IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA45/2019
[2019] NZCA 590

BETWEEN	JOANNE TRACEY BRUCE, STEPHEN LESLIE BRUCE AND LESLIE GORDON WILLETTS as Trustees of the JO AND STEPHEN FAMILY TRUST Appellants
AND	IAG NEW ZEALAND LIMITED Respondent

Hearing:	15 October 2019
Court:	Miller, Simon France and Hinton JJ
Counsel:	M V Robinson and P H Biddle for Appellants M G Ring QC and O V Collette-Moxon for Respondent
Judgment:	26 November 2019 at 2.30 pm

JUDGMENT OF THE COURT

A **The appeal is allowed in part. We set aside the finding that the Bruces have not established that there is a reasonable and practical way to remedy the wall verticalities or the uneven floor levels. Those issues must be decided at the second trial. The appeal is otherwise dismissed.**

B **The cross-appeal is dismissed.**

C **The respondent must pay costs to the appellants for a standard appeal on a band B basis with usual disbursements. We certify for second counsel.**

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] This is a case about substandard repairs to an earthquake-damaged house.

Narrative

[2] The house is the family home of the appellants Joanne and Stephen Bruce. It is a modern house, completed in 2006, and it was built to a very high standard. It won "gold" awards in the 2006 Master Builders House of the Year competition. The evidence is that its pile-supported concrete slab floor was level and its interior framed timber walls true.

[3] The house was damaged in the Christchurch earthquakes. IAG, the insurer, elected to repair it rather than rebuild. Under the policy standard repairs must be completed to "the same condition and extent as when the house was new". If that was "not practicable", repairs would be "as close as is reasonably possible to that condition and extent".

[4] The necessary repairs were extensive. The concrete slab on which the house and garage stood was no longer level. The house was lifted so the slab could be excavated and replaced. It was then lowered and its exterior and interior walls were fixed to the new slab. Much consequential work was required to make it good.

[5] It is not now in dispute that the builder engaged by IAG did not meet the policy's "as when new" standard in a number of respects. The Bruces pleaded no fewer than 135 defects. Shortly before trial IAG conceded almost all of them. Four were disputed at trial: the floor level, the verticality of interior walls, the quality of wall finishes required and achieved, and the fireplace. The last of these is not in issue on appeal.

[6] The trial Judge, Mallon J, found that in each of the first three areas the work failed to meet the contractual standard.[1] The Bruces' appeal concerns the Judge's findings about what needs to be done to repair the house. They say that the work must be done again and the Judge wrongly excluded that option, finding rather that a combination of remedial work and damages would sufficiently compensate them. For its part, IAG does not now dispute that the "as when new" standard could have been met, but was not, with respect to the slab and the wall finishes. It cross-appeals with respect to wall verticalities, saying that it was not practicable to achieve an as-when-new standard and on the Judge's factual findings she ought to have concluded that the work met the fallback standard of "as close as is reasonably possible" to the as-when-new condition and extent.

The procedural history

[7] The appeal and cross-appeal have their genesis in a decision made, on IAG's application and only 10 days before trial, to split the trial into two stages. The judgment under appeal dealt with the first stage, being identification of defects and what was needed to remedy them. The second, which is to address cost of repair, has not been tried. Much of the argument before us was addressed to the proposition that Mallon J decided issues that had been reserved for the second stage. In particular, the Bruces say she impermissibly ruled out as unreasonable their preferred solution for the floor slab, a complete rebuild. To explain this, we must say something about the claim and the decision to split the trial.

[8] The Bruces pleaded that the repairs were defective, complying neither with the contractual standard nor regulatory standards, and the home now requires extensive remedial work including replacement of the piles and floor slab and what we infer is new interior wall framing. The schedule of works listed appears to amount to a complete rebuild (which was and remains their preferred outcome). They seek remediation costs of $2,056,221 and general damages of $50,000.

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1 *Bruce v IAG New Zealand Ltd* [2018] NZHC 3444 [High Court judgment] at [95], [123]–[124] and [150].

[9] IAG's pleading generally denies the claim, including liability for damages. Its position is that the insurance contract is still on foot, meaning that it may commission any remedial work required, and until it has exercised its election in that regard no question arises of any payment being made to the Bruces.

[10] The trial was set down for 19 November 2018 and allocated two weeks' hearing time. On 9 November a telephone conference was held before Matthews AJ, at IAG's request. It appears that IAG had revised its view of the claim after service of the plaintiffs' briefs. We record that IAG explains this by saying the claim was a moving feast and it had done its best to engage the Bruces' solicitors in attempts to clarify the issues. We are in no position to decide where fault lies, and we need not do so. What matters for present purposes is that IAG invited the Associate Judge to direct that the evidence of quantity surveyors, which went to cost of remediation, should not be called at the 19 November trial. IAG argued that the first question was "the extent to which the repairs are defective … and what is required to fix them". The policy remained on foot and IAG claimed to retain the right to undertake any necessary repairs; that being so, it was premature to order any payment to the Bruces. IAG contended that it would be a waste of time and resources to lead the quantity surveyor evidence at that stage. The Associate Judge recorded that:[2]

> [8] IAG … says that it should not have to produce [quantity surveyor] evidence at trial because the Court is yet to decide exactly what has to be done. Once the Court has decided that, [quantity surveyor] evidence can be prepared which is directed with precision at the Court's findings. …

[11] The Associate Judge accepted this argument. He concluded that the most efficient way to resolve the issues was for the trial starting on 19 November "to concentrate on what is wrong with the house and what needs to be done to remediate it. Once that is established the question of the cost to do so can be established."[3] He accordingly directed that quantity surveyor evidence be reserved for a second trial. He added that the first trial would deal with a claim for general damages.[4]

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2 *Bruce v IAG New Zealand Ltd* HC Christchurch, CIV-2016-409-1223, 9 November 2018.
3 At [9].
4 At [11].

Remediation and reasonableness

[12] The split between defects and what was needed to fix them, on the one hand, and the cost of remediation, on the other, may have seemed straightforward. It has now proved to be anything but.

[13] It is uncontroversial that IAG, having elected to repair and commissioned the work, was liable to meet the contract standard. The work does not conform to that standard. The question is what is to be done about it. The rule prima facie applicable to breaches of building contracts is that the builder is liable to meet the cost of work needed to conform to the contractual standard; that being so, the measure of damages recoverable by the owner is the difference between the contract price of the work contracted for and the cost of making the work conform to the contract.[5] The High Court of Australia stated in *Bellgrove v Eldridge*:[6]

> … the [Owner] was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the [Contractor] to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.

[14] However, there is a qualification to this rule. It has been attributed to the judgment of Cardozo J in *Jacob & Youngs Inc v Kent*[7] and was adopted by *Hudson's Building and Engineering Contracts* in the 7th edition (published in 1946) and by the High Court of Australia in *Bellgrove*,[8] which decision was in turn approved by the House of Lords in the celebrated case of *Ruxley Electronics and Construction Ltd v Forsyth*.[9] The qualification is that the remedial work must be a reasonable course to adopt. As the High Court of Australia explained in *Bellgrove*:[10]

> … the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to

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5 *Hardwick v Lincoln* [1946] NZLR 309 (SC).
6 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617.
7 *Jacob & Youngs Inc v Kent* (1921) 230 NY 239 at 244–245.
8 *Bellgrove v Eldridge*, above n 6.
9 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) at 366–368.
10 *Bellgrove v Eldridge*, above n 6, at 618–619.

> the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss. The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. … As to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact.

[15] In New Zealand, this Court adopted *Bellgrove* in *Bevan Investments Ltd v Blackhall and Struthers (No 2)* and in *Warren & Mahoney v Dynes*.[11] In his judgment in *Altimarloch* (which was not a building case) Tipping J discussed the circumstances in which a performance measure of damages will be adopted and held, citing *Ruxley Electronics*, that reasonableness plays a central part in determining whether damages will be calculated according to the cost of reinstatement or some other measure, usually diminution in value.[12]

[16] Whether it is reasonable to insist on the performance measure is a question of fact. However, *Ruxley Electronics* is authority for the proposition that it would not be reasonable to so insist when the cost would be wholly disproportionate to the benefit performance would deliver.[13] The benefit is gauged by comparing what was delivered against what was specified, and proportionality is gauged by assessing the benefit against the cost of making the work conform to the contractual standard. The analysis may determine what measure of damages is adopted. As Lord Mustill explained in *Ruxley Electronics*:[14]

> … the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer.

[17] We add two points for completeness. First, the court's assessment of the reasonableness of insisting on performance may be influenced by the impact of the defect on the building's market or amenity value.[15] Second, a plaintiff who pleads

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11 *Bevan Investments Ltd v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97 (CA); and *Warren & Mahoney v Dynes* CA49/88, 26 October 1988.

12 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [159]–[162] citing *Ruxley Electronics*, above n 9, at 358–359, 361 and 370–371.

13 *Ruxley Electronics*, above n 9, at 356 and 361.

14 At 361.

15 Atkin Chambers (ed) *Hudson's Building and Engineering Contract* (Sweet & Maxwell, London, 2015) at [7–009].

a performance interest and seeks damages that exceed the alternative measure, which may take the form of diminution in value or loss of amenity, must genuinely intend to spend the award to protect that performance interest.[16] If it were otherwise it would be wrong to say that the cost of performance is the true measure of the plaintiff's loss.[17]

[18] It seems that these authorities were not cited before Mallon J, but as will be seen she evidently had in mind the uncontroversial principles for which they stand. We turn to her findings.

The Judge's findings

[19] The Judge accepted this was originally a quality building which had been completed to a very high standard.[18] Workmanship was a leading criterion for the Master Builders award. The concrete slab had been measured and monitored with a laser level when laid. The original architect had not measured the walls with a laser but he said that they were "flawless"; every architrave and every shadow line was perfect. Interior walls had been plastered and finished to a level 5 finish in critical light areas and to a higher than level 4 finish elsewhere.[19]

The floor slab

[20] The floor slab suffered differential settlement of as much as 38 mm in the earthquakes. It could not be remedied using floor level compounds.

[21] The new slab is structurally sound, but it is out of level by up to 46 mm across the entire slab, including the garage. There is now a step of 15 mm down into the garage. In eight areas, four of which are in the garage, it exceeds a slope threshold of 0.5 per cent set by MBIE as a standard for concrete slab floors.[20] It also exhibits variations within rooms. Within the garage, which is the worst-affected room, there is a 28 mm differential. Within the lounge the differential is 12 mm.

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16 *Altimarloch*, above n 12, at [161].
17 *Ruxley Electronics*, above n 9, at 372–373.
18 High Court judgment, above n 1, at [11].
19 At [93].
20 *New Zealand Standard 3109:1997 — Concrete construction* (Standards New Zealand, 2004), table 5.2.

[22] Mallon J found that the repairs were not completed to an "as when new" standard.[21] They are outside the New Zealand standard and BRANZ publication. The dislevelment, an ugly but accurate term, is perceptible to some people walking on the floor and it may cause floorboards to creak. It detracts from the Bruces' enjoyment of this house, which the Judge found to be a loss of amenity.

[23] The remediation options before Mallon J were: applying a floor levelling compound to low areas and grinding or scabbling the concrete in high areas,[22] which would mitigate but not eliminate the overall differential; lifting the house and applying a concrete screed; or repeating the slab replacement process.[23]

[24] Mallon J dismissed the Bruces' claim that the slab must be replaced.[24] She held rather that they were entitled to a reasonable method of levelling the floors of the house and garage, which should be treated separately, if a way could be found that did not involve demolishing the slab and starting again.[25] The Judge's rationale for adopting a room by room basis rested on the proposition that dislevelment caused the Bruces some loss of amenity value. She reasoned that that loss should be assessed on a room by room basis because the garage serves a different function from the rest of the house.

[25] The evidence did not allow Mallon J to say, however, whether the combination of filling and grinding or scabbling was viable. She explained that if taken too far grinding or scabbling would begin to affect the integrity of the slab and what was too far depended on the location of steel reinforcing mesh within the slab. That being so, the Judge was unable to say on the evidence whether there is a "reasonable and workable remedial solution".[26] She invited the parties to investigate further:

> [154] I suggest the parties consider whether they can agree if it would be worthwhile to grind some of the areas and/or fill others and fix any creaking floor boards in order to improve the floor levels to some degree. To the extent that they remain outside the tolerances of the standard, they could determine whether this has resulted in a diminution of value. If so, that might be an appropriate basis to assess damages. If there is no diminution in value, it

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21 High Court judgment, above n 1, at [150].
22 Scabbling refers to the use of an impact tool such as a hammer to remove the surface. Grinding is a slower process.
23 High Court judgment, above n 1, at [143].
24 At [152].
25 At [151].
26 At [153].

> might be appropriate to make a small loss of amenity payment to compensate for the fact that the floors are not as level as they were "when new".

[26] The Judge then suggested how damages might be assessed if filling and grinding or scabbling was not worthwhile:

> [155] If the parties do not agree that some grinding and filling is worthwhile, I suggest the same approach. They could determine whether the floors in their present condition have resulted in a diminution of value. If so, that might be an appropriate basis on which to assess damages. If there is no diminution in value, it might be appropriate to make a small loss of amenity payment to compensate for the fact that the floors are not as level as they were "when new".

[27] In the event the parties could not agree, the Judge stated that they could return to Court, where the appropriate measure of damages, if any, and their quantum, could be considered afresh on the basis of the evidence and argument at that time.[27]

The interior wall verticalities

[28] During construction of the new slab the house was suspended above the ground. It was then lowered and the lower wall frames walls were fixed to the new slab. Some straightening work was required. Subsequent surveys showed that some interior walls are out of plumb. As noted above, there was evidence that they were originally "flawless".[28] After being re-fixed they are structurally sound but do not comply with NZS3604:2011, which sets construction tolerances for timber-framed interior walls. The permitted deviation from the vertical is 15 mm per two storeys and 5 mm per 2.4 m. The permitted deviation from the horizontal is 5 mm per 10m.

[29] Most walls in the house are within those tolerances, but some are not. They are up to 8 mm outside the tolerances.

[30] Mallon J found that the house had been built with close attention to detail and the walls had been measured routinely during the build.[29] Following repair, wall verticalities are not as good as they were. However, deviations from the standard are

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27 At [156].
28 At [11].
29 At [123].

small and there are no resulting structural, functional or amenity problems.[30] Deviations are possibly visible to a very trained and fine eye, leading at worst to a minor aesthetic issue.

[31] It is necessary to set out in full what the Judge had to say about breach and what should happen now:

> [126] I accept Mr McGunnigle's evidence that endeavouring to straighten the walls now is not a reasonable response when no real benefit would be achieved from it. Mr Sturman also acknowledged the difficulty of this because of the timber's age and the processes it had already been through. Far less is it a reasonable response to demolish the house and start again because the wall verticalities exceed the standard by small amounts in a number of places.
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> [127] It was likely never going to be possible to have the walls as straight as they were when the house was originally constructed. The timber frames were older and were suspended and braced while the foundations and concrete slab were rebuilt. The standard required was to repair the walls as close as is reasonably possible to that condition. But for the house's gold award winning standard and the importance of such high quality workmanship to the Bruces (and potential subsequent purchasers), I consider there would be no breach to the insurer's obligations on this matter.
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> [128] The damages question is not for determination at this stage. However I suggest the parties might be able to resolve this issue by considering whether there is any diminution in market value because of the wall verticality issue. If not, they might consider whether a small loss of amenity payment might be appropriate to reflect the fact that the walls exceed the standard in some places, albeit that this is not perceptible, and this partly reflects a lesser standard of workmanship than there was for the original build. Loss of amenity damages are discussed below under "General damages". If the parties cannot resolve the matter on this basis, it will need to be considered by the Court. Of course, at that time the Court will have the benefit of submissions on the appropriate measure of damages (if any) and evidence as to quantum and will consider those issues afresh.
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> (Citation omitted)

[32] As noted earlier, in its cross-appeal IAG contends that the Judge ought to have held that there was no breach because it was not practicable to achieve an as-when-new standard and the work met the fallback standard. We address that argument at [46] below. In this section of the judgment we are concerned with the Bruces' claim that the Judge exceeded the scope of the first trial. We observe that the Judge did conclude that the contract was breached and we focus on what she said about remedial

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30 At [125].

action. It will be seen that she held that endeavouring to straighten the walls now would not be a reasonable response when no real benefit would be achieved from it; and further, that it would be a far less reasonable response to demolish the house and start again. She invited the parties to consider whether there was any diminution in market value, and if there was not, whether a small loss of amenity payment might be appropriate.

The interior wall finishes

[33] The Bruces' case is that the interior walls ought to have been finished to a level 5 finish throughout. That involves plastering an entire wall then sanding and smoothing it, concealing joints and fixing points.[31] The repair contract specified a level 4 finish, in which only joints between sheets of cladding are plastered and sanded and smoothed.[32] A level 4 finish is commonly accepted for most houses.

[34] As noted at [19] above, Mallon J accepted that interior walls were finished to a level 5 standard in "critical light areas" and a better than level 4 standard elsewhere. She held that IAG must remediate the walls accordingly.[33] The Bruces do not complain that she exceeded the scope of the hearing. They complain rather that she preferred IAG's evidence as to what remediation entailed. We address that issue at [55] below.

Did the Judge's findings as to reasonable remediation exceed the scope of the first trial?

[35] We have explained that Mallon J was charged with deciding what was wrong with the house and what was required to remediate it. The cost of repairs was left for later assessment. Unfortunately, the decision about repair methodology inevitably raised questions of reasonableness, and hence cost, which plainly were not foreseen when the trial was split. A technically feasible repair strategy might be ruled out on the ground that its cost was out of all proportion to its limited benefit.

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31 *Australian/New Zealand Standard 2589:2017 — Gypsum linings — Application and finishing* (Standards New Zealand and Standards Australia, 2017) at 3.1.5.

32 At 3.1.4.

33 High Court judgment, above n 1, at [95].

[36] The Judge did not cite cost when deciding that IAG need not replace the slab and straighten the interior walls, but she did reject these options on reasonableness grounds without adopting alternative means of remediation. She decided rather that the Bruces must accept a lower standard than "when as new"; there would be no remedy for the walls and the suggested potential remedy for the slab would not result in it being levelled. We record that it is not suggested that it was or is impracticable to achieve a level slab.

[37] The Bruces say that the Judge failed to establish what must be done to remedy the defects to meet the contract standard; further, the evidence did not address the question of cost, which had been reserved for the second trial, so she was in no position to say their preferred repair methodology was unreasonable. The cost being unknown, it could not be said that it was out of all proportion to the benefit. They invite us to find that the only viable method of remediating the slab to as when new standard is to replace it. Mr Robinson, for the Bruces, accepted that the cost might be found disproportionate to the benefit gained, but he argued that that must be decided at the second hearing.

[38] We conclude that the Judge was right to decline to adopt a repair methodology the cost of which was unknown. We are not prepared to approve a methodology that might be found unreasonable either.

[39] However, replacement cannot be excluded at this time either. We acknowledge that it might be thought self-evident that the cost of again lifting the house and replacing the slab would be out of all proportion to the resulting benefit. The new slab is structurally sound. The Judge knew what the original repairs had cost — $1.4 million — and she had before her the Bruces' pleading, which claimed a much larger sum for all repairs. She did not know the cost of straightening the walls, but she was satisfied that the benefit of doing so was minimal given that they exceeded verticality tolerances by very small and essentially indiscernible margins. She was plainly pointing the parties in the direction of an agreed solution.

[40] But evidence of cost is relevant to the decision to exclude a given methodology as unreasonable, and as a matter of trial process the Bruces are entitled to lead it before

their preferred solution is excluded. The evidence should be led at the second trial and assessed along with the merits and cost of the alternative of filling and grinding or scabbling, which would mitigate the defects in floor level without wholly eliminating them. It may also be necessary to determine whether the Bruces actually intend to have the remedial work performed.[34] Evidence should also be led as to the cost of remedying the wall verticalities.

[41] We also bear in mind Mr Robinson's submission that the cost of achieving conformity for the slab and walls ought not be considered in isolation. We noted earlier that IAG now accepts most of the 135 defects pleaded. We were given to understand that the cost of repairing those items has not yet been established and incurred. Many of the items appear trivial, but some may not be. We do not know whether any of the costs of remediating those items might be avoided were the High Court to adopt the Bruces' preferred methodology.

[42] We conclude that it was open to the Judge to decide at the first trial whether IAG breached the contract by failing to meet its repair standards with respect to the slab, the interior wall verticalities, and wall finishes.

[43] We further consider that she was right to decline to adopt the Bruces' preferred methodologies for remediating the slab and wall verticalities, since those may prove to be unreasonable. We respectfully consider, however, that she ought not to have excluded those methodologies as unreasonable at this stage since their cost is not known.

[44] The sealed judgment of the High Court records that:

> The plaintiffs have not established that there is a reasonable and practical way to remedy the wall verticalities or the uneven floor levels.

[45] This finding is set aside. The consequence is that the Bruces' appeal is allowed to the extent that the judgment precluded them from contending for any given remediation option. The reasonableness of the options for which the parties contend

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[34] IAG argued that the evidence establishes that they do not. But on our reading the evidence is equivocal, and Mallon J evidently was not asked to make a finding about it.

must be revisited at the second trial. We record that breach is established, subject to the cross-appeal to which we next turn.

Did IAG breach the contract with respect to interior wall verticalities?

[46] This brings us to the question whether the Judge was correct to find that IAG breached the contract with respect to wall verticalities. It is not in dispute that the walls do not meet the primary as-when-new standard. As explained earlier, IAG says that was not the applicable standard, for the Judge had accepted evidence that it was not practicable to meet it. The fallback standard applied; when it is not practicable to achieve the as-when-new standard, repairs must be "as close as is reasonably possible" to that standard. IAG says that the repairs meet the fallback standard.

[47] We have set out the Judge's conclusions at [28]–[32] above. We now focus on her findings of fact. Mallon J noted evidence that it was difficult to straighten the walls because of the age of the timber and the processes it had been through.[35] There was evidence that after the earthquakes and the repair work, during which the walls were suspended and exposed to weather, it would have lost its "memory".[36] The Judge stated that "It was likely never going to be possible to have the walls as straight as they were when the house was originally constructed."[37] She added that the standard required was to repair the walls "as close as is reasonably possible" to that condition. It is evident from her use of that phrase that she had in mind the fallback standard.

[48] However, we do not accept Mr Ring's submission, for IAG, that the Judge concluded the repairs were in fact as close as reasonably possible to as-when-new, with the result that she ought to have found there was no breach of contract. We think she must be taken to have concluded that it was reasonably possible to do more than IAG did to meet the contract standard. That is we think implicit in her emphasis in [127] on the high standard of the original workmanship. The fact that she applied the fallback standard but found IAG in breach supports that interpretation. Indeed, it is possible that she accepted it was feasible to repair the walls to the as-when-new standard.

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35 High Court judgment, above n 1, at [126].
36 At [116].
37 At [127].

[49] We add that in our own view the evidence sufficiently establishes that it was possible to meet the as-when-new standard. The principal IAG witness on this point, Mr McGunnigle, contended that because there was no real benefit to be gained it was not reasonable to try to straighten the walls now, but as we have explained above that is to make a different point. He accepted in evidence that it was possible to make the walls plumb, and he also explained how it would be done; it would involve removal of the wall linings, packing out the timber frame and relining and finishing the walls. One Bruces' witness, Mr Sturman, agreed (in cross-examination) that the walls could be made vertical in that way. The experts diverged rather on whether the work needed to be done in circumstances where the defects could be described as imperceptible.

[50] Mr Ring argued in the alternative that the de minimis principle applies; the parties must be presumed to have adopted it in the absence of evidence that the contract was negotiated by reference to a "perfect" standard. Mr Robinson responded that the de minimis exception is narrow and does not apply here, since the contract already prescribes when departures from the as-when-new standard are permissible.

[51] We accept that the de minimis principle may be available to answer a claim which is adjudged trivial.[38] The contract does not exclude it by providing for a fallback standard, since that applies only when it is impracticable to meet the principal standard. De minimis measures the degree of departure from the standard and impracticability addresses the difficulty of meeting it. But we observe that the trial Judge made no such finding; on the contrary, she found that the contract had been breached. It appears she was not asked to address the de minimis principle.

[52] Further, we are not satisfied that the non-conformity can be characterised as de minimis by reference to the principal standard which, though exacting, could have been met. As noted above, the walls deviate from the horizontal by as much as 13 mm per 2.4m, exceeding not only the contract standard but also the tolerance for error in NZS3604:2011, and this is visible to a skilled observer.

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[38] *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1932, [2002] 1 All ER 703 at [44].

[53] For these reasons we do not accept that the Judge was wrong to find IAG in breach of contract in respect of the wall verticalities. The cross-appeal is dismissed.

Wall finishes

[54] As noted, the question here is not whether it is possible to meet the as-when-new standard. IAG accepts that it is. Nor does IAG contest the Judge's conclusion that the house had originally been finished to a level 5 standard in some areas and to a level 4 plus standard elsewhere. The question is to what extent the work done fails to meet that standard.

[55] The Bruces say that the Judge ought to have accepted what the original decorators had to say about the extent and quality of the work required. One of them, Mr Wilson, deposed that IAG had achieved only a level 4 finish for stopping and internal plastering and it was not to the same standard as he and his colleague, Mr McKenzie, had achieved originally. What had been achieved originally was a better than level 4 finish throughout the entire interior and a level 5 finish "in certain areas". Mr Wilson and Mr McKenzie, who also gave evidence, accepted between them that the level 5 finish was in the hallways and entrance way and stairwell. They confirmed that the work elsewhere was a "good" level 4.

[56] The Judge accepted Mr McGunnigle's evidence about the specific work required on a room by room basis. She summarised this at paragraph [85] of her judgment. Her conclusion was:

> [95] I consider IAG is required to remediate the walls and ceilings in accordance with Mr McGunnigle's evidence at [85]. Mr McGunnigle has carried out a detailed assessment of the remediation work to achieve a level 4 plus/level 5 finish. In comparison, Greytone has said all walls and ceilings need to be remediated. I prefer Mr McGunnigle's evidence because it is more specific and he has explained the detailed way he went about making his assessment.

[57] We are not persuaded that the Judge was wrong to prefer Mr McGunnigle's evidence. He assessed each room, and he gauged the work required by reference to both level 4 and level 5 standards, the requirements of which he explained. He accepted that it was appropriate to use a level 5 standard in the stairwell and entry area. He explained the difference between his view and that of Messrs Wilson and

McKenzie by observing that they had not done a detailed assessment of the remedial work with attention to glancing light, texture and visibility to joints, all of which he had addressed. Indeed, it is arguable that his evidence favoured the Bruces, because the Judge stated that she adopted his room by room list of remedial work required if the standard was level 5 everywhere. However, IAG has not taken issue with her finding in that regard. The appeal fails on this point.

General damages

[58] The Judge did not award general damages, but she accepted that they are available in law.[39] She held that the Bruces are entitled to general damages for the physical inconvenience of living in the house in its damaged condition and for disappointment and loss of amenity in no longer having a gold standard house.[40] She also accepted that they have experienced stress and mental anguish. She deferred any assessment, noting that submissions on the issue had been brief (the Bruces) or non-existent (IAG).[41]

[59] Neither party has appealed. However, Mr Ring addressed the issue in his submissions on the cross-appeal, contending that general damages are available for the adverse mental effects of a breach only where the primary purpose of the contract was to deliver peace of mind or enjoyment or where adverse mental effects are consequential upon physical discomfort or inconvenience.[42] He submitted that an insurance contract is not a peace of mind contract; rather, it indemnifies an insured against certain kinds of financial loss.[43]

[60] We think it premature to decide this issue. Apart from the absence of a cross-appeal, the questions whether the Bruces have experienced such losses, and if so, whether they are consequent upon physical discomfort or inconvenience, have yet to be answered at first instance.

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39 See *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Ins Cas 75,274 (HC); and James Edelman (ed) *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at [5-016]–[5-018].

40 High Court judgment, above n 1, at [169]–[171].

41 At [173].

42 *Ruxley Electronics*, above n 9, at 374 citing *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

43 *Pine v DAS Legal Expenses Insurance Co Ltd* [2011] EWHC 658, [2012] Lloyd's Rep IR 346 (QB).

Decision

[61] The appeal is allowed in part. We set aside the finding that the Bruces have not established that there is a reasonable and practical way to remedy the wall verticalities or the uneven floor levels. Those issues must be decided at the second trial. The appeal is otherwise dismissed.

[62] The cross-appeal is dismissed.

[63] The Bruces have succeeded in part on their appeal, and on the cross-appeal. They will have costs as for a standard appeal on a band B basis with usual disbursements. We certify for second counsel.

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