IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0013-2019

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| IN THE MATTER OF | CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019 |
| BETWEEN | PFWE AND JEE |
| | Applicant |
| AND | IAG NEW ZEALAND LIMITED |
| | First Respondent |
| AND | INTERNATIONAL STRATEGIC DEVELOPMENT NEW ZEALAND LIMITED (IN LIQUIDATION) |
| | Second Respondent |
| AND | QBE INSURANCE (AUSTRALIA) LIMITED (REMOVED) |
| | Third Respondent |
| AND | MIYAMOTO INTERNATIONAL NZ LIMITED (REMOVED) |
| | Fourth Respondent |

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DECISION (No 3) OF C D BOYS ON QUANTUM
11 October 2022

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Appearances: On the papers

# Contents

## INTRODUCTION

[1] In my decision of 16 December 2021 (the Initial Decision) I made findings about liability, defining the areas of defective repair or unrepaired damage which IAG was liable to remediate. I could not at that time calculate quantum as there had been an escalation of rates and the effect of my findings made the available costings unreliable, making additional evidence necessary.

[2] Following on from the Initial Decision the parties' costing experts, Mr Whyte and Mr Moore, for Mr and Mrs E, and Ms van Eeden and Mr Creighton, for IAG, have conferred on the points of disagreement. The conferral was chaired by Phillippa Goodman-Jones, an independent Quantity Surveyor appointed by the Tribunal. The expert's conferral resulted in a report prepared by Ms Goodman-Jones. As the experts could not agree, the parties agreed that I should make a decision on the outstanding issues, and that this could be concluded by a decision on the papers.

[3] Both parties have submitted comments on quantum issues. Mr and Mrs E position was accompanied by a detailed pricing prepared by Mr Moore. IAG, responded with fulsome and detailed submissions to which additional evidence from Ms van Eeden and Mr Creighton was attached (the Additional Evidence). Finally, Mr Johnstone for Mr and Mrs E responded with detailed submissions in which he objected to the Additional Evidence due to its late inclusion.

[4] There remains a considerable gap between the parties; Mr and Mrs E say the necessary work will cost $1,628,796 (incl). IAG says the remediation work will cost between $1,136,609 (incl) and $1,262,466 (incl).[1] Furthermore, IAG says that the cost to demolish and rebuild is $1,682,376. Therefore, I also need to consider whether the damages sought are reasonable.

[5] I will first consider the objections to the Additional Evidence, as the extent of its inclusion will drive the discussions of the costs. As the cost of repairs will drive my analysis of whether the damages sought are reasonable, I will assess quantum and then consider arguments about what is a reasonable outcome.

[1] Mr Creighton's and Ms van Eeden's respective estimates.

## OBJECTIONS TO THE ADDITIONAL EVIDENCE

[6] Mr Johnstone has objected to the inclusion of the Additional Evidence from Mr Creighton and Ms van Eeden. The objections are on both procedural and substantive grounds. On a procedural basis he expresses concerns that this matter has gone through a facilitation process and the new evidence raises issues which were not discussed during the facilitation. Moreover, it is argued that my directions called for submissions, not for further evidence. Therefore, he argues the Additional Evidence should be excluded.

[7] Mr Johnstone's substantive objections relate to comments in Mr Creighton's additional evidence and in IAG's submissions about an alternative cladding product, a Resene product called Literock. Literock is put forward as an alternative to the Rockcote Integra system which Mr Whyte's costings are based on. The objection is that the submissions on the Literock system is not backed by any evidence which has been tested. IAG's submission also contains reference to a comparative quote challenging the Properly Plastered Ltd quote on which Mr Whyte's costing is based (the PP quote). However, the comparative quote has not been provided.

[8] I further note that both parties' submissions contain statements about the physical depth, suitability, and availability of the various plaster systems, both Integra and Literock. These statements are not backed by technical documents, or expert opinion, and were not discussed during the hearing or reported on after the conferral. I need to consider the status of these statements.

[9] In the Initial Decision I dealt with objections to the admissibility of contested evidence. I also dealt orally with challenges to the admission of documents and evidence during the hearing. At paragraph [37] of the Initial Decision I noted that this Tribunal was not subject to the Evidence Act 2006 or the High or District Court Rules. Rather, the overriding requirements of natural justice and cost effectiveness drive considerations on admissibility.[2] At paragraph [42] I noted that "*as this Tribunal is inquisitorial there is a wider power to receive evidence than in matters governed by the rules of court or the Evidence Act. Given the overriding considerations of natural justice there is less scope for excluding evidence which is, or may be, relevant to an issue*".

[2] Contained at ss 3 and 20 of the Canterbury Earthquakes Insurance Tribunal Act 2019.

[10] There are, however, categories of evidence which remain inadmissible, and the Evidence Act and Rules of Court provide guidance on these. The categories in this instance include hearsay and unqualified opinion.

[11] IAG's submission repeats statements attributed to Mr Creighton which compare the profiles of the various cladding systems and describes Mr Creighton obtaining an alternative quote from a plaster cladding applicator for the use of Literock. Mr and Mrs E's submission includes a statement about the market availability of the Literock system.

[12] The use of a lower profile cladding system was not raised at the hearing during discussions about altering the roof line, spouting, and windows to allow for an increase in the depth of the cladding. The issue was not mentioned in Ms Goodman-Jones' reporting of the conferral, nor has the comparative cladding quote been provided. The quote is not before me as the finder of fact and its contents were not available to be tested through the discussions which occurred at the conferral or during the hearing. Mr Cuff's statements about the alternative quote, and the depth of the cladding are hearsay, as are Mr Johnstone's statements about the availability of Rockcote.

[13] Hearsay is the repeated statement of a person who is not before a court or tribunal and which cannot be substantiated. Evidence is tested and substantiated through the questioning of a witness, or by interrogating the cogency and provenance of the documents in which the evidence is set out. The difficulties in testing hearsay statements led to the courts developing rules restricting the admission of such statements, now codified in the Evidence Act. There are exceptions to the rule, such as when witnesses adduce reliable records made by a third party.[3] The repeated statements about the alternative quote and the availability of Literock do not meet the exceptions.

[14] Mr Creighton is a witness so the repetition of his statement about cladding profiles is not strictly speaking hearsay. However, it is not possible to test the provenance and accuracy of the statement as it is contained in written submissions prepared by counsel. If the statement was made in a standalone document prepared by Mr Creighton, I would be required to consider it, as I have with his estimate attached to IAG's submissions, discussed below. However, the statement about cladding profiles is unbacked by standalone documentary evidence and is in

[3] See SS 17 – 19 Evidence Act 2006.

effect delivered by counsel, as is the statement about the availability of the Literock system in Mr Johnstone's submission. Counsel's advocacy role is irreconcilable with the impartiality required to provide evidence.[4] I must put to one side and place no weight on statements made in the parties'submissions regarding the profile, merits, availability, or otherwise of the various stucco cladding systems.

[15] However, the comparative estimates provided by Ms van Eeden and Mr Creighton at schedules 1 to 3 of IAG's submissions, are relevant opinion statements provided by sworn experts. These are admissible and must be considered.

[16] While I must consider the Additional Evidence, I am troubled at the provision of this evidence after the conferral process. In large part the challenges to Mr Whyte's estimate set out in the Additional Evidence relate to measures and rates which do not appear to have been raised during the conferral. This makes these challenges difficult to assess without reopening the conferral process, which would cause delay and additional expense. These opinions on rates and measures have not been tested by questioning or discussed during either the hearing or the expert conferral process.

[17] An expert's conferral is an evidentiary process. The process is designed to produce evidence. An expert's duties at conferral, as in other evidentiary processes, are to the Tribunal. Concessions made by an expert during conferral do not bind their instructing party. However, should an expert retreat from a position they held during conferral, the Tribunal may legitimately question why the position has changed, and give less weight to the amended opinion. This is not to say that a change of view will be fatal to an expert's evidence. It is legitimate and necessary that an expert should change their opinion when faced with new evidence or a better understanding of the situation. However, if there is a change of mind, and the change is to be preferred by the Tribunal, cogent and compelling reasons will be needed as to why the expert has abandoned their earlier position.

[4] See *Prattley Enterprises v Vero* [2016] NZCA 67 at [103].

## DISPUTED AREAS – CONFERRAL REPORT

### Stucco cladding

[18] I begin with the stucco clad areas as the stucco repairs are one of the largest areas of dispute. My decision on the stucco cladding will have a bearing on the remediation of the tiled roof, window joinery, guttering, and other areas.

[19] The parties agree that 96m$^2$ of stucco requires recladding.[5] However, there is little else agreed. Mr Whyte used the Properly Plastered (PP) quote for a complete reclad to generate a square meterage rate which he then applied over the 96 m$^2$. The PP quote specifies the Integra cladding system. IAG for its part argues that the Integra system creates issues as the thicker profile requires changes to other building components which can be avoided by using an alternative cavity back plaster system. IAG also argues that the rates used by Mr Whyte are too high.

[20] The issues that I need to resolve are:

(a) Whether the re-clad should be carried out using the Integra system or if there is a lower profile system which can be used? The Integra system has a deeper profile than the current stucco on ply system and necessitates changes to roof framing and window frames to allow the extra thickness of the cladding.

(b) The extent of the re-clad.

(c) Whether the cost for the Integra system based on the PP quote is excessive.

*The evidence*

[21] The evidence available to me on this issue consists of statements made by the experts during the hearing, the documents included in the common bundle and exhibits, and the costing evidence provided through the conferral process. The PP quote was included in the bundle of documents has been the subject of much of the discussion in the parties' submissions.

[5] I note that Mr Whyte's and Mr Moore's costings allow for this figure in their demolition estimates.

[22] Mr Whyte has based his costing of the stucco reclad on the quote. During the hearing Mr Whyte advised that along with Mr Munro of Properly Plastered, a Rockcote contractor also attended the site and proposed the Literock system. However, while on the stand Mr Whyte said that the contractor had declined to provide a quotation because Rockcote "*didn't recommend* [Literock] *for this particular property because of the detailing*". When asked whether the detailing aspect related to the junctions between cladding types Mr Whyte's response was "[Rockcote] *haven't gone into any detail*".

[23] While it was not objected to at the time, in submissions Mr Cuff has raised an argument about the quote and Mr Whyte's comments about it:

> there was no notation on [the quotation] as to whether [it] included Rab board and if it included removal and replacement. No evidence from Properly Plastered was called by the applicants and any evidence of Mr Whyte on this issue is hearsay

[24] Considering this objection, I refer to my observations regarding admissibility above, and also to ss 18(1) (a) and (b) of the Evidence Act 2006 which sets out circumstances under which hearsay statements are admissible. One circumstance is when witnesses adduce business records which they did not prepare. Such records are defined as:[6]

> [A] document that is made… in the course of a business, and as a record or part of a record of that business and that is made from information supplied… by a person who had, or may reasonably be supposed to have had, personalised knowledge of the matters dealt with in the information he or she supplied". "Business …[includes] a trade.

[25] Mr Munro prepared the quote after attending the site and did so as the managing director of a specialist plaster cladding applicator. He may reasonably be supposed to have personal knowledge of the matters dealt with in the quote. Taking these circumstances into account I am assured that the quote is reliable and was correctly entered into admissible evidence as a business record.[7]

[26] As I read Mr Cuff's submission, the statements objected to are that Rockcote did not recommend the Literock system, and Mr Whyte's evidence about the content of the PP quote. Specifically, whether the quote includes the use of Rab-board substrate and whether it included removal of the existing stucco as well as its replacement. [8]

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[6] Evidence Act 2006, s 16.
[7] As could the alternative cladding quote, obtained by Mr Creighton, had it been provided.
[8] A water-proof ply substate on which cladding is installed.

[27] Considering the objection to Mr Whyte's statement that Rockcote did not recommend the Literock system, I conclude that this is not hearsay. It is a statement from Mr Whyte's own observation that a contractor visited the site but declined to provide a quotation. As discussed in the Initial Decision, Mr Whyte is a reliable witness who displayed a proper degree of impartiality on the stand. In addition and specific to this issue, when asked about the reasons why Rockcote declined to quote, he correctly did not speculate.

[28] Considering the second statement, regarding Mr Whyte's comments about the content of the properly plastered quotation, I do not read Mr Whyte's statements as being more than a reading and application of the bare terms of the PP quote. The PP quote states it is "*to supply and install the 50 mm Integra cavity plus plaster cladding system on 20 mm EPS cavity battens with mesh in base coat render as per Rockcote System Specifications … Makes no allowance for the removal or disposal of any existing cladding…*". It also refers to the need for the builder to have installed building paper, which I take to preclude Rab-board.

[29] As to whether Mr Munro should have been called as a witness, the provision of trade quotations in builder's estimates is common practice. In this case 13 expert witnesses were called, and the Whyte costing relies on estimates for roofing, bricklaying, and landscaping. Calling subtrades as witnesses could be appropriate in some situations but would be unworkable if applied as a rule. It would increase cost and cause delay in this instance.

*Alternative cladding systems*

[30] IAG has argued for the use of the Rockcote system, the alleged benefit of which is a lower profile which reduces the need to alter other building components. However, as discussed above, I am unable to assess the comparative technical merits of the stucco systems as no admissible evidence has been adduced regarding the alternatives to Integra. Mr and Mrs E' case is based on proposed remedial design work from Noel Streez Architects in which Integra is specified. These specifications were included in the common bundle and were before me during the hearing. These could have been interrogated while the witnesses were on the stand, however, this was not done.

[31] Mr Wasson and Mr Flewellyn, both experts in stucco cladding systems, appeared before me as witnesses. Mr Pickering, the architect who specified Integra was a witness. Four building surveyors, with expertise in the detailing and specifications of various claddings were

witnesses, as were two very experienced builders. IAG had the opportunity to question any of these witnesses regarding lower profile alternatives to the Integra system, but did not do so. Mr Creighton could have raised the issue during conferral but did not do so. I have evidence of the Integra system and my assessment of quantum will be based on the use of Integra.

[32] The PP quote is for $45,672.25 (incl) to reclad the entire stucco area of 117m$^2$. This works out at a rate of $390.36 per m$^2$. Ms van Eeden, Mr Creighton, and IAG in submissions, argue that this rate is excessive. I note that Ms van Eeden's replacement estimate breakdown includes an allowance of $340 per m$^2$ for a new compliant STO cladding system.

[33] It is argued that that the PP quote lacks detail and was only available shortly before the hearing. I observe that:

(a) the PP quote is dated 4 June 2021 and Ms van Eeden gave her evidence on 25 June 2021;

(b) the PP quote contains sufficient detail of the proposed work to allow for meaningful critique; and

(c) the PP quote was in the common bundle and so was available to all the experts to consider and provide comment.

[34] During the hearing Ms van Eeden was asked if she had any questions about the PP quote and her response was "…*no. My value for the same work is very similar*." I cannot reconcile the response Ms van Eeden gave to a specific question while under oath, with a claim made after the fact that the quote uses excessive rates. To conclude, I find that the re-clad should be carried out using the Integra system to the extent set out in the PP quote and that the quote is not excessive.

**Membrane roofing – protection**

[35] I found that IAG was not liable for replacing the butanol roofing, but that an additional strip of butanol was required to be installed to increase the depth of the up stands to 150 mm. I found that an allowance was required for protection of the butanol while the other roofing and cladding work was carried out. There was disagreement as to the extent of the protection

required: Mr Creighton initially considered that coreflute sheeting could be used as protection; while Mr Whyte took the view that carpet overlaid with ply was necessary.[9]

[36] Through the conferral process it was agreed that ply over the carpet was necessary if scaffolding was to be installed on areas of the membrane roofing, my finding below regarding shrink-wrap means it will be. However, the disagreement remained over the measurement of the area requiring protection and the rates to be used. Mr Whyte concluding that 81 m² of butynol roofing required protection, and Ms van Eeden measuring it at 53 m². Ms Goodman-Jones measured the area requiring protection as being 63 m² and also calculated that an additional turnup of the carpet required that an additional 20% provision of the carpet was necessary.

[37] In Mr Cuff's submissions following the conferral it is argued that carpet and ply is not necessary as coreflute is the industry standard for protection. In the alternative, it is argued that that carpet alone, doubled up as necessary, can be used and that contractors are able to obtain carpet at no cost. IAG says that the use of carpet and ply is not standard industry practice. In her costing provided after the conferral, Ms van Eeden challenges the rate of the plywood to be used for protection.

[38] While IAG is not bound by concessions made by experts during conciliation, for me to look past those experts' positions would require persuasive, evidence backed arguments. Those are not present here. As a result, I adopt the position agreed by the experts that ply over carpet will be used as protection, and I adopt Ms Goodman-Jones' calculation of the measures and rates accordingly.

**Wall linings**

[39] A bracing schedule was prepared by Mr Harris and Mr Simcock, the parties' structural engineers. This includes replacing linings with Braceline Gib and using tiedowns and framing ties. There is discussion in Ms Goodman-Jones' report regarding the areas where linings require replacement. It was clarified by Mr Harris that practically the entire timber framed area needed to have linings removed and replaced. This has ramifications for skirtings, and flooring.

[9] Light plastic board often used for signage.

*Skirting boards*

[40] Ms Goodman-Jones records agreement that skirting boards would need to be removed and replaced where the wall linings were to be replaced. Mr Whyte included skirting replacement for 194 linear metres, Ms van Eeden's costing includes provision for 66 linear metres of skirting to be removed but with no provision for replacement. It is unclear whether this is an oversight or if her view is that skirting can be reused. Ms Goodman-Jones has measured the skirting replacement at 175 linear metres, as there is no requirement for wall linings to be replaced in areas where walls are block work, and therefore require no additional bracing work. I adopt Ms Goodman-Jones' measure.

*Parquet flooring and tiled areas*

[41] There remains a dispute about whether the replacement of the linings necessitates the removal and replacement of floor tiling and timber parquet flooring. There is a risk of damage to the tiles and parquet while the replacement of linings and windows is carried out. Mr Whyte believes that the risk is such that the costing should include the replacement of both the parquet and tiles. Mr Creighton takes the view that the tiles and parquet can be adequately protected. Ms Goodman-Jones agrees with Mr Creighton's advice that the tiles are silicon sealed to the joinery units and the work can be done with the tiles remaining in place.

[42] Mr Johnstone argues that this is a building strategy issue which is, strictly speaking outside of the expertise of Mrs Goodman-Jones as a quantity surveyor. Therefore, the choice is between Mr Whyte's and Mr Creighton's opinions. Of the two he argues that Mr Whyte's is the most cogent and that Mr Creighton's comments about the ability to repair the odd tile should damage occur, shows that there is a genuine risk.

[43] The test for the admission of expert opinion evidence is whether the factfinder is likely to obtain substantial assistance from the opinion of a witness who has specialised skill or knowledge.[10] While I note that in matters of methodology and repair strategy, builders have more relevant expertise and experience, this does not mean that the views of a quantity surveyor with many years practical experience in renovation and repair should be discounted. Ms Goodman-Jones' views on methodology meet the test of being substantially useful to the

[10] Evidence Act 2006, ss 4 and 25.

Tribunal and so are admissible, although are given less weight when set against the contrasting views of a builder.

[44] Carrying out repairs or renovations to an existing property always involves a risk of damage to existing building components. In this situation the evidence is that steps can be taken to mitigate the risk to the parquet and tiles. I do not believe that the risks are such that it is more likely than not that damage will occur. If the risk does eventuate, there is an agreed contingency of 10% applied to the costings by all parties. Contingency sums are intended to address risk in complicated repair projects, such as this one, where there are distinct possibilities that there will either be unknown damage or damage caused as a result of the repair works. The risk of damage to tiles and parquet is addressed by the contingency allowance. Floor protection will be required, however, I note that Mr Whyte's costing already includes floor protection for 307 m². This appears to be sufficient for the entire home. As a result, I deduct $32,351 for the floor tiles, and $6,545 for the parquet flooring.

**Scaffolding and shrinkwrap**

[45] It was agreed by the parties that scaffolding was necessary. This was broken down as 25 weeks for main scaffolding and 6 weeks for stair scaffolding. The parties disagreed about the coverage required, driven by differing views about the need for weather protection in the form of shrink-wrapped scaffolding. If shrink wrap is required, the scaffolding must go above the pitched roofs, to provide the box structure for the weatherproofing. If not, it need only go to the eaves.

[46] In the Initial Decision I found that the extent of the work required meant shrink wrap was a prudent measure. This has been challenged by IAG as Mr Creighton has indicated that he would be prepared to do the roofing work without wrap. However, along with the roofing, most of the cladding of this building and a number of glazing units will require removal and replacement. As such my finding stands and the cost will include shrinkwrap. This also means that the amount of scaffolding involved must extend to roof height. Ms Goodman-Jones concluded that Mr Whyte's scaffolding provision of 728 m² was acceptable and I adopt this figure.

**Wall and ceiling framing**

[47] IAG has raised an argument that framing replacement was betterment. However, it is reasonable to assume that in areas affected by water ingress the framing may have sustained some water damage and require replacement. This may include where stucco has been cracked allowing moisture ingress, or where the brick work has had weep holes blocked. Such replacement does not constitute betterment. My findings here are qualified by the finding that the kitchen pillars were affected by non-earthquake or repair related moisture issues as found in the Initial Decision. Ms Goodman-Jones considered that an allowance of $1,000 plus 10% margin is sufficient for framing replacement. The parties agree and I adopt this figure.

**Wallpaper replacement**

[48] While rates and the areas which require replacement wallpaper are agreed, there is a minor disagreement over the wallpaper. The curved wall had been included in the initial costing and has now been removed from the wallpaper, however this requires repainting and shall be included in the painting allowance, as provided in Ms Goodman-Jones' costing.

**Landscaping and site works**

[49] Ms Goodman-Jones records that a number of disagreements around the landscape and site works have been resolved. However, some areas are not agreed due to competing views about whether IAG's liability is limited by policy terms and limits relating to landscaping, or because of differences of rates and measures.

*Policy limits*

[50] The policy definition of "home" includes patios, paths, and paving, but specifically excludes temporary structures, trees, shrub or hedge, and land or earth or fill. There is a "clawback" clause which provides cover for:

> the following costs, as long as they were necessarily and reasonably incurred:
>
> … costs of up to $2,500 to restore or reconstruct any part of the garden or lawn within the boundary of the **home** that was damaged or destroyed while the **home** was being repaired or rebuilt.

[51] IAG has argued that the policy limit should apply in this instance. Mr and Mrs E argue that all enabling works, that is works to repair damage which occurs as a result of the remedial works, should be included. The two competing positions on this issue follow from differing conceptions of the source of IAG's liability. If approached on the basis that IAG is liable solely via a breach of the policy, then damages are calculated based on policy entitlements, including any limitations. If liability is other than for breach of contract, then the policy limits may not be applicable.

[52] In the Initial Decision I discussed the basis on which Mr and Mrs E' remedy was approached.[11] In short, following on from Gendall J's approach in *Sleight* I found that the defective repairs were in breach of the policy obligations and also a breach of the duties set out in the Consumer Guarantees Act 1993. I noted that the obligation was to pay for repairs to return the house to an "as when new" condition. If the policy response only is considered, the limit is specific to a single loss, in this case the 22 February 2011 earthquake event, and the policy limit for gardening and lawns was exhausted when the original repairs were carried out.

[53] However, I have found that compensatory damages are available both under the policy and in terms of the Consumer Guarantees Act 1993. Compensatory damages are not limited by the policy, rather they are calculated based on the actual costs to reinstate the defective works. In this case the garden and lawn costs claimed are to reinstate gardens disrupted by the remedial works.

[54] I note that in *Sleight,* Gendall J considered the same policy wording with the same limit for gardens and lawns.[12] He awarded the full amount paid by the homeowners for gardens and lawns, which was in excess of the policy limit, commenting that the payment was "*to rectify defective and damaging work here*".[13]

*Rates and measures*

[55] In its submissions IAG has questioned the conferral report on the basis that "the facilitation process was a high-level review of the key items, and so there remains a lot of unnecessary cost in the Whyte construction scope". There was also criticism of the rates and

[11] *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851 at [185] to [194].
[12] At [678] to [682].
[13] At [681].

measures used in the Goom quote on which Mr Whyte's costing of the landscaping is based, including comment that rates are excessive.

[56] I note that despite the critique that the rates used in the Goom quote were excessive, by and large Mr Creighton's own assessment uses similar or identical rates. On the information and arguments before me I see no cogent reasons as to why I should prefer the Additional Evidence on the landscaping costs to the evidence available at the hearing or produced during the conferral. The Goom rates were provided by an independent contractor, whereas the rates in the Additional Evidence are not backed by quotations or any other supporting evidence. The Goom quote was in the bundle during the hearing and was not questioned nor discussed. I give preference to the Goom rates and measures which were reviewed during the conferral process.

[57] Mr Johnstone has questioned Ms Goodman-Jones' adjustment of some measures from the Goom quote. Ms Goodman-Jones reviewed the Goom quote and adjusted measures relating to some items, although she has preferred Goom's on-site measurements to Ms van Eeden's estimates based on site drawings. Ms Goodman-Jones also includes an allowance for the lower patio which was not included in the Goom quote and which was adopted by the parties.

[58] Ms Goodman-Jones' allowance for the removal and replacement of the gardens around the perimeter was $2000, on the basis that not all garden areas were affected. The Goom quote was for 66 m² of gardens to be removed and replaced. The areas of garden that will be affected by the replacement of the brickwork are:

(a) a strip running along most of the south faces of the east wing and around the sunroom area;

(b) a roughly triangular area between the east gallery and the doors on the north face of the central block;

(c) an area around the north-west corner of the central block;

(d) two small areas of the north east face of the west block; and

(e) the area south of the west gallery between the garage and the front door.

[59] Additionally, the 14 m section of garden above the retaining wall will be affected by the replacements of the wall. My rough calculations based on scaled site drawings from the common bundle are that approximately 64 m² of garden will be affected by the repairs. I note the Goom measure taken on site is for 66 m² of garden. In the Initial Decision I commented that a quote based on measures taken on site is preferred over an estimate based on drawings. Based on this I find the Goom measures for the gardens to be correct.

[60] The Goom quote includes an allowance for 53 m of timber edging for the gravelled areas. Ms Goodman-Jones adjusted this to 21.2 m. I note that the gravelled area, separate from the ornamental gravel paths which extend round the east wing of the building, extends across the north boundary of the section, below the retaining walls. Viewing a site plan, I am unable to see how 53 m of edging will be affected by the replacement of the eastern retaining wall and conclude that the Goom quote is for the gravelled areas beneath both retaining walls. As only the east retaining wall requires remediation, I adopt Ms Goodman-Jones' measurement and adjustments.

[61] The final adjustment to the gardening and lawns estimate relates to the irrigation system. The Goom quote includes $4,156.25 for the removal and replacement of the irrigation system. However, Ms Goodman-Jones' assessment is that the irrigation system is a standard consumer level model and does not cover all garden areas. Her costing includes a provision of $450 for the removal and replacement of the system and I adopt this figure.

**Retaining wall**

[62] Ms Goodman-Jones reviewed the retaining wall as an item separate to site works. Her review adjusts rates for: crane hire, the number of waste skips required to remove waste, the measure of geofabric used to back the retaining wall, addresses the reuse of tailings and topsoil, and the removal of landscaping and lawn costs which are covered within the site works costing.

[63] Mr Johnstone has argued that Ms Goodman-Jones' adjustment is outside of the scope of instructions from the Tribunal. However, this does not alter the fact that the review is relevant evidence which is before me and I must consider it. I also note that Ms Goodman-Jones' review was triggered by challenges to measures and rates brought up by Mr van Eeden during the conferral process.

[64] I find that the inclusion of the lawn and landscaping in the retaining wall cost is a double up of the lawn area already included in the lawns and gardens costs above. In the Initial Decision I noted that the agreed plan for replacement of the east retaining wall, discussed by the witnesses during the hearing, involves the reuse of fill and gravel. This finding has a flow-on effect as fewer skips will be required to remove waste during the process. Therefore, Ms Goodman-Jones' adjustments of the number of skips is to be preferred.

[65] Ms Goodman-Jones has also adjusted the hourly rates for the 100-tonne crane which will be used to lift in the excavator and remove the waste from the demolition and reconstruction of the retaining wall. The rate used by Ms Goodman-Jones is the same rate as put forward by Mr van Eeden which I adopt. Ms Goodman-Jones has also adjusted the measure for the Geo fabric which backs the retaining wall. Her estimate is that 60 m² will be required, I adopt this measurement.

**Material supply delays and inflation**

[66] Ms Goodman-Jones records agreement between experts that the material supply delay costs should be considered in two parts: an 8% uplift to allow for an increase in material costs, and an extension of time for the preliminary and general items of two weeks extended construction period. This was challenged by Ms van Eeden in the Additional Evidence, but her comments were not supported by new evidence or by cogent arguments as to why her opinion had changed. As a result, I cannot accept Ms van Eeden's additional evidence on this point.

## DISPUTED AREAS – OTHER ISSUES

[67] There are other areas which are disputed which were not part of the conferral discussions, having been raised in the parties' submissions.

**Guttering and spouting**

[68] There is a disagreement over replacement of guttering and spouting. Mr Whyte's costing allows for the removal and replacement of the guttering and spouting, while IAG argues that the guttering and spouting may be removed, stored, and reused. This issue was not raised during the conferral. IAG's position appears to be contingent on the replacement cladding system being the lower profile Literock system preferred by IAG. However, my finding above

regarding stucco replacement means that a deeper profile will be used, altering roof profiles and requiring new downpipes, scuppers, rainheads and spreaders. Therefore, Mr Whyte's costings will remain.

**Brick veneer cladding**

[69] I found that all brickwork requires replacement. After initial disagreements regarding measurements the parties now agree on the measures involved. However, Ms van Eeden has claimed that the rates used are excessive. This issue was not raised by Ms van Eeden during the conferral. Ms Goodman-Jones adopted Mr Whyte's costing with no comment on the rates. I compare this with other areas where Ms Goodman-Jones has commented when she believes rates are excessive. Moreover, Mr Whyte's rate of \$275 $m^2$ is comparable with the 270 $m^2$ rate used by Mr Creighton in his costing dated 28 June 2022. As a result, I adopt Mr Whyte's rates and total calculation.

**Painting**

[70] The experts agree on a rate of \$23 $m^2$ for painting. Mr Whyte's costing contains provision to repaint 949 m² of interior, which captures all linings including ceilings. Ms Goodman-Jones has reduced this area to 422 m², which is the area of all linings to be replaced. However, Mr Johnstone argues that to remediate the house to a "when new" condition requires all linings to be repainted to the same level. He argues that this also includes re-painting ceilings which are not damaged and do not require remediation or replacement, to match the re-painted walls. He points out that during the pre-hearing conferral of building experts it was agreed that a complete re-decoration was required to address popped nails, cracked sheet joins, and poor finishing. However, I note that this agreement was reached before those experts were made aware of the fact that Mr and Mrs E had interiors redecorated to address cracking caused by the Kaikoura earthquake. IAG has no liability for damage or defective repairs related to the Kaikoura earthquake.

[71] Mr Johnstone appears to be basing his submissions on the interpretation of the "as when new" policy standard as requiring paint finishes to be matched within an area. This is to prevent mismatched paint between repaired and unrepaired areas which are adjacent. However, I do not consider that the ceilings, which are on a different plane and have differing light and shade

from walls, necessarily require re-painting in this instance. I accept Ms Goodman-Jones' adjustment.

**The downstairs bathroom and toilet**

[72] In the Initial Decision I found that the downstairs bathroom re-lining and replacement showed no signs of defective work or unrepaired damage. However, I also concluded that the bracing elements of the house needed to be reviewed and the scope adjusted to allow for the replacement of linings where necessary. Subsequently, the structural engineers have conferred and concluded that the majority of linings require replacement to bring the structure to compliance with bracing requirements. This has implications for the downstairs bathroom. Ms Goodman-Jones spoke with Mr Harris and records that he indicated that the bracing plan could be reworked in the ground floor bathroom and guest toilet to avoid having to strip and reline these areas. Based on his comments she adjusted her costing to remove the work related to lining replacement for these two rooms.

[73] Mr Cuff argues that my initial findings should stand and therefore any work to the bathroom should be removed from the costed scope. Mr Johnstone argues that the discussions with Mr Harris occurred after the facilitation meeting and without consultation from Mr Whyte or Mr Simcock. Therefore, Mr Whyte's provision for the bathroom and guest toilet should remain.

[74] Regarding Mr Cuff's position, my finding about the downstairs bathroom was provisional on the need for bracing to be reconsidered. At paragraph [218] I noted that a bracing schedule was required identifying the areas which require replacement baseline special fixings and the cost adjusted accordingly. Moreover, the engineers' discussions regarding the bracing are new evidence. Given these two points I conclude I am not bound by my findings about any work required in the bathrooms, which were provisional and have been superseded by events.

[75] Regarding Mr Johnston's position, Mr Harris prepared a bracing schedule and drawings, dated 9 May 2022, which was agreed with by Mr Simcock with some alterations. Examining the drawings, I note that there are no walls in the downstairs guest toilet which require bracing work or relining, and the two interior walls in the bathroom which require additional bracing back on to bedroom two. Given this, I accept that the bathroom linings can

be left undisturbed, as the walls which require improved bracing can have the work carried out in bedroom two. Therefore, I adopt Ms Goodman-Jones' costing with the downstairs bathroom and guest toilet work removed.

**Window and door joinery**

[76] Mr Whyte's original costing included the removal and replacement of 41 windows and eight doors. The number of units has been adjusted to 27 windows and two doors. Ms van Eeden agreed with this figure however the meterage measure of the units is challenged. Ms van Eeden's assessment of the figure in the additional evidence provides a figure of 48 m² of glazed window units whereas Mr Whyte's assessment was 79 m². In her notes Ms van Eeden states "*need detail*. [M]*easure seems to*[o] *high*".

[77] This issue is not commented on in the reporting of the conferral and does not appear to have been raised or discussed during the conferral. Ms Goodman-Jones' summary adopts Mr Whyte's costing. Disagreements with measures were raised about a number of issues, including the glazing, prior to the hearing and were specifically addressed regarding the brick measures and tiled roofing. This presents a quandary, on one hand measurements can be resolved by calling for additional evidence, on the other hand issues regarding measurements could have, and should have been raised during the conferral process. As discussed below, I am mindful that this application is some three years old and that my Initial Decision which provided instruction for resolving quantum was issued 10 months ago.

[78] The point of the conferral process was for issues relating to the costing to be discussed, producing the evidence needed to resolve any differences. I am left here with the situation where a measure is challenged which was not raised at the conferral. At the conclusion of the Initial Decision I stated that I was working from the Whyte Construction estimate as it was the most comprehensive and complete. Once amended to take account of the number of windows which require replacement it was open to IAG and its experts to challenge the rates and measures used. This was not done for the glazing. The best and most complete evidence available to me is Mr Whyte's estimate which I adopt.

## QUANTUM

[79] The Additional Evidence includes a repair estimate prepared by Mr Creighton which purportedly prices Mr Whyte's scope as costing $1,262,466.16 to carry out. It includes a similar estimate prepared by Ms van Eeden pricing the work at $1,136,609.33 (both including GST). As stated above these estimates are evidence which must be considered. However, beyond the areas discussed above the number of the variances between Mr Whyte's estimate and those of Mr Creighton and Mr van Eeden are driven by differences in rates and measures which were not raised during the expert's conferral.

[80] If I take the Additional Evidence at face value, I cannot meaningfully resolve these differences without reopening the conferral or directing a further hearing is set down to consider these matters. I will not do so. I am directed by this Tribunal's empowering legislation to provide speedy, flexible, and cost-effective dispute resolution. The repairs in question in this case occurred in 2014, and this application was filed in the Tribunal three years ago. The Initial Decision was sealed in December 2021. Both parties agreed to this matter being heard on the papers. There was sufficient time and opportunity for the disagreements raised in IAG's submissions, and in the estimates of Mr Creighton and Mr van Eeden to have been raised earlier.

[81] Furthermore, Mr Creighton's estimate lacks enough detail for me to make a meaningful comparison with Mr Whyte's updated estimate. Mr van Eeden's estimate, while more detailed, includes items which I have found required adjustment, such as the stucco cladding system, the scaffolding, and shrinkwrap. It also includes additional information about issues, such as the availability of building materials, which has not been tested. These should have been raised during the conferral but were not.

[82] Following the conferral Mr Whyte produced an updated repair cost estimate which allowed for the adjustments that were agreed to during the conferral process. Ms Goodman-Jones use this to produce a cost comparison. I have used this cost comparison and adjusted it when necessary to reflect my findings above. I calculate the reasonable repair costs at $1,543,050 (incl). My calculations are set out at table 1 annexed to this judgment.

## REASONABLENESS

[83] Mr Cuff has argued that the cost to remediate is unreasonable when set against the value of the house, which he says is $990,000, and when set against Ms van Eeden's estimated rebuild cost of $1,682,376.40. While not detailed in Mr Cuff's submissions, there are two aspects to this issue:

(a) The first argument is that when awarding damages based on the cost to remediate, those damages should not be disproportionate with the benefit Mr and Mr E will gain from the work being done. If the comparison between the cost to remediate and the market value of the house is unreasonable, an award to compensate for loss of amenity should be made.

(b) The second argument is that if the comparison between reinstatement and rebuild costs is close, reinstatement is uneconomical. Therefore, damages should be based on the cost to rebuild rather than to reinstate.

### Is reinstatement disproportionate?

[84] In *Belgrove v Eldridge* the defendant builder agreed to build a house with foundations built using a specified concrete mix.[14] The correct mix was not used, and the house was unstable with risk of collapse. The trial judge found that the only remedy was to demolish and rebuild. It was argued on appeal that the rebuild cost, which was more than the value of the original contract, was unreasonable and only the loss of market value should be awarded. This was rejected due to significance of the breach, which went to the heart of the agreement. On appeal the High Court of Australia commented that it is possible for a minor breach, such as painting a room the wrong colour, would make no effect on the economic value of the house, but would nonetheless require remediation. However, there were limitations to the requirement that contractual obligations are performed:[15]

> The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not

[14] *Bellgrove v Eldridge* [1954] 90 CLR 613 HCA.
[15] At [618].

> be entitled to the cost of demolishing the walls and re-erecting them in secondhand bricks.

[85] In *QBE Insurance v Wild South Holdings* the Court of Appeal considered the extent of indemnity for earthquake damaged property and commented:[16]

> Other considerations may inform the decision, and perhaps carry more weight; they include any special character or features of the building, the insurer's promise to pay the costs of reinstating (subject to policy limits) that particular building, and the insured's preferences so far as they are not eccentric or unreasonable.

[86] The argument here appears to be that Mr and Mrs E loss of value is the market value of the house put forward by IAG, $990,000, significantly less than the reinstatement cost. Therefore, it may be argued that Mr and Mrs E will gain a windfall if paid more than this figure. However, there are problems with this analysis.

[87] Firstly, the market valuation provided is from a real estate website based on the Christchurch City Council's ratings value of the property. This is a generic market estimate and does not take into account specific aspects of the building. While market value may adequately reflect an insured loss in some instances, where the insured property is unique or differs from the norm, a market value analysis is overly simplistic. This is particularly so given this house is a high-end, architecturally designed dwelling of size and complexity.

[88] Secondly, and most importantly to my mind, the policy specifically provides for two forms of indemnity, payment of the cost to reinstate, or payment of the "Present value" which is the market value of the home excluding the land value. Consideration of the market value ceased to be relevant under the policy in 2013 when Mr and Mrs E elected to repair. It would be contrary to the meaning and intent of the policy to require Mr and Mrs E to accept indemnity on essentially a "Present value" basis when it ceased being available under the policy when the decision to repair was made.

[89] In *Ruxley Electronics and Construction Ltd v Forsyth,* damages were based on loss of amenity rather than the cost to perform the contract. I note the award for loss of amenity was made on a notional award of general damages.[17] This is because the property in question was a swimming pool which was defective as it was shallower than the contract allowed for.

[16] *QBE Insurance (International) Ltd v Wild South Holdings* [2014] NZCA 447 At [107].
[17] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8.

However, the lesser depth did not affect the use of the pool. In this case the principal defects are to the cladding and the structural strength of the home. The amenity value of having a home that does not leak, and which can resist seismic loading cannot be adequately compensated by a notional award of general damages.

[90] The current situation falls squarely within the example from Belgrove, the breach of contract here goes to the heart of the policy agreement. IAG promised to return the building to an 'as when new' condition. As found in the Initial Decision, it has fallen short of this promise. I do not consider that an award for loss of amenity, or for loss of value are suitable means to calculate damages.

**Is reinstatement uneconomical?**

[91] Mr Cuff argues that the comparison between Ms van Eeden's rebuild estimate and the remediation cost is such that reinstatement is uneconomical. The policy wording, unlike some others, does not contain a provision that repairs will only be conducted if economical. However, repairs are economical when they are cost-effective, and an insurer is not bound to pay more than the policy requires. Therefore, if the estimated cost to repair damaged property is more than the cost to replace/rebuild it the insurer can legitimately take the more cost-effective option.

[92] In *Rout v Tower Insurance*, Gendall J considered the so-called 80% rule. This is a long-standing insurance industry rule of thumb which holds that when repair costs reach or exceed 80% of the cost to replace or rebuild the damaged property, there is a presumption that the repairs are not economic. The rationale is simply that if two estimates are compared one may be 10% too high and the other 10% too low, therefore, a 20% margin of error is applied. This presumption is rebuttable, the more detailed the assessment, the lower the uncertainty and, therefore, the rule may be inappropriate.

[93] In this case the remediation costs are approximately 91% of Ms van Eeden's rebuild estimate. However, Ms van Eeden's estimate is a high-level costing and lacks details of how amounts have been calculated. It does not include work required for the retaining wall for instance. As with the other Additional Evidence the rebuild estimate was not tested during the hearing or discussed at the conferral. It is unclear whether this estimate is a true reflection of the rebuild cost of a high-end architecturally designed home, built on a sloping hill site. As

with other issues, I have considered whether it is appropriate to reopen the hearing on this matter to allow for better evidence to be provided. As with those other issues I consider it would not be just, speedy, or cost-effective to do so.

[94] Furthermore, this property has been subject to numerous, detailed, forensic assessments. It is gone through an extensive and exhaustive scoping and costing process. This process has included a hearing, expert evidence from 13 witnesses, and a conferral process. I do not believe it is appropriate to apply the 80% rule of thumb in this instance.

**ORDER**

[95] IAG is to pay Mr and Mrs E the reasonable cost to remediate, which is $1,543,050.

C D Boys
Chair
Canterbury Earthquakes Insurance Tribunal

**Table 1**

| Item | WCL | PGJ | Adjusted |
|---|---|---|---|
| Preliminaries | $70,856 | $70,856 | $70,856 |
| Demolition | $45,247 | $45,247 | $45,247 |
| Brickwork | $87,246 | $87,246 | $87,246 |
| Aluminium joinery | $96,401 | $96,401 | $96,401 |
| Carpentry | $71,777 | $71,777 | $71,777 |
| Roofing | $127,580 | $127,580 | $127,580 |
| Plumbing | $5,924 | $5,924 | $5,924 |
| Electrical | $10,482 | $10,482 | $10,482 |
| Plastering | $51,203 | $51,203 | $51,203 |
| Heating | $6,050 | $6,050 | $6,050 |
| Painting | $45,067 | $42,617 | $42,617 |
| Glazing | $3,344 | $3,344 | $3,344 |
| Scaffold | $83,375 | $83,375 | $83,375 |
| Site works | $106,795 | $87,736 | $93,432 |
| Flooring adjustment | | | -$38,896 |
| **Subtotal** | **$811,347** | **$789,838** | **$756,638** |
| **Provisional sums** | | | |
| Professional fees | $81,015 | $81,015 | $81,015 |
| Electrical | $3,933 | $3,933 | $3,933 |
| Scanning | $825 | $825 | $825 |
| Timber replacement | $1,100 | $1,100 | $1,100 |
| Flashings | $2,915 | $2,915 | $2,915 |
| Plumbing | $2,475 | $2,475 | $2,475 |
| Drainage | $38,693 | $38,693 | $38,693 |
| Roof | $8,580 | $8,580 | $8,580 |
| Garage door | $990 | $990 | $990 |
| Gas | $2,805 | $2,805 | $2,805 |
| Retaining wall | $45,591 | $37,004 | $37,004 |
| **Subtotal** | **$188,922** | **$180,335** | **$180,335** |
| Additional bracing and wall lining replacement | $182,631 | $182,631 | $182,631 |
| **Allowances** | | | |
| Increase costs-estimate to construction-3% | $35,889 | $34,584 | $33,588 |
| Forecast increase material costs | $57,126.00 (8%) | $55,335 (8%) | $53,741 (8%) |
| Materials supply delays (8 WKs) | $22,888 | $22,888 | $22,888 |
| Contingency (10%) | $119,629 | $115,281 | $111,961 |
| **Total excluding GST** | **$1,518,247** | **$1,380,892** | **$1,341,782** |
| GST | $213,726 | $207,134 | $201,268 |
| **Total including GST** | **$1,638,567.00** | **$1,588,026** | **$1,543,050** |