) What damages are the Dodds entitled to under s 35 of the CCLA? In particular, are they entitled to recover general damages for inconvenience and stress?

FTA claim

(e) Did Southern Response engage in misleading and deceptive conduct in breach of s 9 of the FTA?

(f) Did the Dodds suffer loss or damage as a result of any misleading conduct on the part of Southern Response?

(g) What remedy should be awarded under s 43 of the FTA?

Claim for breach of duty of good faith

(h) Did Southern Response owe a duty of good faith to the Dodds in connection with the settlement of their claim?

(i) If Southern Response owed a duty of good faith to the Dodds, was that duty breached?

(j) What is the appropriate remedy in respect of any such breach?

Misrepresentation claim

The issue

[108] The focus of the Dodds' claim at trial, and on appeal, was the misrepresentation claim under s 35 of the CCLA:

> **35 Damages for misrepresentation**
>
> (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—

(a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and

(b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

…

[109] The issue at the heart of Southern Response's argument before us was whether Southern Response had made any misrepresentations to the Dodds.

What representations (if any) did Southern Response make to the Dodds?

[110] The Dodds pleaded that Southern Response had misrepresented that $895,937 was Southern Response's estimate (as assessed by Arrow) of the full cost to rebuild the house on its present site. As noted above, the Judge found that Southern Response represented that:[42]

(a) Its estimate of the cost of rebuilding the house on its present site was the amount set out in the Abridged DRA, and this represented the complete and at least by implication the only report received from Arrow.

(b) The amount in the Abridged DRA represented Southern Response's full estimate of the rebuild cost.

[111] Southern Response says that these findings are wrong. The statements it made to the Dodds were contentions about Southern Response's obligations under the policy, not representations about Southern Response's estimate of the cost of option (i) — rebuilding the house on its present site. Southern Response expressly said that it was not costing option (i). It did express a view on the cap applicable to option (iii) — Buy Another House. In doing so, Southern Response was simply putting forward its view of what the Dodds were entitled to under the policy. This was a contention, or perhaps an expression of opinion. It was accompanied by a reminder that the

42 At [81].

Dodds' entitlement was determined by the policy documents, and encouragement to seek legal advice. The Dodds did seek their own legal advice.

[112] Southern Response also points out that it was apparent on the face of the Abridged DRA that it did not include amounts for professional fees or contingencies. The Information Sheets also explained that design fees were not included. The information provided to the Dodds was sufficient for them, and their lawyer, to be able to work out what was and was not included in the total figure shown in the Abridged DRA. Other policy holders — in particular, Avonside Holdings Ltd — had been able to identify these omissions from the calculation and take issue with them. Having regard to all the information provided to the Dodds, there was no relevant representation of fact, and no misrepresentation.

[113] The relevant statements that Southern Response made to the Dodds were set out above. Before us the parties agreed that those statements need to be understood in their context, but focused on different aspects of that context. Southern Response emphasised that it was making statements about the interpretation and application of a legal document: this was, it said, an inherently contestable question of opinion. Moreover those statements were being made to property owners who included (as the principal of the trustee company) a lawyer, and in conjunction with a recommendation to seek legal advice. The Dodds for their part emphasised that this was correspondence about settlement of an insurance claim in relation to a residential property. Southern Response had expertise in relation to insurance matters generally, and the operation of its policies in particular. The Dodds as policy holders were consumers who did not have any relevant expertise. They could be expected to place confidence in, and rely on, statements made by Southern Response.

[114] The approach the courts adopt to ascertaining the meaning of a representation was recently summarised by this Court in *Ridgway Empire Ltd v Grant*:[43]

> [11] Whether there has been a misrepresentation of fact is not determined merely by considering the literal meaning of the words used without regard to the context. The enquiry is what a reasonable person would have understood from those words in all the circumstances. Relevant considerations will often

[43] *Ridgway Empire Ltd v Grant* [2019] NZCA 134, (2019) 20 NZCPR 236 (footnotes omitted). Leave to appeal declined in *Ridgway Empire Ltd v Grant* [2019] NZSC 85.

> include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used. Where a party with superior knowledge takes it upon itself to make a representation of fact without qualifying it by reference to the basis for its assertion, it will generally have to accept the consequences of being wrong. However, each case will ultimately turn on its own facts.

[115] We consider that a reasonable person in the position of the Dodds would have understood the statements made by Southern Response as conveying a number of representations.

[116] First, we agree with the Judge that the communications from Southern Response conveyed an irresistible inference that Southern Response's estimate of the cost of rebuilding the house on its present site, as assessed by Arrow, was $895,937. That message was implicit in the Abridged DRA that was sent to the Dodds in February 2012, after they had been advised that they would receive a final costed DRA report. It was made explicit in the September 2012 letter, which advised the Dodds that if they chose the Buy Another House option:

(a) Southern Response would pay the cost of buying that house up to the maximum it would have cost to rebuild your house on its present site.

(b) The maximum amount available if they took this option would be $894,937.

(c) The most Southern Response would pay under this option was "the amount it would have cost us to rebuild your house on its present site".

[117] A reasonable person reading that letter would understand from it that Southern Response estimated that the amount it would have cost them to rebuild the house on its present site was approximately $895,000.

[118] We accept Southern Response's submission that it was possible to ascertain from the Abridged DRA that no allowance had been made for design fees or contingencies. But the overwhelming impression created by the September 2012 letter and the attached Abridged DRA was that Southern Response considered that the cost

to Southern Response of rebuilding the house on its present site was around $895,000.[44] In order to work out that this figure had been arrived at without taking into account certain items which should be factored into a realistic estimate of rebuilding costs, a reader would need to undertake a critical and careful analysis of a kind that most reasonable readers of such a letter would be unlikely to engage in. The intended audience for the letter was individual homeowners making an insurance claim in respect of their home, not litigation lawyers undertaking a forensic analysis of the communication in a search for inconsistencies and errors.[45] The Dodds were entitled to take the letter at face value, and were entitled to take from it that the figure of $895,937 was Southern Response's estimate of the cost of rebuilding.

[119] That message was reinforced by the Information Sheet for the Buy Another House option, which also equated the figure in the letter with "the maximum it would have cost to rebuild your house on the current site". The statements made about the DRA, and why the amount in the DRA might differ from the amount in the letter, were inadequate to convey that the figure of $895,937 was not in fact Southern Response's estimate of the rebuild cost. It seems that the statements may have been carried over from the pre-May 2011 practice of providing the Complete DRA, from which it would have been apparent that the cap that Southern Response was applying to this option was less than its full estimate of rebuild costs including design fees and contingencies. However, read in conjunction with the Abridged DRA, which made no reference to design fees and Arrow fees, these entries in the Information Sheet were unilluminating. They were more likely to cause confusion than to provide clarity about the basis on which Southern Response was putting forward the $894,937 figure as the relevant cap.

[120] That message was also reinforced by the Settlement Election Form, which equated the cost of rebuilding the house on its present site and the figure of $894,937.

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44 The difference between the figure of $895,937 in the Abridged DRA and the figure in the letter of $894,937 was not explained in these documents. As mentioned above, it reflects two excess amounts of $500. The use of the two slightly different figures in various places is in our view immaterial when it comes to ascertaining the overall impression created by these documents.

45 The Dodds did have access to legal advice, and sought advice on the proposed settlement. But this was a communication made directly to them, and if it was likely to mislead a reasonable person in their shoes then it was misleading for the purposes of s 9 of the FTA. Nor is there any reason to think that a lawyer would be better placed to identify the particular respects in which this letter was misleading: see [137] below.

[121] It is apparent from the email sent by Mr Dodds on 13 February 2013 that this is how he understood the communications he had received up to that point in time. His understanding was that the cost of rebuilding the house was $894,137.[46] We consider that that is what most reasonable recipients would have taken from the statements made by Southern Response.

[122] Second, we agree with the Judge that the communications from Southern Response would be understood by a reasonable recipient in the shoes of the Dodds as conveying that the Abridged DRA was the only relevant estimate of rebuild costs that Southern Response had received from Arrow. The Dodds had been told to expect a final costed DRA report. The Abridged DRA was presented to them as that report. Nothing on its face suggested it was incomplete. We agree with the Judge that the sign-off at the foot of the report encouraged the inference that it was Arrow's complete report. Nothing in the material accompanying the Abridged DRA explained that there was a more comprehensive report that included other costs that Southern Response would incur if the house was rebuilt, but that Southern Response considered were not relevant when assessing the cap on the Buy Another House option.

[123] These representations both relate to matters of fact. A reasonable recipient would not understand them as contentions or expressions of opinion about questions of legal interpretation. Rather, they are statements about matters of fact that are relevant when applying the policy.

[124] Southern Response put some emphasis on the statements in its various communications to the effect that option (i) — rebuild on the present site — was not being costed. Southern Response submitted that in circumstances where the Dodds had been told that option (i) was not being costed, they could not reasonably understand the figure of $895,000 as a costing of that option. So, Southern Response submitted, the figure could only be understood as an expression of opinion or contention about the maximum entitlement under option (iii).

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[46] As noted above, the difference of $800 between the figure in the email and the figure used in the September 2012 letter may simply have been a typographical error on the part of Mr Dodds.

[125] This is in our view something of a red herring. The Dodds are not claiming that option (i) was costed, and they were misled about that. They complain that the cap for option (iii) was defined by reference to the cost of rebuilding the house on its present site, and Southern Response made misrepresentations about its estimate of that cost. It is irrelevant that Southern Response made it clear that under option (i) it would meet the cost of rebuilding, so there was no need to provide a costing for it.

[126] More generally, Mr Campbell QC emphasised that the Dodds' claim was not based on a representation by Southern Response about their policy entitlement. He said that was a mischaracterisation by Southern Response of the Dodds' claim. Rather, their claim was based on the two representations of fact identified above. That, Mr Campbell submitted, meant that Southern Response's arguments about statements of policy entitlement necessarily being statements of opinion were irrelevant: they were attacks on a straw man, not on the claim as it was pleaded and presented by the Dodds.

[127] We understand the rationale for presenting the Dodds' claim in this carefully circumscribed way. But there is an element of artificiality in the distinction drawn between the two pleaded representations of fact and a representation about policy entitlement, in circumstances where the significance of the pleaded representations of fact is that they provide the basis for ascertaining the Dodds' policy entitlement. The reason the statements made by Southern Response mattered to the Dodds is that those statements led them to believe that their rights under the policy were worth a maximum of $894,937. If a focus on the practical significance of the statements to the Dodds led to the result contended for by Southern Response — no representations for the purposes of the CCLA, and no claim — that would raise questions about the ability of the court to reach a different result by a less direct path. We think it is important to confront this issue head on.

[128] We consider that the statements made by Southern Response referred to above would be understood by a reasonable recipient as conveying that the maximum entitlement under the Buy Another House option was approximately $895,000. This is a proposition about the effect of a legal document — the relevant insurance policy. But that does not mean it cannot qualify as a representation.

[129] It is often said that a representation must be a statement of fact. The leading New Zealand contract text notes that the term "misrepresentation" is not defined in the CCLA, and the courts have proceeded on the basis that it has the same meaning that it had at common law:[47]

> This means that a misrepresentation is a representation of past or present fact that is false or misleading, and excludes statements of intention, opinion and law.

[130] However this proposition requires qualification in two respects for present purposes.

[131] First, the courts have tended to regard statements about the effect of documents as representations.[48] In cases of this kind it is difficult to distinguish between representations of fact and law.[49]

[132] Second, we doubt that the old common law rule that statements of law could not amount to misrepresentations remains good law. The position that has been reached in recent years by the English courts is helpfully summarised in *Chitty on Contracts* as follows:[50]

> … in the law of restitution the distinction between a payment made under a mistake of fact and one made under a mistake of law has been held by the House of Lords not to be part of English law, and, in the light of this, it was held in *Pankhania v Hackney LBC* that the "misrepresentation of law" rule is no longer good law. Thus, for the purposes of the law of misrepresentation, the distinction between statements of law and statements of fact is no longer maintainable and that even an incorrect statement of an abstract proposition of law may amount to a misrepresentation unless it is apparent that all that is being offered is an opinion without implication that the speaker has reasonable grounds for that opinion. It is submitted that the underlying principle here is the same as that suggested in the previous paragraph, viz that even a statement as to the law may be a misrepresentation if it was reasonable, in all the circumstances, for the representee to rely upon it. …

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47 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [11.2.1].

48 H G Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) at [7-017], referring to cases such as *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805 (CA).

49 Finn, Todd and Barber, above n 47, at [11.2.1(f)].

50 Beale, above n 48, at [7-017], referring to *Pankhania v London Borough of Hackney* [2002] EWHC 2441 (Ch) (footnotes omitted).

[133] There is a strong argument that the approach outlined in *Chitty* should also be adopted in New Zealand in the context of the CCLA. For present purposes, however, it is sufficient for us to say that the statements made by Southern Response about entitlements under policies issued by it, in circumstances where it is not apparent that all that is being offered is an opinion, and where it is reasonable for the representee to rely upon the correctness of the statement, qualify as representations for the purposes of s 35 of the CCLA.

[134] Southern Response sought to draw parallels between this case and *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*.[51] In that case the plaintiff had insured a commercial building on an indemnity basis with the insurer. The insurer told the insured that there were different ways of calculating indemnity value under the policy, but the typical method used was the market value of the building. The insurer provided a valuation of the building that estimated both its market value and its depreciated replacement cost. The insured settled its claim on the basis of market value. The insured subsequently brought proceedings claiming, among other things, that the indemnity value of the building should have been calculated on a depreciated replacement cost basis. They claimed that the view the insurer expressed that the appropriate approach was based on market value was a breach of the terms of the policy, or gave rise to a mistake, or breached the FTA. However the High Court considered that the insurer had dealt with the insured openly and frankly. It had provided a helpful and transparent explanation of the options for calculating indemnity value and of the reasons for thinking that market value was the appropriate measure of loss. It provided valuations prepared on both bases. As the High Court found, the insurer provided sufficient information to allow the insured to take issue with the reasoning process adopted, and the entitlement calculated using that process, which is exactly what the insured then did through its own valuers and lawyers.[52]

[135] We do not consider that there is any parallel with *Prattley*. Southern Response did not explain to the Dodds that there were different views about how the cap on the Buy Another House option should be calculated. Southern Response did not provide the Complete DRA, or another calculation of what the result would be if the cap was

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[51] *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2015] NZHC 1444.
[52] At [166]–[169].

calculated by reference to the estimated cost of rebuilding the house on its present site. Southern Response's reasoning process was not transparent. It did not provide sufficient information to enable the Dodds to understand the implications of adopting a different approach, and to take issue with Southern Response's preferred approach.

[136] We do not consider that there was anything in the material provided by Southern Response to the Dodds that indicated that Southern Response was merely putting forward a (contestable) contention about how the policy operated, or expressing an opinion about a matter on which there was room for different views. We do not accept that this is how every statement about entitlements under a contract should be read. It may be apparent from the terms of a statement that it does no more than put forward a contention, or express an opinion. In some contexts, even a definite statement may be understood by a reasonable recipient in that way.[53] But we do not consider that it was implicit in the communications from Southern Response to the Dodds that their statements should be understood in this more limited way. Rather, the context (communications from an insurance company with relevant knowledge and expertise to consumer insureds) and the unqualified nature of the statements made by Southern Response combined to convey a definitive statement of the Dodds' entitlements under the policy which a reasonable recipient would not have understood as merely being a contention, or statement of opinion.

[137] Southern Response emphasised that the sole director of St Martins Trustee Services Ltd, Mr Marshall, a solicitor, did not give evidence about how he understood the communications from Southern Response, or whether he relied on them when forming a view about the Dodds' position under the policy. Southern Response says no explanation was given for the decision not to call him. We do not consider that evidence from Mr Marshall could have shed any light on how the statements made by Southern Response would have been understood by a reasonable recipient in the position of the Dodds. The statements were not directed to Mr Marshall, but rather to the Dodds as policy holders. Nor is there any reason to think that a lawyer would be better placed to identify that Southern Response's estimate of the cost of rebuilding

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[53] See for example, *Kyle Bay Ltd v Underwriters Subscribing under Policy No 019057/08/01* [2007] EWCA Civ 57. See also *Forrest v Australian Securities and Investments Commission* [2012] HCA 39, (2012) 247 CLR 486 at [94].

was greater than the figure in the relevant communications, that the Abridged DRA was not the complete report received from Arrow, or that the amount shown in the Abridged DRA was not Southern Response's full estimate of the rebuild cost. We return to the role of Mr Marshall in the context of inducement below.

[138] We conclude that there were three relevant representations made by Southern Response to the Dodds: the two representations of fact set out at [116] and [122] above, and a closely related representation about their maximum entitlement under the policy if they chose the Buy Another House option. Were those representations false?

Were the representations false?

[139] We agree with the High Court Judge that the three representations identified above were false. That is, they were misrepresentations.

[140] Southern Response did not attempt to argue that the first and second representations identified above, if made, were correct. Southern Response did argue that any representation that might have been made about policy entitlement could not be described as incorrect merely because a court subsequently took a different view. If Southern Response had confined itself to making statements about policy entitlement which a reasonable recipient would understand as mere expressions of opinion, and if that opinion was genuinely held, that argument would have considerable force. But as explained above, the statements that Southern Response made about policy entitlement were not presented as contestable statements of opinion, or mere contentions. Rather, they were unqualified and absolute statements about policy entitlement. The appellate decisions in *Avonside Holdings* confirmed that those statements were not correct.

[141] Southern Response submits that there can be no misrepresentation if the assessment provided to the Dodds reflected their policy entitlement in accordance with the law at the time of settlement. Southern Response submits that the declaratory theory of the law, under which Judges declare what the correct legal position has always been, cannot retrospectively make a correct statement of the law at the time is was made incorrect.

[142] This argument runs together a number of quite different propositions. First, and most importantly, it is necessary to establish what the content of the relevant representation actually was. So far as the first and second representations identified above are concerned, there is no "assessment" of a legal position involved. These are simply statements of fact. They were not correct at the time they were made.

[143] So far as the third representation identified above is concerned, the difficulty with Southern Response's submission is that the statement was not conveyed as an "assessment" about an issue that was open to doubt, or reasonable difference of opinion. For the reasons explained above, this was an unqualified and definite statement about policy entitlement which has been shown to be wrong.

[144] Southern Response says that it is wrong to characterise the cost of rebuilding the house on its present site as a simple question of fact. As Southern Response rightly points out, the basis on which the rebuilding would be carried out can only be determined by reference to the policy. For example, the cost of rebuilding in this case fell to be calculated by reference to the cost of rebuilding up to the floor area stated on the policy schedule, to an "as new" condition, using new materials and current construction methods in common use at the time of rebuilding.

[145] Again, we see this argument as something of a red herring. The first representation — that the figure provided was Southern Response's estimate of the cost of rebuilding in the manner provided for under the policy — remains a proposition of fact, which as discussed above was not correct. Similarly, the second representation — that there was no other report providing a different costing — was also a statement of fact that was not correct. Insofar as the third representation is concerned — that the identified sum was the cap on the Dodds' policy entitlement — this is a statement of mixed fact and law which, for the reasons explained above, amounts to a representation for the purposes of s 35 of the CCLA.

[146] Similarly, Southern Response's submissions about the circumstances in which a statement of opinion may be an actionable representation are beside the point. The first and second representations identified above were not statements of opinion. Rather, they were statements of fact. The third representation was not presented as

a statement of opinion. A reasonable recipient in the Dodds' position would not have understood it in that way. In this case, the Dodds do not seek to argue that the statements made did not represent Southern Response's honestly held view about the entitlements of policy holders under this form of policy. The genuineness of that view is not in issue here.

[147] Southern Response argued that if a statement by an insurer as to an insured's entitlement could amount to a misrepresentation, then every time an insurer is subsequently found to be wrong in law as to the correct interpretation of a policy, all settlements based on the insurer's interpretation will be liable to be reopened for misrepresentation. That "horror prospect", as Mr Campbell termed it, will not follow from the approach we have set out above. Everything turns on what the insurer actually says to the insured. If an insurer makes it clear that they are expressing a contention or an opinion about a policy entitlement, but the matter is not clear cut, and the insured is given the necessary information to understand that other approaches are arguable, the mere fact that the insurer's opinion is subsequently shown to be wrong would not mean that the insurer had made a misrepresentation or that any settlement agreement was liable to be set aside. But if an insurer dealing with consumers takes it on itself to make absolute statements about matters which are in fact open to doubt, in circumstances in which it is reasonable for the insured to rely on the insurer's statements, a subsequent finding that the insurer was wrong may expose the insurer to liability. Context is everything.

[148] The importance of context also explains why Southern Response's reliance on *Brennan v Bolt Burdon* is misplaced.[54] In that case the English Court of Appeal declined to set aside a settlement agreement on the grounds of common mistake of law, in circumstances where the parties had settled on the basis that the claim faced major difficulties because of a relevant Court of Appeal authority that was subsequently overruled. The majority doubted that there was a mistake of law; rather, there was a state of doubt about the law.[55] The three separate judgments all reach broadly the same conclusion that generally a settlement agreement is entered into in the knowledge that the law may change, and each party accepts the risk of such

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54 *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303.
55 At [23] and [36].

a change.[56] But in the present case two of the representations concerned matters of fact, not matters of law; the third representation concerned rights under a particular contract, not a general proposition of law; and the Dodds' mistaken understanding of the facts and of their rights was the result of statements made by Southern Response. This was not a context in which the Dodds can be taken to have accepted the risk of incorrect statements by Southern Response about the facts, or about the application of a policy issued by Southern Response.

[149] Finally, Southern Response suggested that liability in this case would discourage insurers from making clear statements about a customer's entitlement to avoid the potential for claims for misrepresentation. If the result of this judgment is that insurers avoid making absolute and unqualified statements about matters that are uncertain, and about which there is room for reasonable difference of views, it seems to us that would be a desirable outcome.

Were the Dodds induced to enter into the Settlement Agreement by the misrepresentations?

[150] Southern Response submitted that the respondents had failed to establish that they relied on Southern Response's statements when entering into the contract.

[151] First, Southern Response argued that the trustees were under a duty to act unanimously in entering into the Settlement Agreement with Southern Response. Mr Dodds acknowledged in cross-examination that the third trustee, St Martins Trustee Services Ltd, would have exercised its own independent judgment. The Trust led no evidence from Mr Marshall, the representative of that company, leaving the Court in the dark about the basis on which the Trust as a whole settled. Southern Response submitted that the Court could draw an inference that Mr Marshall's evidence would not have supported the Dodds' claim.[57]

[152] The policy holders were the Dodds, rather than the trustees. The question is whether they were induced to enter into the contract by the misrepresentations that were made. They gave evidence that the statements made by Southern Response about

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56 At [23], [39] and [64].
57 *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153]–[154].

the cost of rebuilding, and its relevance as a cap on their entitlement, were a factor in their decision to enter into a settlement agreement based on the figure put forward by Southern Response. We do not consider that it was necessary for the Dodds to call evidence from Mr Marshall about the factors that he took into account on behalf of St Martins.

[153] The Dodds' decision not to waive privilege in respect of the advice they received from Mr Marshall, and not to call Mr Marshall, left them exposed to the risk of a finding that the court was not satisfied on the balance of probabilities that they had relied on the statements made by Southern Response. For example, it could have been the case that Mr Marshall was aware of the *Avonside Holdings* litigation and advised the Dodds about it, or even that he had expressed the view that Southern Response's approach to the policy was wrong. If that had happened, and the Dodds had nonetheless decided to settle in order to achieve finality, they could hardly complain that they had been induced to enter into the Settlement Agreement by the statements made by Southern Response.

[154] Plaintiffs in the position of the Dodds will often need to waive privilege in order to establish that they relied on statements relevant to the policy entitlement, in circumstances where they also sought legal advice about that policy entitlement. So, for example, in *Prattley* the insured waived privilege in the advice it received about their policy entitlements.[58] But we are satisfied that in this case the evidence given by the Dodds established that at the time they entered into the Settlement Agreement they were influenced by (among other matters) the statements made by Southern Response, which they believed to be true. The evidence they gave excludes the possibility that they knew that their policy entitlement differed from that put forward by Southern Response. In particular, Mr Dodds gave evidence that he had no knowledge of the High Court's July 2013 decision in *Avonside Holdings* which addressed the issue of which costs were relevant for the purposes of the cap.

[155] Southern Response also argued that the Dodds conceded on cross-examination that they could not say what they would have done if the Complete DRA had been

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58 The advice the insured received is set out in *Prattley*, above n 51, at [26]–[29]. See also, for the significance of that advice, [176]–[179] and [192]–[193].

disclosed to them prior to settlement. So, Southern Response submitted, the Dodds had failed to discharge the burden of proof they bore in relation to reliance. It seems to us this misreads the evidence given by Mr and Mrs Dodds. All the Dodds needed to show was that the misrepresentations were an important factor influencing them to enter into the agreement. They did not have to show that if the representations had not been made, they would not have entered into the agreement.[59] Mr Dodds was not willing to speculate about what would have happened if they had been given more complete information. But it is in our view quite clear that if the Dodds had been told that Southern Response estimated that the cost of rebuilding their house on its present site was some $205,000 greater than the figure they were given of around $895,000, they would not have settled on the basis of the lower figure. There would have been further negotiations, and it seems likely that, if a settlement was arrived at, it would have been on the basis of a different and higher figure.

[156] Southern Response says that if it had provided the Complete DRA to the Dodds, it would also have explained to them its firm view that the additional costs referred to were not relevant to the cap, and would have refused to enter into a settlement agreement that took those costs into account. By the time the Settlement Agreement was entered into in December 2019, Southern Response's view was reinforced by the High Court decision in *Avonside*. So, Southern Response submitted, the same result would have followed in any event.

[157] The argument that Southern Response would have insisted on refusing to perform its obligations under the policy, and the Dodds would have had to accept that or get no payment, appears to be based on an assumption that Southern Response would have simply asserted its position without explanation and without disclosing other relevant information known to it. It also assumes that the inequality of knowledge and bargaining power between the parties would have led to a settlement on the terms insisted on by Southern Response. That is not an appealing argument. If Southern Response had disclosed the Complete DRA, explained its position, and referred the Dodds to the *Avonside* decision, that was likely to have led to a different outcome. For example, in *Avonside*, Southern Response accepted that an allowance

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59 *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC) at 595.

for certain professional fees was appropriate when calculating the cap: the dispute was about the nature and amount of those fees.[60] If a settlement was negotiated on the basis of the High Court *Avonside* decision, the settlement figure would almost certainly have been higher. The Dodds could also readily have ascertained that the High Court decision was under appeal, and might have decided to wait for the appeal to be decided, or to seek an interim settlement on a basis that enabled them to benefit from the outcome of the appeal. We doubt that the same result would have followed if, instead of making the absolute and unqualified representations identified above, Southern Response had provided the additional information necessary to ensure that the overall message was not misleading. It is not possible to be precise about which of these various outcomes would have eventuated, as the Dodds acknowledged in evidence. But it is likely that the outcome would have been materially different.

[158] In summary, we are satisfied that the Dodds have established that the misrepresentations made to them were a material factor in their decision to enter into this particular Settlement Agreement, for a sum based on the $895,000 figure put forward by Southern Response as their estimate of the rebuild costs, and as the Dodds' maximum entitlement under the Buy Another House option.

Relief under s 35 of the CCLA

[159] We address relief under the CCLA below, after considering the Dodds' FTA claim.

FTA claim

Misleading and deceptive conduct?

[160] Both parties proceeded on the basis that if the Court found that Southern Response had made misrepresentations for the purposes of s 35 of the CCLA, that conduct would also amount to a breach of s 9 of the FTA. We agree. By making the three misrepresentations identified above, Southern Response engaged in misleading and deceptive conduct in breach of s 9 of the FTA.

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60 *Avonside*, above n 8, at [26]–[32].

[161] We note that in the FTA context, it is clear that statements about contractual entitlements can amount to misleading and deceptive conduct. The specific kinds of false or misleading representation that are prohibited by s 13 of the FTA include, in paragraph (i), making a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy, including rights and remedies under the Consumer Guarantees Act 1993. Such representations would also breach s 9 of the FTA. It cannot seriously be argued that any representation about contractual rights is necessarily a statement of opinion that cannot give rise to liability under the FTA. Incorrect statements about the effect of an insurance policy have been held to establish liability under s 9 of the FTA.[61]

Loss or damage resulting from misleading conduct

[162] As the Supreme Court said in *Red Eagle*, the next step is to consider whether the defendant's conduct was the effective cause, or an effective cause, of the claimant's loss or damage.[62]

[163] It is clear that by entering into the Settlement Agreement the Dodds suffered loss: they surrendered rights under the policy that were worth some $205,000 more than the sum they were paid by Southern Response.

[164] Southern Response's misleading conduct was an effective cause of that loss. If Southern Response had provided accurate information about its estimate of the cost of rebuilding the house, the Dodds would almost certainly have pressed for a settlement on the basis of that full estimate. Disclosure of the additional information that was needed to avoid creating a misleading impression about the estimates obtained by Southern Response, and about the Dodds' policy entitlement, is likely to have led to a different result, as we explained above.

[165] It follows that the High Court was right to find that there had been a breach of s 9 of the FTA, and was right to award relief under s 43 of the FTA. We turn to consider the issues raised in relation to that relief.

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61 See *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) 10 TCLR 213 (HC).

62 *Red Eagle Corp v Ellis*, above n 29, at [29].

Relief under CCLA and FTA

The issues in relation to relief

[166] The Judge awarded the same relief under s 35 of the CCLA and under s 43 of the FTA: the difference of some $205,000 between the cap identified in the Southern Response communications and the cap calculated in accordance with the *Avonside Holdings* appellate decisions.

[167] Southern Response's original notice of appeal challenged the liability findings made in the High Court, and raised two issues in relation to the relief awarded:

(a) Southern Response said that the Judge had erred in finding that the Dodds relied on Southern Response's statements by applying a "loss of a chance" analysis, or alternatively erred in failing to assess the value of the lost chance and award damages on that basis only.

(b) Southern Response said that the loss awarded should not include Arrow contract costs and Arrow construction costs.

[168] Southern Response filed an amended notice of appeal following delivery of the further judgment delivered by the High Court in October 2019, correcting the omission of GST from the sums awarded. The amended notice of appeal added as a further ground of appeal that the Judge "erred in his calculation of the amounts that would be payable as damages". No details of the alleged error(s) were provided.

[169] In the submissions filed by the parties before the hearing, the only issue concerning relief that was addressed by the parties was the Dodds' cross-appeal concerning their claim for general damages. In particular, Southern Response did not pursue the argument that any damages should have been awarded on a loss of a chance basis if that was the nature of the Dodds' loss, and did not identify any errors in the calculation of damages of the kind foreshadowed by the amended notice of appeal.

[170] On the eve of the hearing Southern Response filed a "Memorandum of Calculation of Damages" raising some relatively minor issues concerning the

calculation of damages in the High Court, if the High Court's decision was upheld. It sought a reduction in the amount awarded of approximately $11,000. The rationale for this reduction was that the contingency figure used in the High Court damages calculation was a 10 per cent contingency on all the AMI Office Use cost items, including items that were not relevant to calculation of the cap on the approach adopted in the High Court: demolition, Arrow project manager costs and Arrow DRA costs.

[171] In the course of argument some additional issues concerning the appropriate relief in this case were identified by the Court. We invited further submissions on those issues. In their further submissions Southern Response argued that the Dodds had failed to show that they suffered a loss as a result of the alleged misrepresentations. The Dodds sought to uphold the approach to damages adopted in the High Court. But in the alternative they argued that if damages were not available on that approach then an order should be made under s 43 of the FTA setting aside the Settlement Agreement. Southern Response strongly opposed the making of an order setting aside the Settlement Agreement on the basis that the Dodds had not sought that relief previously, and it would be impractical and unjust to require the parties to start the claims process over again.

Approach to quantification of damages

[172] With the benefit of the parties' further submissions, we are satisfied that the approach to damages adopted by the High Court was available under the FTA, and also under the CCLA.

[173] It is well established that the usual approach to assessing compensation under the FTA is based on the tort measure of damages.[63] The relevant loss is the difference between the claimant's position in the absence of the misleading conduct, and the claimant's position as a result of the misleading conduct. In this case, if the Dodds had not been induced to enter into the Settlement Agreement by Southern Response's misleading conduct, the Dodds would have retained their rights under the policy,

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[63] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA); and Jeremy Finn, Stephen Todd and Matthew Barber, above n 47, at [11.3.3].

which were worth some $205,000 more than the settlement sum. As a result of the misleading conduct, the Dodds parted with those rights for less than they were worth. Their loss is therefore the difference between the value of those rights and the sum they received under the Settlement Agreement — subject to the calculation issues addressed below, some $205,000.

[174] Southern Response's submission that the Dodds have not shown they would have behaved differently in the absence of the misleading conduct, and in particular have not shown that they would have received an additional $205,000, misses the point for two reasons.

[175] First, the Dodds have established that it is likely that they would not have entered into the particular Settlement Agreement, and settled for the sum they received, in the absence of the misleading conduct. Under that Agreement they surrendered rights worth some $205,000 more than they were paid. It is neither necessary nor appropriate to speculate about the possibility that they would have entered into a different agreement with Southern Response under which they surrendered their rights for less than those rights were worth. A defendant cannot reduce the amount of their liability under s 43 by arguing that, absent the misleading conduct, the claimants might well have entered into some other disadvantageous contract, so have not proved their loss.

[176] Second, the underlying premise of the Southern Response argument is that, even if all the cards had been on the table, Southern Response would have refused to settle on a materially different basis because it believed, wrongly but honestly, that its offer was consistent with its obligations under the policy. Because the Dodds wanted to resolve their claim promptly, they would have had little choice but to accept less than they were entitled to. So no harm was done. As explained at [157] above, we do not consider that the evidence supports this counterfactual scenario. More fundamentally, we consider that an argument of this kind, founded on the premise that a business dealing with a consumer would have refused to meet its obligations (correctly interpreted) to that consumer, and might have succeeded in persuading the consumer to enter into a full and final settlement on a disadvantageous basis due to an accident in timing (settling in the window after the High Court's *Avonside* decision

and before this Court's decision on appeal), should not be accepted as a reason for reducing an award of compensation under the FTA.

[177] These points also answer Southern Response's argument that at most what was lost was a chance to negotiate something different. We disagree. What was lost was the true value of the Dodds' rights, as a result of entry into the Settlement Agreement. The "chance" that the rights would have been the subject of a different disadvantageous deal is not relevant. Southern Response's argument elides the immediate consequence of entry into the Agreement — loss of some $205,000 — with the possible additional consequence of another equally, or almost equally, bad deal, under which a similar loss might be suffered. Only the first step is relevant here.

[178] The position under the CCLA is more complex. Section 35 of the CCLA provides that if a party (A) has been induced to enter into a contract by a misrepresentation made by another party (B), A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached. In other words, the contract measure of damages applies. Applying this measure, A will usually recover damages that are designed to put A in the position that A would have been in if the contract had been performed. But that approach to assessing damages gives rise to difficulties where B represents that property (including contractual rights) owned by A is less valuable than it actually is, and induces A to part with that property for less than it is worth. A does not want to be put in the position they would be in if B's representation were true — that is, in the position A would be in if the property were less valuable. A wants to recover the difference between the value of the property disposed of and the price received: say $d. That is the amount by which A is worse off, and by which B has been enriched. An award of less than $d leaves A worse off than they would have been in the absence of the representation, and leaves B enriched by their wrongdoing.

[179] In their text on the Contractual Remedies Act, Dawson and McLauchlan explain that the usual measure of damages for breach of contract is inappropriate in cases of this kind by reference to this example:[64]

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64 Francis Dawson and David McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 31 (footnote omitted, emphasis original).

> The owner of a valuable piece of china is induced to sell it for $10 by a representation that it has certain defects which make it practically worthless. If the damages are assessed by comparing the representee's actual position with the position he would have been in if the representation had been *true*, the result is that he suffers no loss. He would have sold worthless property for a substantial price.
>
> …
>
> It is inconceivable that a New Zealand court would not grant as damages the difference between the actual value of the property and the price received, but precisely what the theoretical basis for such an award under s. 6 would be is a matter of some difficulty.

[180] We agree that the only sensible answer in a case of this kind is to award as damages the difference between the actual value of the property and the price received: in our example, $d. There are two possible rationales for such an award.

[181] One rationale, which focuses on the need for a realistic assessment of the loss suffered by the Dodds, is captured in the judgment of Tipping J in *Marlborough District Council v Altimarloch Joint Venture Ltd*:[65]

> [156] It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. …

[182] The loss actually and reasonably suffered by the Dodds in this case is the difference between the true value of their rights under the policy, and the sum they were persuaded to take in exchange for a surrender of those rights.

[183] An alternative rationale, which provides more guidance about the circumstances in which loss under s 35 of the CCLA will be assessed on a different measure, focuses on the transfer of value from the Dodds to Southern Response as a result of the wrong committed by Southern Response. On this approach the damages awarded are restitutionary damages for a wrong: Southern Response is required to restore to the Dodds the amount by which it was enriched at their expense, as a result

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65 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

of its wrongful act. The transfer of value induced by the wrong is reversed.[66] The underlying principle is one of corrective justice: wrongful transfers should not be sanctioned by the law, and should be reversed.[67]

[184] On either approach the Dodds are entitled to recover the difference between the true value of their rights under the policy, and the sum they were paid in exchange for a surrender of those rights.

Costs relevant to calculation of cap

[185] Southern Response argued that the costs of rebuilding should not take into account the two categories of "Arrow costs" awarded by the High Court Judge: Arrow contract costs and Arrow construction costs.

[186] Southern Response submits that Arrow contract costs were not addressed in *Avonside Holdings*. These are costs incurred in connection with entry into construction contracts and related contracts, if a rebuild takes place. They are internal Southern Response costs, not rebuild costs as such. Similarly, Southern Response submits that the evidence established that Arrow construction costs are costs that Arrow incurs, and bills to Southern Response, for supervising the construction process on behalf of Southern Response in order to ensure that all participants are performing appropriately. These are not project management costs, which are separately taken into account. This is appropriately seen as an internal cost of Southern Response performing its functions as an insurer.

[187] We consider that the Judge was right to find that these items should have been taken into account in estimating the cost to Arrow to rebuild the house on its present site. These are costs that would be incurred only if a rebuild went ahead, for the purpose of ensuring that the rebuild was completed in accordance with the Dodds' policy entitlement. We cannot see any basis for distinguishing these costs from other rebuild costs.

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66 James Edelman *McGregor on Damages* (20th ed, Sweet & Maxwell, United Kingdom, 2018) at ch 14.

67 James Edelman, *Gain-Based Damages* (Hart Publishing, Oxford, 2002) at 80–81, 96 and 243–245.

Calculation issues

[188] We accept Southern Response's submission that the sum awarded was inflated by some $11,000 as a result of errors of logic in the calculation carried out by the parties and, as a result, by the Judge in the High Court. Southern Response raised the issue of calculation errors in its amended notice of appeal. Its failure to address this issue in its initial submissions did not cause any prejudice to the Dodds: the point was canvassed in oral argument, and is a matter of basic logic and arithmetic. Mr Campbell accepted the existence of this error in the course of argument. Southern Response's appeal must be allowed to this limited extent.

General damages

[189] The Dodds cross-appeal against the refusal of general damages. They submit that general damages for stress are available in contract, at least where the contract is not an ordinary commercial contract.[68] In particular, general damages for stress are available where an important object of the contract is to provide pleasure, relaxation or peace of mind.[69] One of the objects of an insurance contract is to provide peace of mind. There are several instances of the High Court awarding damages for stress caused by an insurer's breach of contract.[70]

[190] The Dodds say that the authorities do not support the High Court Judge's imposition of a "high threshold" for claims for general damages. They do support the exercise of moderation as to the quantum of the damages awarded, but that is a different matter.

[191] We need not determine, in this case, the circumstances in which general damages for stress and inconvenience can be awarded in contract. We agree with the High Court Judge that the evidence does not establish a causal link between the breach

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68 *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).

69 *Bloxham v Robinson* (1996) 7 TCLR 122 (CA), referring to the judgment of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421 (CA).

70 *Joseph v McMillan* (HC Wellington A347/82, 18 May 1984) (reversed on liability in *McMillan v Joseph* (1987) 4 ANZ Insurance Cases 60-822 (CA)); *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd* (1988) 5 ANZ Insurance Cases 75,724; *Gaunt v Gold Star Insurance Co Ltd* [1991] 2 NZLR 341 (HC) at 350; *Bloor v IAG New Zealand Ltd* HC Rotorua CIV 2004-463-425, 19 March 2010 at [169]–[170]; and *Bruce v IAG New Zealand Ltd* [2018] NZHC 3444 at [170]–[171].

complained of — the representations about rebuild cost, which led to settlement at a lower figure than might otherwise have been the case — and any inconvenience or stress suffered by the Dodds. Mr Dodds did not refer to stress at all in his evidence in chief. He gave somewhat general evidence about the stress the dispute had caused him in his reply brief. Mrs Dodds gave evidence about the stress that the earthquakes and the damage to their house, and the insurance claim process generally, had caused her. We accept unreservedly that these must have been extremely stressful events for the Dodds. But the evidence simply did not establish any material incremental stress as a result of the insurance claim being settled for less than it would have been if the misrepresentations were not made.

Order setting aside the Settlement Agreement?

[192] As noted above, Southern Response argued vigorously against allowing the Dodds to seek an order setting aside the Settlement Agreement at this stage of the proceedings. The Dodds sought to do so only if the High Court's approach to damages was not upheld. As we have upheld that approach, neither party wishes to have the Settlement Agreement set aside, and we need not address the availability of that relief.

Claim for breach of duty of good faith

[193] The Dodds have succeeded on liability under the CCLA and the FTA. They did not argue that success on their claim for breach of a duty of good faith would lead to a more generous approach to damages than that adopted in the High Court, which we have upheld. So we need not consider this alternative basis on which their claim was advanced.

[194] We would however observe that it does not follow from the fact that a contract of insurance can be described as a contract of good faith that there is an implied term of good faith in every insurance contract, that applies across the board to all aspects of the parties' dealings in connection with the contract. To the contrary, the authorities suggest that the obligations that one party owes the other are context-specific. For example, an insured must not act dishonestly in connection with the making of

a claim.[71] We consider that it is likely to be more productive to consider what obligations are implied by law, or can be implied as a matter of fact, in relation to particular aspects of the dealings between the parties. That was the approach recently adopted by this Court in *Taylor v Asteron Life Ltd*.[72]

Result

[195] Southern Response's appeal is allowed in part. The damages awarded to the Dodds in the High Court are reduced by $10,656.44.[73]

[196] The appeal is otherwise dismissed.

[197] The Dodds' cross-appeal is dismissed.

[198] We were advised that the parties have reached an agreement in relation to costs, and that no order as to costs need be made.

Solicitors:
Bell Gully, Auckland for Appellant
Anthony Harper, Christchurch for Respondents

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71 See *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45, [2017] AC 1 at [8]; Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2017) at [4.7.4(1)]; Neil Campbell "Good Faith: Lessons from Insurance Law" (2005) 11(4) NZBLQ 479; and William Young "Remedies for an insurer's breach of good faith from a New Zealand perspective" (paper presented to New Zealand Insurance Law Association, 2010).

72 *Taylor v Asteron Life Ltd* [2020] NZCA 354.

73 We have calculated this on the basis of a difference of $9,266.47 plus GST.