IN THE COURT OF APPEAL OF NEW ZEALAND

CA400/2015
[2016] NZCA 67

BETWEEN	PRATTLEY ENTERPRISES LIMITED Appellant
AND	VERO INSURANCE NEW ZEALAND LIMITED Respondent

Hearing:	24 and 25 November 2015
Court:	Ellen France P, Stevens and Miller JJ
Counsel:	FMR Cooke QC and S P Rennie for Appellant D J Goddard QC and C M Brick for Respondent
Judgment:	14 March 2016 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Prattley must pay Vero costs for a complex appeal on a band B basis, with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] An insured negotiated a settlement with its insurer following damage to its building from a series of earthquakes. They agreed that the insurer's payment was made in final settlement and discharge of all claims present and future arising out of the policy or the earthquake damage. The insured now seeks to reopen its claim, saying that when they settled both parties were mistaken about the measure of its entitlement. The primary question on this appeal is whether the insured assumed the risk of mistake so as to preclude relief under the Contractual Mistakes Act 1977.

[2] The appeal raises secondary questions worthy of note. One is whether the appropriate measure of indemnity under the indemnity-only policy following destruction is market value or depreciated replacement cost. Another is whether any weight should be attached to the evidence of an expert witness whom the trial Judge found unhelpful and whom we consider partial.

Context

[3] Worcester Towers stood at Cathedral Junction, in the central business district of Christchurch. It was a three-storey building of double brick construction, erected in the 1920s and possessing a degree of character attributable to its design and appearance. In 2010 its tenants included a cinema, the Britten Motorcycle Museum and a management company used by the Britten family, the ultimate owners, to manage their various property interests. The site is owned by Prattley Enterprises Ltd (Prattley), which is itself owned by the estate of John Britten, whose trustees control the property and make all major decisions about it.[1] They are Kirsteen Britten, Bruce Irvine, Christopher Weir and Timothy Corcoran. Mr Irvine is an experienced accountant and Messrs Weir and Corcoran are experienced lawyers.

[4] The building suffered successive damage in three earthquakes. Damage from the first, on 4 September 2010, was moderate and the building remained in use. Damage from the second, on Boxing Day 2010, was extensive; the building was red-stickered, meaning that it could not be occupied. Damage from the third, on 22 February 2011, was severe, partly because the adjoining Christchurch Press building fell onto Worcester Towers.

[5] No substantial repairs were ever undertaken. In June 2011 the Canterbury Earthquake Recovery Authority (CERA) ordered that the building be demolished.

[6] Vero Insurance Ltd insured the building for indemnity value with a per-claim limit or sum insured of $1,605,000. There is no evidence about how the sum insured, which Prattley nominated, was calculated, and nothing to suggest that it corresponded to the actual indemnity value. The evidence does establish that, the building's age and character notwithstanding, a conscious decision was made, on cost grounds, not to purchase full reinstatement or excess of indemnity cover.

[7] The policy obliged Vero to repair or reinstate up to the sum insured for any one claim, subject to the proviso that Prattley could not recover more than it would

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[1] Prattley Enterprises Ltd's directors were Mrs Britten and Mr Corcoran but it was not in dispute that all major decisions were made by the four as trustees of the estate of John Britten, who owned Prattley until his death in 1995.

get if the building were destroyed. On destruction, Prattley's entitlement was limited to the building's indemnity value.

[8] The policy also provided that insurance that had been cancelled by damage was reinstated automatically from the date of damage. It is common ground that cover reinstated after each of the three earthquakes, meaning that Vero's liability was potentially as high as $4,815,000.

[9] At trial the parties agreed that the earthquakes destroyed the building, although we must address the issue since Prattley did not concede destruction by earthquake before us, suggesting rather that it resulted from the demolition order, and Vero argues that destruction was complete in December 2010 rather than, as Dunningham J found, in February 2011.[2]

[10] On 23 August 2011 Prattley settled all its claims with Vero for $1,050,000. That sum was Prattley's own estimate of the building's pre-earthquake market value, which the parties took to be the correct measure of indemnity value. The agreement, which we discuss at [30] below, provided that the payment was made in full and final settlement and discharge of all claims in connection with the earthquakes and the policy.

[11] Prattley came to regret the settlement. It now believes that is entitled to that proportion of total reinstatement cost attributable to each earthquake, subject to a per-claim limit of $1,605,000. The evidence suggests that it would cost some $5,400,000 or more to reinstate the original building using modern methods and materials, and $6,240,000 to build a functional equivalent; that is, an office building offering the same lettable floor area. Prattley quantifies its recoverable loss at $3,400,000 plus GST. That sum is less than the maximum available under the policy for three events because Prattley accepts that damage from the first earthquake could be repaired for less than the sum insured.

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[2] *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2015] NZHC 1444 [High Court judgment] at [115].

[12] Prattley attributes its decision to enter the settlement agreement to a mistake, shared with Vero, to the effect that market value was the correct measure of indemnity. We examine the mistake at [47] below. Prattley's awareness of it is said to arise, at least in part, from a better understanding, resulting from decisions such as that of the Supreme Court in *Ridgecrest* and this Court in *Wild South*, of an insured's entitlement following successive losses.[3] It says that the settlement resulted in a substantially unequal exchange of values and should be set aside under the Contractual Mistakes Act. Vero responds that relief is precluded because the settlement agreement assigned the risk of mistake to Prattley, and in any event there was no mistake and no resulting inequality in value exchanged.

[13] In July 2012 Prattley instructed Risk Worldwide New Zealand Ltd to "assist in the preparation, analysis, presentation and settlement" of Prattley's claim on a no-win, no-fee basis. Risk Worldwide bears all of the costs of this litigation and in return will be paid a substantial percentage of any settlement or award. One of the firm's principals, George Keys, is a loss adjuster by profession. Through a company of his own he holds one-third of Risk Worldwide.

[14] On 8 May 2013 Mr Keys wrote to Vero in his capacity as Prattley's "claims advocate". He advanced a claim for some $8.8 million less the settlement payment. At trial he gave evidence as an expert witness on depreciation. He was admittedly interested in the outcome not only of this case but also of others that might challenge earthquake settlements, were Prattley to succeed. There was no evidence that his "elemental" or item by item approach, which resulted in an overall depreciation rate of 8.5 per cent for the 90 year old building, was accepted in any relevant community of experts. The Judge discounted his evidence but we are asked to rely upon it, which leads us to reflect upon whether it ought to have been admitted at all.

The policy terms

[15] There were two policies; the policy anniversary fell on 21 December 2010, between the first and second earthquakes. Nothing turns on the renewal and the

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[3] *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117, [2015] 1 NZLR 40 (reissued 19 September 2014 as [2014] NZSC 129); *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447, [2015] 2 NZLR 24.

policies are identical but for the method of calculating the policy excess, which is not in issue, so it is convenient to speak of "the policy".

[16] The policy began with a reference to the Fair Insurance Code:[4]

> As members of the Insurance Council of New Zealand, we are committed to complying with the Council's Fair Insurance Code.
>
> This means *we* will:
>
> 1. provide insurance contracts which are understandable and show the legal rights and obligations of both *us* and the policyholder;
>
> 2. explain the meaning of legal or technical words or phrases;
>
> 3. explain the special meanings of particular words or phrases as they apply in the policy;
>
> 4. settle all valid claims fairly and promptly;
>
> 5. clearly explain the reason(s) why a claim has been declined;
>
> 6. provide policyholders with a written summary of *our* complaints procedure as soon as disputes arise and advise them how to lodge a complaint and tell them about the Insurance and Savings Ombudsman Scheme;
>
> 7 be financially sound as measured by *our* Claims paying rating;
>
> …

[17] The insuring clause followed:

> In consideration of *you* having paid or promised to pay the required premium *we* agree to indemnify you in the manner and to the extent set out in the applicable parts of this policy.
>
> The insurance contract consists of any statements on which this insurance is based, *your* proposal, the applicable parts of this policy, and the *schedule*.

[18] The policy contained a number of sections dealing with material damage, business interruption and so on. In the material damage section the policy stated that:

> *We* will indemnify *you* for *damage* to any of the *insured property* occurring during the *period of insurance*. You will be indemnified by payment or, at *our* option, by repair or by replacement of the lost or *damaged* property.

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[4] The italicised words in the policy were defined in a general definition section of the policy document.

> Subject to the reinstatement of amount of insurance extension *our* liability will not exceed the total sum insured …

This indemnity was subject to the terms of the material damage section and the general obligations, exclusions and conditions of the policy.

[19] The material damage section excluded earthquake cover but reinstated it under extension MD020. It provided so far as relevant:

> This extension applies to those items of *insured property* that have a company earthquake sum insured shown in the *schedule*.
>
> In the event of any *insured property* to which this extension applies suffering *earthquake damage* or *volcanic eruption* or *hydrothermal activity damage* during the *period of insurance we* will cover *you* for such *damage*.
>
> Insurance under this extension is subject to the special provisions set out below.
>
> "*Destroyed*" means so *damaged* that the property, by reason only of that *damage*, cannot be repaired.
>
> "*Earthquake damage*" means:
>
> a. *damage* occurring as the direct result of earthquake;
>
> b. fire occasioned by or through or in consequence of earthquake;
>
> c. *damage* occurring (whether accidentally or not) as the direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate the consequences of, any such *damage* but does not include any *damage* for which compensation is payable under any Act of parliament or the *regulations* under any Act.
>
> …

[20] It will be seen that the extension applied to those items that had a company earthquake sum insured shown in the schedule. The schedules here simply stated that the property was "insured". It is not in dispute, however, that the general policy limit of $1,605,000 applied.

[21] The schedules contained two special notes, reading:

> Heritage Classification C, some earthquake strengthening following renovations to building in 1970's.

> "We will repair or reinstate the building to as reasonably equivalent appearance and capacity using the original design and suitably equivalent materials."

[22] It is common ground that the reference to "Heritage Classification" in the first note was in error. The building did not enjoy heritage protection. The parties also agree that Vero insisted upon the second note, intending to limit its repair or reinstatement obligation to reasonably equivalent appearance and materials. The significance of the notes for present purposes, though, lies in their confirmation that cover reflected the building's original appearance, capacity and design.

[23] MD020 provided in special conditions under the heading "limitation on amount payable" that where the property was "damaged but not destroyed" Vero's liability would not exceed the amount it might have been required to pay on destruction:

> Where the *insured property* is *damaged* but not *destroyed our* liability will not exceed the amount *we* could have been called upon to pay if the property had been *destroyed*.

[24] The amount payable on destruction was indemnity value, subject to the policy cap. The policy did not specify what, for purposes of the material damage section, was the measure of indemnity value on destruction. As Mr Cooke observed, it did specify the measure of indemnity for motor vehicles; it stated that Vero would pay the lesser of market value or the sum insured, but that provision appeared in a separate "commercial motor" section of the policy. It is drawing a long bow to suggest that the omission of any similar definition in the material damage section means that market value is not an available measure of indemnity value there.[5]

[25] The standard form policy contained separate extensions for earthquake full reinstatement cover (MD022) and reinstatement (MD033). These did not apply here, but it is noteworthy that the policy contemplated that reinstatement cover would apply where an "excess of indemnity value" was shown in the policy schedule, that the indemnity would then extend to the "cost of reinstatement" of an equivalent

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[5] The policy itself states that 'the indemnity' in each section is subject to all the terms, exclusions and conditions of the relevant section, and all the general obligations, general exclusions and general conditions of the policy.

building, and that absent actual reinstatement the insured could claim only indemnity value.

Destruction

[26] It may seem an obvious and unremarkable conclusion that the building was destroyed by earthquake, but destruction is a controversial issue. Prattley would prefer that the building was never deemed destroyed by earthquake, so that it would have three claims for repair or reinstatement.

[27] Destruction is a question of fact.[6] As noted, the question at trial was not whether earthquakes had destroyed the building but whether destruction was attributable to the second or third event. Justice Dunningham observed that under the policy "destroyed" was defined to focus on feasibility of repair rather than its economic practicality, and she accepted that after the December earthquake repairs remained feasible. For that conclusion she relied on an engineering report prepared after the December earthquake. She also found that Prattley held the building primarily for its income-earning potential before the earthquakes, and that after them the trustees would not rebuild the building because that course of action would not be economically rational.

[28] Mr Cooke cited *Wild South* for the proposition that the Judge was wrong to take account of Prattley's intentions after the event; what mattered was why Prattley held the building beforehand. He pointed out that an insured's intention after the event may be conditional on insurance entitlements. Mr Goddard responded that after the earthquakes Prattley did not intend to reinstate and cannot recover for a cost it will not incur; further, the Judge should have found that Prattley did not intend to reinstate after the December event, and that being so the February event caused no further loss.

[29] We are not persuaded that the Judge was wrong. On the one hand, we accept that an insured's intentions after the event are not irrelevant. This Court did not hold

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6 *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [104].

otherwise in *Wild South*.[7] On the other, we did not understand Mr Goddard to dispute the Judge's conclusion that repair was feasible after the December event — his primary point was that when added to necessary earthquake strengthening it would have proven to be uneconomic — and it was open to the Judge to conclude, as she did, that at that time Prattley still intended to repair the building notwithstanding that it would have had to contribute funding from its own resources.

Settlement

[30] This account adopts Dunningham J's findings of fact, which are not now relevantly in dispute. Reference may be made to her judgment for a fuller account.

[31] Negotiations to settle the three claims began in earnest in June 2011, when it was known that Worcester Towers was to be demolished. On 6 May Prattley had obtained a valuation from Ford Baker, valuers, which assessed the pre-earthquake value using depreciated replacement cost, investment value (based on capitalised rental income) and present value of rental income. Ford Baker estimated the market indemnity value of improvements at $700,000 and depreciated replacement cost at the same figure. Prattley did not disclose this valuation to Vero, regarding it as unhelpful.

[32] A conference call was held on 14 June 2011 between Derek Cherry, representing Vero, and Prattley's representatives Kirsteen Britten, Ray Minehan, Eileen Yates, and Prattley's insurance broker, Karen Austin. Mr Minehan was engaged to manage the Britten Group properties and Ms Yates was responsible for their general administration.

[33] During the call Mr Cherry agreed to commission a valuation to assist in estimating indemnity value. He instructed Knight Frank, valuers, to estimate indemnity value as at 4 September 2010, explaining that he understood indemnity value was usually "market value of the improvements with a comparison of replacement less depreciation".

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7 *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [97]–[103].

[34] After receiving the Ford Baker valuation Prattley had sought legal advice on the question whether Vero must pay the full sum insured. The advice, received from Anthony Harper on 21 June, was to the effect that given the building had been destroyed, the maximum amount of cover would be no more than the building's value at the time of destruction, which might be less than the sum insured.

[35] The Knight Frank valuation was received on 6 July. It estimated the value of improvements at $370,000 and depreciated replacement cost at $1,400,000. The average depreciation allowance adopted for the building's age and condition was 65 per cent.

[36] Mr Cherry sent the valuation to Ms Austin. There followed an exchange in which she asked which method of settlement would be used and inquired whether Vero would meet the cost of a second valuation. Mr Cherry agreed to pay for a second valuation provided he received a copy. He responded to Ms Austin by email, advising that the policy provided an indemnity to compensate the insured for loss and stating that:

> Often this involves the actual cost of repairs less an appropriate allowance for betterment. But where the property is in fact destroyed, the market indemnity value is typically the outcome. This compensates the owner for the actual value of the improvements so that they are in a neutral position. They still have the land and cash equivalent [for] investing in a similar property elsewhere yielding the same returns. In this case, the valuation is low compared to the depreciated value and the sum insured. It is also below the owners expectations. I am discussing this situation internally this week and will advise the outcome.

It appears that this email was never given to Prattley's representatives, but as will be seen we do not think anything turns on that.[8] It is clear that Prattley did receive the Knight Frank valuation.

[37] The Judge found that in the meantime, and without telling Vero, Prattley had gone about getting a "better" valuation from Ford Baker. This became the second valuation paid for by Vero. Prattley asked Ford Baker to assume all of the building was occupied, to assume that all rents were adjusted upwards on the basis of notional

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[8] Perhaps for this reason, there was no argument before us about who — Vero or Prattley — was Ms Austin's principal.

rent reviews, and to ignore the fact that the rents used were gross; that is, they included operating costs. Using this methodology, Ford Baker estimated the market value at $1,050,000 on an investment approach. The firm's estimate for depreciated replacement cost assumed a deduction of 85 per cent for "depreciation and market obsolescence" and arrived at a slightly lower estimate of $1,020,000.

[38] The new Ford Baker valuation was received on 1 August 2011. It was sent to the four trustees with the legal advice from Anthony Harper and a report from Ms Yates stating that some time had been spent getting the valuation up to $1,050,000 but it did not appear there was room for any further adjustments. She intimated that Vero might be willing to settle for that sum.

[39] The Ford Baker valuation was also sent to Mr Cherry, who as predicted did agree to settle at the investment valuation of $1,050,000. He forwarded a settlement agreement that was modified in some respects by Prattley's solicitors. The agreement was described as interim because some matters remained to be resolved, including the excess applicable, but it was to be final so far as the material damage claim was concerned.

[40] The interim settlement agreement provided, as noted above, that the payment was made in full and final settlement and discharge of all claims. We set the clause out in full at [53] below. The agreement was duly signed and payment was made on 25 August 2011.

[41] It will be seen that at all times Prattley was represented by experienced people of business and took its own valuation and legal advice, that Vero understood this, and that the several valuations referred to alternative methods of calculating indemnity value, one of which was depreciated replacement cost. At no time did Prattley ask Vero to settle by reference to depreciated replacement cost, or on any other basis that took into account the building's historic character.

Appellate decisions since settlement

[42] Mr Cooke argued that since the settlement, decisions of appellate courts have clarified what the language of policies such as Prattley's means for successive losses.

As will be seen, these developments are said to inform the question whether a mistake was made.

[43] The judgment of the Supreme Court in *Ridgecrest* was delivered on 27 August 2014.[9] The case concerned a building damaged by successive earthquakes. It was insured under an unusually worded replacement cover policy providing for a sum insured for each "happening", which language was held to effect reinstatement of cover. The building having been destroyed by one of the later earthquakes, the insurer wanted to limit its liability to the sum insured for a single event. The Supreme Court held that because cover reinstated after each event the losses for unrepaired damage did not merge and the insured might recover even though the damage would never be repaired. However, the indemnity principle precluded recovery, from all claims combined, of more than the building's replacement value.

[44] This Court's judgment in *Wild South* was delivered on 10 September 2014.[10] It addressed a series of policies issued by several insurers, including Vero. They were replacement policies providing for reinstatement of cover on loss. This Court held relevantly that reinstatement of cover did not depend on the insurer having made a payment so as to deplete cover and took the view that under the policy language the insured could recover only for actual losses. The Court also considered when a building should be deemed destroyed.

[45] We accept that there may be an issue about the correct approach to indemnity where a building survived cumulative damage from successive events. Some commentators perceive inconsistencies between *Ridgecrest* and *Wild South*.[11] In *Ridgecrest* the Supreme Court held that under the replacement policy in issue the insured might recover for each separate event but the indemnity principle limited total recovery to the cost of replacement. In *Wild South*, this Court took the view,

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9 *Ridgecrest NZ Ltd v IAG New Zealand Ltd*, above n 3.

10 *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3.

11 *Ridgecrest NZ Ltd v IAG New Zealand Ltd* and *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3. For discussion of the judgments, see Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at [8.3.2]; and Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at [5.14].

distinguishing *Ridgecrest*, that under the policies in issue unrepaired damage from successive events should be assessed on an overall basis, reflecting the actual cost of reinstatement.[12] But for reasons explained below, the findings in those cases have no bearing on the settlement in this one.

[46] We turn to the question of mistake.

Mistake

[47] We approach the case in a different way from the trial Judge, who was faced with several causes of action and understandably began by assessing Prattley's entitlement under the policy. The issues having been narrowed on appeal, it is sensible to begin with the meaning of the interim settlement agreement. As will be seen, we find it dispositive.

[48] We begin with the relevant provisions of the Contractual Mistakes Act. The Act confers jurisdiction to grant relief in relation to a contract entered under the influence of a qualifying mistake of fact or law. A mistake is defined as a mistake of law or fact.[13]

[49] Section 6(1)(a) provides that any one of three kinds of mistake may qualify. Prattley relies on the second category, which it is convenient to describe as a common or shared mistake:

> **6 Relief may be granted where mistake by one party is known to opposing party or is common or mutual**
>
> (1) A court may in the course of any proceedings or on application made for the purpose grant relief under section 7 to any party to a contract—
>
> (a) if in entering into that contract—
>
> (i) that party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the

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[12] One of the insurers sought leave to appeal but was refused: *Certain Underwriters at Lloyds of London v Crystal Imports Ltd* [2014] NZSC 186.

[13] Section 2(1) of the Contractual Mistakes Act 1977. We are not concerned here with s 6(2)(a) of the Act, because the alleged mistake affects the policy, not the settlement agreement that is the subject of the claim for relief under the Act.

other party or 1 or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or

(ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) that party and at least 1 other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; …

[50] In addition, the mistake must result, at the time of the contract, in a substantially unequal exchange of values:

(b) the mistake or mistakes, as the case may be, resulted at the time of the contract—

(i) in a substantially unequal exchange of values; or

(ii) in the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; …

[51] And finally, relief is unavailable where the contract provides for the risk of mistake and assigns that risk to one of the parties:

(c) where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.

[52] We turn to consider the last of these requirements as it applies to this case.

Does the settlement assign the risk of mistake to Prattley?

[53] The exclusion clause on which the appeal turns is found in cl 4 of the interim settlement agreement:

… the Interim Settlement Sum is paid by Vero and accepted by the Insureds in full and final settlement and discharge of the Claim and any claims against

> Vero arising directly or indirectly out of, or in connection with the Earthquake Activity and/or the Policy and/or the Insured Property Damage whether such claims arise under statute, common law, or equity; are in existence now or may arise sometime in the future; are known or unknown; in the contemplation of the parties or otherwise. This includes the discharge of any further claim under the Policy for damage, loss or other entitlement under the Policy occurring subsequent to the date the Insured Property Damage occurred, whether or not that further claim has been notified to Vero.

[54] Justice Dunningham held that:

> [209] The drafting leaves no doubt that the Agreement obliged Prattley to take the risk that it may have an existing, "unknown" claim arising under the policy in relation to the damage to Worcester Towers, which it could be relinquishing. When this is paired with the express recommendation in the Agreement to seek legal advice, which Prattley did, I am satisfied this clause covers the risk that Prattley might be mistaken to the extent of its entitlement under the policy for damage to the property, which is a risk it is prepared to assume, in consideration of the payment being made to it under the Agreement …

[55] On appeal, Mr Cooke argued that clear and unambiguous language was needed if the settlement agreement was to assign the risk of mistake to Prattley, for the contra proferentem rule applies and the policy contained express promises by Vero that it would settle all claims fairly and explain any legal or technical words clearly. On its proper construction the settlement agreement did not make provision for mistake, directly or indirectly; rather, it settled the insurance claims. It did so in terms covering claims arising directly or indirectly out of the policy but, counsel argued, Prattley's claim for relief under the Contractual Mistakes Act does not arise out of the policy.

[56] As noted above, s 6(1)(c) applies where the contract "expressly or by implication makes provision for the risk of mistakes" and goes on to assign that risk to one party or another. This provision has received little judicial attention. The leading authority is *Shotover Mining Ltd v Brownlie*, a 1987 judgment of McGechan J.[14] In that case a party had been induced to purchase a mining licence by a fraudulent misrepresentation about the volume of material available for mining. The contract contained an exclusion clause stating that the purchaser had acted in reliance upon its own judgement and not upon any representations by the vendor,

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[14] *Shotover Mining Ltd v Brownlie* HC Invercargill CP 96/86, 30 September 1987. Mistake was not in issue on appeal: *Brownlie v Shotover Mining Ltd* CA 181/87, 21 February 1992.

who did not warrant the correctness of anything in the contract. The purchaser sued, inter alia, in mistake.

[57] McGechan J reviewed the legislative history and held that under the Act:[15]

> Parties are to be allowed freedom of contract to allocate risk of mistake. The Courts' jurisdiction to intervene in the event of mistake may be excluded accordingly by agreement. However, as with all matters of agreement, the question in the end may often be one of correct interpretation of the words of exclusion used. The traditional approach at common law to exclusion clauses was to adopt a very strict and confining interpretation. Section 6(1)(c) states quite specifically that exclusion may be express or "by implication". It is difficult to contend that the strict construction approach of the common law still applies to situations where the legislature acknowledges exclusion may be "by implication". It would appear that the question whether a particular contract or provision has effect allocating risk of mistake now is to be decided rather more in accordance with normal principles of construction of contractual documents, including where appropriate those applicable to the construction of commercial documents.

[58] It will be seen that the Judge assumed s 6(1)(c) would be invoked when interpreting an exclusion clause, as it was in the case before him, and this led him to reason that the traditional approach to interpretation of such clauses must yield to the statutory language.

[59] Professor Brian Coote, one of the authors of the legislation, has suggested that the Judge's assumption was in error, for the risk of mistake may be assigned, and commonly is, by contracting that a given statement of fact is true.[16] To make a promise about the "existence, nature or quality" of a thing[17] is to assume a risk that the promise will turn out to be mistaken, as happened in *McRae v Commonwealth Disposals Commission*, in which the vendor excluded any promise about whether a stranded tanker offered for salvage contained any oil: this was held not to exclude liability when it turned out the tanker did not exist.[18] The judgment of Smellie J in *Dennis Friedman (Earthmovers) Ltd v Rodney County Council* similarly involved a positive assumption of risk about a state of affairs; there a tenderer was required to

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15 *Shotover Mining Ltd v Brownlie* at 160.

16 Brian Coote "Allocation of Risk Under the Contractual Mistakes Act 1977" [1993] NZRL Rev 434.

17 Brian Coote "Security of Contract and the New Zealand Contract Statutes" (2000) 16 JCL 37 at 43.

18 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

satisfy itself about ground conditions and was held to have assumed the risk that its beliefs would turn out to be mistaken.[19]

[60] Two observations emerge when one recognises that s 6(1)(c) is not concerned solely with exclusion clauses. The first is that it is easier to see why the legislation speaks of assigning the risk of mistake by implication. A promise that something is true may well be implicit. By contrast, parties rarely leave the exclusion of liability to implication. The second is that s 6(1)(c) does not say anything about how to interpret exclusion clauses employed to assign the risk of mistake; rather, the ordinary rules of construction apply. We note that McGechan J ultimately reached the same conclusion in the passage cited above, in which his point was that no longer could a court adopt a "very strict and confining" approach to interpreting exclusion clauses. His conclusion in the case before him rested on what would now be considered an orthodox contextual approach to interpretation. He held that the contract did not assign the risk of mistake to the purchaser; the exclusion clause could not be taken literally — the contract contained some express vendor warranties — and the implications available from its language did not justify reading it as an assignment of the risk of mistake.

[61] All of this is to say that the statute does not prescribe that exclusion clauses should be interpreted in a particular way. How then should we interpret the exclusion clause found in cl 4 of the interim settlement agreement? The parties plainly meant to exchange money for peace, but did their agreement extend to facts or law about which they were mistaken or in ignorance? Several relevant propositions may be derived from the authorities.

[62] The first is that the object of interpretation is to ascertain the parties' presumed intention and give effect to it.[20] That remains true when an exclusion clause is in issue. A purposive or contextual interpretation does not require that the court first identify an ambiguity in the language; there may be cases, as in *Shotover Mining*, in which context and purpose make it clear that the general language of an exclusion clause cannot be taken literally. Any doubt may be resolved against the

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19 *Dennis Friedman (Earthmovers) Ltd v Rodney County Council* [1988] 1 NZLR 184 (HC) at 192.

20 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

party benefiting from the exclusion. We note that it was not in issue before us that the contra proferentem rule survives as part of a court's interpretive toolkit.[21]

[63] The second proposition is that a party may enter a binding compromise of a claim or right of which it knows nothing. Releases are routinely written in a general way, covering all claims known or unknown. The objective of such language is closure. As Lord Nicholls put it in *BCCI v Ali*:[22]

> … The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. … The risk that further claims might later emerge was a risk the person giving the release took upon himself.

[64] Where such is the parties' objectively ascertained intention, courts readily give effect to it, recognising that finality facilitates settlements. There is no policy reason to resist an agreement that exchanges money for a full and final settlement of any possible claim:[23]

> … The reason for the traditional hostility of the courts to exemption clauses was that they often amounted to taking with one hand what had been given with the other. A contracting party undertook various obligations and then provided that he was not to be liable if he failed to perform them. But the release in this case is quite different. The bank is paying a sum of money specifically to buy its release from any possible future claim by the employee.

[65] The third proposition is that a court may read down the general language of a release to exclude claims of a type about which the releasor knew nothing and could not be expected to know anything. As Lord Nicholls put it in *BCCI v Ali*:[24]

> … However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to

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21 *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23 at [69]; *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [32]; and *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [18]. Compare *Bank of Credit and Commerce International SA (in liq) v Ali (No 1)* [2001] UKHL 8, [2002] 1 AC 251 at [66] per Lord Hoffmann, dissenting; and John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 221–222.

22 *Bank of Credit and Commerce International SA (in liq) v Ali (No 1)*, above n 21, at [27].

23 At [66] per Lord Hoffmann in dissent.

24 At [28].

> have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed.

[66] By way of explanation, it is ordinarily implicit in the idea of a release that the releasor knows what sort of right or claim is being surrendered,[25] and the factual context will ordinarily show that it did know or was on notice, if not of a specific claim then at least of the subject matter of the release or the type of claims that it covered. Where that is not the case, context and purpose may require that a limitation be read into general words of release. So, for example, Mr Goddard acknowledged that the words used in cl 4, although very general, might not cover mistakes induced by, say, fraud. His point, which we examine below, was rather that the risks assigned here were of a type plainly within the parties' contemplation.

[67] We notice in passing an unresolved question whether a mistake unknown at the time of the contract may qualify for relief under the Contractual Mistakes Act. Some authorities suggest that because a qualifying mistake must induce entry into the contract, it is necessary that express consideration was given to the matter and a party or parties, as the case may be, came to a mistaken understanding about it.[26] This question of statutory interpretation was not argued before us so we do not intend to decide it. We are concerned with a prior question of contract interpretation: whether an exclusion clause covers the risk of an unknown mistake.

[68] The fourth proposition, raised by Prattley's reliance on appellate decisions delivered post-settlement, is that it may be necessary to reconcile the notion of a mistake of law made at a given date with the declaratory theory of the common law, under which a judicial statement of the law is deemed to have always been correct. A striking example is provided by the facts of *Brennan v Bolt Burdon*, in which a claim was compromised in reliance on a first instance decision, later overruled in another case, that the claim had been brought out of time.[27] The resulting mistake of law was not allowed to undo the settlement, because the court was concerned that

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[25] *Salkeld v Vernon* (1758) 1 Eden 64 (Ch) at 67–68, cited in *Bank of Credit and Commerce International SA (in liq) v Ali (no 1)*, above n 21, at [11].

[26] *New Zealand Refining Company Ltd v Attorney-General* (1993) 15 TC 10,038 (CA); and *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC). Compare *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1990] 1 NZLR 344 (HC) at 356–357.

[27] *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303. See *Halsbury's Laws of England* (5th ed, 2010) vol 77 Mistake at [25].

compromises ought not be reopened for mistake arising through the declaratory theory of law. The parties were taken to have understood that the law on which they relied when settling the claim might be declared wrong with retrospective effect.

[69] Counsel addressed this fourth proposition in argument but as will shortly be seen, we need not decide whether it survives,[28] and if so whether it ought to apply in New Zealand under remedial legislation such as the Contractual Mistakes Act.[29]

[70] Mr Cooke argued that the issue of mistake ought to be approached from the perspective that the policy incorporated the Fair Insurance Code and required Vero to present understandable terms and explain any technical concepts. We will assume that this particular policy incorporated the Code. We observe that so far as its requirements concern fair process, the trial Judge held that Vero complied and that conclusion, well-supported on the evidence, was not seriously challenged before us. We need not decide whether the Code adds an obligation to ensure that any settlement is substantively fair. As we go on to explain, it makes no difference to the question whether a mistake was made. Nor should we be taken to accept that the Code has any bearing on interpretation of the interim settlement agreement, a separate contract entered with the benefit of legal advice.

What was the mistake, if any?

[71] As noted, Prattley relies on a common mistake, shared with Vero. It is not now suggested that to Vero's knowledge Prattley was mistaken.[30]

[72] The mistake pleaded was that market value was the "full measure of indemnity" under the policy. Mr Cooke identified two dimensions to the mistake, one being an assumption that cover was capped at $1,605,000 (that is, that cover did not reinstate automatically immediately after each earthquake), and the other that market value was the correct measure of indemnity value. Prattley says that replacement cost is the correct measure, with no allowance for depreciation;

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[28] See Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thompson Reuters, 2014) at 1256.

[29] In *Brennan v Bolt Burden*, above n 27, the Court of Appeal was driven to its conclusion by higher authority, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL). Professor Joseph has suggested that the declaratory theory is archaic: Joseph, above n 28, at 1256.

[30] Such a mistake was pleaded but it was not made out at trial or pursued on appeal.

alternatively, if depreciation is permitted it ought to be calculated on an "elemental" basis that would result in a depreciated replacement cost of around 90 per cent of new build cost.

[73] In the High Court Dunningham J found that no mistake had been made. Specifically, she found that the possibility that combined claims could exceed a per-claim limit was known to Mr Minehan and adverted to in discussions between Vero and Prattley. The building having been destroyed, the parties correctly focused on its value as a total loss, and market value was the proper measure of loss in the circumstances.

[74] We observe that the Judge also found that Prattley did not appreciate that it might claim for depreciated replacement cost but that finding is not now relevant. As noted the appeal invoked common mistake only, and it could not be suggested that Vero was unaware of alternative measures of value. In any event, on this point we take a different view of the facts. As noted at [35] above, the context points to the objective conclusion that Prattley also knew it might claim depreciated replacement cost.

[75] We begin by noting that the parties knew market value was not the only measure of indemnity available. The valuations they exchanged referenced other measures, including depreciated replacement cost. So the question is not whether they both failed to appreciate that any alternative to market value was available. The question is whether they were mistaken in their shared belief that market value was a better measure of indemnity than depreciated replacement cost in the circumstances. That is a question not of law nor of fact, but of opinion.[31]

[76] So far as the cap on Vero's potential liability is concerned, we accept that *Wild South* resolved some issues about the operation of automatic reinstatement clauses. In particular, it established that cover reinstated immediately upon loss and not, as the insurers contended, when payment was made.[32] That may have had a significant effect on insureds' entitlements in some cases. But the questions of law at

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[31] We do not exclude the possibility that an opinion may rest on a mistake of fact, but that is not the position here. See Burrows, above n 21, at [10.3.1].

[32] *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [55].

issue in *Wild South* and *Ridgecrest* have little if any bearing on the settlement in this case. Prattley was entitled under its indemnity-only policy to the amount payable on destruction, and by none of the measures of indemnity value considered in negotiations might that have amounted to as much as $1,605,000; the highest of the valuations was $1,400,000 (being the Knight Frank estimate of depreciated replacement cost). It follows that the sum insured did not limit the settlement. In any event, Prattley had made three claims and the possibility that but for the property having been destroyed they might cumulatively exceed the sum insured for any one claim was known to the parties.

[77] That leaves only one possibility, which is that the parties were mistaken about the correct approach to quantifying replacement cost; more particularly, they were mistaken about whether and to what extent depreciation ought to be deducted from the building's replacement cost when quantifying the insured's loss. To establish such mistake Prattley would have to show that all the valuers at the time were wrong and Mr Keys' "elemental" approach (see [14] above) ought to have been adopted. However, the trial Judge rejected his evidence, and for reasons explained below we think she was right to do so. That being so, the evidence does not establish that the parties' assumptions about depreciation were mistaken.

[78] However the mistake is framed, it is we think a mistake of a kind that the parties must be taken to have had in mind when negotiating the settlement, for it is a mistake about the subject matter of the settlement; that is, the measure of Prattley's entitlement to indemnity under the policy. That being so, there is no contextual or purposive justification for reading down the general words of the release which, as Dunningham J held, plainly extend to any unknown claim under the policy for earthquake damage to the building; Prattley accepted payment in full and final settlement and discharge of all present and future claims, whether known or unknown, in connection with the damage, the earthquakes and the policy, and on whatever legal or equitable basis such claims might arise.

[79] Finally, we are unable to accept Mr Cooke's submission that Prattley's claim does not arise out of the policy. It is true that Prattley sues under the Contractual Mistakes Act, but the cause of action must rest on some antecedent mistake that

induced Prattley to enter the agreement and that mistake, as the pleading makes clear, concerns the correct measure of indemnity value under the policy. Nor does the nature of the cause of action matter, if only because the release expressly extends to a statutory claim.

Was there a substantially unequal exchange of values?

[80] The question is whether a mistake resulted at the time of the settlement in a substantially unequal exchange of values.[33] On the view we take of the case this issue does not arise, but the issue was argued and we think it appropriate to respond.

[81] As noted, Dunningham J held that market value was the correct measure of indemnity value. However, when it came to inequality of exchange at settlement she relied rather on Prattley's claim, which she took to be about $4,000,000 including GST. She recognised that an allowance should be made for certainty, avoidance of delay and avoided legal costs, but nonetheless found there was a substantial inequality of value.

[82] An objective assessment of value is required. We do not think that any value can be attached to the $4,000,000 claim that Prattley made subsequently. As we go on to explain at [119] below, an orthodox allowance must be made for depreciation and, that being so, the disparity in value cannot exceed the difference between the Knight Frank depreciated replacement cost valuation of $1,400,000 and the settlement sum of $1,050,000.

[83] That difference is material, but it cannot be taken at face value. We accept Mr Goddard's submission that allowances must be made for risk and avoided cost when assessing the estimates of both market value and depreciated replacement cost. The narrative of the settlement highlights two points. First, the second Ford Baker estimate of market value was unlikely to withstand close scrutiny. Indeed, the Judge stated that it was not reliable and found that Vero's expert, Mr Stanley, arrived at a "realistic" market value of $520,000. That being so, there was a degree of downside risk for Prattley in any negotiation, even when allowances are made for Vero's

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[33] Contractual Mistakes Act, s 6(1)(b)(i).

willingness to accommodate the Britten interests. Second, the Ford Baker valuation estimated depreciated replacement cost at $1,020,000 so there is no reason to suppose that Vero would have settled for $1,400,000. Some give and take was likely. In the end this is a matter of impression.[34] Our conclusion is that, assuming a mistake about the availability of depreciated replacement cost as a measure of indemnity, there was no substantial inequality of exchange, viewed as at settlement date.

Mr Keys' evidence

The evidence

[84] Mr Keys prepared a brief of evidence that was dated 29 August 2014. It contained the following statement:

> I am familiar with the High Court Code of Conduct for Expert Witnesses and agree to be bound by it. My opinion expressed in the statement is within my area of expertise and based on my own assessment of the relevant material I have reviewed. This statement is given in the knowledge that my primary duty is to assist the Court in giving fair, reasonable and unbiased evidence.

[85] The substance of his evidence was that he was by training and long experience an expert in assessing depreciation in material damage claims and that depreciation ought to be assessed on an elemental or item by item basis according to the nature of each item and its condition. He also prepared a detailed schedule that applied separate rates to items ranging from site preparation to contingency allowance. It resulted, as noted above, in a claim for $8.8 million less the settlement payment.

The trial

[86] The brief met with an admissibility challenge that was resolved late in the trial.[35] Mr Keys had included statements about the approach to depreciation that Vero had adopted in another proceeding. Justice Dunningham accepted that Mr Keys had the expertise to assist the Court when determining the proper approach

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[34] *Realty Services Holdings Ltd v Slater* (2005) 6 NZCPR 657 (HC).

[35] The trial began on 1 December 2014 and was adjourned part-heard. The Judge's ruling was given on 10 March 2015, after the trial resumed.

to depreciation. However, she held that his evidence about what had happened in another case was irrelevant and inadmissible. The challenge did not extend to Mr Keys evidence generally.

[87] As noted above, Mr Keys is a principal of Risk Worldwide. In the witness box he was accused of partiality. In cross-examination of Mrs Britten Mr Goddard had sought and obtained a copy of the agreement between Risk Worldwide and Prattley which revealed for the first time the nature and extent of that firm's pecuniary interest in the litigation. Counsel also referred Mr Keys to the Risk Worldwide website, which describes Mr Keys as a leading advocate for the policyholder in insurance claims, and suggested that Mr Keys could not simultaneously give impartial evidence and act as an advocate:

> Q. … You've got a direct interest in the outcome for one party, haven't you?
>
> A. Yes but it doesn't change my testimony.
>
> Q. That means you're not impartial doesn't it Mr Keys?
>
> A. I may be partial to the outcome but it doesn't change my testimony.
>
> …
>
> Q. Well Mr Keys you write letters describing yourself as an advocate for Prattley don't you?
>
> A. That's before I agreed to come to the Court as an expert witness.
>
> Q. You market yourself to policyholders like Prattley as an advocate for them, don't you?
>
> A. Yes but in the realm of an expert for the Court.
>
> Q. And you say to Prattley, you promised Prattley that you would be with them throughout the journey, putting their needs first at all times, didn't you?
>
> A. That's certainly that website said that, I had nothing to do with the writing of that.
>
> Q. Well that's how the company that you're a director of markets itself to the public isn't it?
>
> A. They certainly did that on that website.
>
> Q. Does your company keep its promises to its customers?

A. Yes but my promise to the Court here today is to have impartial testimony and that's exactly what I'm going to do.

Q. So you're suggesting to Her Honour that you can simultaneously keep a promise to Prattley to put their interests first and to refrain from being an advocate, is that what you're suggesting?

A. Yes I do Your Honour.

Q. In circumstances where you are partial and where you are a policyholder advocate, it's simply impossible for you to comply with these requirements of the code, isn't it Mr Keys?

A. Not at all.

Q. Well I thought we agreed a moment ago that you're not impartial.

A. I am not impartial outside of the Court. As the expert for the Court I have agreed to comply with these conditions and be impartial.

Q. Well your interest in the outcome for one party hasn't disappeared has it Mr Keys? It was there yesterday and it will be there tomorrow.

A. But it's not here today.

[88] Mr Keys' methodology was also challenged. It was said to lack support in any relevant community of experts, and at the very least to have no application in New Zealand practice. In his original brief of evidence he had not cited any authoritative text or other sources for the "elemental" methodology that he used, in which he applied separate allowances for physical depreciation to discrete parts of the building such as the roof and the foundations. He acknowledged in cross-examination that he was not drawing on any literature or other materials, but relied solely on his training and experience as a loss adjustor.

[89] As noted, Vero's expert witness was Mr Stanley, a registered valuer and director of TelferYoung (Canterbury) Ltd. He rejected as unrealistic Mr Keys elemental depreciation approach, which resulted in an effective depreciation rate for the building as a whole of just 8.5 per cent notwithstanding its age. He stated that he had never previously encountered a situation where an elemental approach to depreciation had been used to fix the indemnity value of a building, which had to be valued as a whole. An elemental approach is utilised for tax depreciation but it is not recognised in New Zealand as an appropriate methodology for indemnity purposes.

[90] Finally, it became apparent that some of the depreciation rates used by Mr Keys lacked any foundation in the evidence before the Court. To give one example, he had depreciated interior doors and windows at a rate of 10 per cent, but could point to no evidence of fact about the age or expected life of those items. Of course he had not been able to inspect the building himself. It appeared that he relied upon statements by Mr Yates and Mr Minehan that were not in evidence.

The Judge's assessment

[91] Justice Dunningham found Mr Keys' evidence neither reliable nor helpful:

> [134] I also record that I placed little, if any, reliance on Mr Keys' assessment of the appropriate depreciation rate to apply to the individual items. No clear rationale was articulated for the adopted depreciation rate for each element (whether 0 per cent, 10 per cent, 25 per cent or 50 per cent). In the absence of a clear and full explanation of the evidence and assumptions that were relied on to support each depreciation rate adopted, I did not find his evidence about the depreciation rate to be applied to each of the various elements of the building either reliable or helpful.

The appeal

[92] We were nonetheless invited to rely on Mr Keys' evidence for purposes of the appeal. Mr Cooke submitted that Mr Keys was an experienced loss assessor whose approach was consistent with Australian and New Zealand valuation practice: specifically, he correctly took a physical depreciation approach, rather than an economic one, when appraising the property for insurance purposes.

Admissibility of expert evidence

[93] As noted, it was not in dispute that Mr Keys is an expert, meaning that he has specialised knowledge or skill based on training, study or experience, and his evidence was based on that knowledge or skill.[36] That being so, his opinion was admissible if the trial Judge was:[37]

> … likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

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[36] Section 4(1) of the Evidence Act 2006, definitions of "expert" and "expert evidence",
[37] Section 25(1) of the Evidence Act.

[94] Substantial helpfulness is an amalgam of relevance, reliability and probative value.[38] The assessment is ultimately that of the trial judge, not the parties; a court need not accept the opinion of an expert even where it is uncontradicted.[39] Under s 25 the trial Judge serves as a gatekeeper. That role is necessary, even where the judge is the trier of fact, because of the discipline that it brings to the admission and evaluation of expert evidence. Experts are permitted to offer opinions because they possess an advantage over the fact-finder that assists it to understand something of consequence to the case. But there are risks associated with it, and there are examples where expert evidence has led to miscarriages of justice.[40] Hence the need for processes that allow trial judges to evaluate expert evidence for admissibility and weight.

[95] The gatekeeping function need not be performed before the evidence is given, although it commonly is where the trier of fact is a jury.[41] As with any other evidence, the Court may choose to admit an expert's evidence provisionally under s 14, reserving admissibility for later decision once the evidence has been heard.[42] Subject to fair trial considerations, there can be no objection to a court concluding at that stage that expert evidence was inadmissible.

[96] The court's evaluation processes begin, for our purposes, with s 26 of the Evidence Act, which requires that in civil proceedings experts must conduct themselves in accordance with applicable rules of court:

> **26 Conduct of experts in civil proceedings**
>
> (1) In a civil proceeding, experts are to conduct themselves in preparing and giving expert evidence in accordance with the applicable rules of court relating to the conduct of experts.
>
> (2) The expert evidence of an expert who has not complied with rules of court of the kind specified in subsection (1) may be given only with the permission of the Judge.

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38 *Mahomed v R* [2010] NZCA 419 at [35]. The "amalgam" test was endorsed in *Pora v R* [2015] UKPC 9, (2015) 27 CRNZ 47 at [41].

39 *Davie v Edinburgh Magistrates* 1953 SC 34, (1953) SLT 54 (IH (1 Div)); and *Van Mil v Fence Crete Ltd* HC Auckland CP128/95, 1 February 1996 at 7.

40 Tristram Hodgkinson and Mark James *Expert Evidence: Law and Practice* (4th ed, Sweet & Maxwell, London) at 74.

41 See for example *Mahomed v R*, above n 38.

42 See *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [46].

[97] The relevant rule of court is r 9.43 of the High Court Rules.[43] It provides that an expert witness must comply with the Code of Conduct set out in sch 4 to the Rules. The Code begins by specifying the duty of an expert witness:

> **Duty to the court**
>
> 1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
>
> 2 An expert witness is not an advocate for the party who engages the witness.

An expert witness must expressly promise to comply with this duty.

[98] Sections 25 and 26 mark a departure from the common law's traditional willingness to admit expert evidence and treat reliability as a question of weight.[44] They anticipate that evidence may be excluded for want of reliability, for want of impartiality, or for want of compliance with the Code. To fail to comply with the duty of impartiality is to breach r 9.43, and in consequence the evidence is presumptively inadmissible under s 26(2), subject to a discretion in the trial judge to admit it. Evidence that is not impartial is also likely to lack reliability, so it may be inadmissible under s 25 too. Significant risk attends a party's decision to rely on such a witness.

[99] It is necessary to distinguish impartiality — the primary objective of the Code — from independence. An expert witness need not be independent of the party by whom the expert is briefed.[45] Any potential conflict of interest is ordinarily treated as a matter of weight. That is so because independence goes to the relationship between the expert and the party engaging the witness, while impartiality is a behavioural quality, signifying an attitude of neutrality as between

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43 The Code of Conduct was introduced in 2002, under what was then r 330A of the High Court Rules.

44 See Hodgkinson and James, above n 40, at 31; and Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV25.02].

45 *Geddes v New Zealand Dairy Board* HC Wellington CP52/97, 27 August 2003 at [73]–[74], quoted in *ANZ National Bank Ltd v Commissioner of Inland Revenue* (2005) 18 PRNZ 114 (HC) at [23].

the parties. An expert witness who lacks independence may nonetheless behave impartially.[46]

[100] Trial judges enjoy substantial leeway in the exercise of their s 26 discretion to admit non-compliant evidence. The discretion extends to evidence that is less than impartial. An expert witness has two masters — court and client — and it is commonplace to encounter a witness who has not found it easy to resist completely the temptation to become an advocate. A judge may nonetheless find the evidence helpful. It is sometimes possible to compensate through the combination of an opposing expert and cross-examination for a partial failure to meet the Code's exacting standard.[47]

[101] The Code further requires that an expert witness comply with certain requirements, the objective of which is to make transparent the witness's qualifications, the facts and assumptions on which the witness has relied, the reasons for the witness's opinion, and any literature or other material relied upon. These requirements allow the opposing party and the Court to evaluate the expert's expertise and opinion, initially for admissibility and ultimately for weight:[48]

> 3 In any evidence given by an expert witness, the expert witness must—
>
> (a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
>
> (b) state the expert witness' qualifications as an expert:
>
> (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
>
> (d) state the facts and assumptions on which the opinions of the expert witness are based:
>
> (e) state the reasons for the opinions given by the expert witness:

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46 *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47, (2009) 19 PRNZ 553 at [24]; and *ANZ National Bank Ltd v Commissioner of Inland Revenue*, above n 45, at [22]. As Wild J noted in *Geddes v New Zealand Dairy Board*, above n 45, some of the authorities, notably *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1)* [1993] 2 Lloyd's Rep 68 (QB) at 81, speak of independence as though it means impartiality.

47 *Attorney-General v Equiticorp Industries Group Ltd* [1995] 2 NZLR 135 (CA).

48 High Court Rules, sch 4.

(f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:

(g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.

[102] The sixth of these requirements anticipates that an expert will establish the reliability of his or her methodology by demonstrating that it is orthodox or otherwise accepted within a relevant community of experts. The Code refers to "any" literature or other material, so recognising that it will not be possible to reference such material in every case; some experts qualify by experience rather than training, and allowances must be made for innovation.[49] In such cases reliability of methodology must be established by means appropriate to the circumstances.[50] The important point for present purposes is that the Code should not be taken to mean that citing such material is optional. On the contrary, a court may think it essential where methodology is in issue and the material ought to exist.

Should Mr Keys' evidence be accepted?

[103] As noted, Dunningham J did not find Mr Keys' evidence about the depreciation rate to be applied to each component part of the building either reliable or helpful. She discounted his evidence accordingly. We observe that her reasons are tantamount to saying that she ultimately found his evidence inadmissible under s 25. She did not address directly the challenge to Mr Keys' impartiality.

[104] It seems to us inescapable that Mr Keys was not an impartial witness. The very substantial claim that he advanced on Prattley's behalf was prepared before trial

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49 Mahoney, above n 44, at [EV25.03(1)].

50 There is a valuable discussion of the point in the commentary to the Federal Rule of Evidence 702: 28 USCA § 702. The substantial helpfulness test is derived from this rule: Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [69] and Law Commission *Evidence Law: Codification, Hearsay and Principles for Reform* (NZLC R55, 1999) at [C100]. In the United States, principles for deciding the admissibility of expert evidence were established in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). The criteria are succinctly summarised by Mahoney and others, above n 44, at [EV25.03(1)] as falsifiability, peer review and publication, known or potential error rates, and general acceptance in the relevant scientific community. The *Daubert* principles were approved in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138]–[139] as a "template" for evaluating novel scientific evidence in New Zealand. In the US the principles have been extended, with appropriate modifications, to expert evidence generally: *Kumho Tire Co v Carmichael* 526 US 137 (1999).

in the capacity of an advocate and pursued at trial in the guise of an expert. These two roles were incompatible. He also had a powerful financial interest in his evidence being accepted; it might determine whether Risk Worldwide was compensated for funding the litigation and by how much it would profit. His answers when tasked with partiality were patently unconvincing.

[105] We have noted that Mr Keys cited no professional literature or other material to verify his "elemental" methodology. He did not suggest that there was anything novel about it. He relied rather on his long experience as a loss adjuster in the United States and explained that he was trained in his methodology when working in the insurance industry. That being so, in our opinion he ought to have been able to point readily to material showing that the methodology was orthodox. The absence of any such evidence is a strong indicator that the methodology lacks reliability.

[106] Mr Cooke sought to meet this criticism by arguing that Mr Keys' methodology complied with ANZ Valuation Guidance Note 13 (ANZVGN 13). ANZVGN 13 provides that:

> In the case of insurance, useful life is not synonymous with economic life, but rather only reflects physical life. The insured is entitled to insure the remaining physical life of an asset, even though the economic life may have expired.
>
> Therefore, the determination of indemnity value using a depreciated replacement cost approach requires in the first instance, the assessment of reinstatement cost and then an assessment of the likely physical life of the asset and the life expired. The expected physical life of an asset is assessed on the basis that reasonable maintenance is carried out to preserve the existing use.

[107] There are two answers to Mr Cooke's submission. First, Mr Keys did not rely on ANZVGN 13 when formulating his opinion; as noted above, he said he had relied rather on his experience and training. He did refer to ANZVGN 13 in a reply brief, but not by way of support for his elemental approach, and in cross-examination he conceded that valuation methodology lay beyond his expertise. Second, ANZVGN 13 does not justify a methodology in which the component parts of a building are assigned different depreciation rates for insurance purposes. It does

appear to preclude an 'economic life' measure of depreciation in some circumstances, but that is a different point.[51]

[108] The Code also states that an expert should state the facts and assumptions on which the opinion rests.[52] In some respects Mr Keys did not meet this obligation when giving his opinion as to appropriate depreciation rates. We have instanced his approach to the age and condition of interior doors, to which he applied a depreciation rate of 10 per cent. His evidence did not identify the facts on which he relied. A second example addressed in evidence concerns paint; he had adopted a 50 per cent depreciation rate for what appears to be paint coats to interior floors but he had simply assumed that the paint was replaced during a refurbishment in 2007. He had adopted a depreciation rate of 50 per cent for the roof but there was no evidence about its age either; he accounted for this by saying he relied on photographs showing its condition.

[109] These methodological difficulties sufficiently justify the Judge's conclusion that Mr Keys' evidence was neither helpful nor reliable. In our opinion she might also have concluded that his evidence was not impartial. She could not have been faulted had she ruled it inadmissible in its entirety.

Prattley's entitlement under the policy

[110] The remaining question is whether Prattley was entitled under the policy to market value or depreciated replacement cost on destruction, those being the competing measures of indemnity value advanced before us. It is not strictly necessary to address this issue on the view we take of the case, but we think it appropriate to do so.

[111] Dunningham J recognised that the policy did not fix the measure of indemnity. She held that it would normally be the cost of repair or reinstatement less depreciation but other measures were possible. Having found the facts, including

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51 We address that point at [120] below.

52 Section 25(3) of the Evidence Act provides that facts relied on by an expert must be proved or judicially noticed if the fact-finder is to rely on the expert's opinion.

those relating to Prattley's reasons for holding the property, she concluded that indemnity value was the appropriate measure in this case.[53]

[112] Mr Cooke began by pointing out that the Judge relied in part for her conclusion on the fact that the policy allowed the insurer to choose payment or repair but that provision addresses the form of settlement rather than the measure of indemnity. We agree, but we do not think anything turns on the point. Vero's defence on this issue, and the Judge's reasons, ultimately rested on the proposition that market value was the correct measure of indemnity in this case.

[113] Mr Cooke was on firmer ground with his submission that the policy language dictates what the insurer's indemnity means in any given case[54] and this policy expressly recognised that the building had a special character. The material damage indemnity (at [18] above) stated that the insured would be indemnified by payment or, at Vero's option, by repair or reinstatement, but the special notes modified that indemnity. They provided rather that Vero would "repair or reinstate", and further that it would do so by reference to the original design and suitably equivalent materials. As noted at [22] above, the special notes confirm that cover reflected the building's original appearance, capacity and design. That is so notwithstanding that Prattley chose not to purchase full reinstatement cover. In our opinion "reinstatement" in this policy was not merely a method by which the insurer might discharge its obligation.[55] It was also a primary measure of the material damage indemnity; primary because it reflected the parties' agreement that cover would reflect the special character of the building. Of course the indemnity was subject to the policy limits and Vero might at its option discharge its obligation by payment.

[114] Anticipating this analysis, Mr Goddard submitted that the general indemnity in the insuring clause (at [17] above) must prevail, citing the first instance judgment in *TJK (NZ) Ltd v Mitsui Insurance Company Ltd*.[56] However, the question in that case was whether a full replacement extension allowed the insurer to delay payment

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53 High Court judgment, above n 2, at [82] and [125]–[126].

54 *Tower Insurance Ltd v Skyward Aviation 2008 Ltd*, above n 21, at [25] n 12.

55 Neil Campbell and Barnaby Stewart "Prevention of Performance in Replacement Cost Insurance — Preventing a Fictional Response" (2002) 10 Otago L Rev 229 at 230 n 5.

56 *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Company Ltd* [2013] NZHC 298, (2013) 17 ANZ Insurance Cases ¶61-968.

of indemnity value until the insured had either disclaimed full replacement or had begun to incur replacement costs. The parties agreed that but for the extension the insurer must pay indemnity value immediately on loss. The Court preferred the view that the general indemnity applied and held that the language of the extension in that case contemplated that the insurer must pay indemnity value at once.[57] The policy in this case does not provide for full replacement and its language is materially different. For the reasons given above, we consider that when read with the schedules the material damage section modifies the general indemnity.

[115] We do not think it matters, in the circumstances of this case, that Prattley held the property primarily for the income it generated.[58] Mr Goddard emphasised the following passage from *Wild South*:[59]

> … anything that reduces or diminishes the loss to the insured also reduces the amount that the insurer must pay. So, for example, the cost of a new equivalent building may be the correct measure of indemnity where the insured's interest in it is confined to a commercial use that can equally well be carried on in a functionally equivalent new building. In that case the higher cost of reinstating the original structure with all its features may not be the true measure, for insurance purposes, of the insured's loss. That was the position in *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd*, in which the loss was found to represent the cost of building a new hall, not that of rebuilding the former Victorian structure.
>
> (footnotes omitted)

[116] However, the larger point being made in that section of the judgment was that:[60]

> A material damage policy takes as its subject matter a particular property with all its features. … The policy is written to ensure the property may be reinstated by repair or replacement when damaged by an insured peril. Damage having been suffered, the insured decides under these policies whether to repair or rebuild it. The insurer pays, to the extent of the contractual measure of reinstatement cost.

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57 *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Company Ltd*, above n 56, at [33].

58 Campbell and Stewart, above n 55, at 230.

59 *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [100], referring to *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* [1983] 1 Lloyd's Rep 674 (QB).

60 *QBE Insurance (International) Ltd v Wild South Holdings Ltd*, above n 3, at [97]–[98]. See too *Tower Insurance Ltd* v *Skyward Aviation 2008 Ltd*, above n 21, at [38]; and *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2014] NZCA 76, [2014] 2 NZLR 713 at [23].

> … the contract being one of indemnity, the relevant loss is the loss to the insured, so that the measure of loss may depend on the insured's intentions for the property and reasons for owning it.
>
> (footnotes omitted)

[117] It was against that background this Court observed that because indemnity is measured by loss to the insured anything that reduces that loss also reduces the amount the insurer must pay. The Court referenced some of the authorities for illustrative purposes only. Of course each case turns on its own circumstances. Notably, *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* does not establish that market value is always the correct measure of indemnity where the insured's commercial use can equally be carried on in functionally equivalent premises.[61] That case concerned a Victorian public hall that had been converted to serve as a bingo hall and discotheque, uses that do not appear to have made anything of its period features. The valuation issue was framed as whether the building's value for indemnity purposes was its market value or the somewhat higher cost of a modern equivalent. It was dealt with briefly,[62] Lawson J preferring modern equivalent replacement value on the short ground that the building was used for continuing business purposes and replacement value would better compensate the insured for what it had lost.[63]

[118] In this case, we prefer the view that reinstatement cost was the starting point for calculating the loss to the insured on destruction. That is so because we have found that repair or reinstatement of the particular building was the primary measure of indemnity in the material damage section. Reinstatement cost would be assessed, as the policy dictates, on the basis that the objective was reinstatement to reasonably equivalent appearance and capacity using the original design and suitably equivalent materials.

[119] Mr Cooke argued that depreciation or betterment must be excluded when assessing loss to the insured because it is ousted by the terms of the policy, which provide for repair or reinstatement to a particular standard. That submission may have had force had the building survived, but as matters turned out reinstatement

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61 *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd*, above n 59.

62 The building was destroyed by arson and the principal issue was whether the insured caused it.

63 At 676 and 688–689.

would require a new building. The policy did not provide for full replacement on destruction. It provided for payment of indemnity value. The principle of betterment would ordinarily apply in such circumstances,[64] and we do not think that the policy language excludes it. Betterment applies because Prattley would gain a great deal from reinstatement; the new building would have a much longer economic and useful life than the original and would be earthquake-sound. Accordingly, we find that an allowance should be made for depreciation as the appropriate measure of betterment.[65]

[120] The next question is how depreciation ought to be measured. Putting Mr Keys' elemental approach to one side, there was some difference in approach among the valuers. The three pre-settlement valuations all allowed for depreciation on an age and condition basis, excluding economic considerations. We infer that in taking that approach they were applying ANZVGN 13, which is specific to valuations for insurance purposes.[66] ANZVNG 13 adopts the premise, which must be correct, that an owner is entitled to insure the remaining physical life of a building even if its economic life has expired. Whether a policy has that effect is of course a question of interpretation.

[121] Mr Stanley accepted that a commercial building may reach economic obsolescence before the end of its physical life, but unlike the other valuers he preferred a definition of depreciated replacement cost that took into account all forms of obsolescence.[67] He accordingly considered economic life along with age and condition, noting that the building's location was no longer prime and it could attract only class C and D tenants.

[122] It was for the trial Judge to assess loss to the insured having regard to the policy terms. Ultimately it is a jury question.[68] The Court need not adopt any single

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64 Merkin and Nicoll, above n 11, at [8.6.1].

65 D Kelly and M Ball *Kelly & Ball Principles of Insurance Law* (online looseleaf ed, LexisNexis) at [12.0120.40].

66 Both valuers defined depreciated replacement cost as the estimated cost of replacement less an allowance for age and physical condition. Ford Baker stated that these were the "only" factors taken into account and Knight Frank stated that depreciated replacement cost may not reflect economic potential.

67 He used the International Valuation Standards, which are not specific to insurance valuations.

68 *Lahman v The Phoenix Insurance Company* (1888) 7 NZLR 271 (SC).

methodology, and it may take into account any reliable methodology used by appropriately qualified experts.[69]

[123] For convenience, we tabulate the valuers' conclusions below.[70] We note that market value was calculated as at 3 September 2010 while replacement cost was calculated at diverse later dates. It will be seen that the difference in approach just mentioned has not much affected the depreciation rates. We infer that Mr Stanley's estimate of remaining physical and economic life — 112 years — probably did not differ very much from the other valuers' estimates of physical life:[71]

	Ford Baker[72]	Knight Frank	Mr Stanley
Replacement cost	$6,804,000[73]	$4,000,000[74]	$5,429,000[75]
Depreciation rate	85%	65%	78%
Depreciated replacement cost	$1,020,000	$1,400,000	$1,195,000
Market value	$1,050,000	$370,000	$520,000

[124] Two considerations might warrant departing from depreciated replacement cost in this case. First, there was no question of the building being reinstated and used for its original purpose. Prattley did not have full reinstatement cover and the trustees would not have taken the economically irrational decision to rebuild it from

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69 We note that the valuers employed other methodologies, such as investment valuation and capitalisation of income, but the argument before us was framed as a choice between depreciated replacement cost and market value. We have responded accordingly.

70 All figures are GST-exclusive.

71 The other valuations do not disclose the life estimates used. The building was 87 years old in 2010.

72 The replacement cost and market value figures are taken from the second valuation. The first valuation adopted a much lower replacement cost estimate of $4,665,000 but used the same depreciation rate.

73 This appears to have been estimated at 3 September 2010.

74 This appears to have been estimated at 3 September 2010. (The valuation states that its valuation date is 3 September 2011 but this appears to be an error.)

75 Mr Stanley adopted a detailed replacement cost estimate that was dated 2 October 2014.

Prattley's own resources. Second, the Judge found that Prattley held the building for the income that it generated and not for its character.

[125] As to the first consideration, we accept the Judge's findings but we are not disposed to think that they justified departure from the primary measure of indemnity. As explained above, the primary measure would require that replacement cost be depreciated to allow for betterment. No question arose of Prattley being compensated for excess-of-indemnity building costs that it would never incur.

[126] As to the second, we accept the Judge's findings, but as noted above we do not think they supply sufficient reason to depart from the primary measure either. We do not understand the Judge to have rejected Mrs Britten's evidence that the family had formed an attachment to the building after the death of John Britten. She concluded rather that such attachment was not the trustees' primary reason for holding it. But that conclusion does not sufficiently justify adopting market value. Mr Cooke also emphasised that Prattley did not hold the building for sale immediately prior to the earthquakes.[76] We accept that submission.

[127] In all the circumstances, we prefer the view that as between insured and insurer depreciated replacement cost was an appropriate basis for indemnity on destruction. The policy reflected the character of the building and that must inform the approach to indemnity value. Depreciated replacement cost accordingly better reflected Prattley's loss than did Mr Stanley's realistic market value assessment.

[128] Vero having chosen to take a generous approach to the assessment of market value, however, Prattley has ended up with a settlement that is within the range of depreciated replacement cost valuations. We note that the High Court Judge did not fix a figure for depreciated replacement cost[77] and we were not asked to do so. There would be no point, given our primary conclusion that the settlement stands.

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[76] Compare *Leppard v Excess Insurance Co Ltd* [1979] 1 WLR 512 (CA). As discussed above, counsel also challenged the Judge's reliance on Prattley's post-earthquake intentions, but that is a different point.

[77] She preferred Mr Stanley's approach to that of Mr Keys but did not settle on a figure.

Decision

[129] The appeal is dismissed.

Costs

[130] Vero sought costs on an indemnity or excess-of-scale basis. Mr Goddard sought to establish a principle that indemnity costs ought to be awarded when a claim is brought in breach of a settlement agreement, citing a need to uphold the effectiveness of settlements. For jurisdiction he invoked r 53E(3)(f) of the Court of Appeal (Civil) Rules 2005, which permits indemnity costs when the Court finds that some reason exists that ought to prevail over the principle that costs should be predictable and their determination expeditious. In the alternative, he submitted that indemnity costs are warranted under r 53E(3)(a) because Prattley's conduct was vexatious and improper. He pointed out that the Court need not be concerned that indemnity costs would be burdensome to Prattley, for Risk Worldwide is funding the litigation. He drew attention to Risk Worldwide's profit motive. If the Court should refuse indemnity costs, he submitted, the same considerations justify an uplift of 50 per cent on scale.

[131] In oral argument, Mr Goddard added that initially the mistake issue was to be argued as a separate question but that had to be abandoned at a late stage when it became clear that Prattley wanted to adduce evidence about the exchange of value.

[132] We are not persuaded that indemnity costs are warranted. First, there is no general rule that proceedings challenging a settlement agreement should be met with indemnity costs when they fail. Each case must turn on its own merits. It cannot be assumed, for example, that every challenge to a settlement agreement is hopeless or brought for an improper purpose. Further, indemnity costs are exceptional in New Zealand practice.[78] The same is true of excess-of-scale costs, where justified on the same grounds that would permit indemnity costs.

[133] Second, we do not characterise Prattley's case as hopeless. True, it has met with little success, failing on the central questions whether the interim settlement

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[78] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [9]–[11].

agreement provided for the risk of mistake and whether any mistake was made. But the case was a respectable one requiring careful consideration on our part. Prattley has also enjoyed a degree of success on the applicable measure of indemnity, albeit at the level of principle only.

[134] Third, we are disinclined to attribute blame for failure of the preliminary question. The High Court encouraged the use of preliminary questions in earthquake cases, and with the co-operation of counsel the procedure has allowed the Court to settle some important questions of principle. Not all cases are suited to the procedure, of course, but sometimes that is not immediately apparent. In this case it appears that both parties' positions changed somewhat.[79]

[135] Fourth, we do not accept that it is appropriate to award indemnity (or increased) costs merely because a litigation funder with a profit motive stands behind the losing party. The presence of a funder may warrant security for costs and call for a degree of judicial supervision, but those are different matters.[80]

[136] Prattley must pay Vero costs for a complex appeal on a band B basis, with usual disbursements. We certify for second counsel.

Solicitors:
Rhodes & Co, Christchurch for Appellant
Fee Langstone, Auckland for Respondent

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79 *Prattley Enterprises Ltd v Vero Insurance Ltd New Zealand Ltd* HC Christchurch CIV-2013-409-1511, 16 July 2014 [Minute No 2 of Kós J].

80 See, for example, *Houghton v Saunders* [2015] NZCA 141 at [11].