IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-009-1849
[2015] NZHC 1675

BETWEEN	KANE BRUCE PARKIN Plaintiff
AND	VERO INSURANCE NEW ZEALAND LIMITED Defendant

Hearing: 14-20 April 2015

Appearances: D Webb and S Goodwin for Plaintiff
C M Meechan QC and M Atkinson for Defendant

Judgment: 17 July 2015

JUDGMENT OF MANDER J

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[1] The plaintiff, Mr Kane Parkin, owns a house in Lyttelton which is insured by the defendant, Vero Insurance New Zealand Limited (Vero). The house suffered damage in the Canterbury earthquakes. Mr Parkin claims Vero has failed to discharge its obligation under the insurance policy, to pay him the cost of rebuilding or repairing the house, and has breached the contract of insurance.

Background

[2] The house is a new three level townhouse, completed in March 2009. It is situated on a moderately steep site, sloping to the south and overlooking Lyttelton Harbour. It was constructed at the same time as a second dwelling which is effectively its twin.

[3] In broad outline, the home is accessed from the street or top level via a garage and entranceway. The middle level is accessed from the entrance via stairs, and comprises a kitchen, dining and living area, with doors to a balcony. The lower level is accessed via stairs from the middle level and comprises two bedrooms, a bathroom, toilet and laundry. The schedule to the insurance policy describes the area of the house as 135 m^2.

[4] The house suffered some damage in the September 2010 earthquake event. More significant damage was incurred as a result of the February 2011 earthquake. Claims were lodged with the Earthquake Commission (EQC), which resulted in a payment of $58,019.19 for the September event. In respect of the February earthquake, Mr Parkin received the maximum payment under EQC's capped statutory liability of $113,850. Mr Parkin seeks to recover from Vero the costs of reinstatement that exceed the EQC payment.

[5] In March 2011, the property was first inspected by Vero. By that time, both Mr Parkin's house and the neighbouring unit had been "red stickered". This prohibited its use or occupation, and required the dwelling's structural integrity to be checked by an engineer.[1]

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[1] Building Act 2004, s 124.

[6] Vero engaged MWH (Mainzeal) (MWHM) on 8 March 2011 for the purpose of assessing damage and to scope reinstatement of houses damaged by the Christchurch earthquakes. Vero instructed MWHM to obtain an estimate of the cost of repairing the house. The advice received by Vero was that Mr Parkin's house could be economically repaired. In its "MWHM Reinstatement Recommendation Report", MWHM estimated the cost of repair to be $185,479 (excl GST).

[7] In July 2011, EQC produced a scope of works with a cost of repair significantly higher ($318,213.46 – $331,986.60 (incl GST)) than that provided by MWHM to Vero, and raised whether the house could be economically repaired. The EQC payments for the two earthquake events, paid in October 2011, were, however, to be ultimately based on the MWHM report which provided a more detailed assessment of the damage and costings.

[8] The house was located in an area that was classified as the "white zone". Together with a number of other areas in the Port Hills, this zone was awaiting further classification by the Canterbury Earthquake Recovery Authority (CERA) into either "green zone" (suitable for residential construction) or "red zone" (not suitable for use as earthquake land). The house would remain in the white zone until May 2012, when the area was finally classified as green.

[9] In November 2011, a further assessment of the house was carried out by a building contractor, Simplexity Construction (Simplexity), engaged by MWHM. A recommendation in the building inspection report resulted in an engineer visiting the site and confirming that subject to land classification (from white to green), the house was capable of being repaired. In December, Vero's conclusion that the house was repairable was communicated to Mr Parkin. He was advised a final scope of works would not, however, be produced until the zoning decision for the locality had been made.

[10] Mr Parkin was unhappy about the delay in progressing his claim. As a result of a telephone conversation between Mr Parkin and the claims manager assigned by Vero to his claim, Mr Steven Youl, Mr Parkin's claim was put on the "cash settlement list". This was done as a means of expediting the release of a full repair

scope with pricing. Mr Parkin was unhappy about having to wait for a change in zoning. He appeared to be of the view the house was a rebuild as a result of the earlier EQC advice and oral statements he said had been made by the assessor from Simplexity who had inspected the house in November.

[11] The following day, after Messrs Parkin and Youl's telephone conversation, Mr Parkin received a revised reinstatement report prepared by MWHM. This report which constituted an updated estimate was unconnected with the "cash settlement" process initiated the previous day to obtain a full repair scope and detailed costing. It resulted, however, in Mr Parkin raising further concerns with Vero about the completeness and accuracy of the assessments being undertaken by MWHM, and in particular the estimated cost of repair, which at that stage was put at $157,514.

[12] After further correspondence, during which another earthquake occurred on 23 December 2011, a site meeting took place on 15 February 2012. This resulted in another building inspection report. As a result, Vero again advised Mr Parkin the house could be repaired. However, remediation would not be able to be advanced while the property remained in the white zone.

[13] In March 2012, Mr Youl further advised in an email to Mr Parkin that a formal reinstatement report would not be prepared until the zoning was changed. He explained the procedure which Vero would follow at that point in terms of discussing the proposed remedial work with Mr Parkin.

[14] In the subsequent months, there were further email exchanges between Mr Parkin, his insurance broker, and Vero. Mr Parkin was frustrated about the delays and believed Vero was stalling the settlement of his claim. Mr Youl's view was that Mr Parkin's concern with MWHM's cost estimates was rooted in the discrepancy between EQC's initial conclusion that a rebuild was likely, and MWHM's assessment the house could be repaired. On 2 May, Mr Youl suggested a joint inspection between EQC and MWHM. Mr Parkin rejected that proposal. On 18 May 2012 the land classification changed from white to green.

[15] On 30 May, Mr Parkin's broker suggested, in an effort to make some progress, that an engineer inspect the property and provide a preliminary report. Mr Youl, however, was not prepared to get further engineering input until the house was in the preconstruction phase and building consents were being applied for. Mr Youl noted the property had been inspected three times, and each time found to be repairable. He also observed that a full reinstatement scope would be needed and agreed to by Mr Parkin before any work could actually start. If engineering input was required at that stage, that would be arranged, but until that time he considered engaging an engineer was premature.

[16] On 4 July, Mr Parkin met with representatives from Simplexity and a quantity surveyor from MWHM. It was proposed by MWHM that, for the purposes of providing an accurate estimate, another independent builder be engaged. Mr Youl considered it may be helpful to get someone new to estimate the cost of the repair in order to resolve Mr Parkin's concerns. However, following the meeting on 4 July, Mr Parkin advised he had no confidence in MWHM providing him with an accurate reinstatement report.

[17] On 6 July, Mr Parkin's insurance broker advised that Mr Parkin intended to obtain his own building consultant's report. Subsequently, in August, Mr Parkin through his broker advised that the further MWHM sponsored inspection should be put on hold pending receipt of his own building report. No building report was provided to Vero before Mr Parkin issued proceedings on 10 September.

The parties' respective cases in summary

Mr Parkin's claim

[18] Mr Parkin's claim is that Vero breached the insurance contract. In his statement of claim, Mr Parkin pleaded that Vero had failed, or refused, to meet its obligations under the policy because it only offered to pay costs to repair part of the house, which did not indemnify the plaintiff under the policy. A declaration was sought that Vero be liable to pay to Mr Parkin the costs of rebuilding the house to the same standard, specification and condition as new. Alternatively, judgment for the cost of repairs. General damages were also claimed.

[19] In opening his case, Mr Parkin sought to clarify the basis on which his claim rested. He identified that fundamental to his claim was his allegation that Vero had undervalued his loss, and inappropriately sought to control the basis upon which the house was to be reinstated. Mr Parkin challenged whether Vero had properly assessed the damage and cost of reinstatement. He disputed Vero's view of the proper method of reinstatement of the damage. He submitted Vero was liable to pay him the cost to rebuild the house under the terms of the policy and in accordance with the assessment of damage and scope of works provided by his experts. It was further submitted that the parties had proceeded on the basis that Vero would pay the cash equivalent of the cost of reinstatement.

[20] In closing, Mr Parkin reframed the alleged breaches of the contract by Vero in the following terms:

(a) In breach of its obligations at law and under the terms of the policy, Vero failed to pay the indemnity cost of the reinstatement once an election was made to pay the indemnity cost;

(b) In breach of express terms of the policy, Vero refused to accept the claim in respect of all earthquake damage; and

(c) In breach of the express terms of the policy, Vero refused to settle the claim on the basis of a reinstatement to the policy standard of "rebuilding or repairing the damaged portion of the home using currently equivalent building materials and techniques to a standard of specification no more extensive, nor better than its condition when new".

[21] In addition, Mr Parkin articulated two further previously unidentified breaches of the contract of insurance, namely:

(a) In breach of the implied term of good faith, Vero failed to properly draw the attention of Mr Parkin to his entitlements under the policy.

(b) In breach of express terms of the Fair Insurance Code incorporated into the policy, Vero failed to:

(i) explain the special meanings of particular words or phrases as they apply in the policy;

(ii) explain the meaning of legal or technical words or phrases;

(iii) settle all valid claims fairly and promptly (or at all).

[22] Overarching these allegations is the question of who had control and responsibility for conducting the reinstatement. Mr Parkin submitted the reinstatement strategy was to be determined by the policy holder, the cost of which the insurer was obliged to meet unless clearly outside the terms of the policy.

Vero's response

[23] Vero refuted it had breached any obligation owed to Mr Parkin under the insurance policy. Damage to Mr Parkin's house was able to be repaired and, in accordance with the policy, Vero had always been prepared to meet the actual costs incurred by Mr Parkin to repair his home. Mr Parkin, however, was not entitled to a cash payment based on an estimate of the repair cost. Rather, Mr Parkin is required to incur the costs of undertaking the remedial work before Vero's obligation under the policy is triggered. This is a precondition to Mr Parkin receiving payment. Vero accepted that it is obliged to pay whatever is ultimately necessary to repair his house.

[24] Vero denied that an election had been made by Vero to pay him the indemnity cost of the reinstatement, which is an option available to it under the policy. In the circumstances of this case, placing Mr Parkin's claim on the "cash settlement list" did not have that effect, and this was understood by the parties.

[25] In terms of any remedy, at most, Mr Parkin was only entitled to declaratory relief, limited to clarification of the damage caused by the earthquake, how it is to be fixed, and whether Vero's proposal to remediate the damage discharges its policy

obligations. Vero submitted Mr Parkin is not entitled to general damages in the absence of a breach of its contractual obligations prior to the issue of proceedings.

[26] In response to the reformulated basis upon which Mr Parkin put his case, Vero re-emphasised that it was not obliged to pay Mr Parkin any amount under the policy until Mr Parkin had incurred costs in rebuilding or repairing the damage to his house. Further, that the obligation on Vero to pay costs incurred in repairing the damage, did not require Vero to meet the cost of identically replicating the home when it was new, but rather to meet the costs of remediation which achieves a comparable standard of structural performance, quality and appearance, and provides the same level of amenity.

[27] As a discrete issue, Vero contested whether Mr Parkin had any entitlement under the policy in respect of damage caused to retaining walls. It submitted Mr Parkin had not established that EQC had accepted liability under the Act for a claim in relation to damage to the land, rather than the house. As a result, the Vero policy had not been triggered in respect of the retaining wall. Alternatively, Vero's liability under the policy for damage to a retaining wall is limited to a maximum of $10,000. Mr Parkin does not dispute the alternative argument.

[28] In relation to the claimed breaches of the implied term of good faith and of the Fair Insurance Code as incorporated into the terms of the policy, Vero submitted that neither breach had been pleaded in its statement of claim, nor had Mr Parkin opened his case on such alleged breaches. Raising such allegations in closing submissions on the last day of trial, which had not been referred to in Mr Parkin's own statement of evidence, came too late. While denying the breaches, Vero should not have to meet a different case to that pleaded or opened upon by Mr Parkin, about which it had not had the opportunity to call evidence.

Issues

[29] The matters in dispute between the parties gives rise to the following issues:

(a) The correct interpretation of the insurance policy. In particular:

(i) which party has responsibility for and control of the reinstatement strategy;

(ii) is Mr Parkin entitled to rely on alleged breaches of the implied term of good faith and breaches of the Fair Insurance Code incorporated into Vero's policy; and

(iii) does placing Mr Parkin's claim onto the "cash settlement list" constitute an election by Vero to pay the indemnity cost of the reinstatement.

(b) What constitutes damage under the policy?

(c) What is the standard of repair required by the terms of the policy?

What is the identified earthquake damage to the house and the remedial solution necessary to repair or replace in order to meet the policy standard? This will require review of discrete areas of damage to the house and the appropriate approach to remediation. Separate areas of damage to the house have been identified and were the subject of expert evidence. Those areas of damage can be summarised as follows, and will be addressed in turn later in this judgment:

(i) The lower level piles: In particular, whether the proposal to "jack and pack" the piles at the lower level of the house to remediate floor dislevelment discharges Vero's obligations under the policy. Secondly, whether a corner pile situated proximate to filled ground requires attention.

Cladding: Whether the external cladding needs to be replaced. There is agreement that some of the exterior cladding has moved, however, there is disagreement as to whether sheets of the Colorsteel cladding have bulged. The repair strategy in

issue extends to issues relating to the movement of fixings and a section of cladding affixed to the junction with the neighbouring unit. The parties agree the timber framing of the house has racked in the earthquake and will need to be realigned. Mr Parkin's expert considers it necessary to remove the cladding in order to "re-plumb" the building. Vero's expert disagrees.

(ii) Driveway: The parties' experts are in agreement that the driveway will need to be replaced.

(iii) Rotation and cracking of the front foundation wall: The parties agree there is a crack in the front concrete foundation wall under the top level. The wall has rotated and needs to be repaired. There is agreement that filling the crack with an epoxy resin and constructing a façade wall to mask the rotation would be acceptable.

(iv) Loss of support to the garage piles under the upper level: The parties' experts agree the piles have lost support and cannot be repaired in compliance with the Building Code by reinstating the same foundation system which previously existed. The parties are in agreement that a modified "flitch beam" support system would be acceptable.

(v) Interior of the dwelling, including linings: The parties' experts agree the internal "gib" linings have suffered extensive cracking. Only one area of the house is in dispute, namely the west wall which Vero considers remains undamaged. The parties, however, are in substantial agreement the interior linings need to be replaced and that the stairways have been damaged and also need to be replaced.

(vi) Rotation of the timber retaining wall: The parties' experts agree part of the retaining wall has rotated outwardly and is in an "active state" as a result of the earthquakes. There is disagreement regarding whether the functionality of the wall has been reduced. The repair strategies vary from removal and replacement to retention of the retaining wall. An associated issue relating to the timber retaining wall is the appropriate remedial strategy to address or mitigate water emanating from the wall.

(d) In relation to the retaining wall, it is accepted that any claim is limited to a maximum sum of $10,000. However, there remains an issue as to whether Mr Parkin is entitled to make any claim under the policy for such damage.

(e) Can the cost of the repairs be quantified and accurate costings determined?

(f) Is Mr Parkin entitled to any award of general damages?

These issues are discussed in detail below. I have, however, summarised my findings at [213]-[214].

The insurance policy

[30] Before examining the issues that arise from the terms of the insurance policy, the relevant terms and conditions are required to be identified. The Vero policy provides:

> **We** will insure **you** for **Accidental** loss or damage to **your home** at the situation shown on the **schedule** during the **period of cover**.
>
> **What we will pay – at our option**
>
> 1. the cost incurred in rebuilding or repairing the damaged portion of the **home** using currently equivalent building materials and techniques to a standard or specification no more extensive, nor better than its condition when new; or

2. the **indemnity value** should **you** not rebuild or repair within 12 months unless **we** agree to extend the time period.

[31] Should the house suffer damage caused by earthquake, the policy provided that Vero would pay:

a. The difference between the cost of reinstatement and the amount received by **you** under the Earthquake Commission Act 1993 and its amendments provided that:

   i. the Earthquake Commission has accepted liability under the Act for the lost or damage;

   ii. **we** shall not be liable for any excess imposed by the Act; and

   iii. the total amount paid by **us** with the addition of the amount recoverable from the Earthquake Commission shall not exceed the amount that would be paid under the policy if the cause of the loss was other than natural disaster;

b. for loss or damage to any permanently installed swimming or spa pools, drains, pipes and cables, paths, driveways, garden walls (other than retaining walls that will be limited to $10,000) and tennis courts.

The basis for settling claims and all other policy terms and conditions will apply.

[32] The definition section of the policy relevantly provides:

Home means each dwelling (including residential flat or holiday home) within the residential boundaries of the property on which the **home** is situated.

…

but does not include:

- retaining walls except for the cover provided under the Retaining wall additional benefit;

...

- the land itself

Indemnity value is the amount needed to put **you** back in the same financial position you were in immediately before the loss occurred. This is either:

1. the **market value** of the **home** at the time of the loss or the damage; or

2. the cost of rebuilding or repairing the damaged portion of the **home** to a condition no better, or more extensive than it was when new, less an allowance for depreciation and wear and tear; or

3. the **market value** of the Landlords furnishings at the time of the loss or damage (where the Landlords extension is shown on the **schedule**).

Market value means the reasonable value of the insured property immediately prior to the loss or damage.

Approach to interpretation of the policy

[33] The approach to the interpretation of insurance contracts is no different from the construction of any other contract. In *O'Loughlin v Tower Insurance Ltd*, Asher J, in assessing his interpretive task observed:[2]

> [36] So I must strive to interpret the policy in a way that correlates with the presumed mutual intention of the parties, construed objectively. The parties' views as to what they subjectively thought and intended are irrelevant and I record that I put to one side the O'Loughlins' statements about what sort of cover they thought they had.

[34] The accepted approach of the extent to which there may be inquiry into the circumstances providing context to the plain words of a contract was articulated by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[3]

> Nor does the objective approach require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean.

[35] It is clear therefore that the construction of an insurance contract must commence with the plain words of the contract and the ordinary meaning ascribed to individual words. It may be necessary to bear in mind that some words have assumed a technical or special meaning.[4] Any conclusion reached by that process needs to be checked against the context of the factual matrix in which the agreement was made. The orthodox approach is neatly summarised in McGechan J's judgment in *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*:[5]

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2 *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 (citations omitted). See also *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262.

3 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

4 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL).

5 *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA) at [29].

> The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background — to "surrounding circumstances" — to cross-check whether some other or modified meaning was intended. Apart from matters of previous negotiation, and matters of purely subjective intention as to meaning, both excluded on policy grounds, one looks at everything logically relevant.

What is meant by "damage"

[36] Before moving to the terms of the policy itself, it is necessary to clarify what constitutes damage, although there does not appear to be significant disagreement between the parties in relation to that concept. In *Ranicar v Frigmobile Pty Ltd*, Green CJ considered the meaning of damage in the following terms:[6]

> In my view, the ordinary meaning, and therefore the meaning which I should prima facie give to the phrase "damage to" when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged. It follows that not every physical change to goods would amount to damage. What amounts to damage will depend upon the nature of the goods.

[37] In the context of insurance, Lord Atkinson in *Moore v Evans* remarked:[7]

> In the enumeration of the perils insured against the words "damage to the property" must mean, I think, "physical injury" to the property, but it is difficult to attach any rational meaning to the words "misfortune to the property" other than "loss or physical injury."

[38] The Court must ask itself whether the item in question has suffered damage in the ordinary sense of the word. That is, whether the physical state has been altered in a negative way, in which case the item is prima facie damaged.[8]

Responsibility or control of the reinstatement

[39] The policy is clear on its face. The insured, Mr Parkin, must actually incur the costs of remediating his property before Vero's obligation as the insurer is

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6 *Ranicar v Frigmobile Pty Ltd* (1983) 2 ANZ Insurance Cases 60-525 (TASSC).

7 *Moore v Evans* [1918] AC 185 (HL) at 191.

8 See *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275; *Kraal v Earthquake Commission* [2014] NZHC 919, [2014] 3 NZLR 42; *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307 (HCA); *AXA Global Risks (UK) Ltd v Haskins Contractors Pty Ltd* [2004] NSWCA 138, (2004) 13 ANZ Insurance Cases 61-611.

triggered to pay the replacement sum.[9] In the absence of Vero opting to pay the indemnity value as provided in the policy as the second of two options available to it after the elapse of 12 months, there is no entitlement on the part of Mr Parkin to a cash payment upon assessment and quantification of the loss alone. In respect of a claim under the policy, the contract of insurance provides:

> **5. Claims**
>
> a. On the happening of any event that may give rise to a claim under this policy **you** must:
>
> …
>
> iv. obtain **our** consent before proceeding with repairs (other than for replacement or repair of window glass);
>
> …
>
> b. **You** shall not without **our** written consent incur any expense or negotiate, pay, settle, admit, repudiate or make any agreement in relation to any claim.

[40] Before Mr Parkin can incur repair costs, he is required to obtain Vero's consent to the method of repair and its cost, which may not be reasonably withheld by the insurance company. The terms of the policy envisage the type of process discussed by Dobson J in *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd*, where His Honour remarked:[10]

> [38] I endorse the suggestion that an insurer and insured working through the detail of a claim in circumstances such as the present should both be required to measure the liability involved, reasonably. It is relevant in the limited sense that entitlement of an insured or limitation on liability for an insurer in relation to particular items can seldom be resolved in absolute terms. I acknowledge that beyond that qualification, imploring parties to such a dispute to be reasonable cannot lead to an objective resolution when reasonableness can so easily be in the eye of the beholder.

[41] Ordinarily where dispute arises between the parties, each will need an independent assessment of the damage, and the appropriate way to repair or replace to the standard required by the policy. This is likely to take the form of an exchange

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9 *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [27].

10 *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965.

of scopes of work, followed by discussion and agreement on outstanding issues. The remedial strategy could then proceed.

[42] Mr Parkin has sought to rely on the judgment of Whata J in *East v Medical Assurance Society New Zealand Ltd*.[11] In that case, the operative policy term read as follows:

> [The Medical Assurance Society] will cover the cost of rebuilding or restoring the dwelling to a condition substantially the same as new, so far as modern materials allow, and including any additional costs which may be necessary to comply with any statutory requirements or territorial authority by-laws.

[43] The insurer in the case argued at first instance that the phrase "will cover the cost" required the insured to first incur the cost of the repair before the insurer was liable to reimburse the insured. In relation to the construction of this particular part of the policy, Whata J stated:[12]

> … the reference to "will cover the cost" does not obviously mean that [the insurer's] obligation to pay is only triggered when the costs are actually incurred or just about to be incurred and subject to an incremental approval basis. Different words are needed to place such a strict and cumbersome fetter on the prima facie right to replacement value compensation.

[44] The wording of the relevant condition of the policy in that case was different from the Vero policy. In particular, the Vero policy refers to the insurance company paying *"the cost incurred in rebuilding or repairing the damaged portion of the home…"*. However, leaving that distinction aside, the Court of Appeal's recently delivered judgment, allowing an appeal in respect of that aspect of Whata J's judgment, eclipses the reliance that may otherwise have been available to Mr Parkin based on the High Court judgment.[13]

[45] The Court of Appeal, in allowing the appeal in part, set aside the declaration made in this Court that the insurance policy did not require the cost of rebuilding or restoring the insured's dwelling to have been incurred (or about to be incurred)

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11 *East v Medical Assurance Society New Zealand Ltd* [2014] NZHC 3399.
12 At [24].
13 *Medical Assurance Society of New Zealand v East* [2015] NZCA 250.

before the insurance company was liable to pay the replacement value. The Court of Appeal found to the contrary, and observed:[14]

> We should add that, contrary to the Judge's conclusion, we are not satisfied that [the insurer's] approach — that its liability to cover the cost only arises when those costs are actually or about to be incurred — "place[s …] a strict and cumbersome fetter on the prima facie right to replacement value compensation". *The Easts' right to settlement on that basis is absolute once they incur a contractual obligation for the purpose of restoring the building*: it has no bearing upon the timing of and basis for liability.

[46] While Mr Parkin must actually incur costs, that does not equate to a requirement that he expend his own money. Rather, a legal obligation to pay on his part is required to have been created.[15] The incurring of costs does not cap the insurance company's liability. As Vero itself acknowledged, should further damage be uncovered in the course of repairs covered by the policy, Vero's contractual obligations continue to oblige it to meet the costs necessary to repair that damage.

[47] It follows therefore that there is no requirement that Vero's contractors must carry out the repairs. Mr Parkin would be free under the contract to use his own contractors subject to compliance with the terms of the policy. These include the requirement that Vero consent to the works subject to the overarching requirement of reasonableness.

The evolving nature of Mr Parkin's claim

[48] Mr Parkin in his pleadings alleged that Vero had failed or refused to meet its obligations under the policy because it had only offered to pay costs to repair part of the house, which did not indemnify him under the policy. Mr Parkin sought to rely on an interpretation of the policy, which he alleged required Vero to pay the costs to repair or rebuild the damaged portion of the house. No mention was made of the need for Mr Parkin to incur the costs of rebuilding or repairing, nor that liability to pay the indemnity value was only a secondary alternative at Vero's option.

[49] Mr Parkin's pleaded claim was clarified in opening by reference to Vero being liable to pay costs to rebuild the house "under the policy terms, in accordance

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14 At [29] (emphasis added).
15 *Hawkins v Bank of China* (1992) 26 NSWLR 562 (NSWCA).

with damage assessment and works required as set out by the plaintiff's experts". Mr Parkin submitted that in accordance with the terms of the policy, the appropriate reinstatement strategy was for him to determine in accordance with the expert advice he had received. The insurer was obliged to meet the cost of that remediation subject to Vero rights to refuse to approve unreasonable costs.

[50] Vero did not substantially disagree with that approach. It submitted that it was inherent in the "costs incurred" precondition of its liability that it was for the insured to organise the repair. Vero expressly disavowed any responsibility for it to drive the remedial work, or of having any right to initiate or manage the remedial process. Vero's position, however, is that Mr Parkin provided no scope of works or costings before he issued his proceedings. There was therefore nothing which could trigger its liability for "costs incurred" under the insurance contract.

[51] Mr Parkin's argument, however, became more focussed in closing his case. Firstly, he identified what he claimed to be breaches of the insurance contract relating to the implied term of good faith and failures to comply with the obligations of the Fair Insurance Code written into the policy document, which was said to have arisen as a result of the way Vero approached and handled Mr Parkin's claim.

[52] Secondly, that the obligation to pay arose not from the primary obligation of the insurer to pay the costs incurred in rebuilding or repairing the damaged house, but as a result of failing to pay the indemnity cost of the reinstatement based upon an election said to have been made by Vero in placing Mr Parkin's claim on the "cash settlement list".

[53] Both of these allegations are dealt with as separate issues in this judgment. The first issue, which was only articulated in closing, the breach of express and implied terms of the insurance contract, arises from the narrative of the management of Mr Parkin's claim, and the interactions between himself and Vero prior to him issuing the proceeding. It can conveniently be dealt with at this point.

Alleged breach of duty of good faith and the terms of the Fair Insurance Code

[54] Mr Parkin submitted that he had not been made aware by Vero that under the insurance policy he was required to incur the costs of reinstating his house before Vero was obliged to make any payments towards his claim. He submitted this was because Mr Youl, Vero's claims manager, was labouring under the same misapprehension that Vero had control of the reinstatement process. It was submitted on behalf of Mr Parkin that he was unaware that Vero held the right to elect between paying the cost of reinstatement, or paying the indemnity value, and he proceeded in the belief he had the right to make this election. Mr Parkin submitted that Vero had failed to properly explain to him what his policy entitlements were. Mr Youl rejected that proposition.

[55] It was submitted on behalf of Mr Parkin that, had he been aware of how the Vero policy was intended to operate, he would have progressed the claim himself, and that, as a result of Vero failing to advise him of his policy entitlement, his claim remained unsettled. This, it was submitted, was a breach by Vero of its obligations of good faith under the policy.[16]

[56] The alleged failure by Vero to explain to Mr Parkin his policy entitlement was submitted to have been compounded by Vero then failing to apply the terms of its own policy to the management of Mr Parkin's claim. Under the policy, Mr Parkin had the responsibility or right to assess the costs of reinstatement and to embark on the repair project with the guidance of his chosen professional advisors. Apart from some parameters relating to the standard and specification of the repairs under the policy, the only other requirement on an insured was to obtain Vero's consent before proceeding. Mr Parkin submitted that any refusal of consent would have to be reasonable and consistent with the insurance company's duty to act in good faith. Mr Parkin submitted this was not how Vero proceeded to deal with his claim.

[57] There is no evidence of Mr Parkin having received expert advice regarding the damage to the house, or obtaining a scope of repairs and costing as contemplated by the policy prior to him commencing his proceeding. Since that time, however, he

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[16] *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162 (KB); *Fussell v Broadbase Christchurch Ltd* (2011) 16 ANZ Insurance Cases 61-913 (HC) at [140].

has instructed experts, and it is submitted he is now entitled to rely on their view in assessing the work to be done to reinstate his house.

[58] Mr Parkin submitted that Vero did not manage his claim in accordance with his policy entitlements, but applied its own internal management procedure which resulted in a failure by it to correctly apply the terms of the policy. He contended that Vero had conducted itself on the basis it was entitled to determine the method of reinstatement and apply the advice and costing of its experts to assess the proper cost of reinstatement. Mr Parkin submitted there was no basis for this in the contract of insurance between the parties.

[59] MWHM was engaged by Vero to assess the damage at Mr Parkin's house at a very early stage, in accordance with the arrangements made between MWHM and Vero to assess damage, determine scope of repairs, and price work for the purpose of carrying out reinstatement of properties insured by Vero. This, it was submitted, had been imposed by Vero onto policy holders, including Mr Parkin, despite him never having consented to such a process. Mr Parkin submitted this was a process which fell outside the terms of the policy.

[60] Mr Parkin identified instances where he submitted this approach by Vero was to his detriment. Firstly, Vero did not progress claims in relation to houses in the CERA white zone, on the basis that repair work would not be able to commence until the final zoning decision had been made. Mr Parkin submitted there was no restriction on carrying out repairs on properties in the white zone. The Council was still issuing building consents at that time for properties in the red zone and building was not prohibited.[17] Mr Parkin referred to Vero's refusal to obtain an engineer's report to properly assess the damage while the house remained situated in the white zone. He submitted there was no impediment to obtaining such a report, and this was an example of Vero dictating the management of the repair in a manner outside the terms of the policy.

[61] Either Vero could have instructed an engineer to progress a cash settlement under the second option of the policy, or Mr Parkin could have instructed an

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[17] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 at [27].

engineer himself to progress his claim under the first option. Mr Parkin submitted that the failure to advise him of his right to commence repairs himself under the policy caused him to wait for Vero to progress his claim and breached the Fair Insurance Code, which had been incorporated into the terms of the contract of insurance.

[62] Secondly, Mr Parkin points to a further delay in settling his claim after the property had been designated as green zone, as a result of Vero's own internal assessment programme, known as "CHIP". Under the CHIP programme, assessments were made regarding the order in which, or priority given to the commencement of repairs, according to which area a house was located. Mr Parkin submitted this was imposed by Vero's own internal procedures in breach of the insurance contract, and did not reflect his rights and Vero's obligations under the policy.

Assessment of the allegation of breach

[63] The evidence discloses that Vero did introduce a claims management process to handle the unprecedented large number of claims arising from the damage to properties caused by the Canterbury earthquake sequence. Mr Youl stated that Vero had to adjust its normal claims handling procedures in order to deal with the volume of claims it received.

[64] Part of Vero's response, as with other insurance companies, was to enter into business relationships with construction companies to manage the assessment and costing of reinstatement of damaged properties. Mr Youl's evidence was that the programme was established to help manage the reinstatement process for its clients, notwithstanding that under most of its policies, including Mr Parkin's, Vero was not required to directly undertake the repair work. Mr Parkin did not dispute that it was open to Vero to offer additional settlement options to home owners. He says however, it was not entitled to unilaterally substitute a claim settlement procedure that it considered more efficacious than that set out in the insurance contract, which Mr Parkin submitted had occurred in his case.

[65] Vero submitted that it has no right or obligation to drive the remedial work or manage the remedial process. It was not required under the insurance contract to provide a scope of works, or provide Mr Parkin with the type of technical input, such as the services of an engineer. Vero submitted that in processing the claim under the auspices of its joint venture with MWHM, it was offering to help the insured manage the reinstatement of their property, but that this did not create any obligation on Vero to repair the property outside the terms of the policy. Vero submitted that following notification of a claim it carried out an assessment of the damage to determine whether it can be repaired, or whether the house may need to be rebuilt. That assessment is for its own purposes, and does not change the extent of its contractual obligation, or the onus on the insured establishing damage, or of taking responsibility for the remediation.

[66] In reliance upon the type of dynamic outlined in *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd*, discussed at [40] above, Vero submitted that assessments and preliminary scope of works would normally be obtained for the purposes of dialogue between the insured and the insurer, and that it remained for the insured to challenge the insurer's view of the extent of the damage, how it is to be repaired, and the cost. Vero submitted that Mr Parkin did not do that in the present case before commencing his proceedings.

[67] While he advised Vero that he was obtaining a builder's report in July 2012, and expressly requested that Vero desist from proceeding with its initiative to obtain a further assessment for the purpose of developing a more detailed scope of works upon which to base a "cash settlement list" offer, no alternative scope or report was provided by Mr Parkin prior to the commencement of proceedings.

[68] Vero's interaction with Mr Parkin, and in particular with Mr Youl after he took over management of the claim, is largely documented in email exchanges between Vero, and Mr Parkin and his insurance broker. Mr Youl also gave evidence of Vero's file notes recording telephone conversations between Vero staff members and Mr Parkin, in addition to his own conversations with Mr Parkin, which were followed by emails, either recording an agreed course of action, or confirming Vero's position regarding matters raised by Mr Parkin.

[69] That evidence discloses that Mr Parkin was becoming increasingly frustrated with the lack of progress in respect of his claim. It is also apparent that both Mr Parkin, his broker and Vero were dealing with Mr Parkin's claim within the framework of the processes provided to policy holders by the Vero/MWHM joint venture. In following that course, there were advantages and disadvantages to both parties. Importantly, however, the adoption of that process did not alter the terms and conditions of the contractual relationship between Mr Parkin and Vero. In my view, it did not result in Vero misleading Mr Parkin about his rights under the policy.

[70] In December 2011, Mr Youl, in an email to Mr Parkin, made it clear what Vero's position was in respect of obtaining a full repair scope for his house with cost estimates. In the absence of CERA completing its geotechnical investigations for the purpose of determining its land classification, no accurate scope or price for the repairs was able to be obtained. In particular, Mr Youl noted that in the absence of knowing the technical requirements necessary for the foundations in respect of the yet to be determined classification of land, it was not prepared to advance matters. Vero submitted that if Mr Parkin was dissatisfied with the position being taken by Vero, he, in terms of the policy, could have progressed the remediation of the house, notwithstanding the white zone status of the property.

[71] Whether, in those prevailing circumstances, he could have obtained an accurate scope of works, a building consent, and engaged a builder to carry out the work is moot. The short point, however, is that Mr Parkin did not choose that course. Like other people in the same situation of having to wait for a determination as to whether the white zone went green or red, he had little option but to wait. While that resulted in further frustrating delay it was a realistic and sensible course to follow. Mr Parkin would have been entitled to a cash payment for the total value of both his land and building if the land had been classified as red zone.

[72] Similar considerations arise in respect of Mr Parkin's frustration at the lack of progress after the land classification changed from white to green in May 2012. Mr Parkin was insisting that engineering input be obtained by Vero. In replying to this request, Mr Youl advised Mr Parkin's insurance broker that, in Vero's view, geotechnical and structural engineering advice would not presently be necessary

until repairs had entered the preconstruction phase, and consents were required for any building. Reference was made by Mr Youl to possible changes to build requirements and guidelines by the Council or the Department of Building and Housing which may render any reports out of date. Mr Youl advised that Vero would wait until the locality of Mr Parkin's house had been released by its "CHIP risk assessment programme" and would not be considering further engineering input until that time.

[73] Mr Youl observed in his email to Mr Parkin's broker that the property had been inspected three times and each time found to be repairable. He further observed the earlier MWHM price estimates were sufficient for setting "our reserves at this stage of the claim" and that "clearly" a full reinstatement scope will be produced and agreed with Mr Parkin before work was actually started. If engineering input was required at that stage, it would then be arranged. Mr Youl advised Mr Parkin's insurance broker that if Mr Parkin felt strongly an engineer was required he could make that arrangement himself.

[74] Mr Parkin has referred to this issue as an example of an obstacle presented by Vero which stalled the progress of Mr Parkin's claim, noting the reference to the "internal CHIP risk assessment programme". This, it was submitted, was an example of Vero's own internal procedures being imposed on Mr Parkin in breach of the insurance contract.

[75] I am not satisfied that Mr Parkin's criticism is borne out upon analysis. Mr Youl's email specifically makes reference to Mr Parkin having the option of seeking engineering advice himself, which accords with the terms of the policy. It is also apparent that Mr Parkin had an ongoing concern about the differing approaches to remediation of MWHM on behalf of Vero, that the property could be repaired, and that of EQC, which at least initially assessed the property as a rebuild.

[76] Mr Parkin also seemed to be labouring under a misapprehension that Vero had not obtained engineering advice in respect of the house. This was a contention Mr Parkin persisted with when giving his evidence. However, an engineer had visited the house in November 2011 as part of the MWHM assessment, and had

concluded the house could be repaired. Mr Parkin himself referred to an onsite meeting with a MWHM contracted engineer and builder in an email he sent to Vero on 14 December 2011.

[77] The following month, in July 2012, there was an onsite meeting attended by Mr Parkin and representatives of Simplexity and MWHM, as a result of which approval was given by Mr Youl to engage an independent builder to provide an estimate for the purpose of progressing the "cash settlement" process. Mr Parkin did not have confidence in MWHM assessments, and this initiative was viewed as a way of making progress. In August, after Mr Parkin had been contacted by the builders instructed by MWHM to prepare the new estimate of costs, he advised through his broker that the inspection should be put on hold until he had obtained his own building report. That report had not been provided to Vero before Mr Parkin commenced proceedings the following month.

[78] I am not satisfied that Vero breached any contractual terms of the insurance policy, implied or otherwise. While Mr Parkin's claim was managed within the purpose designed framework of the centralised process put in place by Vero to administer the large number of claims generated by the Canterbury earthquakes, it did not alter the terms and conditions of the policy which governed the contractual relationship between Mr Parkin and Vero. I am not satisfied that Mr Parkin did not understand his contractual rights under the insurance policy. He did not give evidence to that effect. Nor am I satisfied that any actions on the part of Vero, in particular Mr Youl, led Mr Parkin to misapprehend the rights and obligations of the parties under the policy.

[79] Mr Parkin was represented by an insurance broker who was actively involved in the claim process. In my view, it is apparent that both parties saw advantages in having Vero directly involved in the management of the claim by utilising resources provided by MWHM to assess, scope, and cost the remedial work. I do not find there was any breach of the obligation of good faith on the part of Vero in the way it sought to manage Mr Parkin's claim. Similarly, I am not satisfied there has been any breach of the Fair Insurance Code referred to in the introduction to the insurance policy. Express terms relied upon by Mr Parkin in that regard, relating to the

explanation of special meanings of particular words or phrases in the policy, or the meaning of legal or technical words, simply do not arise on the evidence. The requirement on the insurance company to settle all valid claims fairly and promptly is a duty to be assessed against the terms of the insurance contract, and the conduct of the insurance company managing the claim of the insured. I have not found Vero to have acted unfairly, nor was it unresponsive to Mr Parkin in its endeavour to progress his claim in the circumstances pertaining to his house.

[80] Mr Parkin was clearly frustrated by what he considered was a lack of progress in settling the claim. However, as I have already observed, I have the strong impression that, in large part, this frustration related not only to the delays associated with remediating the damage to his property, but also out of Vero's assessment that the property could be repaired, and what Mr Parkin considered was the inadequate building reports and assessments of costs to achieve an appropriate standard of remediation. Having received advice from EQC that the house was a rebuild, Mr Parkin's discontent with the approach taken by Vero may be understandable. However, EQC's assessment was a limited one. As later became apparent, EQC's assessors did not enter the house at the time they visited the property, and EQC advised Mr Parkin in February 2012 that the settlement of his EQC claim was actually based on Vero's assessment of the damage, not its own.

[81] I have taken the time to deal with Mr Parkin's argument relating to the alleged breach of the duty of good faith and the Fair Insurance Code, as incorporated into the policy document, because it was apparent on the evidence that the process developed by Vero to manage the large wave of earthquake claims was the framework within which Mr Parkin and Vero worked to progress Mr Parkin's claim. I have not found, however, that the express terms of the policy were displaced. The contractual relationship between the parties continues to be governed by the express terms of the insurance policy.

[82] While there was some cross-examination of Mr Youl about the approach taken by Vero to Mr Parkin's claim regarding the imposition of a remediation strategy on him, the allegation of breaches of the implied duty of good faith or of obligations under the Fair Insurance Code were only articulated in closing. These

allegations were not pleaded by Mr Parkin, nor was it the basis upon which he opened his case. Vero was not on notice that these were allegations it was required to meet, and it was not apparent there were live issues between the parties until identified in Mr Parkin's closing written submissions.

[83] While Vero was able to respond to the wider allegation of a breach of contract, and called evidence of its narrative of the management of Mr Parkin's claim, that was in the context of the express terms of the policy. Vero, as the defendant, is entitled to be fairly and fully informed of the case that it must meet. While a degree of flexibility can be extended to reflect the organic nature of the way evidence may develop at trial, essentially, Mr Parkin's claim, based upon a breach of the duty of good faith and terms of the Fair Insurance Code, represented different allegations from that pleaded.

[84] Mr Youl, who appeared as Vero's representative, gave his evidence-in-chief based upon the claim pleaded by Mr Parkin and the content of Mr Parkin's brief of evidence. Neither document referred to Mr Parkin's misapprehension of his contractual rights, nor did they identify statements or representations made by Mr Youl which Mr Parkin considered, either expressly or implicitly, had misled him about his rights. Mr Parkin, in oral evidence, did not expand upon the matters canvassed in his written statement of evidence.

[85] It is not acceptable for these allegations to be made for the first time in the plaintiff's closing address, and for the defendant to have to answer those new discrete allegations at that late point in the trial. For that reason alone, these belated allegations of breach would fail. But in any event, on the available material, notwithstanding these matters having not squarely been put in issue from the outset, I would not have found the alleged breaches established.

Cash settlement proposal

[86] Similar considerations arise in respect of Mr Parkin's allegation that Vero was in breach of the terms of the policy when it failed to pay the indemnity costs of the reinstatement once an election had been made to pay the indemnity cost. This was not the basis upon which the claim was pleaded.

[87] In opening, Mr Parkin identified his claim as an entitlement under the policy for a declaration that he is entitled to follow the advice provided to him by various building professionals and need not be dictated to by the defendant's experts, in whom he has no confidence. Alternatively, he sought an award of damages reflecting the amount of the cost of reinstatement. This is a clear reference to the first option under the policy for recovery of the cost of rebuilding or repairing the damage to the house. Vero denied that it had such an obligation in the absence of such costs being incurred.

[88] In closing, however, Mr Parkin identified a failure by Vero to pay the indemnity value after an election had been made by Vero to pay cash. The failure to do so and settle the claim was alleged to constitute a breach of the contract. The genesis of this argument was Mr Youl's evidence about placing Mr Parkin on the "cash settlement list". Although Mr Parkin makes no reference in his evidence to this event, he argued that the initiative proposed by Mr Youl constituted an election by Vero to pay Mr Parkin an indemnity value in accordance with the second option provided for in the insurance policy, available to Vero to exercise at its choice after the elapse of 12 months.

[89] Mr Parkin submitted that Vero took steps to pay the cash equivalent of the cost of repairs after placing his claim in the "cash settlement list" on 8 December 2011. Mr Parkin submitted that from that point the parties were working towards a cash settlement on the basis of the second option provided for in the policy. The subsequent assessments by MWHM were considered deficient to meet the reinstatement standard under the policy for the purpose of the cash settlement.

[90] Mr Parkin submitted that he was entitled to the cost of reinstatement from the time Vero accepted the claim could be dealt with by way of a cash settlement. Because the house was very new, the indemnity value would, it was submitted, be identical to the cost of reinstatement. In the absence of Vero making a settlement proposal in accordance with the agreement to cash settle, Mr Parkin submitted Vero has continuously been in default of its obligation to pay the "proper amount".

[91] Mr Parkin's argument, however, does not stand scrutiny. It is correct that his claim was placed on the cash settlement list, however, that was done for strategic reasons, in order to expedite the obtaining of a full scope of repair for Mr Parkin's house. This initiative had been precipitated by an email from Mr Parkin who reported that the representative of Simplexity, who had completed an earlier inspection of his house in December, had informed him that it was a rebuild. That advice was inconsistent with Mr Youl's understanding of the position. After making inquiries from MWHM, Mr Youl emailed Mr Parkin advising that MWHM would produce a full repair scope with cost estimates, but that this would not be produced for some time as the property was in the white zone. The position taken by Vero at this time I have reviewed earlier, at [10]–[14]. In sum, Mr Youl advised that a final scope would not be produced until the zoning changed to green.

[92] Later that day, Mr Youl had a telephone conversation with Mr Parkin, who expressed his unhappiness with having to wait for a change to the zoning. In the course of the telephone discussion, Mr Youl agreed to put Mr Parkin on the "cash settlement list" in order to expedite a fully scoped repair for his house. Mr Youl's evidence was that the "cash settlement list" was a list of claimants who had expressed an interest in settling their claims with Vero before repairs were undertaken. The first step in this process was to obtain a full scope of repair in order that a settlement figure could be negotiated. It is immediately apparent that this extra contractual process is a means of resolution available to the parties, should they agree, which stands apart from the terms and conditions of the insurance policy itself.

[93] Mr Youl's understanding was that Mr Parkin did not necessarily want to cash settle his claim, but he considered that obtaining a full scope of repairs may help address Mr Parkin's concern relating to MWHM reinstatement report.

[94] Vero submitted that the agreement to put Mr Parkin on the "cash settlement list" did not amount to a commitment to pay Mr Parkin whatever amount of cash he claimed so long as he could refer to a quantity surveyor's scope that supported that amount. That submission extends further than what I understood Mr Parkin to be contending for. However, I accept that entry into the cash settlement list did not

create an enforceable obligation to pay cash. The parties would still have to negotiate an agreed amount in settlement of the claim. The failure to achieve such agreement could not constitute a breach of the contract.

[95] Entry onto the "cash settlement list" was, I accept, an "extra-contractual" initiative commonly agreed upon between insurers and the insured as an alternative means of settling claims. Such a development was referred to by Gendall J in *Rout v Southern Response Earthquake Services Ltd*:[18]

> It may well be that Southern Response, outside its obligations under the policy, has been prepared voluntarily to make an immediate cash payment to the Routs for the cost of building or repurchasing a replacement house (as seems to have been the approach in the earlier negotiations between the parties), but this is always entirely optional and a matter for the company. The policy does not allow the Routs to insist on a rebuild cost cash payment being made, as the Routs seek in their statement of claim, before rebuilding actually takes place and those costs are incurred.

[96] No such rebuilding has happened here. The cash settlement process is to be distinguished from the second alternative means by which Vero, at its option, could settle a claim under the insurance policy. That is an entirely different course available to the insurance company in the absence of an insured person incurring costs to rebuild or repair damage within 12 months of the notification of claim. At Vero's option it can then pay the indemnity value.

[97] The terms of the policy were not modified by the initiative taken by Mr Youl with the agreement of Mr Parkin to place his claim on the "cash settlement list". It does not constitute an election by Vero to pay indemnity value in accordance with the alternative option available to Vero under the policy to settle a claim. I therefore reject the submission made by Mr Parkin that Vero was under any obligation to pay the indemnity cost of the reinstatement, or that it had made an election to do so.

[98] At best, the placing of Mr Parkin's claim onto the "cash settlement list" was an extra-contractual initiative that may possibly have led to the settlement of the claim outside the terms of the policy. It is apparent, however, from the evidence that this was not the intention of either Mr Parkin or Mr Youl on behalf of Vero. The

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[18] *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262 at [180].

course was adopted in order to placate Mr Parkin's concerns regarding MWHM's assessment of the damage and the cost of repair in an endeavour to expedite a full scope of repair with pricing, which would not otherwise have been available given Vero's approach to finalising an accurate scope and price of repairs until the land on which Mr Parkin's house sat was rezoned.

[99] Mr Parkin, at this point, could have rejected Mr Youl's proposal and elected to instruct his own building professionals with a view to commencing the repair process himself, as contemplated by the policy. This is what he intimated he would be doing in his last communications with Vero through his broker in July 2012.

[100] As previously discussed, there were likely practical difficulties in embarking on that course prior to determination of the classification of the land, which finally occurred in May 2012. Alternatively, it is possible the cash settlement process may have ultimately resulted in a mutually acceptable settlement. The fact is, however, that while this process, such as it was, remained extant, it could not constitute a breach of the insurance contract. The process sat outside the terms of the contract.

[101] I therefore reject Mr Parkin's argument that Vero was in breach of its obligations under the policy by not paying him the indemnity value of reinstatement after he was placed on the cash settlement list by Vero.

Post-commencement obligation to settle

[102] Mr Parkin submitted that Vero's duty of good faith, and its obligation to settle, endures beyond the issuing of proceedings and whilst litigation between the parties remains on foot. He submitted:

> 54. Vero appears to assume that any contractual obligations it had in respect of reinstatement came to an end once Court proceedings were instigated in 2012. The management of the plaintiff's claim has effectively been stopped by the defendant since this time. While it is clear that the duties of good faith attaching to claims handling do not attach to the conduct of litigation, there is no authority for the proposition that the contractual duties to settle a claim are placed in limbo if a homeowner elects to litigate. The contract of insurance remains on foot and the insurer remains obliged to meet its obligations under it.

> 55. On this basis Vero has a continuing obligation to properly manage Mr Parkin's claim. That is, Vero is still obliged to assess the damage and settle the claim, in good faith, within a reasonable period of time in the usual way.

[103] Vero rejected this suggestion. It relied on the comments of Winkelmann J in *Pegasus Group Ltd v QBE Insurance (International) Ltd*, where Her Honour stated:[19]

> … once proceedings are on foot between the parties, a litigant must be free to argue its case in accordance with the relevant law and rules of practice. The implications for [the insurer] of its conduct, if any, fall to be determined within the context of the High Court Rules. It would be unfair to fetter either party to litigation with implied equitable or contractual obligations to each other once proceedings have been issued.

[104] Mr Webb's submission, in my view, is urealistic. Once a party has commenced proceedings against the other, that party has agreed to submit resolution of the dispute to the formal judicial process, which will be binding upon both parties. It is unrealistic to suggest the parties are mandated to nonetheless resolve their differences. While they are able to do this by way of settlement, there is no obligation to do so. Further, in this case, the very reason the matter is being litigated is because the parties formed apparently irreconcilable views about fundamental aspects of the policy. There would be little to be gained from Vero putting the same offer to Mr Parkin or communicating its same position during the course of litigation, and Mr Parkin continuing to reject that offer or deny the legitimacy of Vero's stance.

The repair standard

[105] The standard of reinstatement provided by the contract of insurance is to rebuild or repair the damaged portion of the home "… to a standard or specification no more extensive, nor better than its condition when new". The competing views of the parties in respect of this standard of repair required by the policy is particularly acute in relation to the approach to the remediation of the subfloor area, and in particular the approach to be taken to the lower level piles, in order to fix the dislevelment of the floors.

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[19] *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941, 1 December 2009 at [280].

[106] Mr Parkin submitted the words of the policy require the damaged portion of the house to be restored in a manner that achieves a result that "is as good in all respects as it was when it was new". By contrast, other standards of repair such as "reasonable", "sound", "good trade practice and the like", which he submitted Vero's experts were contending for, are not sufficient. Mr Parkin further elaborated on his interpretation of the "when new" standard. The opposite of "new", he submitted, is "used" or "second-hand".

[107] Repairs of damaged portions of the home would need to be restored to a condition whereby a reasonable and informed onlooker would conclude the previously damaged part of the building is new and not patched or second-hand. In the present case, it was submitted on behalf of Mr Parkin the house was new at the time of the earthquakes, and therefore it was incumbent on Vero to apply a standard of repair which reinstates the house to that "when new" condition. By way of illustration, it was submitted Mr Parkin should not have to tolerate a building which has been "jack and packed", or is anyway outside of new-build tolerances.

[108] Vero rejected a suggestion that any remedial strategy is required to achieve a house in identical condition in all respects to that on the day it was finished. If that was the case, it would be impossible to ever discharge the obligation by repair, because a repaired element will never be identical to the item which was new. By definition, an element of the building that has been damaged can only be repaired to an adequate standard, on Mr Parkin's argument, by being replaced. The concept of repairing damage would become redundant if an identical new condition was the standard required.

[109] Vero submitted that such a level of "equivalence" is not sustainable, and that the "identical replica" argument has previously been rejected by New Zealand Courts.[20] Mr Parkin in response submitted that Vero's reliance on the jurisprudence identified, wrongly applied the issue of equivalence to the present situation. He submitted the policy required the house to be brought to a standard "when new", which is different from the "as new" standard of reinstatement discussed in

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[20] *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2012) 17 ANZ Insurance Cases 61-965; *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275.

O'Loughlin v Tower Insurance Ltd and the "as when new" standard considered in *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd*. Mr Parkin's house was new at the time it suffered the earthquake damage, and there were no pre-existing defects or deterioration. The reinstatement strategy therefore required by the policy was to return it to as it was "when new".

[110] *O'Loughlin v Tower Insurance Ltd* and *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* concern total losses in respect of homes which were of some vintage, and actual replication was not possible. The reinstatement issue that arises in respect of Mr Parkin's house is not the provision of an equivalent house, as was the case in the earlier New Zealand cases. In the present case, it was submitted there is no requirement for alternative building materials or methods, because Mr Parkin's house can be reinstated exactly as it was "when new".

[111] The New Zealand authorities referred to by counsel were capable of being distinguished on the basis put forward on behalf of Mr Parkin. The wording of each policy may be different, and in both *Turvey Trustee Ltd v Southern Response Earthquake Services* and *O'Loughlin v Tower Insurance Ltd* the Court was concerned with the replacement or rebuilding of whole houses. In *Turvey Trustee Ltd v Southern Response Earthquake Services*, the rebuild or repair standard provided by the policy was "as new". This was recognised by Dobson J as being different from a "when new" standard:[21]

> There has been consideration of phrases in policies such as an obligation to reinstate or repair to a condition "equal to but not better or more extensive than the condition when new". Although Mr Johnstone acknowledged that the Lion Nathan decision appeared to use the phrases "as new" and "when new" as synonymous, I accept his submission that "when new" suggests a narrower basis for comparison between the insured item and its replacement than "as new", which conveys a sense of comparison between old and new, rather than direct replacement.

[112] In *Lion Nathan Ltd v New Zealand Insurance Co Ltd*, the policy provided for the restoration of damaged property to a condition substantially the same as (but not better or more extensive than its condition) when new.[22] Doogue J first referred to a

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21 *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2012) 17 ANZ Insurance Cases 61-965.

22 *Lion Nathan Ltd v New Zealand Insurance Co Ltd* (1994) 8 ANZ Insurance Cases 75-398 (HC).

decision of the Supreme Court of New South Wales, *Morlea Professional Services Pty Ltd and Pace Micrographics Pty Ltd v The South British Insurance Co Ltd*, in which Clarke J stated:[23]

> … the reference to 'condition when new' is indicative of an intention that the policy affords more than a true indemnity. In other words one is not concerned with a repair of the article to its pre-fire condition. One is concerned with a replacement of the article with one equal in condition to the damaged article when new or the repair of the article to a condition equal to its new condition.

[113] Doogue J then returned to the language of the policy he was required to construe. He remarked:[24]

> The plain language of the clauses in question makes plain, as NZI in part recognises, that the essence of the provision is the return of the damaged property as nearly as possible to its new condition. …
>
> …
>
> … The plain meaning of the clauses is that Lion is entitled to restoration to a substantially as new condition, not pre-fire condition, wherever there has been damage as a result of a defined risk. Where that risk has occurred, as the exclusion clause relied upon by NZI makes plain, fair wear and tear is irrelevant. …

[114] The approach of Doogue J in *Lion Nathan v New Zealand Insurance Co Ltd* accords with the approach of the Supreme Court of Victoria in *Colonial Mutual General Insurance Co Ltd v D'Aloia*.[25] There the policy required the insurer to pay the cost of reinstating "the buildings to a condition equal to but no better or more extensive than the condition when new". On the basis of this wording, which is the same formula to be found in the Vero policy, the Court concluded:[26]

> The words "equal to" mean, in our opinion, that the reinstatement does not necessarily have to conform precisely in appearance, structure and configuration to the destroyed building. But basically there must be "equality" in the sense of size, structural quality, amenities, space, plumbing, electrical, gas and like installations. …

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23 *Morlea Professional Services Pty Ltd and Pace Micrographics Pty Ltd v The South British Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-777 (NSWSC).

24 *Lion Nathan Ltd v New Zealand Insurance Co Ltd* (1994) 8 ANZ Insurance Cases 75-398 (HC).

25 *Colonial Mutual General Insurance Co Ltd v D'Aloia* (1988) 5 ANZ Insurance Cases 60-846 (VSC).

26 At 75,293.

[115] The fundamental obligation on Vero under the policy is to pay for the cost to rebuild, replace or repair the damage. The upper limit of the measure of indemnity is "when new"; Vero is not obliged to make good beyond that standard. On its face, this standard would appear absolute, however, that interpretation is tempered by the immediate context and the broader factual matrix in which the insurance policy is required to be applied.

[116] It is unlikely that it was the parties' intention that every single item of damage would have to result in the damaged element being replaced, rather than repaired, which logically follows from Mr Parkin's construction of the standard of repair provided for by the policy. On Mr Parkin's interpretation of the policy, notwithstanding the function or purpose of the particular part of the house or the item for which it is designed, the only adequate remediation would be to substitute the damaged item with a new replacement.

[117] Mr Parkin placed great emphasis on the fact that his house was new. The house was completed in March 2009, and was some two years old at the time of the February 2011 earthquake. The fact remains, however, that the house had been occupied and used, whether that was for a two year period, a five year period, or a 15 year period, would not alter the interpretation and application of the standard of repair required under the policy. The standard of "when new" has to be consistently applied. Furthermore, notwithstanding the age of the house, the historic fact that it was damaged by the Canterbury earthquakes cannot be changed. As with so many houses in Canterbury, its future function, utility and value will likely always be assessed with knowledge of that fact. The standard of repair required by the policy is to render that fact immaterial when measured against those considerations. In my view, that is key when assessing whether the standard of repair required by the policy has been met.

[118] Mr Parkin, in his closing submissions, submitted:

> The fact of the matter is that in the present case the Court need not be troubled by the issue of "when new" because the building was new and there is no need to substitute materials or techniques (except in respect of the garage foundation which is accepted). A "when new" repair returns the dwelling to its standard when it was new, not some alternative compromise

> "fix". … [T]he homeowner need not be expected to tolerate a building which has "jack and pack" or is in any way outside of new-build tolerances.

[119] A number of the expert witnesses were questioned regarding the appropriateness of employing a "jack and pack" method in regard to the construction of a new house. This will be considered in more detail when the issue of the appropriate repair to the subfloor space is considered later in this judgment. However, if Mr Parkin's contention was correct, it would render superfluous the concept of repair. If "when new" means the only remediation of the damage would be replace like for like – that is by replacement or substitution of the damaged item or component with a new item or component, the concept of repair would be unduly restricted. The parties to the contract cannot have intended such a narrow means of achieving reinstatement, not least of all because the option of a "repair" is expressly included in the policy.

[120] In my view, the purpose or utility to be achieved by the reinstatement of the individual item which has suffered damage cannot be divorced from the standard of remediation required to be achieved under the policy. Broadly, the purpose of any particular part of the house can be divided into structural or functional components and those which have an aesthetic purpose; each, of course, is not mutually exclusive. Where an item has only a functional purpose, so long as the repair or replacement restores that functional purpose to a "when new" condition, the obligations under the policy will be met.

[121] Where there is also an aesthetic purpose there will be a need to ensure the remedial strategy also restores the former aesthetic to a "when new" quality. That will not necessarily mean there will be an obligation to replace like for like, or to replace in every instance, but that may be the only realistic option in order to meet the standard of the policy.

Damage and remedial solution

[122] The substantive dispute between the parties related to the identification of damage to the house, the assessment of that damage, and the appropriate remedial strategy. Ordinarily, the Court would also be required to make findings as to

quantum in terms of the cost to remediate damage based on the factual findings of the appropriate approach to repair or replacement. Mr Parkin, however, acknowledged that on the state of the evidence it was not possible for the Court to make any determinations as to quantum.

[123] Four engineers gave evidence at trial. Mr Jonathon Mumford was the structural engineer originally engaged by Mr Parkin. However, he was disengaged at an earlier stage in the proceeding. Nevertheless, he together with Mr Graeme McMillan were called as experts on behalf of Mr Parkin. Mr Murray Spicer was engaged by Vero. He provided a comprehensive assessment and scope of works which in his opinion reinstated the house in accordance with the requirements of the policy. In addition, Vero also relied upon the evidence of a geotechnical engineer, Mr Titus Smith. Some supplementary evidence was also provided by Mr Alister Miles, an experienced building contractor, in relation to the practicality of the scope of works proposed by Mr Spicer.

[124] By the conclusion of the evidence, while there remained some substantive areas of disagreement between the experts, there was a considerable degree of agreement regarding the approach to be taken to repair a number of areas of damage.

Overview of damage to the house

[125] Mr Parkin provided a broad summary of what he considered to be the damage to his house in the following terms:

> Damage has occurred to the house, foundations, garage, driveway, and retaining wall. This includes racking, hogging, tilt settlement, pounding, uneven floor levels, floating piles, cracks in foundation wall, and rotation to the retaining wall. The retaining wall drainage system no longer functions correctly. There is bulging and non-alignment to exterior cladding. Cracks and or bulging to virtually all Gib wall linings. The driveway has a large gap and has dropped lower, it has moved south including the foundation walls which have impacted into the garage and house entrance. This force has produced visible damage as it has continued into the house, and into the living room on the level below.

[126] There was a consensus that the damage to the house encapsulated in the broad description provided by Mr Parkin could be approached under a number of separate headings relating to the discrete areas of damage.

Lower level piles

[127] In relation to the lower level piles, the essential question in dispute was whether the proposed remedial method by Vero of "jack and pack" was sufficient to discharge its obligations under the policy to repair the dislevelment to the floors. Mr Parkin submitted that such a remedial strategy is inadequate to bring the house back to a "when new" standard. Where repairs to the piles are required in order to achieve levelment of the floors, the only available option, in Mr Parkin's submission, is to replace the piles.

[128] In general terms, the engineers and Mr Miles accepted that ordinarily packing of piles on a new build would be indicative of poor workmanship. Essentially, on that basis, Mr Parkin submitted that having regard to the newness of his house, packing of piles would not meet the repair standard of the policy.

[129] Mr Mumford did not directly address the remedial solution for the lower level pile in any detail in his written brief of evidence. However, in cross-examination the issue was reviewed with him. He confirmed that the piles and the lower foundation system had not been damaged. The relevant part of Mr Mumford's evidence was as follows:

> Q. The last paragraph on 1001, the last sentence, "It would be reasonable to say that the repaired structure elements would not be considered to be new, as they are not the same as when the building was built." Did Mr Shand ask you to put that in, Mr Mumford?
>
> A. No, no. We discussed that as an office and the argument that was put forward was you could bring it back to code quite easily and probably – well, you could bring it back to code but even if you were bringing it back to code it wouldn't be as if it was a new pile that had gone in the ground the day before. So not new as gone and bought off the shelf and put in the ground as new. You could bring it back to new but we were not swayed by Mr Parkin on that at all.
>
> Q. Can you explain that, why you weren't swayed by Mr Parkin?
>
> A. Like I said to you before, irrespective of whether we spoke to Mr Parkin or not, we discussed this and we just said it is reasonable to say that the repaired structural elements would not be considered to be new. They would not be off the shelf in new concrete in the ground. They would be piles that have been through an earthquake or whatever it is and been repaired and be put back to a state that

they complied with code, but if you're asking as new or brand new, no, they're not brand new.

Q. Let's be clear. The piles in the lower foundation, the lower foundation system, weren't damaged at all.

A. No. The floors move.

Q. So the foundations are fine?

A. Well, you would hope the builder wouldn't have to jack and pack your floors.

Q. But they'd achieve level by between the bearer and the joist and the floors are level as soon as they put the floor joists on?

A. No. They'd have to put it down and make sure that the get it level and they may, in some instances, jack and pack but you would hope that they don't and they get it right. But in this instance, what we're referring to, is it's not as if it's come off the shelf and gone in, it might be something that's in that is remediated up to the code so if you're talking about something new, like a pen, that's never been written with, well it's not that.

Q. Alright. So your position, expressed in that paragraph, was to reflect the fact that the foundation, let's just deal with the foundations, weren't actually damaged but they weren't the same as they were the day they went in so you needed to take them all out?

A. No we didn't say that, we didn't say that. We didn't say take them all out. All we said was that it's reasonable to say that these elements would not be considered new. We didn't say that they didn't come up to code, we just said that would not be considered new in that – at that stage we had assumed, because I hadn't seen a geotechnical report at that stage, that there was no damage to the foundations.

Q. And you now know there isn't?

A. No I know there isn't.

Q. Know there isn't, so do those foundations, let's deal with the lower ones, function in the same way as the new foundations, in terms of the level of support they provided? Was their level of functioning, in terms of providing structural support?

A. Well that's bringing it up to code, yes, it's got to – in terms of the code you've got to meet B1 of the building code, which is the structural functionality of the pile.

…

Q. What could you not use the house for or do in the house if the Spicer scope is implemented, that you could have done before the earthquake?

A. You, you could – it would serve the same purpose if you brought it up to the code as it did prior to the earthquake. So you – there would be no, there would be no, there would be no difference, you could bring it up to code and it should behave and perform and you should be able to get the same use out of it as you would out of a brand new building.

Q. So the same level of amenity?

A. Yeah.

[130] In his brief of evidence, concerning the appropriate way to repair the undulating floor levels, Mr McMillan relevantly stated:

(2) Remove all structural elements considered to be damaged – foundations, floor framing, …

(3) Install new piles including floor framing to meet Clause B1 (structure) of NZ Building Code. This will require structural analysis and design based on comprehensive geotechnical information …

[131] Mr McMillan expanded upon his brief in examination-in-chief, where he commented:

Q. … So then in terms of the remediation to the piles, at paragraph 24, what is your remediation strategy for the piles?

…

A. … So in answering the question, jacking and packing. If it was a new house, I wouldn't accept, if I was in control of the job for the client, I wouldn't accept any jacking or packing in a new form of a rebuild of a house. It's unacceptable. I'd say pull it out and replace it so there's no jacking and packing. Very few builders or clients would accept any form of packing under bearers onto a timber pile. It's not acceptable. You would take the whole pile out and replace the whole pile so there wasn't any. So that's a new fit. Now, my specification of fixing this is I have to look at the contract in place or my specification that I'm looking at. I can fix an engineering solution in two different manners. I can fix it to the code. I can fix it to another manner which could be higher, and I believe we're looking at a higher standard. I have to reflect on that.

Q. Just for the Court, you accept that a packed pile is code compliant or may be code compliant?

A. It may be code compliant. You don't put more than one pack. You can't put a series of packs. Then you've got to make it structurally acceptable because what happens in a small packing, you can get – you can break down to the wood, the timber's only a small, and the moisture gets in there and it breaks down in the pack itself rather

than in a solid strata. So it's up to the engineer, in fact, normally, if you use a jack and pack.

Q. Is a packed pile in the way you've described as durable as a new pile?

A. No, it's not because the packing can corrode in itself after 25 to 50 years is that pack going to last 50 years? I don't know.

[132] Mr McMillan was also cross-examined on the issue of the piles, of which the following exchange is relevant:

Q. And in terms of the – yes, but you've got different methodologies. Mr Spicer's going to achieve re-levelling by jacking and packing, and you don't buy into that as a way of achieving re-levelling.

A. Depending how much jacking and packing was what I would have something to say about. If the pile had not – if the piles were sitting on fill I would replace them down to firm bearing, all right, that's my view on it, and in doing that I would make sure there was no packing under those new piles.

Q. Okay.

A. If there was an odd pile that was still sound, you might pack the odd pile, but I'm concerned about the visual aspect for any detriment that might have for future people looking at the house.

…

Q. There'd be a little fillet of timber that might be one millimetre, two millimetres, three millimetres deep, that's a packer?

A. If you see more than two piles like that it would concern anyone to look at it, and what I would do, it's just easier to take the whole pile out 'cos it's only sitting on the concrete and Mr Spicer even refers to that and we see a new vertical timber pile under it and sit it on new concrete and support it.

[133] Mr Alastair Miles, an expert builder, was called as a witness for Vero. In his brief of evidence Mr Miles states:

> The recommended repair for the lower level foundations, which involves adding packers to re-level the floors above, is a conventional construction method which is regularly used in New Zealand and has been used extensively in Christchurch. I agree with Mr Spicer's view that the re-levelling of the lower level floor should also restore the floor above to the level that it had before the earthquakes.

[134] Mr Miles was cross-examined on the acceptability of packing piles in a new building:

Q. And would you ever hand over a new home with packed piles?

A. Packing happens in building so, I, I would expect that we would open up the build and find packing in the building. The packing happens in various forms so yes you need to pack window frames, you need to pack door frames, you need to pack walls for Gib linings. You sometimes need to pack particle board flooring to get things as correct as possible onsite.

Q. Would you hand over a new building with packed piles?

A. Potentially, yes.

Q. Substantially packed piles? Several? Numerous?

A. If you want to try and get it right you might be dealing with one or two mill packing. Malthoid is used constantly in the construction game to pack not only piles but to pack bottom plates, to ensure top plates are level, because you get tolerances within building.

Q. There's a –

A. Concrete slabs are never poured 100% level and therefore you're quite often having to pack timber walls to ensure that the walls are going level and timber piles are the same. They laser in the cuffs for the bearers but the cuff doesn't have to be out too much before it, you need to a bit of malthoid packing in it.

…

Q. Is a building that has had numerous piles packed of 20, 10 or 20 millimetres or more, would you hand over that as a new building?

A. As a new building, not if every pile was packed 20 mills.

Q. I'll ask you, would you hand over a building in the state that this building would be with its piles packed as a new building?

A. If there has been a mistake on site and a pile has been cut incorrectly, then if the engineer is happy for us to pack the pile which 99 out of 100 times they are or 100 out of 100 times then yes.

Q. That's one pile. Would, I'm asking this really clear question. You've priced a repack, a packing for this foundation.

A. In accordance with the MBIE guidelines.

Q. The packing that you have priced for this foundation, would you be prepared to hand over a brand new building to one of your clients with that extended packing?

A. I don't think that situation would arise.

…

Q. I put it to you this way Mr Miles, you've got a building company with a good reputation and you wouldn't hand over a building that had been extensively, had its piles extensively packed would you?

A. No but the likelihood is that you would identify this before the building was handed over, it would be identified at the very very early stages and then all option of remedial would be open for discussion and with the client and with the client's consultants. So you'll probably find that there'll be a different solution than packing. And that could be up in the size of bearers …

[135] Vero also engaged Mr Andrew Lind, a chartered professional engineer, to provide evidence. As to the piles his opinion is that:

> The eighteen timber piles which are situated in the back fill tailings and which have lost support will need to be replaced. I propose excavating the tailings and replacing the shallow timber piles with ones founded on good ground. Where required pile heads will be packed to the bearers to achieve a level floor. The remainder of the piles do not need to be replaced. General re-levelling of the floors can be achieved through the use of packers.

[136] Mr Murray Spicer, the primary witness for Vero, relevantly stated in relation to the piles:

(a) There has been some minor differential settlement in the foundations for the lower level which has affected the levels of the floors above. I have accepted the survey undertaken by EQ east as giving a general indication of the variation. I note that they are within the MBIE recommendations for re-levelling.

(b) The foundations remain functionally sound. They have retained their load carrying capability and remain founded in 'good ground' …

[137] As to the appropriate remedial solution, Mr Spicer stated:

(a) Nothing needed to be done to the foundations themselves.

(b) Re-levelling the pile bearers with packers and re-fixing with appropriate stainless steel "Lumberlok/Bowmac" brackets to NZS 3604 requirements will address the floor levels.

[138] Mr Spicer was questioned on the repair strategy for the piles in cross-examination. I replicate the relevant exchange below:

Q. No the repair strategy is to pack the piles, isn't it?

A. To pack the bearer that land on the piles, yes. The pile itself is not being touched.

Q. The packer goes on – now, if I've got this wrong tell me. Goes on top of the pile and under the bearer, correct?

A. Correct.

…

Q. In fact isn't it the case that the New Zealand 3604 suggests that packing should be avoided when new.

A. Again, with compliance with 3604, if you want non-engineer involvement in building a house you can do it completely, provided you comply with 3604. When you get an engineering expertise brought to bear then 3604 can be changed and modified in all sorts of ways, provided you provide justification.

Q. Well in your view is it good engineering practice to use packers for new, some new piles?

A. The fact that you would have to use it indicates some poor workmanship, to that extent. From in terms of the functionality, again, you, it's going to work perfectly well, yes. I mean …

Q. So in fact you would agree NZ3604 when it says packing beneath bearers should be avoided if possible?

A. If possible, yes, but here we have a situation where MBIE which is guided by a very skilled and widely experienced group of engineers and others has come out extremely strongly that this is obviously a situation where it's appropriate and necessary for economic recovery.

[139] Mr Parkin's argument rested on a submission that because a new house would not have been built with piles that had been packed, the standard required by the policy of "when new" could not be satisfied by adopting such a repair strategy. He relied on the evidence of Mr Mumford who, while readily acknowledging that the foundation system could be brought back to comply with the building code "quite easily", it would not be a "new pile". In the sense of it having "come off the shelf … like a new pen, that's never been written with …".

[140] Vero emphasised that the repair strategy of packing the piles would have no effect on the structural integrity of the house. The lower level foundation piles and the concrete in which they are encased have not been damaged. To achieve what both Messrs Mumford and Spicer describe as "minimal" variation and the levelness of the floors, packers would be applied to an as yet undetermined number of piles.

[141] Vero submitted that until a person went under the crawl space or lifted the floor, the change from an unpacked pile to a pile with a packer would not be discernible. None of the engineers gave evidence that the introduction of a packer would make any difference to the structural integrity of the pile, or compromise the structure itself. Given the location of the repair, any visual change caused by the packer does not amount to proven damage.

[142] The evidence given by the experts results in the following findings:

(a) In a new build the use of packers would generally be considered unacceptable.

(b) The use of packers, however, does not affect the structural integrity of the floor structure.

(c) The floor structure is not visible, absent an underfloor inspection, and therefore has little, if any, aesthetic value.

[143] I have concluded that the use of jacking and packing is, in the circumstances of this case, a permissible remedial solution under the policy that would discharge Vero's obligations. The purpose of the pile and, indeed, foundation system as a whole is substantially, if not entirely, structural. While Mr McMillan raised some suggestion that the packing may corrode "after 25-50 years" in comparison to a new pile, which requires a minimum 50 year lifespan under the building code, it was not seriously advanced that the durability of the piles would be adversely affected by approaching the repair using the packing method described by Mr Spicer, and also elaborated upon by Mr Miles. None of Vero's experts were questioned about the durability of the packing itself. For clarity, I do not find this suggestion proved by Mr Parkin on balance.

[144] An obvious concern of Mr Parkin was the effect that packed piles may have on the value of the house in terms of a prospective purchaser inspecting the property. There was no real estate valuation evidence given regarding the possible impact on the value or attractiveness of the property resulting from adopting a repair

methodology involving packing the foundation, as opposed to replacing the pile. The piles themselves have no aesthetic quality. As I have observed earlier in this judgment, the fact the house experienced the Christchurch earthquakes cannot be hidden from the Christchurch real estate market. The concern of any prospective purchaser, however, will be whether the repair to the lower level foundations has restored the structural integrity of the house. The expert evidence is that Vero's remedial strategy will achieve this.

[145] The remedial strategy of "jacking and packing" therefore discharges Vero's obligations under the policy in the circumstances of this case.

Pile at extreme southeast corner

[146] The geotechnical engineer, Mr Smith, who carried out a geotechnical survey of the property observed the presence of fill up to 1.6 metres deep as a result of sampling of the land taken approximately 2-3 metres from the southeast corner of the house. Mr McMillan expressed concern at the proximity of the fill to a pile situated in this corner of the house, and considered it prudent to carry out further investigations to determine the extent of the fill.

[147] Mr McMillan's evidence on this point is unsatisfactory. He has raised the concern and speculated that the pile might be situated in fill. Mr McMillan made a similar observation when he described the ground as "suspect" or "subject to slip circle failure". Mr McMillan is not a geotechnical engineer, and his floating of these concerns without more, neither assists Mr Parkin, nor the Court. Mr Smith's expert geotechnical evidence did not support Mr McMillan's concerns, and in the absence of Mr Parkin having called any geotechnical evidence himself to contradict Mr Smith's views, it is not possible to take these matters further.

[148] The presence of fill was a pre-existing condition, and its existence on the property of itself does not constitute earthquake damage. Mr Parkin has not called evidence to support a submission that the existence of fill requires a more elaborate foundation system to be constructed. His evidence simply did not go that far. Nor is it clear what Mr McMillan was suggesting should be done regarding the presence of fill in the area of the southeast corner, which of itself is not capable of constituting

earthquake damage. Mr Smith's evidence is that relying on the testing done onsite, his assessment of the foundation plan and what he observed at the property, there is no problem with the corner foundation that is required to be addressed.

[149] Mr Parkin has not therefore proved damage to this part of the foundation.

External cladding

[150] There are three types of exterior cladding; corrugated long-run horizontal Colorsteel; Linea weatherboard cladding present on the north, east and west sides of the garage; and Hardiflex sheet below the upper level on the east side enclosing the subfloor space and on the west side of the lower level.

[151] There is disagreement between the experts regarding damage to the external cladding. A fundamental difficulty is the identification of the damage, in particular, the location of "bulging" of the cladding referred to in the evidence.

[152] Mr Mumford referred to cladding damage at various points in his report presented as his evidence-in-chief. He observed what he described as "pounding damage" to the flashings and Linea weatherboard cladding, described as being "below the garage door" and that "the cladding on the eastern side of the front door at the entrance deck level had suffered pounding damage". He also referred to damage to the corrugated steel cladding in the following terms:

> The Colorsteel corrugated steel cladding at the south western corner of the subject unit showed displacement of approximately 20–30mm horizontally corresponding to the racking of the subject unit in an easterly direction.

In relation to the issue of 'bulging', Mr Mumford observed:

> In the external lower level northern and southern walls of the subject unit there appeared to be bulging of the cladding.

In his oral evidence in relation to the "bulging", Mr Mumford stated:

> We noticed a bit of a bulge down in the lower level which is probably to be expected because of the floor, floor level variations and we don't know what's going on because as we state, it's a purely visual inspection, this was not invasive, so some sort of investigation may be needed to determine

> exactly what's causing that or, in the re-level, if a re-level does happen, that might remedy the situation.

[153] Mr McMillan's witness statement reflects the content of his report of 8 October 2014. He stated in reference to damage to the exterior cladding:

> There is pounding damage to the flashings and Linea weatherboard cladding below the garage door. A gap of approximately 5-10mm exists in the Linea weatherboard return at the junction of the garage of the units. The cladding damage on the eastern side of the front door at entrance deck level had suffered pounding damage, likely as a result of the driveway being shunted into the entrance deck that, in turn, had been shunted into the Colorsteel cladding.
>
> …
>
> The Colorsteel corrugated steel cladding at the south western corner of the dwelling unite showed displacement of approximately 20-30mm horizontally corresponding to the racking of the dwelling in an easterly direction …

[154] As will be apparent from the last passage quoted from Mr McMillan's written evidence, it word for word matches the description provided by Mr Mumford in his earlier report. In the course of the cross-examination of Mr McMillan, it was revealed that in preparing his brief of evidence and in particular the description of the damage, he essentially copied and pasted large sections of Mr Mumford's report of 3 December 2012.

[155] In oral evidence, Mr McMillan virtually conceded that his brief of evidence was not entirely his own words and that he had utilised other sources, and did not rely solely on his own observations, notes and expertise. It is a matter of some disquiet that Mr McMillan, who purported to give evidence of his own observations as a result of his inspection of the site, has for the purposes of his evidence taken wholesale chunks from secondary sources and represented it as his own. The following exchange from cross-examination is instructive:

> Q. – and you're an expert complying with the code of conduct for experts and you know your evidence must be in your own words. Surely Mr McMillan, you're an experienced expert witness?
>
> A. The time I had to prepare for this was assisted for me by the solicitor.

Q. So to the extent there appears to be a verbatim cut and paste, that was just the time pressure this was being done under that prompted you to take that approach, is that your evidence?

A. It's a different thing when your solicitor running the case is in Auckland and I'm in Invercargill.

[156] The preparation and presentation of Mr McMillan's evidence was unsatisfactory, and at times I found his evidence to be speculative. Mr McMillan purported to present a scope of works based on his findings, which was demonstratively inadequate for the purpose of this proceeding. While there is therefore some question as to the reliability and weight that can be given to Mr McMillan's evidence, his technical competence was not directly put into question, and, in relation to the specific and detailed issues regarding remediation and repair of particular items of damage, some of his proposals were adopted by other experts. Further, he himself was prepared to make responsible concessions regarding the resolution of particular items of repair that had previously been in dispute.

[157] Under cross-examination Mr McMillan confirmed that he had sighted bulging in the cladding onsite. He observed that the damage was difficult to record and photograph, but was clearly discernible with the naked eye. He described the bulging as being "adjacent to the landing on the stairwell". The report from the building company, Simplexity, obtained by MWHM, also reported bulges in the corrugated iron exterior cladding, though it did not identify the locality of this damage.

[158] Mr Spicer did not see any bulging in the exterior cladding. Mr Miles did not observe any bulging either, although it is unclear whether he was focussed on identifying such damage. Mr Spicer's evidence was that the corrugated cladding to both the roof and the external walls was undamaged, that apart from minor scratches and some movement at the junction with the neighbouring unit, the cladding was in a satisfactory condition. In relation to the scratched paintwork, Mr Spicer's view was that it could be touched up.

[159] A second issue in relation to the external cladding concerned potential problems relating to the distortion of the holes through which the fixings attach the cladding to the framing of the house. A concern was that some of these holes may have become elongated by the lateral movement of the house. This was an issue raised by Mr McMillan. He was cross-examined about whether he had tested his theory regarding distortion of the holes through which the cladding is fixed.

[160] Despite the relative simplicity of undertaking a sampling of a number of the screws, this had not been done. When challenged that the issue he raised was nothing other than his apprehension of a possible problem which did not justify the replacement of the Colorsteel cladding, Mr McMillan considered that, having regard to the severe racking of the house and the load which "would have gone into the iron", it would be appropriate to investigate the issue.

[161] While Mr Spicer did not express any concerns about the elongation of the fixing holes in his written report. In his oral evidence, after being referred to MBIE guidance that if cladding has a bracing function, then the sheet fixing should be checked. Mr Spicer acknowledged:

> At the time that the remedial works are undertaken and after the Gib has all been stripped out, and the internal framing has all been replumbed and refixed as necessary, it would be prudent to have a look at some of the fixings, unscrew them at key stress locations, and if there was damage then one could take it further. My own view is that they will find nothing significant but provisional allowance can be made to undertake that. That would be sensible.

[162] The main focus of the cladding dispute centred on the bulging and elongation of the fixing holes, however, there were also uncertainties as to whether the cladding needed to be replaced in order to remedy the racking of the building. Mr Spicer did not consider that this was necessary, however, the Simplexity report and Mr McMillan's views considered that it was necessary to remove the cladding. Mr Mumford also thought it likely to be necessary to remove the corrugated iron cladding in order to straighten the walls. This appears consistent with the MBIE Guidelines which provide:

> External sheet cladding connections and joints should also be checked and refixed. If the cladding has a bracing function (likely in houses built since 1978), then the sheet fixings should be checked. If they are found to be damaged, appropriate fixings will need to be installed in intervening gaps and the finish reinstated. Any exterior sheet claddings with diagonal cracking should be replaced.

[163] The evidence concerning the cladding is less than ideal. There is some ambiguity regarding the location of the bulging. The point was made on behalf of Vero that there was a conflict in the evidence regarding the presence of the bulging and how extensive this bulging was. I agree that it is unclear whether this problem extends across an entire elevation, or is discrete and limited to one particular area of the cladding. Vero submitted that if there is bulging it is minor and likely to be able to be remedied when the house is relevelled.

[164] Mr Mumford and the author of the Simplexity report which was advising MWHM definitely observed bulging in the external cladding. Mr McMillan also gave evidence of having observed bulging in the exterior cladding. Mr Spicer did not make such an observation, but that of itself, while perhaps indicating such bulging might not be present, is limited and does not of itself exclude such damage. Mr Mumford was an expert witness in which both parties expressed confidence. The exterior cladding is the only area of Mr Spicer's assessment of the damage to the house with which Mr Mumford does not agree. On balance, I consider it more likely than not that there is bulging of the cladding. As to the potential elongation of the fixing holes, I have concluded that the parties are in agreement that further investigative work should be undertaken.

[165] From the totality of the evidence, a tolerably clear strategy for repair is able to be discerned. In my view, the following course should be adopted:

(a) the building should be re-straightened and plumbed to rectify the racking issue;

(b) the cladding should again be checked by Messrs Mumford and Spicer together for bulging (or creasing where the bulging once was) – if that damage is present, the cladding should be replaced in those areas.

(c) The cladding fixings should be removed in key stress areas following rectification of the racking issue to test the elongation of the fixing holes. For clarity, I note this is for testing purposes only, as Mr Spicer agrees this would be a prudent course. It does not require removal and testing of all the fixing holes, which clearly would be impractical. Messrs Mumford and Spicer should consult to determine whether the fixing holes are within accepted tolerances, if not, the relevant cladding should be replaced;

(d) the cladding or vertical flashings which have been scratched can, prima facie, be repaired by painting. However, the cladding or flashings should be replaced if:

(i) the Colorsteel cladding manufacturer does not recommend painting the scratches; or

(ii) such painting repair would be visually noticeable and would detract from the aesthetic value provided by the cladding or flashings;

(e) damage to the Linea weatherboards and corner soakers in the vicinity of the north east area of the garage should result in their replacement. Damaged cladding below the upper level on the east side is to be replaced. The cladding on the west wall is to be re-fixed after relevelling of the floors in the absence of damage to the fixing holes, otherwise the cladding in that area replaced; and

(f) if the rectification of the racking issue does not wholly remediate the 20–30 mm displacement identified in the south western corner of the dwelling, the cladding in that location should be replaced.

[166] The remedial solution in respect of the exterior cladding throws into relief the issue of whether the cladding ought to be removed when the racking of the building is corrected. The evidence of Mr Spicer was that the building could be restored true

and plumb once the internal linings were removed, but with the exterior cladding still in place. Mr McMillan does not agree in one respect; he says the exterior cladding will need to be removed to re-plumb the building. It seems an available approach would be to re-plumb the building with the cladding in place, which may potentially rectify or ameliorate some of the issues with the cladding referred to above.

[167] To the extent that the re-plumbing does not rectify the issues then the remedial strategy described above will need to be followed. Further, re-plumbing the building with the cladding in place emphasises the need for investigatory work to be undertaken to ascertain whether there has been elongation of the holes through which the cladding is fixed.

[168] It may well be that the building contractor charged ultimately with undertaking this work may express a view regarding the pros and cons of undertaking the re-plumbing of the house with parts of the cladding either on or off. If the recommended approach is to take parts of the cladding off, then, mindful of Mr Mumford's opinion that the Colorsteel cladding should be removed before re-plumbing undertaken, that would appear a reasonable course to follow.

Driveway

[169] All parties are agreed that the driveway has received substantial damage, and that the appropriate remedial strategy is wholesale replacement. There having been agreement that the appropriate remedial strategy is replacement, it is not necessary for me to comment further.

Rotation and cracking of front foundation wall under the garage

[170] Similarly, the experts were in agreement that the earthquake caused cracking to the front foundation wall, which has also rotated. Mr Spicer's proposed solution of filling the crack with epoxy resin, to seal and reinstate its structural integrity, and erecting another wall in front of the cracked wall, thereby preserving the aesthetics of the wall, was acknowledged by Mr McMillan as an appropriate remediation of this damage. While Mr Mumford did not specifically comment on this particular

repair, he confirmed that Mr Spicer, in his detailed scope of works had addressed all the damage that he had observed onsite, and that, barring his concerns regarding the external cladding, did not dispute what was being proposed.

Upper level subfloor support of garage

[171] As with the front concrete foundation wall, during the course of evidence the experts agreed on the appropriate approach to the reinstatement of the foundation under the garage. The experts agree that reinstatement of the existing foundation system is not appropriate, as it was not code compliant. Mr Spicer recommended resupporting the foundations with a flitch beam running under the house. While Mr McMillan initially proposed to reinstate the foundations in the entirety by rebuilding the garage, he accepted in evidence that with one modification to Mr Spicer's design solution, what Mr Spicer proposed would be an acceptable solution from an engineering point of view. Mr Spicer had no difficulty with accepting that modification, and the repair can proceed on that basis.

Interior of the dwelling – linings, etc

[172] The parties are in substantial agreement that the interior Gib linings have suffered cracking and need to be replaced. The only area that was in dispute was the western internal wall, which Mr Spicer considered was undamaged.

[173] Mr Mumford understood that almost "every wall lining in the building was shot", and those that were not might as well be replaced, given the extent of the work that was required to be done to the interior. Mr Mumford acknowledged that Mr Spicer had provided for the replacement of the wall linings in his scope of works, and that they had agreed the wall linings needed to be replaced. Mr Spicer's scope of works includes removal and replacement of virtually all the wall linings, except those along the west wall.

[174] Mr McMillan considered that a large part of the internal linings needed to be replaced, and those that were not compromised were not worth keeping. As they were so few in number it was more economical to completely replace the internal linings.

[175] It may well be that for the purpose of carrying out the remedial work from an economic perspective, it does not make much difference whether the linings of the west wall are excluded from the scope of works. Mr Spicer's evidence was noteworthy for its carefulness and detail. He provided a comprehensive description of the damage that he located, the remedial solution and a comprehensive scope of works, and I am not in a position to reject his professional opinion regarding the extent of the replacement of the wall linings, which on his evidence does not include the western wall of the various levels of the house.

[176] Accordingly, on the balance of probabilities, Mr Parkin has not proved that replacement of the western wall linings is required under the policy. To this, however, I would add the caveat that a seemingly necessary implication of this approach is that the western wall linings will not be removed while the racking of the building is corrected. I simply observe that if that process further damages the wall linings, a need to ensure that Vero complies with its policy obligations will emerge.

[177] Although originally an area of dispute, the experts are agreed that the stairways have been damaged, and in particular the stairway stringer. The stairways are required to be remediated in accordance with Mr Spicer's scope of works.

Rotation of the timber retaining wall and water seepage

[178] A timber retaining wall runs underneath the top level of the house, supporting the excavated area where the middle and bottom levels of the house are sited. A section of that wall at its eastern end has rotated outwards. All the experts are in agreement this section of the retaining wall has moved, although their descriptions of that movement slightly differ. The assessor from Simplexity, engaged by MWHM, noted the retaining wall was no longer straight and had been pushed out of alignment. Mr McMillan observed that certain piles had rotated, which he considered to be both structurally and visually unacceptable. Mr Spicer observed the wall had deflected "ever so slightly" and only in respect of two to three posts. While Mr Smith observed the wall had visually deflected in a down slope direction.

[179] Messrs Spicer, Mumford and McMillan all agreed that the retaining wall was now in an active state as a result of the earthquake. Messrs Smith and McMillan

further agreed the retaining wall now had a reduced capacity to resist seismic forces. Mr Spicer did not agree with this observation.

[180] Mr Mumford considered the rotation in this part of the retaining wall, which does not sit directly underneath the house, to be significant. Unlike the greater part of the retaining wall under the footprint of the house, the area which has rotated was not originally pinned back and fixed by a ground anchor system. This anchoring system was described in evidence as a manta ray. This area of the retaining wall is now subject to the active pressures of the soil or fill that sits behind it as a result of the movement caused by the earthquakes.

[181] Mr Mumford suggested that a manta ray ground anchor system could be used to pull this part of the wall back, restore its position and fix it in place. In order to do that, however, it would be necessary to excavate behind the retaining wall.

[182] Mr Spicer described that part of the retaining wall which runs under the house, as consisting of tied back cantilevered poles supporting half round timber rails. He did not consider this part of the retaining wall had been structurally damaged, and no remedial work was required. At the east end of the wall where the cantilevered posts had not been tied back, Mr Spicer observed the outward deflection which has occurred, causing the wall to be in an "active retaining state". He also acknowledged the wall was visually out of alignment with the tied back part of the retaining wall. Notwithstanding the movement to this section of the retaining wall, Mr Spicer did not consider it had been structurally damaged.

[183] Mr Spicer considered the posts were functioning as intended, and that no action was required apart from some backfilling behind the retaining wall "for cosmetic reasons only". The need for this additional backfill is because of the consolidation of the drainage fill behind the wall as a result of it being shaken in the earthquake. This compaction of filled ground has had consequences for the timber piles under the upper level which, contrary to the building code, had been erected on this area of filled ground. The resulting damage to the foundation system under this area beneath the garage is to be remediated by the agreed strategy already canvassed under the heading *Loss of support to the garage piles*.

[184] Mr McMillan's initial repair proposal extended to removing all the manta ray anchors and replacing the whole of the retaining wall. Initially, this was advocated out of potential concern regarding the efficacy of the anchors in the wake of the earthquakes, but was also linked with a concern regarding water drainage, which he considered to be a substantial concern. It is apparent, however, that such a step would be investigatory rather than remedial. Mr McMillan in cross-examination limited removal and replacement of the retaining wall to the eastern section only.

[185] Mr Titus Smith, the geotechnical engineer called by Vero, confirmed that the greater part of the retaining wall under the house showed no obvious evidence of deflection or deterioration. However, the section of the retaining wall sitting beyond the footprint of the house on the eastern side had deflected between around 2-4 per cent in the down slope direction, and this deflection was visibly observable. Mr Smith stated it was unlikely the geotechnical capacity of the timber poles supporting the wall had decreased significantly as a result of the recent earthquake activity, although he did note that deflection of 2-4 per cent was above the deflection of 1 per cent which is considered normal.

[186] Mr Smith, while opining that he did not believe the load on the wall had increased as a result of its deflection, accepted the more the retaining wall was deflected or "pushed over", the less reserve capacity there was for the future. He accepted therefore that, while adequate to resist the present loading, it did have some reduced capacity to resist seismic deflection as a result of some of that capacity having already been taken up. Mr Smith stated he would defer to a structural engineer's view as to whether the deflection of the wall has resulted in a reduced capacity to resist a further seismic event.

[187] A related concern regarding the retaining wall was the seepage of water and what Mr McMillan described as "ponding" at the base of the retaining wall.

[188] Mr McMillan expressed concern that the drainage system behind the retaining wall had been compromised as a result of the movement and consolidation of the fill that sat behind the wall. Mr McMillan questioned whether the drainage system was still working, and believed the Novaflow drain, which sits at the bottom

of the retaining wall on its internal side, was blocked. While Mr McMillan accepted a timber retaining wall of the type in question is not designed to be impermeable, that fact did not assuage his concerns regarding drainage. He considered the moisture should drop vertically through the fill to be caught by the Novodrain at the base of the wall. Mr McMillan's recommended remediation strategy for the retaining wall was to dig out the granular fill behind it, inspect the Novodrain and, if necessary, replace it. The ground anchors would also be tested at that time.

[189] Mr Spicer gave evidence of observing the consolidation and compaction of the drainage fill behind the wall as a result of being "shaken", however, he did not consider that this had impacted on the drainage capability of the backfill material. He, however, acknowledged that the seepage of water through the wall may indicate some damage to the Novaflow drain. While he had not observed the seepage himself, he did notice the damp ground at the bottom of a particular section of the wall. He believed the most likely scenario is the drain has become partially filled and blocked with silt over the passage of time. His recommendation would be to construct a drain in front of the wall to address the drainage issues.

[190] The geotechnical engineer, Mr Smith, tendered to the view that the water coming through the retaining wall is likely to have been caused by water flowing from the top of the property at street level. This was a result of water flowing between a gap caused by the earthquakes, between the curb and the concrete driveway. Mr Smith believed that removing a section of the asphalt adjacent to the entranceway and sealing the gap in the driveway would fix the problem. He did not agree with Mr McMillan's evidence regarding his view of the source of the drainage problem, and considered that earthquake activity was unlikely to have affected the drainage function of the granular backfill.

[191] The retaining wall has undoubtedly suffered damage in terms of the policy. My findings in respect of the damage to the retaining wall can be summarised as follows:

(a) there can be little doubt that the section of the retaining wall at the eastern end, sitting beyond the footprint of the house, which is not tied back has visually deflected;

(b) the evidence of Messrs Spicer and Smith is that this deflection has not materially diminished the structural integrity of the retaining wall, although Mr Smith considered it may have some reduced capacity to resist seismic deflection;

(c) the deflection means that the retaining wall is now in an active state;

(d) Mr Parkin has not established on the evidence that he has called that on the balance of probabilities the drainage issue has resulted from damage to the retaining wall. It is possible that the drainage issue may have been caused by silting up of the Novaflow drain, however, the view of the geotechnical engineer, Mr Smith, is that the water is likely sourced from the gap in driveway. This is, at least, equally plausible.

[192] There is an overarching consideration in approaching the remedial strategy in respect of the retaining wall. It is undisputed that the terms of the policy limit the cost of any repairs to retaining walls to a maximum of $10,000. The repair strategy would ultimately be one for Mr Parkin to determine. The cover available under the insurance policy is unlikely to fund the type of approach recommended by Mr McMillan, which would require, it would appear for exploratory purposes, removal of all the fill from behind the entire retaining wall to check the drainage and test the ground anchors, and removal and replacement of the eastern section of the wall.

[193] However, even more fundamental than the maximum cap under the Vero policy, is the issue of whether Vero has any liability for the retaining wall at all. In this respect the arguments advanced by the parties were divergent:

(a) Vero suggested that Mr Parkin had made no claim with EQC for land damage as it relates to the retaining wall (which is included in the definition of land under the EQC Act). As Vero's liability is only for the difference between EQC's liability and its own liability, Mr Parkin has not satisfied an essential precondition for making a claim under the policy and therefore fails at the first hurdle.

(b) Mr Parkin responds to that submission by noting that Mr Parkin has very clearly made a claim for land damage under the EQC Act, which has been accepted by the EQC. What he now seeks is the difference between the amount EQC paid, and Vero's replacement liability under the policy, up to a maximum of $10,000.

[194] It is clear Mr Parkin has made a claim for land, and received $33,774.58, after its acceptance by EQC. It is not clear precisely what this payment relates to on the face of the settlement, referring as it does to "damage to the land access way" and "site fees & engineer, design, survey etc costs". This is compounded by the fact no one spoke directly to this evidence. That said, there is a suspicion the payment did relate, at least partially, to the retaining wall. In plans annexed to the EQC settlement documentation, reference is made to the retaining wall.

[195] On the evidence as presented I would have been unable to conclude whether the EQC settlement included the retaining wall. However, in the event I do not need to reach a concluded view. Vero's liability for the retaining wall is supplementary; it is only triggered to the extent that EQC has not covered the retaining wall. Even if I were to find that Mr Parkin had satisfied the first essential precondition of making a land claim, which related explicitly to the retaining wall, there is no satisfactory evidence as to what Vero's liability would be.

[196] In other words, there is no evidence as to how far the EQC payment would have gone to remediating the retaining wall and what amounts beyond that, if any, would need to be expended to return the wall to a "when new" condition (within the $10,000 liability cap).

[197] I have therefore reached the point where Mr Parkin has been unable to prove, on the balance of probabilities, that Vero has any financial liability under the policy for the retaining wall. This is because it is not at all clear to what the EQC settlement for the land involves, or the payment covers. This is a matter in respect of which, this Court has no choice but to leave to the parties.

[198] Had I found Mr Parkin had discharged his requirement of proof, on the evidence as presented, I would have reached a conclusion that what is necessary to satisfy the terms of the policy, in relation to the retaining wall, is to rectify the deflection (to the extent possible within the limited cover under the policy). This deflection does negatively detract from the aesthetics of the retaining wall and has qualified its capacity to withstand pressures. Once this is done, the retaining wall should be backfilled to top up any fill which has settled.

[199] In relation to the drainage problem, the parties are in agreement the driveway is to be removed wholesale and replaced. That will rectify the present gap that exists between the concrete driveway and the curb, which Mr Smith believes is a likely source of the drainage problem. If that does not remediate the drainage problem there are two courses available to Mr Parkin. Firstly, he could adopt that recommended by Mr Spicer, and have a drainage channel constructed in front of the retaining wall. Alternatively, investigations could be undertaken regarding the source of the water from behind the retaining wall and, if necessary, excavate behind the retaining wall, and, if needed, rectify damage to the Novaflow drain.

[200] It is likely, however, that given the monetary limit in the policy this would be at Mr Parkin's expense. It would be a matter for Mr Parkin as to how he would prioritise the work and spend the available cover to repair the retaining wall.

Remaining aspects of damage

[201] Other than the damage which I have specifically addressed above, the parties were in substantial agreement that the repair strategy should proceed in accordance with the scope of works prepared by Mr Spicer. Thus, all remaining damaged items (such as the roof and deck) are to be repaired in accordance with the scope of works prepared by Mr Spicer.

Quantification of the cost of reinstatement

[202] Mr Parkin acknowledged that on the state of the evidence it was not possible for any determination to be made regarding the cost of repairs. He referred to Vero's quantity surveying evidence as not being based on market rates, and Mr Miles', the building contractor, costing evidence being based on a lump sum contract that did not provide for additional costs, such as a project contingency sum, and included a number of provisional items. Mr Parkin accepted that his own quantity surveying evidence was premised on a scope which had been departed from during the course of evidence. It was therefore accepted that it was not possible to quantify the cost of the repairs.

[203] Quantity surveying evidence was called by both parties based on their respective scopes of work. In light of the concession made by Mr Parkin that the evidence did not allow the Court to make any determinations as to quantum, it is not strictly necessary to make any further observations. However, I am bound to observe that Mr MacMillan's scope of works, upon which Mr Harrison, the quantity surveyor called by Mr Parkin, purported to rely was inadequate. Mr Harrison sought to supplement the material upon which he based his costings by reference to Mr Mumford's report of December 2012 and his own visual assessments during two visits to the property.

[204] Mr MacMillan's scope of works raised more questions than provided answers. His 16 line, 11 point scope was vague and insufficient. It provided for removal of "all structural elements considered to be damaged – foundations, floor framing, bracing interior linings, bracing exterior cladding". Mr MacMillan could not, however, presently be any more specific as to which part or how much of the "structural elements" he considered to be damaged. For example, when asked how much floor framing was required to be taken out and replaced for the purposes of his scope of works, he was unable to provide a definitive figure, as it was "still subject to what I find to be damaged or not damaged". In relation to the amount of Colorsteel cladding required to be removed and replaced, Mr MacMillan acknowledged that it would only be a guess, which he acknowledged did not provide an adequate basis for the Court's purposes.

[205] It was also apparent that Mr Harrison relied on Mr Mumford's original engineering report, which itself did not purport to provide a scope of works. Significantly, Mr Harrison was unaware of the level of agreement subsequently reached by Messrs Spicer and Mumford as a result of their meeting to discuss Mr Spicer's scope of works. Mr Harrison was not required to cost Mr Spicer's scope.

[206] Mr Harrison referred to a level of license that he allowed himself in preparing his costings, arising out of his interpretation of the engineering advice. However, it became apparent in the evidence that such license led to considerable inaccuracies, as demonstrated by the inclusion in Mr Harrison's costings of a retaining wall running in a north-south direction that did not form part of Mr Parkin's house, and which no engineer had identified as damaged.

[207] Mr Harrison was not an engineer or architect. The license he allowed himself to interpret the material upon which he sought to base his costings led to an outdated and ultimately inaccurate presentation of the cost to repair Mr Parkin's house. A further simple illustration is the inclusion by Mr Harrison of the cost to demolish and rebuild the garage as a means to allow foundation work to be undertaken under the upper level of the house. No engineer was recommending such a course.

[208] The costing evidence put forward by Mr Harrison was unsatisfactory. Counsel for Mr Parkin made the responsible acknowledgment that the Court would be unable to make any findings in respect of quantum. In any case, absent a finding of breach of the insurance contract, or of Vero having an obligation to pay Mr Parkin under the terms of the policy, the costing evidence becomes largely irrelevant.

Is an award of general damages appropriate?

[209] Mr Parkin has claimed general damages in the sum of $25,000. This pleaded remedy received little detailed consideration in the course of the trial. Mr Parkin, in closing his case, made the bare submission that it was appropriate in the circumstances to make an award of general damages, and that costs should be awarded to Mr Parkin.

[210] The claim for general damages is predicated on Vero's alleged failure to adhere to the terms of the policy and the effect this has had on Mr Parkin. As to the latter, the extent of Mr Parkin's evidence was as follows:

> Dealing with Vero has had an enormous effect on me personally of the last three years. My life has been put on hold and it has created a huge amount of stress. It has been, and continues to be a huge financial burden. I have been forced to engage professional engineers, quantity surveyors, builders and legal advisors to simply try to obtain a fair outcome. Lodging a claim with the Court was my last resort.

[211] Vero submitted that it acted throughout reasonably and in good faith, and that it has not breached any obligation created by the policy expressly or impliedly. In the absence of any breach of the insurance contract no issue of damages arises.

[212] I have not found that Vero breached the insurance policy. I do not underestimate the personal stress and frustration Mr Parkin has experienced as a result of the earthquake damage to his house, however, in the circumstances of his case I have not found Vero to be in contractual breach of its obligations, or to have acted unreasonably in the circumstances. There is therefore no foundation upon which an award of general damages could be made.

Conclusions

[213] In the end this proceeding devolved to a resolution of disputed remedial strategies for discrete aspects of damage to the house. Much time and money has been expended in relation to issues in respect of which the parties ended in substantial agreement. In my view, Mr Parkin was driven to acknowledge that the evidence presented was unsatisfactory and it was not capable of providing a sound basis upon which to make findings as to quantum.

[214] This is not a case where it is appropriate to make any declarations. The claim as initially pursued by Mr Parkin has failed – I have not found Vero to be in breach of its policy obligations. The ultimate value of this judgment is therefore resolution of the factual and legal disputes, which I will formally record in the findings below:

(a) I have outlined the correct legal interpretation of damage above at [36]–[38]. In summary, if the physical state of an item has been altered in a negative way, there will be prima facie damage.

(b) The issue of control over reinstatement is addressed above at [39]–[47]. Under the terms of the policy it is apparent that Mr Parkin has control over reinstatement (including using his own contractors). However, he is required to incur the cost of reinstatement before Vero becomes liable to pay to him any sum of money. Incurring the cost includes incurring the legal liability to pay (such as by entering into a contract). Further, Mr Parkin is contractually obliged not to undertake any works without the prior consent of Vero, such consent is not able to be unreasonably withheld. The ordinary procedure would be that each party retains experts, who ultimately exchange scopes of work, with areas of dispute being resolved.

(c) There has been no breach of the duty of good faith, nor the incorporated terms of the Fair Insurance Code. I dismissed this on the facts, but would have also dismissed it on the basis it was raised only in closing submissions, with Vero not fairly on notice of this aspect of the claim. This is discussed above at [48]–[85].

(d) Vero was not in breach of its policy obligation by placing Mr Parkin on the "cash settlement list" but not immediately paying him the indemnity value of reinstatement. In this case, Mr Parkin's placement on that list was a means to an end, and not a definitive election by Vero that it would cash settle the claim. This is discussed above at [86]–[101].

(e) Vero was under no obligation to continue to attempt to settle Mr Parkin's claim after Mr Parkin had issued proceedings against it. This is discussed above at [102].

(f) The repair standard was in substantial disagreement between the parties. I have discussed this above at [105]–[121]. By way of summary, I have concluded that the "when new" standard depends on the purpose of an item. Broadly speaking, where an object is solely structural or functional, with no aesthetic purpose, restoration of that item such that it carries out that function as if it were new, discharges Vero's obligations. Where there is also an aesthetic element, there is a need to account for that also. These two broad purposes are not mutually exclusive and whether a suggested repair strategy is sufficient will require assessment of the items proposed to be repaired, and the item itself, in light of the facts of each case.

(g) As to the damage and remedial solution, I first note that Mr Parkin conceded in closing that it was not possible for the Court to make any findings of quantum on the state of the evidence as presented (see above at [122] and [202]-[208]). Further, that by the conclusion of the evidence, the parties were in substantial agreement as to the damage suffered by the house, and the appropriate remedial strategy (see above at [124]). What follows are brief synopses of the required remedial strategy for each particular item:

(i) *Lower level piles*: the jack and pack methodology discharges Vero's obligations under the policy (see above at [127]–[145]).

(ii) *Pile at extreme south east corner*: this damage was not proved by Mr Parkin on the balance of probabilities (see above at [146]–[149]).

(iii) *External cladding*: there has been bulging which needs to be repaired, repairs to scratches are conditional upon manufacturers recommendations and visibility, further investigatory work is needed to check elongation of fixing holes, and the cladding is to remain in place while re-plumbing

the building, with all remedial work to the cladding occurring after this has occurred (see above at [150]–[167]).

(iv) *Driveway*: the parties are agreed that the driveway is to be replaced (see above at [169]).

(v) *Rotation and cracking of front foundation wall under the garage*: the parties are agreed as to the appropriate remedial strategy (see above at [170]).

(vi) *Upper level subfloor support of garage*: the parties are agreed as to the appropriate remedial strategy (see above at [171]).

(vii) *Interior of the dwelling – linings, etc*: Mr Parkin had not proved, on the balance of probabilities, that the western linings required replacement. This is subject to any further damage which may occur during the re-plumbing of the building (see above at [172]–[177]).

(viii) *Rotation of the timber retaining wall and water seepage*: Mr Parkin has been unable to prove, on the balance of probabilities, the extent of Vero's potential financial liability for the retaining wall, largely due to a paucity of evidence regarding the EQC land settlement (see above at [178]–[200]).

(ix) *Remaining aspects of damage*: the remaining aspects of damage to the house (such as the roof and deck) were not in dispute, and are to proceed in accordance with the scope of works prepared by Mr Spicer (see above at [201]).

(h) I have concluded that no award of general damages is appropriate (see above at [209]-[212]).

Costs

[215] I reserve costs. If the parties are unable to agree on the issue of costs, they are to file and exchange submissions (not exceeding five pages). In the absence of either party indicating a wish to be heard, I will make a decision in relation to any outstanding matter of costs on the papers.

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