

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV 2016-409-1223
[2018] NZHC 3444**

BETWEEN JOANNE TRACEY BRUCE, STEPHEN
LESLIE BRUCE and LESLIE GORDON
WILLETTS as trustees of the JO AND
STEPHEN FAMILY TRUST
Plaintiffs

AND IAG NEW ZEALAND LIMITED
Defendant

Hearing: 19-22, 26 and 27 November 2018

Appearances: G Shand and P Biddle for Plaintiffs
R Raymond QC, O Collette-Moxon and M Booth for Defendant

Judgment: 20 December 2018

JUDGMENT OF MALLON J

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Introduction

[1] Mr and Mrs Bruce, through a trust, own a house in Papanui, Christchurch damaged in the September 2010 and February 2011 earthquakes. Their house was insured with the defendant (IAG). Under the policy IAG agreed to “repair or replacement ... to the same condition and extent as when new”. The policy gave IAG the right to elect to reinstate the property or to indemnify Mr and Mrs Bruce for the cost.

[2] IAG elected to reinstate the house. Mr and Mrs Bruce are unhappy with the repairs carried out pursuant to that election. They say there are numerous defects and the result is that IAG has not met its obligation to repair their house to the same condition as when new. IAG accepts a large number of these defects exist and that it has responsibility to Mr and Mrs Bruce for them. The trial before me concerned the

remaining alleged defects. They are: the interior finish, the wall verticalities, the floor levels and the fireplace. A claim concerning the garage was ultimately abandoned.¹

[3] Pursuant to a pre-trial direction, this trial concerned whether the alleged defects exist and what is required to remediate them.² The cost of remediation and the appropriate remedy or quantum of damages is to be determined subsequently. The claim for general damages is to be considered at this trial.³

The house

[4] The house was designed by Darren O’Neil in 2004. He is an architectural designer. His practice is O’Neil Architecture Ltd, which is a small architectural practice in Christchurch specialising in high quality residential design. The house was designed for Mr O’Neil and his wife to live in. They had just returned from France and decided they would like their house in the French style.

[5] The house was designed as a two-storey timber framed house with plastered concrete block exterior cladding. It had a pile supported concrete slab floor and foundation, aluminium exterior joinery and a Colorsteel roof. There was an attached double garage with internal entry to the house. The house had high stud ceilings, ceiling roses, handcrafted French marble fireplaces, ornate cornices, lead lights and detailed architraves. It was sited on a large parcel of land.

[6] The house was constructed by DJ Hewitt Builders Ltd (DJ Hewitt) in 2006. DJ Hewitt had been the builder selected on a lot of other O’Neil Architecture projects. Mr O’Neil selected this builder because he regarded Mr Hewitt and his tradespeople as some of the best in Christchurch. That was also his view of Powell Fenwick, the structural engineering firm that he used for the design. These were people with whom his practice had existing relationships and he knew they would achieve the best house

¹ Counsel abandoned the claim orally in closing submissions. He was correct to do so because, despite considerable latitude provided to Mr and Mrs Bruce to pursue their concerns about the garage size and operation, ultimately they were unable to prove that the repairs varied from the garage as it was originally built.

² Direction of Matthews AJ, 9 November 2018.

³ I attended a site visit of the house, with counsel, to gain a perspective of the evidence.

for him. He was after a house constructed to the highest quality and beyond the quality of a standard house build.

[7] Mr O'Neil was involved in the construction of the house from the start and until it was completed. He made regular site visits and was very involved in the aesthetics and finishing. The foreman for the build was Noel Barnes. While Mr Barnes had day to day responsibility for the job, Mr Hewitt was also involved. Mr O'Neil saw both of them on site throughout the project. The subtrades knew each other from other projects they had worked on and this helped with the smooth running of the build. Mr O'Neil knew the subtrades from other projects, including the plasterer (Paul Lally), the painter (Greystone Painters and Decorators Ltd (Greystone)), and the joiner.

[8] For his part, Mr O'Neil understood the people involved wanted to do a perfect job for him. That was confirmed by them. Mr Barnes has worked for DJ Hewitt for 19 years and has been in the building industry for 25 years. He confirmed he was on the site daily. He said there was a motivation to get everything right and to produce the best quality build they could because it was to be Mr O'Neil's own home.

[9] Mr Lally said it was an "O'Neil house". He knew he was an architect and was "quite fussy" and "so we knew that we needed to get his house looking good ... and we had make sure it was spot on really". He said it paid off because after this he did another house with DJ Hewitt for Mr O'Neil.

[10] Anthony McKenzie, a director of Greystone, said his firm was engaged by DJ Hewitt to paint the house externally and internally. Greystone has been operating in the upper end of the Christchurch market since 1992. DJ Hewitt asked them to produce the best possible finish. This was echoed by Graham Wilson, another director of Greystone. Both Mr McKenzie and Mr Wilson have about 35 years as painters and decorators. They were asked to achieve the best possible finish and they did everything they could to achieve it.

[11] The end result was a quality building. For example, Mr O'Neil said when the house was built "the walls were perfectly vertical". He was challenged on this and

asked whether “perfect” was achievable in practice. He said it was and another word for this was “flawless”. He was asked if this was just an impression or if he had measured them:

- A. Well if it’s – look, I guess what you’re getting at is it’s pretty hard to – to – unless you measure a wall with a laser and ensure it’s perfectly vertical, but the – when you walk round it – when I built the house everything lined up – every architrave, every shadow line was perfect. I have – flawless, sorry – every architrave and shadow line was flawless so it appeared perfect to me, and I’ve got a – I’ve got a reasonable eye for that and so does D J Hewitt and so does his builder and all the trades that worked on the house.

[12] The house was entered in the Registered Master Builders House of the Year competition. This competition assesses the home on its workmanship as well as its design, functionality and style, with the workmanship criteria having the greater weighting.⁴ Before the awards were announced, Mr O’Neil and his wife sold the house to Mr and Mrs Bruce. They had not intended to sell the house. They were approached by a real estate agent who asked them if they wanted to sell it. They initially said no but the agent went ahead and put together an offer which the O’Neils regarded as too good to decline.

[13] For their part, Mr and Mrs Bruce heard about the house from a real estate agent who said that the newly built home was for sale. Mrs Bruce described viewing the house for the first time as a “wow” moment. She was impressed with the details and quality of the finish. The house was close to a decile 10 school and situated close to family. Mr and Mrs Bruce could not believe their luck in finding their dream home. They purchased the house for \$1,350,000 and took possession on 9 June 2009.

[14] Mr and Mrs Bruce were aware the house had been entered in the House of the Year competition. About a month after they moved in, the house won a “gold” award. David Sturman, who has been in the building industry for 42 years and is a past judge of the competition, said a house had to be in “sublime” condition across all categories to be considered for a gold award. Mrs Bruce’s evidence was that this award

⁴ The 2017 judging criteria was in evidence. Mr Sturman gave evidence that the 2006 criteria was “pretty similar”.

confirmed to them the quality of the house and that having this prestigious award would be an excellent selling point for the future.

The earthquake damage

[15] The house was damaged in the September 2010 and February 2011 earthquakes. The damage included: differential settlement of the concrete slab and foundations; damage to the superstructure and garage; damage to the exterior cladding, veneer block and plaster coating; and damage to the exterior landscaping, driveway, patios and fencing.

The insurance claim and response

The policy

[16] Mr and Mrs Bruce's policy with IAG provided cover for sudden accidental loss to their house and associated permanent structures (including the garage). It provided:

If the house can be repaired	If the house can be repaired, we pay the reasonable cost of the repair. We choose to either repair it, or to pay you the cost to repair it.
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If **you** do not repair the **house**, the most **we** pay is the **present value**, plus the reasonable cost of any demolition and removal of debris and contents which is necessary.

If **we** settle a claim by paying for repair, **we** automatically reinstate this insurance without making any extra charge to **you**.

If the house cannot be repaired	If the house cannot be repaired, we pay the reasonable cost to replace it with a new one at the situation . We choose to either replace it, or to pay you the cost to replace it.
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If **you** do not replace the **house**, the most **we** pay is the **present value**, plus the reasonable cost of any demolition and removal of debris and contents which is necessary.

If **we** settle a claim by replacing the **house**, this policy ends, and **we** keep any premium already paid.

How repair or replacement is made	We pay for repair or replacement using materials and methods which are in common use at the time of the loss .
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Repair or replacement will be to the same condition and extent as when the **house** was new. If this is not practicable, repair or replacement will be as close as is reasonably possible to that condition and extent.

You must take all reasonable action to allow repair or replacement work to be carried out promptly.

The insurer's obligation

[17] There are two legal points concerning IAG's obligations that arise in this case. The first concerns IAG's obligations if it elects to repair the house rather than paying the insured the cost of the repairs. There is no issue about this between the parties. The settled position is that where an insurer elects to reinstate, the insurance policy becomes a repair contract and is enforceable as such. The insurer is liable in damages if the repair contract is performed inadequately.⁵

[18] The second legal point is what is required of IAG to repair or replace to the same condition "as when the house was new". Similar wording was considered in *Parkin v Vero Insurance New Zealand Limited*.⁶ That case concerned a policy which provided reinstatement "to a standard or specification no more extensive, nor better than its condition when new".⁷ The High Court Judge rejected that this meant everything damaged had to be replaced rather than repaired.⁸

[19] In reaching that conclusion, the Judge discussed authorities which considered the "when new" standard to be different to an "as new" standard. As to the "when new" standard, this included the following authorities:

- (a) *Morlea Professional Services Pty Ltd and Pace Micrographics Pty Ltd v The South British Insurance Co Ltd* where it was said:⁹

... 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.

⁵ John Birds, Ben Lynch and Simon Milnes *MacGillivray on Insurance Law relating to all risks other than marine* (12th ed, Sweet & Maxwell, London, 2012) at [22-006]; Anthony A Tarr and Julie-Anne R Kennedy *Insurance Law in New Zealand* (2nd ed, The Law Book Company Ltd, Sydney, 1992) at 233; *Robson v New Zealand Insurance Co Ltd* [1931] NZLR 35; *Best Food Fresh Tofu Ltd v China Taiping Insurance (NZ) Co Ltd* [2014] NZHC 1279 at [16]-[17].

⁶ *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675 per Mander J.

⁷ At [30]

⁸ At [116] and [119]. The argument for the insured was that this required a standard of repair to a condition whereby a reasonable and informed looker would conclude the previously damaged part of the building was new and not patched or second hand.

⁹ *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) at 74,729, cited in *Parkin*, above n 6, at [112].

(b) *Lion Nathan Ltd v New Zealand Insurance Co Ltd* where it was said:¹⁰

... 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 ...

(c) *Colonial Mutual General Insurance Co Ltd v D'Aloia* where it was said:¹¹

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. ...

[20] Picking up on the point that “when new” could take into account the nature of the building element that had been damaged, the Judge said:¹²

[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.

[21] These authorities helpfully set out the standard that applies to IAG in this case. IAG was required to repair the house to its same condition as when it was originally

¹⁰ *Lion Nathan Ltd v New Zealand Insurance Co Ltd* (1994) 8 ANZ Insurance Cases 61-217 (HC) at 75,401, cited in *Parkin*, above n 6, at [113].

¹¹ *Colonial Mutual General Insurance Co Ltd v D'Aloia* (1988) 5 ANZ Insurance Cases 60-846 (VSC) at 75,293, cited in *Parkin*, above n 6, at [114]

¹² *Parkin*, above n 6.

built (as distinct from its condition immediately prior to the earthquakes). The standard of repair was to be to an equal condition as it was when it was built. If this was not practicable, the repair was to be as close as was reasonably possible to that condition. In assessing equality, the nature of the element was relevant. In this case, the relevant factual context includes that the house was built to a gold award winning standard.

The claim

[22] Mr and Mrs Bruce lodged a claim for the September 2010 earthquake on 24 June 2011 and for the February 2011 claim on 18 August 2011. IAG accepted the claims. Frances Lyford, an IAG Canterbury Earthquake Senior Manager, was assigned to the claim around June 2011. She had knowledge of how other houses in the same street had been damaged by the earthquakes. Her delegation was for claims under one million dollars.

[23] In July 2011 EQC advised Mr and Mrs Bruce that their claim was likely to exceed its statutory cap.¹³ As a result of this advice, IAG appointed an internal loss adjuster on 29 July 2011. The first site meeting took place on 2 August 2011. There was then a delay in progressing the claim with IAG because the EQC position first needed to be finalised. That occurred on 22 February 2012 when EQC paid Mr and Mrs Bruce the EQC cover.

Hawkins appointed to manage repair works

[24] Because of the number of claims IAG received following the earthquakes, IAG engaged Hawkins Management Limited (Hawkins) to provide project management and related services for the repair or rebuild of the homes of its policy holders. Where the house was to be repaired, a Hawkins Rebuild Solutions Manager (RSM) was appointed. The RSM would:

- (a) engage contractors from a list held by Hawkins to assess the damage and report on what needed to be done;

¹³ Under the policy, IAG was liable to pay only the amount of the loss that exceeded the EQC cover.

- (b) prepare a scope of works to repair the damage for review by a Hawkins approved builder;
- (c) monitor the delivery of the repair works on behalf of IAG and the insured;
- (d) process and certify payments to the builder on behalf of IAG and the insured; and
- (e) coordinate with IAG, the loss adjuster, the builder, subcontractors and the insured.

[25] The loss adjuster's role was to review the scope of works from a policy perspective and, if necessary, to meet with the insured to discuss any issues.

[26] On 2 May 2012 Hawkins wrote to Mr and Mrs Bruce to advise of its appointment and its role.

Repair strategy

[27] The RSM looked to involve those who had been involved in the original build. He engaged Matt Blyth from TM Consultants, an engineering practice, to provide advice as he understood that Mr Blyth had carried out the work for the original build when he was working for Powell Fenwick. On 7 June 2012 TM Consultants carried out an initial inspection and provided a report detailing earthquake damage. This included that the house had settled. The report said there was no observable damage to the perimeter foundation and the house was continuing to perform well structurally to the same degree it had prior to the earthquakes. A level survey was recommended and undertaken.

[28] The RSM approached Mr O'Neil on 20 August 2012. He told Mr O'Neil that he had engaged Mr Blyth and the plan was also to use DJ Hewitt. Mr O'Neil replied on 4 September 2012. He said he had looked at the site report from the engineer. He declined to be involved saying:

If you plan to remediate the house as per the engineers recommendations i.e. not replace the cladding, I don't think there is anything for O'Neil Architecture to do as this is a repair to original.

[29] Mr O'Neil elaborated on this in his evidence. He was aware the Bruces wanted him to be involved. He elected not to be. He was very busy at work at the time, it had been his own home, there were plenty of other people who could assist, there was no need for him to be involved, he knew all the parties (including Jim Stenberg, people from Hawkins and so on) and felt it was better if he was not involved.

[30] The RSM also approached DJ Hewitt to see if they were available to carry out the work and, if they were, to prepare a scope of works. On 6 September 2012 DJ Hewitt confirmed it was keen on having the job. The RSM advised Mr and Mrs Bruce of this on the same day.

[31] On 18 September 2012 TM Consultants reported to the RSM on the results of its floor level survey:

The results of this levels investigation have determined the building to have settled by up to 38mm over the area of the ground floor. The survey indicates settlement has occurred along the northern and eastern elevations of the building.

[32] TM Consultants explained that after their first inspection they had thought floor levelling compounds could be used to relevel the building to its pre-earthquake condition. However, the level survey had highlighted that more significant releveling was required. TM Consultants proposed two releveling solutions: one involving digging under the concrete strip foundations in specific areas, disconnecting the piles and installing new ones; and the other involving breaking out the concrete slab in specific areas and replacing it with an enhanced slab.

[33] On 20 September 2012 TM Consultants' repair strategy was discussed with the loss adjuster, RSM, the Bruces and DJ Hewitt (who was invited at the request of the Bruces). It appears that DJ Hewitt was pushing for a rebuild and that he did not want to be involved in a repair. A note on IAG's file about this records the RSM's view as follows:¹⁴

¹⁴ This note appears to be recording the RSM's view at this time.

Owner Preferred Builder involved. I believe this will add unnecessary delays to the claim as builder are [sic] pushing the owners towards a rebuild.

[34] Similarly, the RSM sent an email to the loss adjuster on 20 September 2012 which said:

Would you like me to arrange a Geotech report based on Matts conclusions, I will arrange them directly without the builders involvement, ...

I have my concerns over the owners builder pushing them to a rebuild when the house is most likely repairable ...

[35] The RSM engaged Aurecon to prepare a geotechnical report. Aurecon initially reported on 22 January 2012. In February 2013 Aurecon was engaged to carry out further inspection, undertake a structural engineering assessment of the foundation and provide a solution to remediate the differential settlement to the foundation.

[36] On 15 May 2013 Aurecon provided the RSM with advice on the two options that TSM Consultants had proposed. Aurecon raised limitations with both options. It noted that a logical extension of the second option would be to replace the entire slab on the ground while the house superstructure was lifted. Under this option it would likely be necessary to replace all the existing piles to meet “new design” standards.

[37] In the meantime, having learned that DJ Hewitt and Mr O’Neil were not going to be involved, Mr and Mrs Bruce had proposed that Jim Stenberg, of Jim the Builder Limited (JTB), be appointed to carry out the repairs. Mrs Bruce explained that he had been the builder of their neighbour’s property and had a good reputation. Mrs Bruce asked IAG if he was on their list. On 22 May 2013 the RSM advised the Bruces that JTB was interested in doing the repair.¹⁵

[38] On 27 June 2013 IAG’s loss adjuster met with the Bruces. Later that day he emailed them to explain the process going forward. He noted there were presently three repair options being considered and JTB was reviewing them. The repair strategy was expected to be confirmed by 19 July 2013. This would be reviewed by IAG. The work would then be scoped by the RSM, JTB and the loss adjuster. The

¹⁵ A later email, dated 5 July 2013, recorded that JTB wished to work with the RSM with whom they worked on other jobs. IAG and Hawkins agreed to changing the RSM because Mr and Mrs Bruce were “very keen” to keep JTB on board.

Bruces would be given an opportunity to review the scope and ensure all necessary repairs had been considered. The scope would then be signed off by the loss adjuster for pricing by JTB and his subcontractors. This would be reviewed by a quantity surveyor. The priced scope would be compared to the cost of a total rebuild to determine whether the repair strategy was economic. The claim would then move into the building contract signing stage.

[39] By July 2013 Aurecon's third option, complete slab replacement and installation of new piles, had been settled on.

[40] On 23 September 2013 the provisional scope of works had been completed. This was provided to the Bruces on 27 September 2017 in case they "have noticed something that has not been included or [which has been] missed from the scope". The loss adjuster would be in contact the following week to discuss any comments or amendments that might be required by the Bruces following their review. In response to that invitation, Mrs Bruce raised a question about the garage. She had understood it needed to be demolished due to the issues with the door and the "obvious sloping" of the floor. The loss adjuster advised that this would occur if JTB could not separate the garage from the house.

[41] The scope of works was priced over the subsequent seven months.

The building contract

[42] On 14 May 2014 a building contract was entered into between JTB and the Bruces. The contract price was for \$867,903.66 (excluding GST). The provisional start date was 29 September 2014 and the provisional completion date was 19 June 2015. No additional sums were payable by IAG to JTB unless agreed to in writing by Hawkins (other than any emergency works).

[43] Under the contract JTB and the Bruces acknowledged that IAG had appointed Hawkins to carry out certain services for IAG. JTB was required to forward all certificates, invoices and other documentation to Hawkins; "comply with all reasonable instructions issued in writing by Hawkins"; and to deal with the Bruces,

Hawkins and IAG in good faith. The contract required JTB to submit payment claims to Hawkins in accordance with the milestone schedule payments set out in the contract.

[44] The contract provided JTB could engage subcontractors but it would remain liable for its subcontractors' acts and omissions.

[45] Practical Completion occurred when the contract works and any agreed variations were completed except for minor omissions and defects (as further described). The Bruces were entitled to possession following Practical Completion. JTB was liable for any defects in the works notified to JTB within 90 days after Practical Completion. JTB was required to rectify the defects within the defects period or such other times as agreed between the Bruces and JTB.

[46] Mr Willetts, a solicitor and a trustee of Mr and Mrs Bruce's family trust that owned the house, gave evidence about the meeting on 18 March 2014 at which this contract was signed. He did not recall if he had been forwarded the contract earlier (emails indicated IAG intended this was to occur) but he does recall having the opportunity to read through the contract. He said that the meeting came as a relief after a lot of anxiety and stress for the Bruces in getting their claim to progress to this point. The meeting was attended by the Bruces and Mr Willetts, a raft of IAG representatives, the owner of JTB, a loss adjuster, and a Hawkins' representative.

[47] Mr Willetts said it was outlined at this meeting that the house would be jacked up two or three metres to enable the new foundations to be put down. Other detail about the remedial works was provided. He voiced his concern about whether the remedial works would succeed and asked whether it would be easier for all if the house was rebuilt. The response was that those experienced and qualified to do so had made the decision.

[48] Mrs Bruce also gave evidence that she disagreed with the repair strategy and was concerned about how IAG would match the quality of finish and fixtures in the house. This disagreement was not recorded in any of the email communications she had with the RSM up until this point (or if it was, I was not referred to this). She said IAG were adamant the house was to be repaired.

[49] I accept Mr Willetts queried the strategy of a repair. It is less clear if Mr and Mrs Bruce did, although I accept they had concerns about it. Regardless of whether they conveyed their concerns, it is clear IAG wished to pursue this approach. There is no documentation that shows any detailed consideration was given to a complete rebuild. IAG had expert advice that repairs could be carried out. IAG was entitled to rely on that advice.

The handover

[50] The work did not begin until February 2015. Practical completion and handover occurred on 15 May 2016.

[51] As this time was approaching, Mr and Mrs Bruce began to raise issues regarding the quality of the work that had been carried out. For example, by email dated 27 April 2016 Mr and Mrs Bruce advised IAG of a number of problems. These included “water pooling in areas”. They asked for a level report to be carried out and proposed that DJ Hewitt carry this out. IAG advised that it would prefer to use Axis Building Consultants (Axis) because it was qualified to report on all aspects of the repair.

[52] By email dated 6 June 2016, Mr and Mrs Bruce provided IAG with a full list of defects they had discovered to that point (referred to as a “snag list”). They expressed a preference to involve their own contractors to remedy the work and to send the invoices to IAG for payment. If this was not possible, they wished to be involved in the repair strategy. The snag list was detailed and set out numerous defects. For present purposes the following are the relevant ones:

Overall marks on walls throughout [which] have uneven sanding especially in the hallway, entry and downstairs toilet. Marked walls and sloppy paint finish lacking finesse. We have engaged painters to check this and they agree, the grade finish is very poor with no attention to detail, the few walls that are ok have marks on them from tradesmen’s fingers or leaning up or touching them with dirty hands.

...

It appears the garage is smaller than it originally was ... around 150mm. Entry from the home to the garage slab drops down and is not level. ...

...

Throughout ... Walls appear to be out, not straight.

...

A floor board feels like it's lifting in main hallway – air bubble. Swinards have reviewed and said this normal however every visitor who walks on the one piece in question comments without any prompting.

... French doors we can see light through and aren't flush ...

[53] On 17 June 2016 a code of compliance certificate was provided by JTB to Mr and Mrs Bruce.

[54] IAG considered JTB had the initial responsibility to try and address the defects in accordance with the procedure in the building contract. However, to help facilitate this, IAG engaged Axis to inspect the house and to report on the quality of JTB's work. A floor levels survey was to be part of the assessment.

[55] Brian Ellis of Axis inspected the property on 11 July 2016. He spent seven hours on the site. He provided his report to IAG on 7 September 2016. The report was detailed. It included floor level and wall verticality surveys. The floor level survey showed, for example, that the lowest point on the ground floor level was -32 mm and the highest point was in the garage at +42 mm. The wall verticality survey showed the ground floor walls out of plumb in one area (by the French doors) by up to 18 mm and by amounts ranging from 5 mm to 15 mm on a number of other walls.

[56] The report concluded:

Following our visual inspection we conclude that the majority of the owners concerns are justified. While there is evidence of poor workmanship and non-compliant work, the majority of the issues are generally cosmetic, but they are noticeable and are in our expert view a valid source of disappointment, as they detract from the overall finish of the project. Most of the defects appear to have been caused by too much rush to finish at the end of the project and could have been sorted earlier with more attention to detail.

[57] In the meantime JTB, which had earlier changed its name to Jim Finished Ltd, was removed from the Companies Registrar on 15 July 2016.

[58] IAG provided the Axis report to Mr and Mrs Bruce and JTB for discussion. Ms Lyford's evidence is that efforts to resolve the Bruces' concerns were not successful by the time, in December 2016, that Mr and Mrs Bruce commenced these proceedings.

[59] While the proceedings were on foot Mr and Mrs Bruce engaged Powell Fenwick, the surveyors engaged on the original report, to report on the repair methodology and whether it had left any structural defects, and on the general quality of the repairs. Malcolm Freeman of Powell Fenwick provided his report on 11 August 2017. His report identified a number of defects including those that remain in issue now (namely, the internal finish, the wall verticalities and the uneven slab). His comments included the following:

During our inspection we noted many deficient or poorly constructed and finished non-structural items most of which are covered in the Axis report. In general the comments made in this report are consistent with our findings and opinion of the quality of the finish throughout the house.

...

The house has suffered a significant reduction in quality as a result of the repairs which, in our opinion, were undertaken to an inferior standard.

[60] IAG engaged Mr McGunnigle of McGunnigle Hodge. Mr McGunnigle provided his report on 22 August 2017. He is a highly qualified and experienced building surveyor. He was called by IAG to provide evidence on the defects alleged by Mr and Mrs Bruce. He inspected the house on five occasions for this purpose.

[61] In accordance with a court direction, on 22 November 2017 Mr Freeman and Mr Lanyon, a structural engineer engaged by IAG, provided a joint report of their areas of agreement and disagreement. On 23 November 2017 Mr Sturman and Mr McGunnigle provided a joint report of their areas of agreement and disagreement. A further joint report was provided in the course of the trial. The result of this process is that agreement has been reached about most of the defective repairs. There were other unsuccessful efforts to settle the matter – in particular a judicial settlement conference took place.

The finish to the internal walls

The levels

[62] Interior plastering and painting to walls can be carried out to different standards that are called “levels” or “grades”. For a level 5 plastering finish, the walls are completely covered in plaster, then sanded and smoothed. For a level 4 finish, only the joints are plastered, and then sanded and smoothed.

[63] Mr McGunnigle said a level 4 finish is generally understood in the building and painting trades to be the commonly accepted level of finish for most dwellings. A level 5 finish is generally specified where the design of the dwelling is such that glancing light is prevalent or where gloss or semi-gloss paints are being used.

[64] The relevant standard, AS/NZS2589:2017, states:

Level 5 shall be used where gloss or semi-gloss paints are used or where critical lighting conditions occur on flat, matt or low sheen paints.

A level 5 finish is characterized [sic] by a parity of texture and porosity. The surface texture shall be random in fashion and monolithic, concealing joints and fixing points.

A paint or plaster material shall then be sprayed, rolled or trowelled over the defined area.

The original build

[65] The contract for the original build was for a level 4 finish except for the entry and stairwell which were to be level 5. The contract also provided that the painter was to “inspect and satisfy himself that all surfaces to be painted, varnished, etc., shall be suitable for a first class finish”. Mr McGunnigle said that this would be understood to mean that the job should be done to standard of best practice to achieve the level of finish that has been specified.

[66] Mr O’Neil’s evidence was that in the course of the build the finish was upgraded. He said a level 5 finish for the stopping and internal plastering was achieved. He was questioned about this and said:

Q. And obviously as you – the entry and stairwell was an area that you wanted to have as a better finish, correct?

A. Yes that's right.

Q. And –

A. It was more about cost actually, because you know, I want the best finish everywhere, but to do it – in fact, later on as I said, when I read out, we changed our mind on it because when you get into a build, like everybody, you spend more money. So, you know, initially when we were doing the drawings we are just trying to watch our – watch the cost, you know, level 5 everywhere is quite expensive, but once you get into the build and it's looking fabulous and you're caught up in the emotion of it, yeah, you upgrade things.

Q. So did you issue a variation to the contract to change it from level 4 to level 5?

A. No – verbally yeah. Paul – it's a long time ago, but I told Paul and I think Noel Barnes to – it will be a conversation we had where they were pointing out other areas. I said, "Well just do the whole thing level 5," it was verbal. And actually to be honest, I don't think the cost was that – was as much as I thought it was going to be.

[67] Similarly, in a letter sent to Mr and Mrs Bruce on 3 July 2018, Mr Lally said:

In 2006 Broomfield Quality Stoppers sub-contracted to D.J Hewitt Builders. Our line of work is interior plastering. The house was a Darren O'Neil architects own home. We produced a top-quality finish, to get this finish we had to do a level 5 finish. When the house was completed it looked fantastic.

[68] Mr Lally clarified this in his evidence. He produced a level 5 finish in critical light areas. This included the entrance way and the stairwell. Elsewhere he carried out a level 4 finish but to a high standard. This involved putting the plaster more widely over the joints and putting more work in the sanding and smoothing.

[69] Mr Wilson and Mr McKenzie's evidence was that Mr Lally had achieved for the painters a level 5 finish in certain areas and what they described as a "Level 4 plus finish". By this they meant it was better than a level 4 finish. It was a "grade 4 plaster, but to a very high standard within that grade".

[70] The painting was finished to the same standard. Mr Wilson said they "were asked to achieve the best possible finish" and they "took extra steps to ensure the finish was as near perfect as possible". Mr McKenzie said:

After this process, walls will always have fine scratches and imperfections that cannot be seen until the wall is painted. We then painted the wall with a thick grade 5 paint, which covers the scratches. It essentially builds up a thick layer of paint. We then sand the wall down by hand and plaster over any imperfections. Then we put another under coat over the plaster, and two top coats.

There may be other marks that become apparent, which we would deal with as we go. We always deal with these when we aim to achieve a high level finish, as we did here.

... We carried out the process as I described above because we were asked to produce the best possible finish at this job by DJ Hewitt Builders.

[71] Mr Barnes said he recalled the plasterers and painters putting on a level 5 finish reflecting the owner's requirements and DJ Hewitt's desire to build an award winning home. He considered the finish had met his and Mr O'Neil's expectations.

[72] In summary, both the plastering and the painting was to a level 5 finish in critical light areas (which included the entranceway and stairwell) and elsewhere it was to a high level 4 finish.

The repairs

[73] The building contract for the repairs provided for a level 4 finish throughout. Generally all workmanship was to be "a first class finish". There were no additional stipulations for the painter about achieving this as there were in the contract for the original build.

[74] Mr Lally was asked by Mrs Bruce to look at the interior plastering because she was not happy with it. In a letter sent to Mr and Mrs Bruce on 3 July 2018 Mr Lally said:

... I can see imperfections on the walls and ceiling, this house was not plastered to the standard we left it in 2006. The house will need a level 5 finish again.

[75] He elaborated in his evidence. He said you can determine the level of finish if you spend half a day at a house and can see the different light changes. He said:

... but the time I spent there which wasn't very long and I could see where the light was hitting off and you could see the difference between the plaster board finish and the plastered finish ... And I could see areas when the light did hit

across it wasn't a level 5 ... And that was in areas we definitely would've done a level 5. ...

[Q...And what about generally in other areas ... Did you notice what it was?]

Yeah, yeah we could notice it wasn't our standard, yes ... You could see that slight mount in the joints and I could see them in like two minutes ... I wouldn't like it in my house.

[76] Mr Lally said it would be good enough for a lot of people. But this was an architectural house, not a standard subdivision house, and the standard was not an architectural finish. He accepted it might have met a level 4 finish under the New Zealand specifications and standards but "it wasn't my standard level 4 finish".

[77] Greytone's view, as set out in a letter dated 16 August 2016, was that the finish on site was a Level 4 finish and was not the finish achieved in 2006. Similarly, Mr O'Neil said the finish he viewed on site post-repair was to a lesser standard than was achieved on the original build.

[78] Mr Sturman said:

The level of finish of JTB's remedial works is inferior to the pre earthquake damaged finish and when it was new. It is currently level 4 at most, where the as new when built finish was level 5.

This is not only a level of finish issue; it is also a paint specification and quality of paint finish...

[79] Mr Sturman went on to refer to the kind of paint originally used. However, Mr McGunnigle said this was not correct according to the specifications. It is not necessary to discuss the detail of this.

[80] Mr Freeman's August 2017 report said:

The standard of plaster and painting finish to the interior walls of the house. This is of an inferior quality that does not achieve what we would expect was specified in a house of this standard which would generally be an F5 paint finish as a minimum.

The remedy

[81] Greytone provided its view of the work necessary to repair the walls to achieve the finish of the original build:

4. For Greystone Painters and Decorators to undertake the remedial work we would require the re-sanding of all walls & ceilings, sanding/stripping of all the architraves to apply a [sic];
 - ✓ All ceilings & walls need to be sanded, filled where necessary, sealed and have two coats of the appropriate ceiling paint and wall paint. (this will cover the wet areas as well)
 - ✓ All trims and doors to be sanded, filled & sealed where necessary, then apply 1 coat of alkyd undercoat then 1 coat of Lustaglo enamel. The reason why we prefer this option is that it is harder wearing and provides a smoother more superior finish.
5. The project has a reasonably high degree of difficulty to get this project back to the standard it once was. This project will require four of my qualified staff members working full time for up to 4 – 5 weeks. We recommend that the homeowners move out of the home for that period of time such that we get a good clear run at the project and the fumes do not affect the owners.

[82] Mr Sturman said the finishing and level of finish needs to be brought up to a Gold Award House of the Year standard.

[83] Mr McGunnigle's evidence was:

Some remedial works are needed to bring certain areas of the house to a level 5 finish (if that was the standard required) ... These works need not disrupt the use of the house if carried out properly and carefully.

However, to achieve a level 4 finish (except in the stairwell/entry), if that was the standard required, the work needed would be considerably less, comprising work to repair Kitchen wall 1 which has some nail pops, depressions and paint flecks on the surface, and upper level hallway 3, which needs visible making good for air conditioning services. All other walls and ceilings meet or exceed the requirements for a level 4 finish.

[84] Mr McGunnigle carried out a careful ceiling by ceiling and wall by wall inspection. He used a bright torch to scan the surface with glancing light to reveal imperfections and allow detailed inspection. To achieve a level 4 everywhere except level 5 in the entry and stairwell, his conclusions were:

In general the finish on the walls and ceilings in the upper floor, is currently level 5. This is a superior level of finish to a level 4 and it would not make sense to do any work to make the ceilings a level 4 finish. In the upper level hallway wall 3, visible making good for air conditioning services is required to achieve a level 4 finish.

For the lower floor the ceilings were left in place, except for bedroom 4 and the kitchen which were replaced to provide bracing. Annexure A to my brief, sets out that the ceilings have a level 5 finish on the lower floor including bedroom 4 and the kitchen. Certain work is required to repair the kitchen wall 1 which has some nail pops, depressions and paint flecks on surface. All other walls and ceilings on the lower floor meet or exceed the requirements for a level 4 finish.

The ceilings to the entry and stairwell are to a level 5 finish and do not require any remedial work. The walls to the entry and stairwell including the central wall adjacent the stairs exhibits blemishes which must be rectified to achieve a level 5 finish. All the walls to the entry and stairwell require remediation in the form of preparation, sanding down and repainting to achieve a level 5 finish.

[85] If a level 5 finish was required everywhere, Mr McGunnigle's conclusions were:

Lower floor:

- (a) Laundry: (no remediation required);
- (b) Entrance: all the walls require remediation (the ceiling does not require remediation);
- (c) Hallway: the walls require remediation (the ceiling does not require remediation);
- (d) Lounge: remedial work is required to the wall of the chimney breast (none of the other walls or the ceiling require remediation);
- (e) Dining room: one of the walls requires remediation (none of the other walls do);
- (f) Kitchen: one wall requires remediation (none of the other walls or the ceilings require any remedial work);
- (g) Bedroom 4: (no remedial work is required to the walls or ceilings);

- (h) Bathroom ensuite to bedroom 4: (no remedial work required to the walls or ceiling);
- (i) Scullery: (no remedial work required to the walls or ceiling);
- (j) WC near entrance: (no remedial work required because it is wallpapered); and
- (k) Garage: (no remedial work).

Upper floor:

- (l) Hallway: two long walls require remediation (none of the other walls or ceiling require this);
- (m) Bedroom 1: two walls require remediation (none of the other walls or ceiling require this);
- (n) Dressing room off bedroom 1: (no remediation required);
- (o) Ensuite to bedroom 1: two walls require remediation (none of the other walls or ceiling require remediation);
- (p) Bedroom 2: one surface blemish requires remediation;
- (q) Bedroom 3: one wall requires remediation (none of the other walls or ceiling require remediation);
- (r) WC near bedroom 3: (no remediation required); and
- (s) Bathroom: (no remediation required).

[86] The walls and ceilings on the first floor were not removed. Mr McGunnigle refers to a number of rooms or walls that have glancing light other than the stairwell and entrance. His evidence that a number of walls and ceilings apart from the stairwell

and entrance are already level 5 confirms the evidence of Mr O’Neil, Mr Lally and the painters that a high standard was achieved for the original build. This is consistent also with the evidence that the internal walls on the upper floor were left intact during the remediation work and therefore do not require further remediation to bring up to the “as when new” standard of the insurance policy.

Submissions

[87] IAG submits the relevant comparison is as between the specifications for the original build and the repair work as completed. It would be unreasonable to require IAG to carry out the repairs to the “Level 4 plus” standard described by the witnesses. IAG could not be expected to know this was the standard without tracking down those originally involved in the work. Further, such a standard is not capable of clear determination.

[88] IAG therefore says its obligation was to achieve a level 4 finish to all the interior walls and ceilings, except the entrance and stairwell which was to be level 5. It accepts Hawkins should have scoped the entrance and stairwell to a level 5 finish. It will meet the cost of bringing this area up to a level 5 finish. For the balance of the work, it submits the work outlined by Mr McGunnigle at [84] above is what is required. IAG notes there was no serious challenge to this evidence and he was the only one to carry out a detailed assessment.

[89] The Bruces submit the relevant comparison is as between the house as it was when it was originally built (“as when new”) and as it is now after the repairs by JTB were completed. They say the evidence shows there was a level 5 finish in the hallway and stairwell and other critical light areas and the rest was at the top end of a level 4 standard.

[90] The Bruces submit this is an architectural home, not a standard or mass produced home. Quality was important. The insurance policy required the house to be repaired to the same condition as when it was new. That standard is easily ascertainable with reference to those involved in the original build. Their evidence is that this standard has not been achieved. It submits the repair scope is that as provided by Greystone.

My assessment

[91] I accept the relevant comparison is as between the house as it was when it was built and taken possession of by the O'Neils in 2006 and as it is now after the repairs by JTB were completed. That is what the policy provides. It is a question of evidence to establish the finish of the house when it was new.

[92] Absent any other evidence, the specifications might provide the most reliable evidence of the internal finish. However, there is other reliable evidence before the Court about the level of finish as it was when new. The architectural designer and original owner of the house, the builder, the plasterer and the painters were all available to give evidence about what actually occurred on site. I reject IAG's submission that it could not be expected to know about this without tracking down those originally involved because the Bruces actively pushed for this and IAG in fact attempted to bring them on board, as discussed above. Additionally, some of the walls and ceilings remained intact when the house was lifted and then repositioned. There is expert evidence from Mr McGunnigle about the level of finish of these walls and ceilings.

[93] The finish of the house as originally built varied from the specifications because Mr O'Neil decided he wanted a higher finish than he had specified in the contract; Mr Lally carried out a Level 5 finish to critical light areas and carried out the rest of the plastering to a higher standard than is required for a level 4 finish; Mr Lally's high standard enabled the painters to carry out their work to a high standard; and the painters took extra steps to ensure the best possible finish.

[94] This is confirmed by Mr McGunnigle's evidence about the level of remediation required if a level 5 finish is to be achieved throughout. His evidence is that in most rooms only some or no remediation is required because the walls and ceiling are already at a level 5 finish in critical light areas. His evidence confirms that the finish achieved on the original build was above a standard level 4 – he regards it as a level 5 finish in many areas, which is consistent with the excellent work Mr Lally and the painters carried out.

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

Wall verticalities

The standard

[96] The relevant standard is NZS3604:2011. This sets out the construction tolerances for timber framed internal walls. The permitted deviation from vertical is 15 mm per two storey height and 5 mm per 2.4 m. The deviation from horizontal is any length up to 10 m is 5 mm, and in any length over 10 m is 10 mm total.

The original build

[97] As set out above, Mr O’Neil’s evidence was that “[w]hen we built the house the walls were perfectly vertical” and “everything lined up – every architrave, every shadow line was perfect”.¹⁶ He acknowledged this was based on his visual assessment rather than a survey, but also said he had a good eye for detail.

[98] Mr Barnes said:

The framing of the walls were also routinely measured throughout the construction. Having square and level framing that we would have the best structure to achieve the best level of finish. ... There is no doubt in my mind that the floors and walls were originally built to the industry standard being both plumb and level.

The repairs

[99] Mr O’Neil visited the house in 2016 for about two hours. He was not told of any specific defects that he was to look for. He saw there were defects but did not delve deeper because he was not really interested in being involved. He said:

¹⁶ At [11] above.

...I did notice in the lounge the doors were out of alignment, you know, the architrave was out of alignment to the wall so I did notice that. I didn't, I didn't – nobody told me about the walls or the floor so I wasn't going there looking for that but I did notice the architrave was slightly off.

[100] Mr Freeman's report dated 11 August 2017 identified the wall verticalities as an issue.¹⁷ His report included the following:

The following structural items were noted from our review of the information along with what was noted from our inspection on site:

- The timber framed walls of the house are not plumb. This is supported by both the survey information and the door function within the house, particularly on the sliding doors between the lounge and living areas.
- The verticality of the timber frames [sic] walls do not meet the tolerance requirements of the standards NZS3604:2011, which apply to this type of structure.
- The out-of-vertical walls have induced a permanent racking into the adjoining walls leaving windows and fittings out-of-square.
- The floor slab is out of level by up to 40mm from the highest point to the lowest point and has significant variation within rooms.
- The levels of the newly placed slab and foundation do not meet the tolerances of the building standard NZS3109:1997 or NZS3114:1987, which apply to this type of structure.

...

The repairs to the property have had a detrimental effect on the original structure of the house. The new foundations and timber framed walls do not meet the New Zealand Building Code in terms of the construction tolerances required in the individual Standards. Amending these deficiencies will require major disruptive work on the site effectively repeating the scope of work that has already been undertaken to adequately rectify.

[101] Mr Lanyon is an engineer with 45 years' experience. Using the profiles compiled by Richard Graham (IAG's cadastral surveyor), he said that most walls are within tolerance particularly on the first floor. He accepted that across profiles 5, 6, 8, 9 and 10 there were areas that exceeded the tolerances. Specifically:

¹⁷ Mr Freeman provided another report for Mr and Mrs Bruce dated 27 October 2017. In this report Mr Freeman noted that IAG's expert agreed that the verticality limits in the standard had not been complied with.

- (a) Profile 5 (inside kitchen/dining, looking east): there are horizontal deviations of 8 mm and 13 mm below bedroom 1. These were therefore 3 mm and 8 mm respectively outside the tolerance in the standard.
- (b) Profile 6 (inside north dining and lounge, looking north): there are vertical deviations of 8 mm, 6 mm, and another of 8 mm along the ground floor wall. These were therefore 3 mm, 2 mm and 3 mm outside the tolerance in the standard.
- (c) Profile 10 (inside kitchen/dining and lounge, looking south at hallway): there is a vertical deviation of 7 mm on the ground floor below the Bedroom 2 ensuite. This was therefore 2 mm outside the tolerance in the standard.
- (d) Profile 8 (a two storey profile inside the entrance, looking south at stairs/laundry): this complies with the 15 mm per two storey height vertical tolerance. There are localised areas that breach the 5 mm vertical and horizontal tolerances: a 12 mm (high) spot at the bottom of the laundry door and a 10 mm (depression) at the top right corner of the profile.
- (e) Profile 9 (a two story profile inside the entrance, looking west at the front door): this complies with the 15 mm per two storey height vertical tolerance. There are a number of minor breaches of the 5 mm horizontal tolerance, with the wall having high spots ranging between 6 mm to 8 mm.

[102] Mr Sturman noted that the wall verticalities are greater than 3 mm outside the standard tolerance in 16 of the 25 locations surveyed by Scott Williams (the Bruces' cadastral surveyor). Mr Sturman sought to add to this in his oral evidence by stating there were five walls he could see that had verticality issues within five minutes of inspecting the house for the first time. However these walls were not part of Mr Graham's or Mr Williams' survey and the manner in which they were raised did

not enable IAG to respond to them. I therefore do not place any weight on this aspect of Mr Sturman's evidence.

Fault of repairs?

[103] Mr Lanyon expressed the view that these breaches are likely to be pre-existing rather than a result of the repair work. He considered the bracing used made it very unlikely that the walls had moved. If they had moved he would have expected the walls to have been damaged. He considered the uneven floor has not caused wall verticality issues because there is no consistency in the direction the walls lean as he would have expected if this was the case.

[104] Mr Sturman considered the wall verticality issue occurred during the repair. He considered it was possible that moisture got into the frames when it was exposed and then when it dried it bent and bowed. He accepted the house was wrapped in building paper when it was lifted and a competent builder ought to notice issues if the timber framing was affected by moisture. He also considered the uneven concrete slab was a cause of the walls deviating from the verticality standard.

[105] Mr Freeman considered the verticality issues were caused partly by the uneven floor slab but primarily because of poor construction during the repairs.

Structural and functional performance

[106] Mr Lanyon's expert opinion was that the exceedances of the standard have no impact on the structural or functional performance of the house required under the Building Code.

[107] He said the exceedances from the standard do not affect the structural or functioning integrity of the walls themselves. Further, the standard is an "acceptable solution". That is, compliance with the standards provides a means of evidencing compliance with the Building Code.¹⁸ However it is also possible to build a house that does not comply with the "acceptable solution" of the standards but nonetheless to demonstrate compliance with the Code in another way. A structural engineer can

¹⁸ See "Outcome Statement" in NZ3604:2011.

be engaged to provide an expert assessment of the building against the performance criteria of the Code. He had carried out such an assessment and provided his calculations in support of his assessment.

[108] His conclusion was:

... the walls of the house meet the functional and performance requirements of the Code. They are no more likely to rupture become unstable, lose equilibrium or collapse than walls strictly falling within tolerances of the relevant New Zealand Standards.

[109] Mr Freeman's view was that the standards are the verification method for meeting the Code. He accepted this was one verification method and "unless you're presenting an alternative method of complying with the Building Code that is the accepted path". He accepted that the particular deviations from the standard in this case did not give rise to a structural issue. The house was not going to fall down, life was not going to be put at risk, and it was going to survive a ULS or SLS event.¹⁹ He considered, however, that it had not been proven that the Building Code was complied with in this case. His evidence on this included:

Q Is it something that you noticed?

A The wall alignments, no I didn't.

...

Q Well these walls with that deviation isn't going to cause a structural failure is it?

A No it's not.

Q So the question is, it's not a structural issue. The walls are sound, the house is not going to fall down, life isn't going to be put at risk. It is going to survive a ULS or SLS event?

A Correct.

Q And again, on that profile there's not an amenity issue either is there?

A No.

¹⁹ Serviceability Limit State (SLS) represents a level of stress or strain below which there is a high expectation the building can continue to be used as originally intended without requiring substantial structural repair. Ultimate Limit State (ULS) is the limit state where buildings are expected to be severely damaged, but not collapse (that is, not cause severe injury or death to occupants).

[110] Mr Freeman considered that Mr Lanyon's calculations did not take into account the combinations due to gravity and wind or earthquake loads as required by NZS1170 and hence did not provide a true reflection of the suitability of the timber framing. He did not carry out his own calculations.

Aesthetics

[111] Mr Freeman agreed the wall verticality issue was not an "amenity" issue under the Code. He accepted it did not prevent the enjoyment or use of the space. He said that, whether it was perceptible, depended on who was looking at it. He personally had not noticed the wall alignments as an issue.

[112] Mr Lanyon said the exceedances "are not visible to the naked eye".

[113] Mr McGunnigle said:

In my view the amounts by which the walls are out of plumb is not visually perceivable. Because it cannot be perceived, the minor extent to which some walls are not exactly plumb does not affect the visual character, use or amenity of the room spaces in any way. To repair this would involve straightening the walls by amounts that are not visually noticeable and then would not achieve any benefit for the user.

The remedy

[114] Mr Freeman considered the verticality of the walls could be addressed when the timber structure was reconnected to the floor slab in the process of the floor slab and foundations being replaced. This evidence was premised on his view that the floor slab needed to be replaced.

[115] Mr Sturman's written brief said:

The high lift repair methodology has clearly failed. The floors are not level and the walls are out of vertical. IAG and its consultants have miscalculated the appropriate remedial solution for the house evidenced by the resultant slab/floor levels and the framing having wracked to the extent it has. Again, because of these factors, it is my opinion the only logical method is to rebuild the house from scratch in order to avoid another failed repair. In my opinion, the damage is too extensive for the house to be repaired.

[116] In cross examination he said he had “softened a little bit” on his position that the house should be completely demolished and rebuilt. He proposed a method for straightening the walls. However, he also said:

... the downstairs framing had lost its memory because for eight years from 2010 to now it’s been out of verticality, so the process in straightening that frame becomes a tenuous exercise.

[117] He agreed he had not done a wall by wall analysis as Mr McGunnigle had done.

[118] Mr Lanyon considered it was not necessary to do any remedial work to the walls. However, if it was necessary to rectify them so that they met the tolerances in the standard, this would involve removing the internal wall linings on the affected walls on Profile 5, 6, 8, 9 and 10, packing out the wall framing and reattaching (or replacing) each lining. The walls would then be repainted. On profile 8 a skim coat could be applied to the local depression in the lining.

[119] Mr McGunnigle considered that to bring the walls within the standard would require “significant” work involving the removal of the linings, packing out of the timber frame to give a vertical surface, relining the walls, skim coating and repainting. He considered “nothing would be achieved” by this “because there is no visually perceptible deficiency.” He added:

It should be appreciated that this is not a new building with a new timber frame. The timber frame is about 14 years old. The existing timber frame was unlikely to be perfect when built in 2004, it is not perfect now and cannot be made perfect in a practical way. Nor is there any need for it to be made perfect because the areas of out of plumb wall linings are not visually apparent. Unless there are structural reasons otherwise, a rebuild is simply not necessary.

Submissions

[120] The issue of whether the walls were “racked” was covered at the hearing. However there was some uncertainty about what that meant and to which walls it applied. The evidence for Mr and Mrs Bruce on this topic lacked detail. In closing submissions it was not pursued.

[121] IAG submits Mr and Mrs Bruce have not proven the walls are defective because of the verticality issues. That is because there is no structural, aesthetic or amenity issue with them. Even if the Court concluded IAG had breached its obligations under the policy, it would be unreasonable to replace the walls. It submits that the issue is whether there is any impact on market value because of the verticality issues and the answer must be “no” because they are imperceptible.

[122] Mr and Mrs Bruce submit the walls were perfectly vertical when new. Strictly that means they should be straightened so that they have a zero mm lean. The wall framing should be replaced.

My assessment

[123] The wall verticalities are not as good as they were when the house was originally built. The consistent evidence from those involved in the original build was that the work on the original build was carried out with particular care and attention with a high-quality outcome. I accept Mr Barnes’ evidence that the walls were routinely measured to ensure the best structure and finish. I accept Mr O’Neil’s evidence that he has a good eye for detail and the workmanship was, essentially, flawless. The gold award was confirmation of that. That does not mean that all the walls were at zero mm. But any variations from that would have been minor and within the standard.

[124] That sort of care and attention did not take place with the repair. That is evident from the lengthy list of defects following handover as confirmed by the experts each side engaged. The particular process by which the repairs were undertaken meant that the lower floor frames were unattached from the foundations and suspended above the ground. Once the foundations were repaired, the timber frames needed to be lowered and reattached to the slab. The work schedule indicates that some straightening was necessary as part of this process. The perhaps not surprising result was that internal walls on the ground floor were no longer as straight as they had been before.

[125] Wall verticalities have structural performance and functional, amenity and aesthetic elements. I accept Mr Lanyon’s evidence, essentially confirmed by Mr Freeman, that there are no structural, functional or amenity issues with the walls

even though they do not comply with the standard in a number of instances. However the variations from the standard are small. At most they are possibly visible to a very trained and fine eye. Otherwise they are imperceptible. Therefore any aesthetic issue is at best very minor.

[126] I accept Mr McGunnigle’s evidence that endeavouring to straighten the walls now is not a reasonable response when no real benefit would be achieved from it. Mr Sturman also acknowledged the difficulty of this because of the timber’s age and the processes it had already been through. Far less is it a reasonable response to demolish the house and start again because the wall verticalities exceed the standard by small amounts in a number of places.

[127] It was likely never going to be possible to have the walls as straight as they were when the house was originally constructed. The timber frames were older and were suspended and braced while the foundations and concrete slab were rebuilt. The standard required was to repair the walls as close as is reasonably possible to that condition. But for the house’s gold award winning standard and the importance of such high quality workmanship to the Bruces (and potential subsequent purchasers), I consider there would be no breach to the insurer’s obligations on this matter.

[128] The damages question is not for determination at this stage. However I suggest the parties might be able to resolve this issue by considering whether there is any diminution in market value because of the wall verticality issue. If not, they might consider whether a small loss of amenity payment might be appropriate to reflect the fact that the walls exceed the standard in some places, albeit that this is not perceptible, and this partly reflects a lesser standard of workmanship than there was for the original build.²⁰ Loss of amenity damages are discussed below under “General damages”. If

²⁰ Jeremy Finn, Stephen Todd and Matthew Barber *Burrows Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis NZ, Wellington, 2018) at 821 states: “The cost to the plaintiff who has lost the benefit of a bargain may be measured in at least three different ways – the difference in value between what was promised and what was supplied, the cost of curing the breach, and, sometimes, the loss of amenity caused by the breach... The choice between damages based on difference in value and on cost of cure has arisen frequently in the context of disputes about the quality of work done on goods or buildings. The courts take a pragmatic attitude and adopt whichever seems appropriate. The choice ultimately is based upon considerations of reasonableness ...”. See, also, E Peel *Treitel The Law of Contract* (11th ed, Sweet & Maxwell, London, 2015) at [20-037]-[20-046].

the parties cannot resolve the matter on this basis, it will need to be considered by the Court. Of course, at that time the Court will have the benefit of submissions on the appropriate measure of damages (if any) and evidence as to quantum and will consider those issues afresh.

Floor levels

The standard

[129] The relevant standards are NZS3109:1997 and NZS3114:1987. The experts are not agreed about what they require in this case.

[130] Mr Freeman considered the relevant part of the 1987 standard to be “Profile, Position, Position on plan or in elevation (distance to the nearest reference line)”. This allows a tolerance of +/- 10 mm from the nearest reference line, in this case being the reduced level of the floor slab.

[131] Mr Lanyon considered the 1987 standard specifies that there cannot be any abrupt deviations for thin sheet tiles and carpet. It sets out tolerances for abrupt and gradual deviations for a U3 finish. A gradual deviation is measured over a 3 m length and an abrupt deviation is measured over a 200 mm length. Depending on the floor surface, the gradual deviation tolerance is 3 mm or 5 mm. The abrupt deviation for exposed concrete is 3 mm.

[132] The difference in view ultimately does not matter because the floor levels are outside the tolerances and it is not clear that any reasonable remedial work will achieve floor levels within the tolerance. Further, Mr Lanyon accepts that typically, when pouring the floor slab, builders will follow a BRANZ publication. This provides for the concrete slab to be within +/- 10 mm in one room or space and a maximum of +/-3 mm in any 3 m of length; and for finished suspended timber floors to be level within +/- 10 mm within a single room or space; and individual sheets or boards that are flat and straight to within +/- 6 mm for every 3 m of length.

The original build

[133] Mr Barnes said the original construction of the slab was built to a high standard. DJ Hewitt supervised and coordinated the concrete subcontractor who laid the concrete slab. Both the foundation and the floor slab were engineered. He said the laying of the slab “was measured and monitored routinely using a laser level.” There was no doubt in his mind that the floor was level.

The repairs

[134] Mr Graham carried out a laser scan survey of the ground floor and garage levels. His survey was largely consistent with an earlier survey that Mr Williams had completed for Mr and Mrs Bruce, on which Mr Freeman had relied when providing his August 2017 report. There are depressions and high spots in the garage and throughout the ground floor of the house.

[135] Mr Freeman’s August 2017 report said:

The floor slab is out of level by up to 40mm from the highest point to the lowest point and has significant variation within rooms.

The levels of the newly placed slab and foundation do not meet the tolerances of the building standard NZS3109:1997 or NZS3114:1987, which apply to this type of structure.

[136] This difference of 40 mm is across the garage and the internal floor of the house. Mr Freeman considered this was the appropriate differential because the garage is attached to the house and they share the same concrete slab.

[137] Mr Lanyon’s view was that this was not the appropriate comparison. Although the garage and the house sit on one concrete slab, they are separate structures and perform different functions. He considered the appropriate levels comparison was a 24 mm difference between the highest and lowest points on the ground floor and a 28 mm difference between the highest and lowest points on the garage floor. He accepted they exceed the 1987 tolerances. While he accepted this, he also said that the floor levels comply with the relevant standard necessary for the structural components on the house to align properly. Mr Lanyon further said that all the rooms

or spaces are within the +/- 10 mm tolerance within a single room or space, except the garage which is a non-habitable space.

[138] Mr Lanyon said the rationale for the standards was to ensure a quality finish. Unlevel floors, particularly abrupt ones, will affect the floor coverings themselves and the amenity for the user. For example, a user might feel a depression under their feet, floor coverings might squeak, feel springy or possibly break (eg if the coverings are tiles). His view was that the measured levels did not affect the building's structural performance and function. He was not able to see or feel any issues with the floor levels during his site visits. He therefore considered they were not affecting the amenity or aesthetics of the house.

[139] Mr McGunnigle considered the variance in floor levels was not discernible when he walked across the spaces. Because of this, he considered the amenity of the room spaces and the garage is not affected by the amounts by which the floors are not exactly level. While, for example, levels can matter in a bathroom or a kitchen because pooled water can become a slip hazard or accumulate and cause damage, it was his view that there were no significant level issues in rooms which could lead to damage or affect amenity.

[140] Mr Graham felt a noticeable variance in the slope in the lounge and dining rooms – he could feel the depressions as he walked over them.

[141] Mrs Bruce gave evidence of water running off the benches in the kitchen and it being necessary to put pieces of cardboard under furniture because of the uneven floors. The evidence was somewhat vague. The evidence about the water was not supported by, for example, any photographs produced at the hearing and no details were provided about how often this occurred or in what circumstances. No details were provided of which furniture needed cardboard nor whether this matched with areas of unevenness as surveyed. I therefore give this evidence no weight. I accept more generally that the unevenness is perceptible to some and consequently will be causing some loss of use or enjoyment of the place.

[142] Mrs Bruce also said she stubbed her toe because of the difference in level between the garage and the rest of the house. However this either has been or can be fixed at the internal entry between the garage and the house.

The remedy

[143] Mr Freeman considered there were three possible ways to address the uneven surface: applying a floor levelling compound; lifting up the house and pouring a concrete screed on top of the existing floor level; or repeating the repair process undertaken by JTB. He considered there were problems with the first two of these, leaving the third and remaining option of rebuilding the concrete slab (and retaining any existing piles that were undamaged). He considered grinding was not a satisfactory option because of concerns about whether it would affect the long term durability and performance of the slab if the grinding was too deep. He considered it was not known where the mesh was placed and how it lay.

[144] Mr Sturman originally gave evidence that the house needed to be demolished and the house rebuilt to rectify the uneven floors. As noted earlier, that is no longer his view. However it remains his view that the uneven floors have not returned the house to the “gold award” standard it was when it was originally built.

[145] Mr Lanyon considered remedial work was not necessary to correct the floor levels. However, if the Court found that remedial work was to be carried out, it was his view that this could be done by removing the floor coverings and, in the affected areas, either grinding down the high spot (the blue areas of Mr Graham’s survey in the dining room and kitchen) or applying a levelling compound to the low spot (in the hallway, and a maximum of 12 mm to the lounge). The floor covering would then be reattached. He considered this to be a common approach to remediating floor levels.

[146] Mr McGunnigle considered remedial work was not necessary to correct the floor levels. However, if the Court found that remedial work was to be carried out, he recommended this be restricted to the garage. He considered the garage carpet could be removed, the surface “scabbled off” to a depth of about 15 mm and then 3 mm thick floor levelling compound applied to provide a smooth surface about 12 mm lower than

the existing high points which would give an overall floor variance of about 34 mm.²¹ This work would take a few hours at most. If the work was not restricted to the garage, he considered the work should involve taking up the carpet in the lounge and applying a floor-levelling compound over the existing concrete surface and re-laying the carpet, and this would provide an “adequate” solution.

The squeaky floorboards

[147] Mrs Bruce gave evidence that the floors creak. Mr Honeybone, an experienced builder, gave evidence about this. He inspected the property and concluded that the wooden floors appeared to be laid correctly and met all industry standards. He gave three possible causes for squeaky floorboards, one of which was that the concrete floor under the flooring was not true and level. He noticed the floorboards squeaked in one or two places around the house. While this was not “major”, if this occurred in his own house he would sort it out.

The submissions

[148] The Bruces submit, with the floor level across the ground floor now at 46 mm with eight areas of slopes over 0.5 percent, it exceeds the New Zealand standard tolerances and the MBIE Guidance thresholds. They submit the differentials and slopes affect living in the house. They compare the floor level differential with the post-earthquake floor settlement of 38 mm which resulted in IAG’s decision to replace the entire concrete slab. They say this is the only solution now. Grinding could impact upon the performance of the slab and is not a releveling method in the MBIE Guidance.

[149] IAG submits the MBIE Guidance is irrelevant. That document provides guidelines developed in response to the Canterbury earthquakes to assist engineers in assessing whether or not foundations required replacement or could be re-levelled depending on the extent to which slabs/foundations had “settled” into the land. IAG submits the floor level complies with the Building Code. It is structurally sound and there is no amenity issue in terms of something which interferes with the health,

²¹ Scabbling is a different process to grinding.

physical independence or well-being of the building's users. IAG therefore submits there is no defect which requires remediation.

My assessment

[150] I consider the floor levels have not been repaired to "as when new". Though this does not give rise to structural issues, they are outside the standard and the BRANZ publication. This is perceptible to some who walk over the floor but not to others. It may be causing floor boards to creak. More generally, the unevenness affects the Bruces' enjoyment of the house. This is a loss of amenity in the general sense (as compared with the narrower meaning in the Building Code).

[151] In my view, this loss of amenity should primarily be assessed separately for the garage and the rest of the house. These spaces serve different functions. While it may have been nice to have had the house and garage all at one level (as it was when new), the step down from one to the other can be addressed. Both the garage and the house have unlevel surfaces and, if there is a reasonable way to address this not involving demolishing the concrete slab and starting again, and not impacting on its structural integrity, the Bruces are entitled to that.

[152] I do not accept the Bruces' submission that the concrete slab must be replaced in reliance on the MBIE Guidance. I agree with IAG that this mis-uses the guidance provided in that document. That is about settlement into the land post-earthquake. It is not about floor levels that are uneven when built. As to that, the New Zealand standard, the BRANZ publication and the Building Code are relevant.

[153] It is unclear on the evidence if there is a reasonable and workable remedial solution to this issue. That is because it is unclear if grinding (or scabbling) and filling will, if taken too far, begin to affect the integrity of the concrete slab. I accept Mr Freeman's evidence that this is possible because the exact placement of the mesh is not known. I acknowledge the evidence produced by IAG to show how the slab was constructed. But absent measurements or other more direct evidence from those involved about what actually occurred, Mr Freeman must be right that the exact placement of the mesh is not clear.

[154] I suggest the parties consider whether they can agree if it would be worthwhile to grind some of the areas and/or fill others and fix any creaking floor boards in order to improve the floor levels to some degree. To the extent that they remain outside the tolerances of the standard, they could determine whether this has resulted in a diminution of value. If so, that might be an appropriate basis to assess damages. If there is no diminution in value, it might be appropriate to make a small loss of amenity payment to compensate for the fact that the floors are not as level as they were “when new”.

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

[156] If the parties are not able to reach an agreement on this basis and it is necessary to return to the Court, the appropriate measure of damages (if any) and their quantum can be considered afresh on the basis of the submissions and the evidence on those matters at that time.

The fireplace

[157] The original house had two matching handcrafted French marble fireplaces – one upstairs and the other downstairs. The upstairs fireplace was damaged in the earthquakes, the downstairs fireplace was not. IAG has provided funds for the replacement of the marble surround for the upstairs fireplace and there is no issue about this. The problem is that it is no longer possible to find a replacement firebox that matches the downstairs fireplace. Mr and Mrs Bruce consider it is important to the aesthetics of the house that the two fireplaces match. They contend IAG must therefore replace both the upstairs and the downstairs fireboxes to return the house to “as when new”.

[158] I accept the contrary submission for IAG. IAG’s obligation is to “cover sudden accidental loss to the house”. Loss is defined as “physical loss or damage”. The

downstairs fireplace has not suffered physical loss or damage. The obligation is to repair or replace to the same condition and extent as when new but, if this is not practicable, repair or replacement is to be as close as is reasonably possible to that condition and extent. IAG's obligation would have been to replace the firebox with the same as what was there when new but, because that is not possible, the obligation is to instead replace it with something that is as close as is reasonably possible to what was there before.

[159] Further, the Bruces have not called evidence to support their view that it is important to the aesthetics of the house that the fireboxes, as distinct from their surrounds, are matching. I can understand the importance of matching surrounds, but the firebox itself is ordinarily more about function than aesthetics. This is especially so when, as it seems in this case, the distinctive element of them was the surround and IAG accepted its liability to indemnify the Bruces for the cost of replacing the handcrafted French marble surround.

[160] I therefore find against the Bruces on this aspect of their claim.

General damages

The claim

[161] Mr and Mrs Bruce seek general damages of \$50,000 for their "substantial distress, inconvenience and mental anguish" caused by "IAG's conduct". Their pleading refers to IAG having breached its obligations because the building work had defects. The conduct relied on in support of the claim for general damages is not otherwise particularised.

[162] In closing submissions the claim for general damages was advanced as being because of the manner of IAG and its contractors in dealings with the Bruces, IAG's decision to repair rather than rebuild, its failure to address the defects earlier and its failure to fulfil its obligations under the policy.

The law

[163] IAG submits general damages are not available in New Zealand for a breach of an insurance case. It says the Court of Appeal decisions in *Bloxham v Robinson* and *Mouat v Clark Boyce* are conclusive authority on this issue.²² It says the applicable principle is that general damages are awarded for breach of a contract only where it has as its principal object the provision of pleasure or enjoyment or the amelioration of distress or vexation. It says an insurance contract is not such a contract. In support of this last point, it relies on a decision of the High Court of England and Wales in *Pine v DAS Legal Expenses Insurance Co Ltd* which concerned a contract to provide legal expenses insurance.²³

[164] The Bruces say that general damages are available. They say that the general damages they seek are in line with “leaky home” awards. They rely on *Stuart v Guardian Royal Exchange Assurance of NZ Ltd (No 2)*²⁴ and a paper written by Neil Campbell, “Claims for Damages Against Insurers in New Zealand”.²⁵ Of relevance this paper states:²⁶

Recently there has been a move, in the general law of contract, to award damages for non-pecuniary losses. These losses can usefully be divided into two categories: physical inconvenience, and mental distress. Partly because the former category is more objectively identifiable, both contract law in general, and insurance contract law more specifically, has been fairly ready to award damages for physical inconvenience.

By contrast, New Zealand is still deciding whether, or when, to provide damages for mental distress for breach of contract, with two positions being adopted in the Court of Appeal. The more restrictive view, in *Bloxham v Robinson*, is that mental distress damages are available only where the object of the contract is to provide pleasure, enjoyment, or freedom from distress. The alternative view, in *Mouat v Clark Boyce (No 2)*, is that such damages are recoverable in non-commercial contracts. For insurance contract law it may not matter too much which of these views is adopted, because many insurance contracts fit the “freedom from distress” criterion, though usually only in the non-commercial sphere. Thus it is no surprise that there are many examples of awards of mental distress damages for an insurer’s breach of contract. The Court of Appeal, obiter, has given some approval to such awards, observing

²² *Bloxham v Robinson* (1996) 7 TCLR 122 (CA); *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA)

²³ *Pine v DAS Legal Expenses Insurance Co Ltd* [2011] EWHC 658 (QB).

²⁴ *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Ins Cas 75,274.

²⁵ Neil Campbell “Claims for Damages Against Insurers in New Zealand” (paper presented to New Zealand Law Association Conference, Christchurch, 2001).

²⁶ Footnotes in the text are omitted.

that the “mental significance [of late payment by an insurer] may well be within the “reasonable contemplation” of the parties.”

[165] I have quoted this part of the Neil Campbell paper because I consider it to correctly draw the distinction between the different heads of non-pecuniary loss that may comprise a general damages award. As is explained in *McGregor on Damages* it has long been established that “[s]ubstantial physical inconvenience and discomfort caused by a breach of contract will entitle a claimant to damages”.²⁷ Awards have been made under this head for the physical inconvenience and discomfort of having to live in a house in a defective state.²⁸

[166] As also discussed in *McGregor on Damages*, it was once the law that no damages could be recovered in contract for injury to the feelings. The law has developed since then, going through a period of expansion when such awards were made, then a downturn, followed by a re-emergence of such awards led by the important and influential decision of *Ruxley Electronics v Forsyth*.²⁹ The learned authors conclude:³⁰

The above views appearing in cases at the highest level, admittedly of an obiter nature, suggest that the general rule in *Addis* may soon be abandoned and that, in addition, one should not adhere too closely to the somewhat limiting test, for recovery of damages for mental distress, of whether a principal object of the contract is to promote enjoyment or avoid distress but simply to apply the wider, more principled test of whether recovery for the particular loss is within the contemplation of the contracting parties. This is how it was put by Lord Millett: “In such cases [namely, cases of ordinary commercial contracts]”, he said in *Unisys*, “non-pecuniary loss such as mental suffering consequent on breach is not within the contemplation of the parties and is accordingly too remote.”

[167] An insurance contract pursuant to which an insurer elects to reinstate a damaged home is not a purely commercial one. It is a contract subject to a duty of good faith. It involves a commercial party on the one side and private parties on the other. It provides an indemnity for the private parties’ domestic home. When an insurer elects to reinstate, the contract becomes a contract to repair. It is akin to a

²⁷ James Edelman (ed) *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at [5-016]-[5-017].

²⁸ At [5-018]. See, also, Finn, Todd and Barber, above n 20, at 863.

²⁹ *Ruxley Electronics v Forsyth* [1996] AC 344.

³⁰ At [5-034]. See, also, Finn, Todd and Barber, above n 20, at 865-867 and the decision of the Supreme Court of Canada in *Fidler v Sun Assurance Co of Canada* [2006] 2 SCR 3.

building contract as to which general damages for physical inconvenience and discomfort are available. It is foreseeable that if the insurer breaches its obligations under the contract, stress and mental anguish is likely to follow. It is no surprise, as Neil Campbell puts it, that there are many examples of awards of mental distress damages for an insurer's breach of contract (despite the contrary view in *Pine v DAS Legal Expenses Insurance Co Limited* relied on by IAG).

My assessment

[168] As to the insurer's handling of the claim, in evidence, Mr and Mrs Bruce alleged that IAG had been dismissive of their concerns throughout. This was not borne out by the evidence. Mr and Mrs Bruce may have preferred a rebuild rather than a repair, but IAG opted for a repair based on expert advice about how the house could be repaired. IAG approached the claim throughout in an appropriate manner, seeking to involve Mr and Mrs Bruce in all important matters (particularly, the builder to carry out the repairs and the scope of work). When Mr and Mrs Bruce provided their "snag list", IAG responded appropriately by instructing an expert to provide a report. The proceedings were issued soon thereafter. In the course of the proceedings, the experts have engaged cooperatively with each other to the point that most of the identified defects and how they are to be resolved have been agreed. In these circumstances, a claim for general damages for mental anguish is not made out on this basis.

[169] As to IAG's breach of its obligation to repair the house "as when new", general damages are available. They are first available under the head of physical inconvenience and discomfort. The house as repaired contained a lengthy list of defects at handover. They have not been remedied. In the meantime, Mr and Mrs Bruce have been living in the house. The defects are largely cosmetic in that the house remains liveable. An award under this head must therefore be modest.

[170] As for stress and mental anguish, this is partly a loss of amenity issue and partly the stress of living in the house with the defects yet to be rectified. It is evident Mr and Mrs Bruce found it stressful living through the earthquakes and the fact that their dream home required repairs. On top of that, the repairs have been defective. As it was put by Axis in its report dated 7 September 2016, the defects are noticeable and

are a valid source of disappointment. Mr Freeman described the repairs as resulting in a significant reduction in quality. I accept that this had materially contributed to the Bruces' stress and mental anguish.³¹

[171] Mr and Mrs Bruce are entitled to modest compensation for their disappointment and loss of amenity in no longer having a "gold award" standard of workmanship once the agreed defects have been rectified and for their stress during the period that the defects remained unrectified. This is not to criticise IAG. It was not IAG's fault that JTB was not around to rectify the defects in accordance with the process under the building contract. However IAG accepts its liability in damages if the repair contract is performed inadequately. Logically, this must extend to general damages if they are available at law (as I consider them to be) and made out on the evidence (as I have partly found them to be).

[172] Mr and Mrs Bruce have not provided examples of cases to support the quantum of their claim. IAG has not made submissions about the quantum claimed. Reflecting that Mr and Mrs Bruce have not established part of their general damages claim and that such awards are intended to be modest, I consider the appropriate award to be set is likely to be less than what has been claimed. I accept that there are examples of general damages in the \$20,000 to \$25,000 range but I would need persuading to accept the submission that this should be double because there are two plaintiffs.

[173] I do not, however, reach a final view on the award of general damages. It is not clear from the pre-trial direction that this was envisaged. The submissions on this were brief (the Bruces) and non-existent (IAG). Moreover, some of the loss of amenity aspects may be subsumed with an award for diminution of value if one is made. This will need to be the subject of submissions if it is necessary for the matter to return to Court.

³¹ Indeed, Mr Bruce gave very mixed up and unclear evidence at the trial, which I attribute to the stress he was under.

Result

[174] Mr and Mrs Bruce have established that IAG has not complied with its obligations to reinstate the house “as when new” in relation to the internal finishing, the wall verticalities, and the floor levels. They have established that there is a reasonable and practical way to remedy the internal finishing. They have not established there is a reasonable and practical way to remedy the wall verticalities or the uneven floor levels. They have established a basis for general damages for the physical inconvenience in living in the house in its defective condition, for the loss of amenity because the quality of the house is diminished and for associated stress and mental anguish. The appropriate measure of damages and its quantum must be determined in light of these findings. The proceedings should be given a nominal call date to assess progress on resolution of the damages – the parties can liaise with counsel about this. I make orders to this effect.

[175] Costs are reserved and may be the subject of brief memoranda if they cannot be resolved.

Mallon J