IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0009-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	A J E, C D E, and J P S as trustees of the E E Family Trust and J S D and J H N as trustees of the M Family Trust Claimants
AND	VERO INSURANCE NEW ZEALAND LIMITED Respondent

Hearing:	22-23 September 2020 Written submissions received on 28 September 2020, 5 October 2020 and 8 October 2020 Joint memorandum addressing additional issue received on 26 February 2021
Counsel:	T Grimwood for the Claimants C Brick and A Cornwall for the Respondent
Decision:	30 April 2021

DECISION OF S M A McCormack

---

[1] A landslip occurred. The exact cause of the landslip is in dispute.

[2] The landslip necessitated a retaining wall to be built at X, Christchurch (the Property) prior to any further earthquake repair work being undertaken on the dwelling at the Property.

[3] The question in this claim is who is responsible for the cost of the retaining wall.

Background

[4] On 5 March 2014 a landslip occurred on the Property. The landslip followed a storm that was recorded as a "1-in-100 year" event in the region.

[5] The storm, lasting three days on 3, 4, 5 March 2014 (Rainfall Event) was preceded by numerous earthquakes that struck the Canterbury region in a series of earthquakes (CES), with the major events occurring in the 2010/2011 sequence.

[6] It is well recorded that the CES had a devastating impact on the people of Christchurch. These impacts included physical, financial and emotional upheaval. Hundreds of thousands of earthquake claims were made and the insurers, loss adjustors, project managers and builders alike were all under siege.

[7] Homeowners were left in broken homes and insurers had to deal with repairs in conjunction with EQC repair works. During this time earthquakes continued to rattle the region. It is recorded that in the first two years alone from 2010 that over 10,000 earthquakes hit the Canterbury region. It was a period of huge uncertainty and a lengthy process of physical and psychological recovery. The number of claims and the continuing aftershocks lead to considerable uncertainty about many of the claims.

[8] At the time of the CES and the landslip, A E (Mr E) and J D (Ms D) resided at the Property which was held in two trusts.

[9] The Property was insured by Vero, the Respondent under the AMP Home Plan Maxi Policy (Policy) and at the time of the landslip Vero had accepted a claim for earthquake damage to the dwelling at the Property following the CES. By October 2012 Mr E and Ms D had agreed with Vero that the repairs to the dwelling would be managed by Vero under the Vero programme, with MWH Mainzeal Limited (Mainzeal) managing the process alongside DJ Hewitt Builders Limited (D J Hewitt) as builder.

[10] At the time of the landslip in 2014, little had been done in the way of earthquake repairs to the dwelling. Mr E and Ms D arranged and paid for the retaining wall necessitated by the landslip. The actual cost is not in dispute.

[11] At the time of the hearing of this case, full repair work had been completed by Vero (2016) and the Property had been sold (2019).

The Parties' Positions

The Claimants

[12] The Claimants' claim is that following the Rainfall Event, defective repair work at the Property caused the landslip.

[13] Mr E advised the Tribunal that Vero's contractors failed to adequately repair earthquake damage to spouting at the Property. Mr E says that between October 2012, when a downpipe was replaced on behalf of Vero, and March 2014 when the landslip occurred, he advised Vero and its agents that rainwater was still spilling over the associated spouting, and that he was concerned that water was running under the dwelling. Mr E further says that Vero representatives at one of those meetings confirmed that Vero would make repairs to the spouting to resolve the overspill. The further repairs were not completed prior to the Rainfall Event and Mr E says that the failure to repair the spouting led to water continuing to overspill from the spouting over a period prior to the landslip, and which he says was the cause of the landslip.

[14] Mr E says Vero was in breach of contract or was negligent in the repair and that this breach or negligence resulted in the overspill continuing to occur from the spouting and resulted in the landslip occurring which required the building of a retaining wall. He says Vero is either liable for contractual damages being the cost of the retaining wall or liable in negligence because he says the defective repair caused the landslip which makes Vero liable for the loss incurred from the landslip being the cost of building the retaining wall.

[15] Mr E also says that Vero is estopped from denying it agreed to repair the spouting.

Vero (the Respondent)

[16] Vero denies the CES caused damage to the spouting, denies that repairs were carried out inadequately, denies overspill following replacement of the downpipe, and says the cause of the landslip was the Rainfall Event.

[17] Vero says if overspill did continue after the down pipe had been replaced, then the owners who occupied the house should have noticed it and reported it to Vero. Vero argues that Mr E did not report any continuing overspill, relieving it from liability.

[18] Vero says it was not in breach of contract and was not negligent in the repair. Vero further says that even if the Tribunal found that there was a breach of contract or negligence Mr E would still need to prove to the Tribunal that on the balance of probabilities that this breach or negligence caused the loss.

[19] Vero submitted that this is not a situation where an estoppel argument is able to be raised. I will deal with estoppel at the outset by saying I agree with Vero. I will not deal with this issue any further. This is not a case where one party has relied to its detriment on a promise by another, where the second party later reneges, such that an estoppel would arise.

Issues

[20] The following are the issues that need to be addressed and resolved:

(a) Issue 1: Did any overspill occur from the spouting after the replacement of the downpipe?

(b) Issue 2: Was the spouting earthquake damaged?

(c) Issue 3: If so, was that damage causative of the overspill?

(d) Issue 4: Did Vero have a contractual obligation and/or owe a duty of care to the Claimants to repair the downpipe and spouting?

(e) Issue 5: If so, did Vero breach its contractual obligation or duty of care?

(f) Issue 6: If so, did Vero's breach of contract and/or its duty of care cause the Claimants' loss? This question involves an assessment of the contribution, if any, of the overspill to the landslip, and if necessary, foreseeability and remoteness.

[21] For the Claimants to be successful, they need to establish each issue in the affirmative on the balance of probabilities.

[22] There was an issue about whether Vero is vicariously liable for the actions of the loss adjuster and contractors. In closing submissions, and for the purpose of this claim, Vero conceded that it is. There is, therefore, no need to address that issue.

***Issues 1 and 2*: Did overspill occur from the spouting after the replacement of the downpipe? Was the spouting earthquake damaged?**

[23] I will deal with these two issues together as the evidence is specific to both.

The evidence

[24] During the hearing and submissions, much time was dedicated to the issue of whether earthquake damage had occurred not only to the downpipe but also to the associated spouting.

[25] Vero submitted that there was no evidence that there was any misalignment of the spouting that had been caused by the CES, nor any damage at all, and that Vero could not reasonably be expected to rectify any defects.

[26] There was no dispute between the parties that the February 2011 earthquake dislodged boulders from a retaining wall above the Property and that one or more than one, struck and damaged a downpipe on the southwest edge of the property.

[27] Submissions and evidence for Mr E were that one or more boulders hit the downpipe with such force that it caused the spouting to go out of alignment. Mr E says that whilst being uncertain of the precise cause of the overspill from the spouting and downpipe, that such overspill did not occur prior to the earthquake on 22 February 2011, nor after the repair work of 'lift spouting and remount brackets' that was undertaken by G E Construction Limited (G E Construction) on behalf of Vero in late March 2014. I accept Mr E's evidence that the spouting and downpipe were fully functional prior to the CES.

[28] Further, when Mr E was questioned by the Tribunal whether he noticed a musty smell in the library before the CES earthquakes, Mr E's evidence was that he didn't and that prior to purchasing the Property in March 2010 he had instructed a moisture meter investigation and that no moisture issues were recorded.

[29] Following Vero's acceptance of the owners' claim for earthquake damage, Mainzeal prepared, for Vero, an Initial Earthquake Damage Assessment dated 24 August 2011 (the Assessment) which included:

GARAGE				
		Damage	Remedial	Quantity
DOWNPIPES	Metal	D	RIR	3
GUTTER	Metal			

[30] The Assessment did not note any damage to the gutter.

[31] Vero's loss adjustor, Mr Plumridge, explained in evidence that this report was preliminary in nature, and that he would not expect it to include damage that was not obvious. Mr Cade Marson, who prepared the report, was not called to give evidence.

[32] In September 2012, Mr E noticed dampness and a musty smell in the library downstairs. He assumed it was a drainage issue, and on 24 September 2012, he emailed Mr Plumridge:

> It seems that because the drainage has not been repaired for the storm water we are now getting seapage(sic) through the bottom of the house. ……
>
> With last weeks of heavy rain we have again had flodding(sic) under the house.……...
>
> can you get someone to come and check it out

[33] Mr Plumridge engaged DJ Hewitt to investigate the matter. D J Hewitt thought that there may be an issue with the stormwater system and in turn engaged G N Brewer Limited (GN Brewer), drainlayers who on 2 October 2012 invoiced D J Hewitt. The description of work was:

> Cleaned out stormwater sumps, waterblasted the line clear from the inspection chambers & from the bubble-up sump to the outlet & removed sand/silt from the line.

[34] On 22 October 2012 Mr E emailed D J Hewitt, copying in Mr Plumridge:

> Just letting you know that in this rain 8.14am Monday 22 Oct that the spouting and drain pipe are not couping (sic) with this rain and it is spilling all over the path to the front door so I expect it will be going under the house.
>
> The down pipe is not yet fixed.

[35] The damaged downpipe was replaced by Placemakers at the direction of D J Hewitt on an unknown date, but for which DJ Hewitt issued an invoice dated 13 December 2012 to Vero Insurance. It simply passes on the Placemakers' invoice of 27 November 2012 to:

> Supply and Install Downpipe - Supply and install replacement downpipe as per Robbie, adding on a 10% margin.

[36] In closing submissions Vero said that:

> This work arranged by Mr Plumridge on behalf of Vero in 2012 was temporary or emergency work

[37] I note that even if this was temporary or emergency work it was undertaken as part of the Vero programme.

[38] Vero submitted that it would have expected Mr E to have emailed Vero about the issue of the continuing overspill, as he did with many other issues. Ms Brick for Vero said:

> If the applicants had raised an issue about water continuing to overspill the spouting, or water running under the house, I would expect to see mention of this in Vero's files, given the large number of emails received from Mr. E concerning other matters, but there is none.

[39] In Mr E's affidavit and cross-examination, he is clear that after the down pipe was replaced by Placemakers, discussions were held on site between late 2012 to March 2014 where the issue of the overspill from the spouting and/or dampness around the front door area was mentioned with various agents of Vero at the time and was in the context of other major house repair discussions which were still ongoing.

[40] Vero denies this. Between October 2012 and March 2014 Vero says there were only two meetings recorded. Vero relies on written records including these two meetings which note issues with the on-going dwelling repair, and which do not reference the overspill issue.

[41] I am not satisfied that the evidence provided of notes of those meetings, included in the affidavit of Ms Matheson, who has been a case manager for Vero since 2017, are all encompassing of the discussions at those meetings. I accept Mr

Grimwood's submission, that these written records are not true minutes of the meetings. Vero did not call evidence from those in attendance at those meetings, and indeed of those present at those meetings, only Mr E has provided evidence.

[42] Mr E's evidence was that meetings that involved discussions about the reinstatement of the earthquake damage to the Property continued to take place after the downpipe was replaced. Mr E says he explained to representatives of Vero and its agents:

(a) That rain water was still spilling over the spouting near the replaced downpipe; and

(b) That he was concerned that the water was running underneath the dwelling.

[43] Mr E's further evidence is that at one of those meetings a Vero representative confirmed that:

(a) Repairs were to be undertaken at the direction of Vero; and

(b) Vero would make repairs to the spouting and downpipe to resolve the water spilling.

[44] Ms Brick, for Vero, argued that the occupants of the property should have noticed the continuing overspill each time it rained. I accept Mr E's evidence that both he and Ms D used other accesses and that visitors stopped visiting the property after the earthquakes. This meant that the front door was not accessed as Ms D drove directly into the garage and Mr E parked his car on the other side near the back entry which was on the other side of the house.

[45] I also accept Mr E's evidence that he had a lot going on and this issue was one amongst many serious issues being discussed over the repair of the dwelling. Mr E's evidence, which I accept, was that he was talking to Vero representatives on site before the landslip, that Mr E advised Vero representatives of the overspill, and that Vero agreed to fix the spouting.

[46] If as Ms Matheson says all meetings were formalised in writing, then it is surprising that no minutes were taken of the all-important meeting held on site on 18 March 2014 when Mr E's evidence is that he says Vero agreed there must have been over spilling and agreed to engage GE Construction to reinstate the spouting.

[47] Vero called no witnesses who were at that meeting to challenge what Mr E says was agreed at the meeting.

[48] I accept Vero's submission that Mr E has confused the identity of who exactly he spoke to at various meetings.

[49] Vero seeks to discredit Mr E because he erred in his affidavit as to which Vero personnel were involved in the repair process at which times, and because he did not change his position when Vero says he should have and could have, following him finding out he was in error when the matter was before the District Court.

[50] Further, it challenges his credibility on the basis he failed to include a deduction in his claim for a payment made by EQC.

[51] I found Mr E to have been unsure of which people from Vero he was dealing with at various times. However, I generally found him to be a genuine witness notwithstanding that his recall was not always correct. I reject the inference that this confusion undermines his recall of the nature of the discussions about which he gave evidence.

[52] The errors he made I found to be genuine and generally explicable.

[53] He was candid in evidence about his errors in relation to Vero personnel, plausibly explaining that there were more than 20 people involved over a long period of high stress. Ms Matheson in her affidavit confirmed that there had been many staff changes over the years. Both Mr E and Vero were dealing with a myriad of issues of a major house repair.

[54] I place little, if any, weight on Vero's submission in closing, and which was not put to Mr E in cross-examination, that the occupants should have been able to see, and or hear, the over spilling through the glass panels either side of the front door.

[55] I accept the reality of living in the house which had suffered major damage in post-quake Christchurch meant Mr E and his then wife were rarely able to observe any overspill, given lack of visitors, and lack of use of the front door, where the spilling, if any, would have been occurring. I do not accept Vero's submission to the contrary, that if over spilling had been occurring it would have been often and obvious to anyone in the home.

[56] I make this finding as to overspill, mindful of Mr E's equivocation in his evidence under cross-examination on this issue. My assessment, having heard Mr E, is that he backtracked to some extent as he realised he was being confronted by Vero for failing to report the overspill, and this was his misguided response. While not condoning this, it supports my finding that Mr E had indeed seen overspill, and the effects of it, including dampness in the area, as he said in his examination in chief.

[57] The only person who gave evidence in relation to the meeting following the landslip was Mr E. The parties confirmed that a site meeting after the landslip was held very shortly after the landslip on 18 March 2014 with the new builder Grant England of G E Construction. I consider for the spouting to be addressed so quickly after the landslip it must have been a high priority for both Mr E and for the new builders. G E Construction must have considered it was of such a serious nature that having just been appointed they quoted for the work, and then completed the work in short order.

[58] I find on the evidence that some overspill occurred from the spouting from after the February 2011 earthquake, when the down pipe was struck by one or more boulders and significantly damaged, through until the March 2014 landslip. I also find that the over spill ceased completely following the repair by G E Construction shortly after the landslip.

[59] A test undertaken by Mr E, referred to in evidence as the 'hose test' was also supportive of overspill. After the landslip, but before the March repair, he, by ladder, hosed water into the spouting, to find none went down the downpipe, but all overflowed the spouting onto the path by the front door.

[60] G E Construction quoted and invoiced for some works including:

> Lift spouting and remount brackets

[61] This invoice was dated 26 February 2014. However, it was accepted by both parties that the date is incorrect and that the correct date that post-dates the landslip is likely 26 March 2014.

[62] Vero's position was that the first time it heard about the overspill, after the downpipe was replaced, post-dated the landslip. It called no direct witnesses on the issue of spouting damage and/or misalignment. Vero's position was based on inviting the Tribunal to draw inferences from indirect evidence.

[63] The only evidence Vero provided on this issue was that of Mr McPhail, a licensed building practitioner, who said that, from photos taken after the CES, and after the work was completed by GE Construction, that the spouting appeared to be in the same place as before the replacement of the downpipe and after the spouting was repaired. Mr McPhail said if the spouting had been affected or had been lifted during the damage to the downpipe in 2011 then there would be damage to the barge, fascia and roof cladding and at his site inspection in 2020 he could not see any damage or repairs to these areas. I do not accept photos or shadows as being in any way conclusive evidence of no work being done to lift the spouting and remount brackets, especially in the face of the quote and invoice by G E Construction.

[64] For these reasons I find that both the downpipe and spouting were earthquake damaged. The only logical conclusion is that the boulder or boulders damaged not only the downpipe but, in some way, the spouting, rendering it incapable of serving its very purpose. I make this finding despite the lack of specificity in the evidence as to the actual form of the damage, whether it be physical damage and/or misalignment and/or twist damage, and accordingly the lack of the specificity of the actual path of the water

from the roof to the ground. Any alternative is untenable, necessarily involving some form of impropriety on the part of G E Construction.

***Issue 3*: If so, was the damage causative of the overspill?**

[65] Given my findings in the previous section, I therefore find the damage was causative of the overspill.

***Issue 4:* Did Vero have a contractual obligation and/or owe a duty of care to repair the downpipe and spouting?**

[66] There was an insurance contract between the Claimants and the Respondent. A claim was made under the Policy for earthquake damage after the February 2011 earthquake. That claim was accepted without question.

[67] I have concluded that the downpipe and spouting were earthquake damaged. Vero therefore had a contractual obligation to repair the downpipe and spouting under the insurance contract to the standard required under the Policy to ensure that it carried out its function of taking water away from the Property in such a way as to avoid adverse consequences of stormwater accumulation.

[68] It is well established that an insurer is liable for losses resulting from defective repair, where it assumes responsibility for repairs,[1] and it is settled law that an insurer is liable to remedy defective repairs in order to meet its contractual obligations.[2]

[69] There is no doubt therefore that Vero owed a contractual obligation to the Claimants to complete the repairs to both the downpipe and the spouting to the standard stipulated in the Policy.

[70] Mr Grimwood for the Claimants submitted that Vero accepted the Claimants' claim. The Claimants then opted for Vero to manage the reinstatement of the Property and by doing so Mr Grimwood said Vero assumed a responsibility to carry out the

[1] *Best Food Fresh Tofu Limited v China Taiping Insurance (NZ) Co Ltd [*2014] NZHC 1279
[2] *Sleight v Beckia Holdings Limited* [2020] NZHC 285.

repairs with due care and skill. Accordingly, it was submitted, a duty of care must be owed.

[71] Vero owed the Claimants a duty of care to repair the downpipe and spouting in a proper tradesman-like manner in accordance with best trade practice to the standard required under the Policy, but ultimately in a way that the system performed its function, namely to divert water away from the Property in a manner that would avoid risks that uncontrolled stormwater poses. It does not matter that they may have been termed emergency repairs. They were nonetheless repairs completed as part of the agreed Vero programme, and in response to the Policy, and meeting the contractual obligations of the insurer under the Policy.

Issue 5: **If so, did Vero breach its contractual obligation or duty of care?**

[72] In other words, was the repair of the earthquake damage to the downpipe and/or the spouting defective?

[73] I am inclined to apply a functionality test to the repair works undertaken in the context of the spouting and downpipe at the Property. Mr Carter, a director of an architectural practice and a witness for Vero, in cross-examination advised that the downpipe and the spouting 'work together.' Mr McPhail, a director of a roofing specialist company and a witness for Vero, said in his affidavit evidence that gutters, downpipe and associated drainage all need to work effectively for a rainwater system to work as designed. I find from this evidence that spouting and downpipes work as a system to perform the specific function of directing water from a roof into a storm water system and away from property.

[74] At the 18 March 2014 meeting, Vero agreed to arrange to realign the spouting. Mr E gave that evidence, and Vero called no one to challenge it, despite Mr England being present at the meeting. Vero's position was to rely on a subsequent visual inspection some six years later and a hindsight challenge to the wording of G E Construction's invoice.

[75] The invoice from GE Construction stated, 'Lift spouting and remount brackets.' I have concluded that this work took place. Vero did not call any contradictory evidence from those who carried out the work.

[76] I do not accept Vero's submissions that during the repair work undertaken on behalf of Vero, the duty of care did not extend to the repair of the system of the spouting and the downpipe as a whole in order to maintain functionality of that system.

[77] Based on Mr E's specific notification to Vero that, 'the spouting and the downpipe are not couping (sic),' as well as the undertaking of work on behalf of Vero to the spouting shortly after the landslide, I find that the spouting and downpipe system was not fully functional at the time of the landslide.

[78] Mr McPhail, an expert roofer for Vero, and Mr Whiteside, a builder for Mr E, agreed that if they were undertaking the repair work themselves they would (albeit using differing methods) check the functionality of the repair work.

[79] Mr McPhail said he would check that the spouting and the downpipe were working. However, he would not do a water test but would check the spouting was running the right way by measuring the fascia levels. No evidence was provided that any such measurement test was undertaken.

[80] I have little difficulty in finding that the repair work carried out by Placemakers on behalf of Vero breached Vero's contractual obligations to the Claimants and its duty of care, resulting in the ongoing loss of functionality of the spouting and downpipe system on the Property.

Issue 5: **If so, did Vero's breach of contract or duty of care cause the Claimants' loss?**

[81] In other words, what caused the landslip? There was no issue that the landslip caused the requirement for the retaining wall and therefore the loss.

Causation – the evidence

[82] There was extensive evidence before the Tribunal on this issue.

[83] Tonkin and Taylor visited the site shortly after the landslip on 7 March 2014 and again after the landslip on 18 April 2014 to assess the claim for natural disaster damage. Tonkin and Taylor considered that saturated ground conditions caused by the Rainfall Event was the cause of the landslip.

[84] Riley completed two reports for Vero, one in 2013 and another in 2017. In the 2017 report, Mr Clough for Riley considered that failure of the slope by direct infiltration from rainfall alone was likely to have been the primary cause of the landslip.

[85] Mr E appointed Mr Aramowicz from Eliot Sinclair to prepare a report in 2017 and again in 2020. Mr Aramowicz said that the most likely cause of the landslip was uncontrolled stormwater from the earthquake damaged gutter, and possibly an earthquake damaged stormwater pipe, at the southwest corner of the dwelling.

[86] The Tribunal appointed Mr Duke of Davis Ogilvie as an independent engineer to assist the Tribunal and to provide a report on what was the cause of the landslip. Mr Duke found that the significant Rainfall Event, blocked stormwater system, and poor control of surface water led to saturation of the fill and caused the landslip.

[87] Mr Duke calculated the catchment areas delivering water to the relevant parts of the Property, describing the management of the runoff and where water from each catchment area would end up if the stormwater system was not capable of managing the amount of water being directed towards it.

[88] Mr Duke provided a table (table 2) in his 2020 report that estimated water runoff from the various catchment areas being, C1 (dish drain), C2 and C4 (strip drain), C5 (roof catchment) and Y, land above entranceway (C3).

[89] Calculations of runoff were set out in table 2. Mr Clough in cross examination agreed with the figures in table 2 and confirmed that the volume of runoff from the Rainfall Event was calculated on the basis of none of the water being captured in the catchment areas (also agreed to by Mr Duke).

Direct rainfall

[90] Mr Clough for Vero said that it was probably direct rainfall that caused the landslip. Mr Duke and Mr Aramowicz said it was due to saturation of the ground, albeit from different sources, and from more than just the Rainfall Event. The water then followed a preferential path from the southwest corner of the dwelling through the silt and gravel fill towards the slope east of the garage.

Depth of in-fill and gully

[91] There were two hand auger test sites HA2 and HA3 reported in the 2013 Riley Report. Both sites had similar fill composition.

[92] Mr Aramowicz agreed fill was more permeable than natural soil, but for the fill to be permeated there had to be a water source. He did not see any evidence of a deep gully, but rather a slight topographical depression.

[93] Mr Clough said that if there was a gully then there would be more fill and the saturation of a larger amount of fill was more likely to have led to the landslip. Mr Clough confirmed in evidence that direct rainfall would have been enough alone to have caused the landslip.

[94] Mr Aramowicz's view was that the depth of the fill was not an issue especially since that fill had been in place since sometime in 1950 when the original house foundations were laid. In Mr Aramowicz's view the depth of the fill was not a factor in the landslip but was a statement of fact and does not indicate why the landslip occurred. In his view something had to change to make that area slip.

[95] The things that changed in his view that led to the landslip was the increased pour pressure in the fill material that was immediately to the east of the garage. If it was direct rainfall it would have been more of a shallow slide. For it to be a landslide of this nature it required the fill to be saturated which would have required more than just rain. In his view it must have been the water spilling from the spouting that

saturated the fill from the front door entrance causing a preferential flow path to the landslip site.

[96] Mr Duke said that the landslip occurred where the fill was at its thickest and where there may have been a gully. However, he said the saturation of the fill, rather than being caused by the spilling of over flow of the spouting, was from the preferential flow path from the overflow of the stormwater from the different catchment areas. If it was just direct rainfall Mr Duke said it would have slipped north and south of the landslip. Because those areas didn't move he said it must have been because of the preferential flow path for water that was caused by cumulative changes.

[97] I accept the evidence that a depression does not increase the site's susceptibility to slip and I accept the evidence of both Mr Aramowicz and Mr Duke that it was more than direct rainfall that caused the landslip.

C1, C2 and C4

Sumps and Drains

[98] There was much debate by the experts about the condition of the stormwater system. Mr Duke said that when he visited the Property in 2020 that there were leaves and debris in the sumps and drains which may have compromised the system and that they may not have been operating to full capacity.

[99] Further, Mr Duke said that as there was no new stormwater put in place when the house was rebuilt on existing foundations in 2006, the existing stormwater system may not have been capable of dealing with the stormwater and runoff.

[100] Mr Duke also questioned the size of the storm water line which he said might not have the capacity to manage runoff unless it was built to a sufficient gradient. Neither he nor any of the experts knew the gradient of the slope or the stormwater line.

[101] At the time the photos were taken by Mr Duke in 2020 Mr E and Ms D no longer lived at the property. In consideration of the course of nature and life, video and photographic evidence taken some time after the Rainfall Event, in 2015 and 2020

cannot be a surrogate for evidence of the condition of the sumps and drains at the time of the Rainfall Event.

[102] Mr Clough said in cross examination that C1, C2 and C4 had enough capacity to meet the peak flow of the Rainfall Event even if partially blocked.

[103] As stated above there was no evidence that C1, C2 and C4 were blocked at the time of the Rainfall Event.

[104] Having considered the evidence presented on the sumps and drains at the property, I do not accept that the sumps and drains were blocked. Also, I do not accept that the stormwater line was not laid at a gradient sufficient enough to deal with the runoff from the Rainfall Event as there was no evidence on the gradient.

Stormwater system

[105] When the stormwater system was cleaned out by GN Brewer on instruction from DJ Hewitt in 2012, this was in response to Mr E raising a concern about a musty smell and dampness in the library. However, this clean out of the stormwater, undertaken by GN Brewer, did not appear to alleviate the problem. Mr E later advised Vero (Mr Plumridge) that the spouting and gutter were not coping with the rain and that rainwater was over spilling and will be going under the house. DJ Hewitt considered that the water in the bottom of the house could also be coming from the hill behind and running under the foundation.

[106] Wallace Blocked Drains Limited (Wallace Drains) undertook a test in 2015 and the CCTV footage of the stormwater drains was shown to the Tribunal. Whilst this showed some silt and water pooling the test itself was inconclusive in that it required further CCTV investigative work by drainlayers to open sections up of the drain. Further some of the camera work appeared to go into redundant lines that had been blocked shut.

[107] Ms Brick suggested that further drainage work may have been completed. She asked Mr Clough in cross examination to consider the quote from GE Construction

for the scope of works repair for X. She referred him to the Drainage description where it noted works for carrying out drainage work, ProDrainage Limited, and suggested that this might have been the missing piece of the puzzle that indicates that works were done to the drainage system following on from the Wallace Drains report.

[108] There was no evidence what this work was for. It may well have been for the removal and replacement of 10 metres of the dish channel at the front of the garage that was in the original building inspection report in 2011 prepared by Mainzeal, which I questioned the parties about, by way of a supplementary question. However, the parties confirmed in a joint memorandum to the Tribunal that this note in the inspection report would not have materially changed their evidence before the Tribunal.

[109] There is therefore no conclusive evidence of further drainage work in relation to the stormwater system around the western side being completed under the contract by GE Construction. Further Mr E was not aware of any work done on the drains down the back lane.

C3

[110] The parties' geotechnical experts agreed that the garden area left of the front door provides bark and gravel to assist in infiltration and prevent surface runoff. Mr E's evidence was that the garden slopes to the north to allow stormwater to drain along the western side. It was suggested that the minor slip on the south west slope may have blocked the area impeding the flow of overflow water from C3. The area for water to flow appeared to have a step and photos showed a small gap but there was no evidence that water was impeded or that this minor slip occurred before the main slip.

[111] Mr Clough and Mr Duke said that all the water that came into C3 would flow through the preferential path towards the slip area. Mr Aramowicz said that some would flow north and that some would go under the house and follow a preferential path.

Vegetation

[112] The Tonkin and Taylor report stated some vegetation was removed from below the slip site following a conversation with Mr E, the suggestion being it could lead to destabilisation. It was Mr E's evidence that only the tops of trees were removed, and that roots and stumps were left in place. Mr Aramowicz stated in his 2013 report that only a small part of the area affected by vegetation removal was subject to the landslip and he considered it was unlikely that the removal of vegetation played a part in causing the landslip. I agree with Mr Aramowicz.

C5

Spouting compliance

[113] I accept on the evidence of Mr Aramowicz that the spouting design complied with the New Zealand Building Code and that the spouting and guttering size would have, had it not been damaged, been able to deal with the south west roof runoff at the peak flow of the Rainfall Event. I understood there to be no objection by other experts to Mr Aramowicz's opinion on this issue.

Water from the spouting

[114] The Claimants' evidence is that the spouting was misaligned or otherwise damaged and that no water was running down the downpipe.

[115] Mr E undertook a second hose test in November 2015, by allowing water to find its own way from a position by the front door under the spouting, that is the area of overspill. The results he observed after 4 hours of flow, and the following morning, he says, established a 'Preferential Path' to the head of the landslip area. Although I accept the description of this test as 'amateur' and 'simple', it was not challenged by the expert witnesses as establishing the Preferential Path he said it did.

Y property

[116] I accept that the CCC drainage plans for the property and surrounding properties have not been kept up to date and there is no evidence that there was stormwater runoff from Y after 2008.

[117] It was agreed that the stormwater system met the building code.

[118] I have already recorded that I find that neither the stormwater system or any failings in it, the removal of vegetation, nor the gully played any part in causing the landslip.

Conclusion on the evidence

[119] Mr Duke's figures in table 2 states that if all the catchment from C3 and C5 ran through the preferential path then the contribution would be more from C5 (9.5m2) than from C3 (8.8m2). There was a lot of discussion on how much overspill occurred from the spouting and how much water came into C3 from above slope and including Y or from other catchment areas. I accept that some water came from the slope above, but there was no evidence that water came from Y after 2008. I do not accept that any water came into the area from C1, C2 and C4 because of the reasons I have already given, namely that there was no evidence I can rely on that the sumps and drains were blocked at the time of the Rainfall Event.

[120] In relation to the spouting, Ms Brick for Vero raised with Mr Aramowicz the issue of the degree of misalignment, or the degree of the fall of the spouting, that would be required for no water to go down the downpipe, the implication being that it would be noticeable. However, the evidence before the Tribunal that I can rely on is the quote and invoice from G E Construction that stated that the work quoted and undertaken was to lift spouting and remount the brackets. We have Mr E's evidence that no further spilling took place after that work was completed. No witnesses were called to say what was done to the spouting. I therefore have to rely on the wording in the quote

and invoice. The question of exactly how the water travelled from the roof to the ground remains open. One possibility is that it never reached the spouting at all and simply ran off the roof to the ground prior to the spouting being lifted and remounted on the brackets, although this was not raised at the hearing. Again, it would have been helpful if witnesses who completed the work had been called. However it happened, my finding is that water made its way from the roof to the ground and not into the stormwater system.

[121] Mr Aramovicz said there was actual saturation of the ground caused by overspill from the spouting. Mr Aramovwicz said in his 2017 report:

> Any stormwater that was not collected as a result of damage to the gutter, and discharged onto the ground near the front door, will have resulted in a strong seepage flow to the area of the landslip.
>
> This explains how the ….. damaged gutter caused the fill materials to the east of the garage to become saturated which eventually resulted in the landslip.

[122] Mr Duke agreed with Mr Aramowicz around the difference between surface infiltration and actual saturation and where there is a destabilising effect from the buoyancy of any saturated material. Mr Aramowicz's comments on this issue simply made sense. Although Mr Duke agreed with Mr Aramowicz that it wasn't a saturation event his evidence was that it was the preferential path from water runoff from various catchments that led to saturation and contributed to the landslip.

[123] Having assessed the evidence, both expert and lay, on the issue of factual causation, I find that the landslip resulted, at a time of heavy rainfall, from saturation of the fill material, the saturation being a combination of water flow from overspill from the spouting and C3 to the preferential path. I have already said why I have dismissed other claimed causes.

Causation – contract and negligence

[124] It is well established that an insurer is liable for losses resulting from defective repair, where it assumes responsibility for repairs.[3]

---

[3] *Best Food Fresh Tofu Limited v China Taiping and Bruce v IAG New Zealand Limited* [2014] NZHC 1279

[125] The defect has been remedied. The question is whether the loss sustained by the Claimants prior to remedy meets the legal test of not being too remote.

[126] In Contract, the rule was stated in *Hadley and Baxendale*[4]:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[127] In *Victoria Laundry (Windsor) Ltd v Newman Industries Limited,*[5] Asquith LJ said:

> In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract as liable to result from the breach…It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result …Nor … to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was a likely so to result. It is indeed enough …If the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger" For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

[128] On 22 October 2012 Mr E sent an email to Mr Plumridge, which stated:

> …the spouting and drain pipe are not couping (sic) with this rain and it is spilling all over the path to the front door so I expect it will be going under the house.

[129] I have concluded that this email identified the possibility that, if the spouting and downpipe were not fully remedied to be a fully functioning system, water would continue to go under the house, and on a hillside property that could cause some form of damage, including a landslip. I find the landslip was 'a serious possibility' or 'on the cards.' Therefore, the contractual test of remoteness was met.

---

[4] [1854] 9 Exch 341
[5] [1949] 2 KB 528

[130] The test of remoteness in tort is wider as it does not encompass the element of the contemplation of the parties. Where concurrent liability exists, as here, the English Court of Appeal considered the more confined contract test should apply.[6]

[131] However, if the negligence test did apply, I have concluded that it was also met.

[132] Both Counsel set out the current law on causation in the negligence context in their submissions. If the 'but for' causation test has been met, which I find on the facts it has here, the question whether the Respondent's conduct was a material and substantial cause of the Claimants' loss will arise in circumstances, as here, where it is contended that there were other more dominant causes that have robbed the asserted cause of causal potency.

[133] It is important to remember that the asserted cause needs only to be a material and substantial cause, not the material and substantial cause.

[134] The concept of substantiality is included to show the Respondent's conduct must have had more than a minimal effect on the occurrence of the Claimants' loss; it must be a sufficiently contributing cause.

[135] In *Todd on Torts*, the authors state that in determining whether there is a sufficient causal connection necessarily requires a value judgment as to whether the Claimants' loss is within the scope of the duty or the risk created by the Respondent's conduct.[7]

[136] I have concluded that the consequences of the breach of duty was a material and substantial cause of the landslip in accordance with the legal tests and therefore of the loss.

[137] In conclusion, I have found that the tests for causation under the laws of contract and tort are each met. The test that I have found the Claimants meet is that on

---

[6] *Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146*.
[7] Todd et al, *Todd on Torts*, 8th edition, Thomson Reuters, at 1100

the balance of probabilities, the overspill meets the tortious test of material and substantial causation as set out above. In doing so, I specifically reject Vero's submission that the applicants were required to establish that the overspill itself contributed to over 50% of the cause of the landslip. That is not the test.

General damages

[138] While Mr E gave evidence to the Tribunal about the stress this series of events caused him, including the breakup of his marriage, no substantial evidence was provided about these matters. He did not adduce any medical evidence that he suffered physical illness including a cardiac condition because of Vero's actions or inactions.

[139] There is therefore no sufficient basis for an award of general damages.

Costs

[140] Costs in the Tribunal are governed by s47 of the Canterbury Earthquake Insurance Tribunal Act 2019 (Act). Relevantly here, they are to be awarded only where the Tribunal considers a party has caused costs and expenses to be incurred unnecessarily, by, acting in bad faith or making allegations or objections that are without substantial merit.

[141] I am not prepared to prolong this matter by inviting submissions on costs. Where on the face of it there was no indication of actions by either party that would ground a claim under s47 of the Act for any costs, it would best meet the principles of the Act to apply s47 (4) of the Act. I do not award costs.

Interest

[142] I see no reason why interest should not be awarded in accordance with s48 of the Act.

Summary of findings

[143] The Respondent breached both its contractual and tortious duties to the Claimants in failing to adequately repair earthquake damage to the earthquake damaged downpipe and spouting system on the southwest corner of the Claimants Property.

[144] The breaches caused loss to the Claimants being the sum incurred by them to build a retaining wall in the sum of $119,422.74.

Outcome

1. The Respondent is ordered to pay the Claimants the sum of $119,422.74 plus interest as claimed under the Interest on Money Claims Act 2016 from 28 January 2016, being the date when the Claimants completed payment for the retaining wall until the date of the judgment.

2. There is no order for general damages.

3. I apply s 47 (4) of the Canterbury Earthquakes Insurance Tribunal Act 2019. Costs are to lie where they fall.

S M A McCormack
Member
Canterbury Earthquakes Insurance Tribunal