IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-0015-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	BD and ND
	Applicants
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LTD
	First Respondent

Hearing Date: 27 May 2022

Appearances: B. Burke, and B. Hood for the applicants
K. Paterson, and E. Mishra for the respondents

DECISION OF C D BOYS
10 August 2022

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INTRODUCTION

[1] This decision is about the extent of an insurers liability to remediate repairs which do not meet the policy standard or are not compliant with building regulations.

[2] The applicants live at XXXXXXX. Their home is a 1920's California style bungalow. The house and its surrounds present a picture of a quintessentially Christchurch character suburb, houses of a uniform architectural style on a leafy, oak-lined street. The aesthetic values of the neighbourhood have been deemed worthy of protection by Christchurch City Council and it has been classified as a character area.

[3] The house was damaged in the Canterbury Earthquake Sequence. It sits on liquefaction prone, TC3 land, and suffered from differential settlement and foundation damage. The concrete ring foundation was broken in a number of places and separated from the house superstructure. The house settled 170 mm across its footprint, and the sinking of the ring foundation caused hogging as internal piles pushed up against flooring. The superstructure of the house performed reasonably well, although the original lathe and plaster was extensively damaged.

[4] Liquefaction ejecta rose from boils around and under the house and garage. In the garage liquefaction ejecta broke the floor slab and rose approximately 30 cm up the sides of and inside the garage.

[5] The house was insured with AMI, whose liabilities were subsequently taken over by Southern Response. Claims were made to EQC and to AMI for the damage. These were accepted and Southern Response elected to repair the damage. Southern Response appointed Arrow to act as project manager and Maincom New Zealand Ltd was selected as the builder. A building contract was signed on 13 August 2013, and work began soon after.

[6] It is fair to say that the repair process was problematic. As has been noted in several judgments of this Tribunal, in the aftermath of the Canterbury Earthquake Sequence the construction industry was stretched to and beyond its capacity. Overstretched and under supervised tradesmen, whose work was not adequately project managed, produced poor results. In his evidence BD commented that once the building contract was signed, they never saw the

principal of Maincom again. The applicants efforts to have defective repairs remediated has led to this application.

Issues

[7] Southern Response has acknowledged that the repair work is, in a number of significant ways, defective or substandard. Many of the issues originally raised in the application have been settled. However, three aspects of the repairs remain in dispute:

(a) The perimeter ring and internal pile foundations were replaced with a new type 2B reinforced waffle slab on an under-slab gravel raft platform. Timber piles were embedded in the slab and the house was lowered back on to these piles. There are issues with the alignment of and connections to the piles which have been settled. The original foundation involved a vented concrete ring on which bearers sat. The replacement foundation involves these bearers sitting on perimeter piles, so for aesthetic and bracing purposes a plywood skirt was installed. However, the skirt had no venting After installation a strip was cut away at the base of the skirt to allow for the movement of air. Unfortunately, the gap created allows the entry of cats, vermin, and windblown leaves. This last aspect is particularly problematic as XXXX Street is oak lined, and in autumn, leaves blow under the skirt. Under-floor photos show large matts of waterlogged leaf litter have accumulated under the house. The parties have agreed that the skirt will be replaced by a concrete block perimeter which will be rendered to match the original. However, the slab edge, which protrudes up to 0.5 m beyond the edge of the house perimeter (the protrusion), has been incorrectly finished and water drains towards the house rather than draining away from it. The applicants argue that the removal of the protrusion will address both the fall and aesthetic issue. Southern Response argues that overlaying the protrusion with a grout topping will remedy the fall.

(b) The garage, which appears to have been constructed around the same time as the house, was repaired by replacing the broken floor slab. Unfortunately, during the repair process, the garage suffered additional structural damage. It appears that efforts were made to correct this damage using poorly installed

timber cross braces. When rebuilt the replacement garage slab was not correctly sited, and the garage now sits hard against the boundary, approximately 300 mm from where it was originally constructed. At the start of the hearing it was disputed whether the garage should have been replaced entirely. However, during the expert evidentiary process the experts concluded that the additional damage the garage suffered during repairs means that it needs replacement. As the garage slab is now located hard against the boundary the replacement garage will now require a firewall, and is no longer compliant with its grandfathered resource consent. There is also a loss of amenity as the applicants can no longer trim hedges or maintain the garage without accessing their neighbours land.

(c) During repairs the lathe and plaster, which formed part of the linings for approximately half the house was replaced. The applicants say that they understood that when this work was done the original rubber wrapped wiring would be replaced, as it was accessible whilst linings were removed. However, this was not done, instead fittings were replaced with wiring left untouched. The applicants seek the costs of replacing the wiring, as the now nearly 100-year-old wiring has begun to fail.

THE LEGAL FRAMEWORK

[8] As in most insurance disputes the issues turn on the terms of the policy. In this case the policy requires that Southern Response "*will pay to repair or rebuild your house to an 'as new' condition, up to the floor area stated in the policy schedule*". This is subject to the condition that Southern Response "*will use building materials and construction methods in common use at the time of repair or rebuilding*". As the house is damaged, rather than destroyed, the policy allowed Southern Response to choose whether to repair the house to an as new condition or pay the cash equivalent of the cost of repairs.

The standard of repair

[9] The heart of the wording is a promise to pay to reinstate damage to an '*as new*' condition. In the context of the policy and in conjunction with the authorities on the meaning of '*as new'*, once the insurer has chosen to reinstate, it is obliged to pay the costs to restore damaged property to a condition which renders the fact of earthquake damage immaterial to its

future function, and value.[1] The policy pays to reinstate to an '*as new*' condition, rather than simply to indemnify, so issues of betterment are irrelevant. The nature of the repair work required to meet the policy standard must include:

(a) restoration of functionality requiring considerations of whether a damaged element has a structural, functional, aesthetic or mixed purpose;[2]

(b) aesthetic equivalence to a similar standard as when the damaged element was new;[3]

(c) meeting health and safety requirements for the useful life of the damaged element, for example; structural components must last for at least 50 years and cladding for at least 15 years;

(d) consideration of the future saleability of the damaged property, which by implication requires that the reinstatement must enable the insured to meet standard real estate warranties for quality and compliance;[4] and

(e) restoring the damaged portions of the property to compliance with either the building regulations at the time it was built, or if required by the extent of the work or the nature of the building element being repaired, to current standard (discussed below).

[10] I am guided by *Sleight v Beckia Holdings.* Sections of the discussion in *Sleight* are not relevant to the AMI policy in which Southern Response has the right to elect the form of indemnity. However, the analysis of the operation of an '*as new*' policy is authority for the proposition that an insurer's policy obligation is no more and no less than to reinstate damaged property to a repaired condition. Gendall J found that neither a building contract, nor payments made to a builder for defective works, modified that underlying obligation.[5] This recognises the indemnity principle; it is not that the insurer has assumed a new liability or responsibility for the repairs, rather the obligation to indemnify cannot be met by defective work. The

[1] *Parkin v Vero Insurance New Zealand Limited* [2015] NZHC 1675 at [117].
[2] At [120].
[3] *Sleight v Beckia Holdings,* above n 11, at [164].
[4] *Parkin v Vero,* above n 12, at [144]; and *Sleight v Beckia,* above n 11, at [165] - [168].
[5] *Sleight v Beckia,* above n 11, at [179] - [180].

obligation to indemnify continues until remediation is properly completed, or the insured has agreed to an alternative indemnity, either by clearly assuming responsibility for remediation, or by clearly accepting an alternative form of settlement.

[11] An important consideration in this case is when should repair work be considered defective or non-compliant? There are two criteria to be considered. Firstly, is the work compliant in terms of the Building Act 2004, the Building Code, and trade practice. Secondly, does the work meet the policy standard, applying the criteria referred to at [9] above.

[12] That a repair strategy is not what the insured would have chosen does not make the repair works defective, provided it meets policy and building standards. In *PJ & SJ v Holloway Builders* it was noted that "*an insurer is entitled to base the indemnity on a repair strategy which reasonably addresses the damage, even if the insured does not agree with the proposal*".[6] On this point *H Trust v Southern Response*[7] was cited by Southern Response. In that case Chair Somerville was considering repairs necessary to remediate earthquake damage. He commented that the role of the decision-maker is not to choose which proposed repair strategy is most reasonable, rather it is to decide whether or not the insurer's proposed strategy is unreasonable.

[13] The first question, compliance with building standards is a relatively straightforward exercise in this case, as there is a high degree of agreement between the experts on the various issues. The issue of whether repairs meet the policy standard is a more difficult and nuanced question requiring analysis of the nature and extent of the departure from the policy standard.

Aesthetics

[14] In this case it is argued that the protrusion is unsightly to a point where it detracts from the aesthetics of the house, and that it prevents the use of the land next to the house as gardens. This second point illustrates that aesthetics (visual amenity) crosses over with the practical use of insured property (practical amenity) as in this case it is argued that the visual qualities of this housing style involve decorative gardens around the perimeter.

[6] *PJ and SJ v Holloway Builders* (& ors) [2020] CEIT–068–2019.
[7] *H Trust v Southern Response* [2020] CEIT 2019-0011.

[15] The question is one of degree: replacing a distinctive architecturally designed home with a generic off the plans style, would not satisfy the criteria of an "as when new" policy, whereas small visual changes to allow the use of modern materials would.

[16] In *Turvey Trustee v Southern Response* Dobson J considered the extent of the insurer's obligations to reinstate visual amenity when rebuilding an architecturally distinctive Edwardian Villa. The policy wording was substantially the same as in this case. He found the obligation was to remediate to the same style, and quality of materials as the original and talks of "*reasonably addressing the re-creation of character and appearance*"[8]. However, the insurer could use modern materials and methods where the original materials and methods were unavailable or not in current use. This finding was reached after discussions about issues including: replacing damaged solid plaster features with plaster over polystyrene forms, the use of cheaper readily available pine instead of native timbers for painted woodwork, replacement of non-working fireplaces and chimneys with mocked up fireplaces, and that exposed polished native timbers features must be replaced with similar native hardwood.[9]

[17] In *Bruce* v *IAG* Mallon J discussed the replication of visual elements; the quality of plaster finishes when repairing a home.[10] The home was an award winning architecturally designed building where plastering was carried out to the highest possible level. The plaster repairs were finished to a less exacting level. It was concluded that IAG was liable to rectify the plastering to the higher-grade finish as this was what was present before the damage occurred, even though the difference in finish was not perceptible to an average viewer.[11]

[18] Reviewing the authorities, I conclude that aesthetic questions are fact specific. The comparison is between the visual appearance before damage occurred and the appearance the repairs have or will deliver. That a visible building component is not decorative does not negate the need for aesthetic equivalence, demonstrated in this case by the render finish applied to the ply skirt to give the appearance of the original concrete perimeter foundation. At the heart of the inquiry is the specific insured interest affected. A period home or architecturally designed property with distinct features has high levels of visual amenity, such homes are valued for their distinct visual elements. A functional but visually nondescript home on the other hand has

[8] *Turvey Trustee Ltd v Southern Response* [2012] NZHC 3344 at [24].
[9] At [39].
[10] *Bruce v IAG* [2018] NZHC 3444 at [91].
[11] At [93]

less visual amenity. However, this may change over time, for instance when originally built railway cottages were cheap and unremarkable, whereas that style of home is now sought after and valued.

[19] The issue must be decided by the nature of the property and objective evidence of the value the insured has placed on the aesthetics. For instance, it would be difficult for an insured with a poorly maintained period building to argue that visual amenity is important when the condition of the property shows otherwise. Another person with a similar home may have spent time and money to maintain and accentuate the period features, showing that the visual amenity is a valued interest.

[20] The above analysis ties in with the established law on what is to be considered damage or loss under an insurance policy. The change to visual amenity argued must affect an insured interest in a manner which can be defined as "*physical loss or damage*" for the policy to respond. In *Technology Holdings v IAG* Woodhouse J explored the limits of the meaning of 'damage' in a similar wording. He concluded:[12]

> Something must happen to the property itself, followed by the impairment of value or usefulness, for damage to occur. That is the factor which excludes from cover cases of pure economic loss; cases where nothing happens to the property itself.

[21] The indemnity principle means that the insured event must have a negative effect on an insured interest: some diminishment of the property's utility to the policy holder. The case of *Ranicar v Frigmobile* shows there is no least or minimum diminution of the insured interest to be considered damage[13]. However, the effect on the interest must be real. A minor change, say a different shade of paint, or the replacement of terracotta roof tiles with concrete or pressed steel tiles, would be a reasonable change as these do not detract from the style of a house and so do not effect an insured interest. However, changing the paint colour to bright pink, or replacing a period house's weatherboards with steel cladding would affect that same insured interest. The economic effects of the loss of visual amenity are not part of the assessment, although they do have a bearing on the assessment of the remedy, discussed below.

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[12] *Technology Holdings Ltd v IAG New Zealand Ltd & Anor* (2009) 15 ANZ Insurance Cases 61-786 at 77,150.
[13] *Ranicar v Frigmobile PTY* Ltd (1983) 1 ANZ Cases 60-525 at 78,000.

THE FOUNDATION SLAB PROTRUSION

[22] The replacement foundations are a type BII foundation, of a design based on an early version of the MBIE guidelines which was in place at the time. This design included the slab extending outside of the footprint of the house (the protrusion). As I understand it the intention of the protrusion was to assist in spreading the load of the building to compensate for the poor bearing capacity of liquefiable soils. The evolution in engineers' understanding of the performance of such foundations systems means that the equivalent current design does not include a protrusion.

[23] The protrusion is a 0.5 m wide strip of slab which extends between the bay windows and patios along the north-west/driveway, north-east/street, south-east/fence, faces of the house. To the south-west/back garden the protrusion is covered by a deck built across the rear of the house or by paving. By my calculation the slab protrudes beyond the house for approximately 10 linear metres on the south-east/fence aspect, 6 linear metres on north-east/street aspect and 8 linear metres on the north-west/driveway aspect. It is approximately 0.5 m wide so around 12 square metres of land are covered.

[24] The consented design for the slab included a 25 mm fall from the perimeter to the edge of the slab. However, the slab was constructed with either no fall, or in some areas with a fall towards the foundations. Water collecting on the protrusion drains under the house. This has led to water pooling under the house and soaking into leaves which have accumulated. I note the under-floor photos show moisture having soaked into the timber of the piles. The building code requires that enclosed and subfloor spaces should be protected from the ingress and collection of moisture. This is to prevent increased moisture levels in the subfloor and the damage which collected moisture can cause to building elements.

[25] It was agreed by the experts, John Aronis, for the applicants, and Simon Finn, for Southern Response that the lack of fall away from the house is non-compliant. Mr Finn has proposed using Ardex, a non-shrink grout to overlay the slab once the skirt is replaced by a block work perimeter ring. This would provide the fall required both by the original design and by the building legislation. Mr Aronis agrees this proposal would address the non-compliance.

[26] However, the applicants argue that the visual effect of the protrusion has a negative effect on the aesthetics of the house and also reduces amenity by preventing the replanting of gardens around the perimeter. They propose cutting away the protrusion so that the slab edge sits beneath the perimeter block wall. They argue this will satisfy the policy requirement to return the house to an "as when new" condition. Mr Finn and Mr Aronis agreed that this could be done when the skirt is replaced with blockwork without affecting the structural integrity of the foundations.

Aesthetics/visual amenity

[27] The protrusion is noticeable. To lessen the visual impact from the street the applicants have, in the eight years since the repairs were completed, grown hedges along the edge of the slab of the north-east/street side of the house and have planted gardens to the side of the driveway. However, walking down the driveway the protrusion is clearly visible behind the hedges and gardens. The hedges will need to be removed to allow for the ply skirt to be replaced with blockwork and for the Ardex to be installed.

[28] During my site visit I did not walk down the south east side of the house. However, site plans show this area is a narrow strip between a boundary fence and the house and would have minimal visual impact. At the southwest (back-garden) aspect decking or paving covers most of the protrusion.

[29] To judge the aesthetic impact of the protrusion I need to compare the appearance of the house before and after the repairs. Photos taken before the repairs were carried out show tidy, well-kept gardens, with plantings up to the edge of the perimeter strip on the north facing aspects of the house. Roses were planted on the north-west/street facing aspect. There are no close-up photos of the south-east/fence aspect, however, google street view photos from January 2008 and August 2012, show the area shaded by trees planted along both sides of the boundary fence. The shade and south facing aspect would make for difficult gardening.

[30] Southern Response acknowledge that the perimeter has some aesthetic qualities and says that the blockwork perimeter will alleviate most of the applicant's aesthetic concerns. The applicants say that the visibility of the protrusion detracts from the classical look of the house. BD commented that the use of the area around the house as flower beds is a feature of houses built in this period. ND referred to the slab detracting from the character and appeal of the

house, and referred to the difficulties that the slab causes for gardening. She comments that they used to have gardens all around the house.

[31] In cross-examination Ms Paterson asked the applicants whether they agreed to the protrusion before the repairs and whether they were in fact concerned about the protrusion until recently. If so this would indicate that the visual amenity issue was not as important to the applicants as they have made out. BD was taken to the documents included in the building contract and asked whether the presence of the protrusion in technical foundation drawings meant they had in effect agreed to it. He indicated that he did not believe that the diagrams showed the protrusion to be prominent. Looking at the documents I note that these are small-scale technical drawings showing engineering detail rather than architectural drawings which show an intended visual finish. They would not provide a layperson with an understanding of the visual appearance of the finished foundation.

[32] ND said that when the repairs were being completed, she questioned whether she would be able to put the original garden back. She also commented that prior to the repairs she had roses planted in the front garden, however, she had been required to plant an evergreen hedge in front of the protrusion, as roses bushes would not provide visual cover when they were bare of leaves.

[33] I find that the protrusion at the front and driveway sides of the house has a material, negative effect on the visual and practical amenity of the house. The protrusion is visible to anyone approaching or entering the house and is out of keeping with the rest of the style of the house. The evidence shows that prior to the repairs the rose gardens at the front and flower gardens along the driveway were features which accentuated the house's period features and were in keeping with neighbouring houses, which sit in a special character zone. That the gardens were, and are, well cared for and were in keeping with the style and character of the house demonstrates that the visual features had value and provided amenity to the applicants. This is supported by ND's concerns at her ability to replant gardens and the planting of the hedge and gardens to the side of the driveway, both of which are intended to screen the protrusion from view. The protrusion does not meet the policy when new requirement as the repair affects an insured interest.

[34] My findings apply to the north facing aspects of the house. The protrusion to the southwest is largely covered by the deck and paving. To the southeast the protrusion is not readily visible due to the narrow gap between the house and the boundary fence and, therefore, does not influence visual amenity. The gardening amenity of the narrow, shaded area to the south east is also less affected.

Is the remedy reasonable?

[35] Having found that the protrusion on the north facing aspects is defective works, I need to decide what remedy is necessary. Southern Response has argued that the nature of the effect on the aesthetics is such that the cost to remove the protrusion is out of step with the value of the insured loss. The argument is that if there is a lack of proportionality between the cost to cure and the actual loss caused by the protrusion, I should award damages for the lost value and amenity rather than requiring Southern Response to perform the policy promise and remove the protrusion.

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

[14] *Bellgrove v Eldridge* [1954] 90 CLR 613 HCA.
[15] At p618.

[37] In *Ruxley Electronics and Construction Ltd v Forsyth*, the House of Lords considered the issue.[16] The plaintiff had contracted with the defendant builders to construct a swimming pool which was to be 12 feet deep, but instead the finished pool was only 10 feet deep. The plaintiff sought to have the swimming pool demolished and reconstructed as specified in the contract. It was found that the actual benefit to the plaintiff of requiring the defendant to demolish and rebuild the swimming pool was out of proportion with the cost, and that the difference in depth made no difference to the market value of the pool. However, the award of general damages for loss of amenity was upheld. In reaching this view Lord Lloyd accepted that the homeowner's intention not to rebuild was relevant to the decision about what was reasonable.[17]

[38] In *Bruce v IAG* the Court of Appeal considered the issue in a defective earthquake repair case.[18] The Court found that some remedies sought by the insured plaintiff, including straightening and re-plumbing wall framing, or relevelling the minor deviations of the floor slab, were unreasonable and would provide no real benefit to the insured. However, the Court commented: [19]

> We add two points for completeness. First, the court's assessment of the reasonableness of insisting on performance may be influenced by the impact of the defect on the building's market or amenity value. Second, a plaintiff who pleads a performance interest and seeks damages that exceed the alternative measure, which may take the form of diminution in value or loss of amenity, must genuinely intend to spend the award to protect that performance interest. If it were otherwise it would be wrong to say that the cost of performance is the true measure of the plaintiff's loss.

[39] Ms Paterson argues that the approach applied by Chair Somerville in *H Trust v Southern Response* is relevant. This would require the applicants to show that the choice to rebuild the foundations with the protrusion was unreasonable.[20] In *H Trust* the issue was whether the repair strategy chosen by Southern Response was reasonable. The policy granted Southern Response the discretion to decide on the form of the indemnity. Chair Somerville's decision applies the rule that contractual discretions must be applied reasonably, in good faith, within the purposes for they are conferred, and without caprice, but are not otherwise subject to review.[21] However,

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[16] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344.
[17] At pp372-373.
[18] *Bruce v IAG New Zealand Ltd* [2019] NZCA 590.
[19] At [17].
[20] *H Trust v Southern Response* [2020] CEIT 2019-0011.
[21] *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [66]–[74]

the issue here is not whether the repair strategy was unreasonable, but what steps are reasonably necessary to remediate the defective execution of that strategy. The scope of review is not constrained as it is when considering the application of a discretion.

[40] It was also argued that the issue must be viewed in isolation, without considering the other defective repairs. I do not find this persuasive. Severing the protrusion issue from the other remedial work to be done is artificial when assessing proportionality. This is not a matter where the cost comparison is between the protrusion work and leaving the rest of the foundation as it is.

Comparison of the option

[41] At the close of the hearing I indicated that I would consider whether additional cost estimates were required to assess proportionality between the cost to remedy the fall using Ardex and the cost to remove the protrusion. After considering the issue and the case law, I concluded this evidence was necessary. Comparative costings were obtained and were provided on 17 June 2022. I have adjusted these costings to allow for the finding that the protrusion need only be removed on the north facing aspects and to allow for the Ardex overlay to be applied to the protrusion to correct the fall on the southern aspects. This exercise produces comparative costings of $109,052.35 (excl) for removing the protrusion and the other agreed foundation work, and $91,884.65 (excl) for the Ardex overlay of all aspects and the other agreed foundation work. The difference is $17,16.77, an uplift of approximately 18%.

[42] I note that:

(a) The applicants intend to carry out the work to remove the protrusion.

(b) The evidence shows that the amenity provided by the garden beds, and the visual features of the California bungalow style, which the protrusion interferes with, is genuinely valued by the applicants.

(c) The cost comparison shows an 18% uplift in remediation cost to remove the protrusion from the north facing aspects.

(d) Some work is already required to remediate the foundations. This includes the Ardex overlay, replacing the ply-skirt with a blockwork perimeter strip, and work on the bearers and piles.

(e) Southern Response was not a builder contracted to carry out construction works. It was an insurer who elected to remediate insured damage. While not wishing to venture into discussions about the extent of an insurer's duty of good faith, at the very least an insurer's obligations colour considerations of what is reasonable, particularly when the defects have come about due to choices the insurer made in determining the necessary repair works.

[43] Considering the above factors, I find it is reasonable for the protrusion to be removed on the Northern aspects. If the protrusion was the only issue the proportionality exercise would be starker. In that case I would be comparing the difference between general damages for the loss of amenity (both visual and practical) and the cost to remediate. However, the additional cost of removing the protrusion involves an uplift of 18% from work already required to remedy other defects. Such a figure is not unreasonable to restore the practical and visual amenity which the applicants had prior to the repairs.

THE GARAGE

[44] The garage was lifted off its foundations, a new slab was constructed, and the garage was moved back into place. However, the new slab was constructed some 300 mm to the north-west and the garage now sits hard against the boundary. This affects amenity, as it is not possible to access the outside of the garage for maintenance, and the repositioning means the garage no longer has the benefit of the pre-existing resource and building consents from its original construction and is now non-compliant.

[45] The garage issues have narrowed considerably through the pre-hearing process. Mr Finn and Mr Aronis both concluded that the garage was irreparably damaged by a combination of the earthquakes and the repair process. They have concluded that the repairs carried out are defective works and the garage is less structurally sound and compliant than before the repairs were carried out.

[46] The issues now to be resolved are:

(a) whether Southern Response's treatment of the garage repairs was misleading conduct;

(b) what effect, if any, an agreement between the parties on 15 June 2018 has to Southern Response's liability for the garage; and

(c) what work is required to remediate the garage.

Misleading conduct

[47] The applicants have argued that the information contained in a Detailed Repair/Rebuild Analysis (DRA) Southern Response provided to them about the garage was misleading. They rely on *Southern Response v Dodds* where a failure to disclose versions of a DRA was found to be misleading conduct.[22] *Dodds* considered the alleged misleading conduct in terms of the Contract and Commercial Law Act 2016 (CCLA), and the Fair Trading Act 1986 (FTA). The undisclosed DRA contained a higher rebuild figure which entitled the insured to a higher value settlement. Damages for the difference between the settlement sum and the higher figure in the DRA were awarded.

[48] The allegation here is that the DRA of 16 August 2012 was a misrepresentation. The DRA listed the garage as a repair, contradicting assessments of 29 February 2012 and 27 May 2013, which recorded that the garage would be replaced. The argument is that Southern Response, through its agents, represented that the 16 August DRA was the only assessment, when in fact there were other assessments. Therefore, Southern Response acted misleadingly, in breach of s 9 FTA, and the applicants were induced into entering into the build contract, allowing a remedy of damages under s 35(a) CCLA.

[49] Looking at the events which underpin this argument I observe that:

(a) the 29 February DRA contain inconsistencies about the garage, some fields describe it as a repair, others as a rebuild;

[22] *Southern Response Earthquake Services v Dodds* [2020] 3 NZLR 383.

(b) the 29 February DRA was not signed off by an Arrow QS, which indicates that it was not a finalised version;

(c) BD's evidence was that he was verbally advised by Arrow that the garage would be rebuilt prior to the 29 February DRA; and

(d) there is no evidence of other material (letters, emails, or verbal advice) that supports the allegation the Southern Response, or it agent misled the applicants, unlike in *Dodds* where letters accompanying the DRA created expectations that the information provided was complete and reliable.

[50] I am not persuaded that the presentation of the 16 August DRA in these circumstances was misleading conduct, in terms of the FTA or CCLA. Prior to being provided with the DRA the applicants had already been told that the garage would be rebuilt, so withholding the 29 February DRA made no difference to their state of knowledge.

[51] I also cannot find that reliance is made out because, unlike *Dodds*, where the right to elect the form of settlement was with Mr and Mrs Dodds, in this case the policy grants the right to elect to repair with Southern Response. Southern Response did not induce the applicants to reject or affirm a right, as the right to choose was Southern Responses.

[52] Even had I found misleading conduct and reliance, the remedy in this case: rebuilding the garage, is necessitated by the fact that the garage repairs were defective and Southern Responses' liability is to rebuild the garage in any event.

The agreement of 15 June 2018

[53] Southern Response has argued that the applicants are restricted from recovering for the garage defects as they accepted an offer to settle the garage issues on 15 June 2018. This argument has shifted through the course of the hearing. The final pleading is that the agreement prevents the applicants from claiming further remedies relating to the relocation of the garage.

[54] The background of the agreement is that the applicants had raised the issue of the garage mis-location through the Residential Advisory Service. The offer was contained in an email sent to the applicants on 8 June 2018. I set out the relevant sections of the email below:

> [A]…[W]e are pleased to provide you with an offer of full and final cash settlement on a without prejudice basis as set out below (the Settlement Payment). If the offer is accepted, the Settlement Payment will be paid by Southern Response and accepted by you in full and final settlement and discharge of all claims against Southern Response and its contractor/s arising directly or indirectly out of or in connection with the Earthquakes and/or the Policy and/or the Construction Contract and/or the loss or damage to the Property, whether such claims arise under contract, statute, common law, -or equity; are in existence now or may arise sometime in the future; are known or unknown; and/or are in the contemplation of the parties or otherwise.
>
> [B] Subject to the above, acceptance of the offer does not affect any rights that you have under the Construction Contract regarding the standard of the works carried out under that contract for any issue identified after the date of-acceptance...
>
> [C] Strictly subject to written confirmation of acceptance of the full and final settlement terms Southern Response offers a full and final settlement payment of $1,200 inc GST towards resource consent costs, should one be required if you choose to rebuild your garage
>
> (lettering inserted to assist with interpretation)

The offer was accepted by return email on 15 June 2018.

[55] The law on the finality of "full and final" settlements is settled; they are not to be disturbed for reasons short of fraud, unconscionability, or a substantial mistake common to both parties.[23] However, agreements of any sort must be interpreted subject to the recorded terms and using the normal interpretive tools. In this case the agreement was drafted and proffered by Southern Response. Therefore, if the terms of the agreement are ambiguous, the meaning most favourable to the applicants must be applied. Words will be given their ordinary meaning unless context requires otherwise. In this case the context of the agreement is important, the discussion is about what is described elsewhere in the email as "*the garage situation*". This defines and limits the effect of the agreement to the garage.

[56] Paragraph [A] of the email is a boilerplate settlement clause, similar to others seen in many settlement deeds. It is unusual to see such a clause in an email, however, the intention is clear; the offer is intended to finalise the issue by payment. Paragraph [B] is a claw back clause, it saves issues regarding workmanship which are identified after 15 June 2018 from being captured by the finality of the settlement. Paragraph [C] defines further the effect of the agreement, it is a payment towards resource consent costs.

[23] *Prattley Entreprises v Vero* [2016] NZSC 158.

[57] It may be argued that paragraph [A] is broad and captures all the "*garage situation*" issues. However, this argument ignores that the payment is "*towards resource consent costs*" which can be interpreted as limiting the issues to the need to correct the resource consent. In such a case the *contra proferentem* rule applies and the conflict between the two meanings must be interpreted in the applicants favour.

[58] I find that the agreement has the effect of finalising Southern Response's liability for resource consent costs. However, it does not affect Southern Response's liability for rebuilding the garage in the correct location.

Garage remediation

[59] The garage must be rebuilt in the correct location. As to what type of structure the garage should be replaced with, I have no evidence before me on alternatives and options and so am unable to decide on this issue. The issue is driven by whether a lightweight structure (such as a coloursteel clad garage) with a gib-lined fire wall will suffice which could use the existing slab extended to the south, or whether a garage of a heavier construction is necessary, which appears to require a new slab.

[60] I direct the parties to discuss this issue. If agreement is not possible, I will call for submissions on the papers and make a deliberation.

THE ELECTRICAL WIRING

[61] The third and final issue relates to whether or not Southern Response is liable for the costs of replacing the original Indiarubber wrapped electrical wiring. The applicants argued that this work should have been carried out when the lathe and plaster were replaced with gib board during repairs. When the repairs were completed new fittings and switches were connected to the old wiring. The evidence is that this was done compliantly and was correctly certified. There is no evidence that the wiring was in any way damaged. The wiring has now begun to fail due to its age.

[62] I have little evidence in front of me regarding this matter. There was no expert evidence in the form of an electrician's report or similar on which I could base my decision. The

argument appears to be that the repairs offered an opportunity to replace old wiring with new. It is now argued that this loss of opportunity should now be remedied in some way.

[63] I struggle with this issue for a number of reasons. Firstly, there is no evidence before me of the costs, reasonable or otherwise, of replacing the wiring. It would at the very least appear to require removal of at least some gib board, and the refinishing and re-fixing of that gib board. Secondly, I was not directed to any authorities or arguments of law as to why Southern Response would be liable for repairing undamaged property, which was also unaffected by the repairs.

[64] Most people renovating a property will take the practical step of replacing old wiring when linings are being replaced and the wiring is accessible. However, Southern Response was not carrying out renovations. It was repairing earthquake damage. That is the beginning and the end of its liabilities. I am unaware of any law, or interpretation of the policy, which would have required Southern response to have done this work. I cannot find that Southern Response is liable for replacing the old wiring.

C D Boys
Chair, Canterbury Earthquakes Insurance Tribunal.