IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEI-00XX-2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	H & H and DB as trustees of the H TRUST Applicant
AND	SR Respondent

Date: 10, 31 October, 14 November, 10, 11, 20 December 2019

Appearances: B for Applicant
F and S for Respondent

DECISION OF C P SOMERVILLE
31 March 2020

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[1] This decision explains how to approach an insurance dispute about repairing earthquake damage to an "as new" standard on a 50-year-old house. It also describes the remedies available if an insurer breaches its obligations under an insurance policy.

[2] The first half of this decision will discuss the general principles involved; the second will apply those principles to the facts of this case.

GENERAL PRINCIPLES

[3] These insurance disputes are complex because they occur at an intersection between insurance law, building law, geotechnical engineering, and structural engineering. Although

everyone has an opinion and considers themselves to be an expert, few are expert in more than one field.

[4] The complexity of these insurance disputes is made worse when they involve damaged foundations, an extremely complex area by itself: a complication upon a complication.

[5] It is easiest to start with simple propositions to which layers of complexity can be added as the enquiry progresses.

The legal perspective

[6] From a legal point of view, an insurance dispute is simply a dispute between two parties to an insurance contract. The rights and obligations of those parties are set out in the terms of an insurance policy, either expressly or by implication, and are identified by applying standard rules for interpreting contracts. There are also general principles of insurance law, established by Commonwealth courts over the last 150 years, which can be relevant to the court's deliberations.

[7] The only publicly available knowledge about these disputes is found in the record of cases decided in the High Court, but those decisions are very fact specific and are overlaid with technical rules, such as the standard of proof and onus of proof. Moreover, because each insurance company offers a range of different policies that are subtly different from each other and different from the policies offered by other insurers, courts must have regard to the similarities in the policies in some cases and the differences in others.

[8] Finally, there are strict limits upon the extent to which one court can bind another: a higher court only binds a lower court in respect of the issues squarely before it.

The building perspective

[9] Another complexity for lawyers and homeowners is the building compliance regime incorporating the Building Act 2004, the Building Code, the New Zealand Standards, Acceptable Solutions, Verifiable Methods, BRANZ appraisals and Codemark certificates.

[10] The Building Act provides the regulatory legislative authority for the regime and the Building Code can be found in the Building Regulations 1992. In essence, the Building Act imposes obligations on those undertaking building work and the Building Code sets out the standards to which that work should be performed. However, the Building Code only provides generalised performance standards; more detailed standards can be found in the New Zealand Standards (eg NZS 1604). How the Standards are measured is outlined in a series of Verification Methods.

[11] Every proposal for building work must comply with the performance standards in the Building Code, as refined by the New Zealand Standards if there are any. For all major work, a building consent is required from a Building Consent Authority (the Christchurch City Council in this case). The proposed work cannot begin until that consent has been obtained; the consent authority regularly inspects the work while it is in progress; when it has been completed, the consent authority carries out a final inspection and certifies in a code compliance certificate that the building work complies with the Building Code.

[12] Although minor work does not require a building consent, regular inspection, or a code compliance certificate, it must still comply with the Building Code. In such cases, it is the responsibility of the designer and the builder to ensure that the building work being undertaken complies with the Building Code.

[13] There can be serious financial consequences for a consent authority that provides a building consent or a code compliance certificate for work that does not comply with the Building Code. Naturally, the application for a building consent is subjected to close scrutiny. To avoid the consent authority becoming over-cautious and risk-averse, the government, through the Ministry of Business, Innovation and Employment (MBIE)[1] has provided a series of Acceptable Solutions under s19 of the Building Act which, if submitted by a homeowner seeking consent, must be granted that consent. Alternatively, the homeowner can submit an Alternative Solution accompanied by a detailed submission demonstrating code compliance.[2]

[14] MBIE can also provide guidance under s175 of the Building Act which may be accepted by a Building Consent Authority if it is used.

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[1] Formerly the Department of Building and Housing

[2] The is often called a special engineering design.

[15] Figure 1 provides a useful overview.

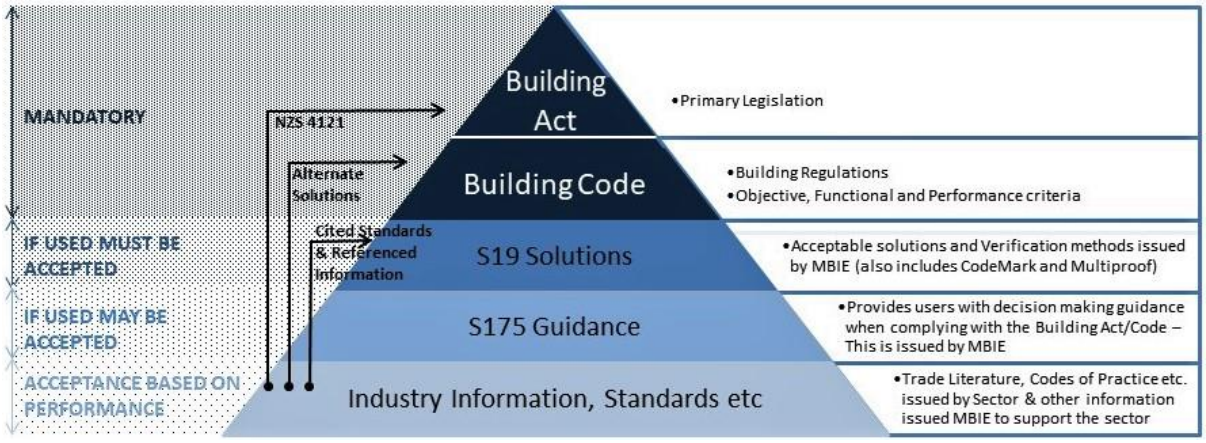

Figure 1

[16] That process can be illustrated by using an example of what happens when a homeowner wishes to install a staircase in a residential building.

[17] Installing a staircase in a house is building work which requires compliance with the Building Code, regardless of whether a building consent is necessary or not.[3]

[18] The part of the Building Code that deals with access routes provides:

(a) *Objective*: "Safeguard people from injury during movement into, within and out of buildings."[4]

(b) *Functional requirement*: "Buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people."[5]

(c) *Performance standard*; "Access routes shall enable people to: (a) Safely and easily approach the main entrance of buildings from the apron or construction edge of a building…."[6]

[19] The Building Code goes on to specify that access routes are to have stair treads which provide adequate footing, and uniform risers within each flight and consecutive flights. They

[3] Building Act 2004, ss7 and 17.
[4] D1.1 Building Code
[5] D1.2.1
[6] D1.3.1

must also have smooth, reachable and graspable handrails which are to be of adequate strength and rigidity.[7]

[20] MBIE has provided Acceptable Solution D1/AS1[8] to ensure compliance with these provisions of the Building Code:

(a) Clause 4 provides specifications and drawings relating to stairway pitch line slopes, riser heights, tread depths; and

(b) Clause 6 provide specifications and drawings relating to handrails.

[21] Building Consent Authorities must issue a building consent if the proposed stairway is to be constructed using Acceptable Solution D1/AS1. However, a builder can propose an Alternative Solution, say a staircase with a different handrail, but it will only be granted a building consent if the Building Consent Authority is satisfied that the proposal meets the requirements of the Building Code; e.g. the handrail is "…. smooth, reachable, and graspable ..."

[22] Although a replacement staircase in an existing house must comply with these standards, a repair to a staircase need not comply if it does not "reduce the extent to which it complied before the repairs were undertaken."[9] In other words, the analysis requires a before and after comparison to ensure that the repair does not increase the degree of non-compliance with the Building Code.

[23] This neatly illustrates the difference in compliance standards for a repair compared with a replacement: a replaced staircase needs a handrail, but a repaired staircase does not.

Role of the Tribunal

[24] Disputes that come before the Tribunal are essentially contractual disputes in which the Tribunal must consider the respective rights and obligations of the parties under an insurance

[7] D1.3.3(f), (j) and (k)
[8] Ministry of Business, Innovation & Employment *Acceptable Solutions and Verification Methods* (Wellington, 2016)
[9] S 112, MBIE Determination 2015/060, 28 September 2015

contract, decide whether any of these rights or obligations have been breached, and provide appropriate remedies for those breaches.

[25] Those issues are addressed using established rules of interpretation and enforcement. The jurisprudence developed in the High Court since the Canterbury earthquakes reveals the High Court has considered the events that trigger the insurer's liability and has seen it define the insurer's obligations once that liability is triggered. For example, the Court has often been asked to decide:

(a) Has the property suffered earthquake damage?

(b) What are the insurer's repair obligations under the policy?

(c) Does a proposal meet that policy standard?

[26] But there are situations where the courts are asked to base their decisions on matters outside their field of legal expertise. For example, in the present case, part of the H's argument involves the suggestion that the MBIE Technical Guidelines are fundamentally flawed because they specify performance criteria for Serviceability Limit State (SLS) and Ultimate Limit State (ULS) events that are less rigorous than the Building Code requires. I do not consider that it is appropriate for the Tribunal to rule on technical engineering disputes of this sort.

[27] Since 1991 the Building Act has provided a process for determining whether building processes or products comply with the Building Code. The current process, found in Part Three Subpart One of the Building Act, prescribes a process under which building owners, building consent authorities, insurance companies, and so on may seek a determination from the Chief Executive of MBIE about whether particular matters comply with the Building Code, despite those matters have arisen from intended building work, work already underway, or work completed.[10] Determinations may also be made about hypothetical proposals for which no particular site or design plans are yet available.[11] Moreover, determinations can also be made about the validity of building consents that have been, or are about to be, granted. [12]

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[10] Section 117(1)(a) BA; *Minister of education v Hawkins Construction North Island Ltd* [2016] NZ HC 1836 at [24].
[11] *MBIE Determination* 2017/025, 24 April 2017 (BD 27.16).
[12] Section 117(1)(b); *MBIE Determination* 2014/011, 17 February 2014 (BD 24.2).

[28] Because the Chief Executive is required to issue determinations within 60 working days of receiving the application, this is a speedy process.[13]

[29] The only caveat on this process is that the Chief Executive need not decide how the building should be brought into compliance; that is the responsibility of the person undertaking the building work.

[30] So, on the one hand:

(a) the Tribunal is charged with resolving disputes between homeowners and their insurers about the repairs to earthquake damaged homes;

(b) parties will have been in dispute for years and desperately need assistance; and

(c) because they are unable to resolve the dispute for themselves, they want the Tribunal to resolve it for them.

[31] On the other hand:

(a) questions of compliance with the Code can involve complex engineering issues;

(b) engineers for the parties often take very different views that are not capable of being reconciled;

(c) the responsibility for issuing a building consent rests with the building consent authority, which has the expertise and authority to determine whether proposed repairs comply with the current Code;

(d) any decision by the Tribunal about compliance issues is neither binding nor even persuasive on that building consent authority; and

[13] Section 185 BA

(e) there is an existing statutory dispute resolution process available to homeowners if they wish to challenge the building consent authority's granting or refusal of a building consent for the repairs.

[32] I see these insurance disputes as having twin channels for resolution:

(a) the Tribunal is responsible for resolving legal issues; and

(b) the consent authority and the MBIE Determination process resolve disputes about Code compliance.

[33] Although some homeowners may have doubts about MBIE's objectivity and independence, that does not justify the Tribunal in venturing outside its area of expertise.

[34] This approach has the advantage of being fair, speedy and cost effective:

(a) the various issues are dealt with by those most able to decide them fairly; and

(b) the MBIE Determination process is far quicker and cheaper than deciding complex engineering issues in a judicial forum.

[35] To summarise, therefore:

(a) it is not the responsibility of the Chief Executive to propose what repairs should be undertaken; that is the joint responsibility of the owner and the insurer;

(b) where there is a dispute about the scope of the repairs, then that dispute should be determined by the Tribunal; and

(c) if the dispute concerns the compliance standard, then that dispute should be determined by the consent authority and/or the Chief Executive of MBIE.

Process

[36] The issues to be addressed by the Tribunal are likely to be considered in the following order:

(a) Has the house suffered damage caused by an earthquake?

(b) What is the policy standard that applies to the rectification of that damage?

(c) What repairs are required to repair the property to the policy standard, or the compliance standard if that is higher?

(d) What is the cost to rectify each item of damage to either the policy standard or the compliance standard, whichever is higher?

(e) Is the total cost of rectification economic in comparison with the cost of replacing the insured property?

Has the insured property suffered damage caused by an earthquake?

[37] The damage must be:

(a) a physical change to the building that is more than de minimis; and

(b) an impairment to its value and usefulness.[14]

[38] For elements of the building that have a structural or functional purpose, the damage must affect that structural or functional purpose. For elements of the building that have an aesthetic purpose, the damage must affect that aesthetic purpose.[15]

[39] Determining causation in the law of contract is a common-sense exercise rather than one involving formal tests for causation. It is sufficient if the breach was an effective cause.[16] If there are two causes, the court need not choose which is the more effective cause.[17] If,

[14] *He v Earthquake Commission* [2017] NZHC 2136 at [67]; and *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 3447 at [32].
[15] *Bligh v Earthquake Commission* [2018] NZHC 2102 at [26]; *Myall v Tower Insurance Ltd* [2017] NZCA 561; *Myall v Tower Insurance Ltd* [2017] NZHC 251; *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675 at [214(f)]; and *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [176].
[16] Hugh Beale *Chitty on* Contracts (33rd ed, Sweet and Maxwell, 2019) at 26–76.
[17] *County Ltd and Anor v Girazentrale Securities* [1996] 3 All ER 834 (CA)

however, a loss has two effective and interdependent causes, one within the policy and one excluded by it, the exclusion prevails.[18]

[40] Pre-existing damage is not a barrier to a claim for earthquake damage, but the additional damage must make a material difference to the utility or value of the property. An insurer cannot be expected to repair or reinstate something that has not been discernibly changed in value, amenity or utility.[19]

What is the applicable policy standard?

[41] Under the Building Act 2004 there are two compliance standards, one for repairs and the other, higher standard, for new buildings or replaced elements. The repair standard, promised by the insurer to the homeowner in the policy, is known as the policy standard.

[42] Identifying the appropriate policy standard is the responsibility of the Court or Tribunal, using accepted methods of contractual interpretation; the correctness of that decision is challenged by lodging an appeal. Observance of the appropriate compliance standard is the responsibility of the appropriate Building Consent Authority; any decision it makes is challenged by seeking a determination from MBIE.

[43] Although each policy standard is what the policy says it is, there are two common standards for replacement insurance policies, "as when new" and "as new".

[44] The interpretation of these two phrases has been the subject of major debate:

(a) are they the same or are they different standards; and

(b) if they are different, how do they differ?

[45] This debate has been addressed by the Court of Appeal in *Medical Assurance Society v East (MAS v East)*, but the reference in that decision to the "as when new" standard being a

[18] Known as the Wayne Tank principle. See *AMI Insurance Ltd v Legg* [2017] NZCA 321, [2017] 3 NZLR 629 at [46].
[19] *He v The Earthquake Commission,* above n 13, at [67].

"temporal standard" and the "as new" standard a "quality standard" is not particularly enlightening, as both policy standards involve quality and temporal issues.[20]

[46] Essentially, "as when new" means the quality standard applying to the standard of the house when it was built; "as new" means the quality standard applying to new houses built today.

[47] However, nearly all policies supplement the policy standard with an obligation to meet any additional costs incurred to comply with the Building Code, thereby requiring the insurer to meet the policy standard or the compliance standard, whichever is higher. Were it otherwise, the homeowner might be in the invidious position of needing to undertake repairs for which a building consent could not be obtained.[21]

[48] If the damage to the house is such that it must be rebuilt, then it must comply with the current Building Code. With an "as when new" policy, the compliance standard for the new house is higher than the policy standard for the damaged house; with the "as new" policy, the policy standard is the same as the compliance standard.[22] Both policies deliver the same result (a new house) but by different mechanisms.

[49] Similarly, with elements of a house that must be replaced: the replaced elements are built to comply with the current Building Code but the undamaged portion of the house remains as it was before the earthquake. Again, both policies deliver the same result but by different mechanisms.

[50] The problem comes when only a repair is required. Regardless of whether a building consent is required, the compliance standard involves a comparison between the compliance

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[20] *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250 at [38].
[21] At [38]
[22] *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250 at [11(c)] "in accordance with building code requirements as they exist at the time of the rebuild or restoration;" and *East v Medical Assurance Society New Zealand Limited* [2014] NZHC 3399 at [104]: "… contemporary standards for building works, applying modern materials and meeting minimum building requirements, will be adopted."

levels before and after the repair.[23] With most earthquake repairs, the policy standard (whether "as when new" or "as new") would be higher than the compliance standard.[24]

[51] Repairs on an "as when new" policy must restore it to the same condition as when it was built. Stairways, for example, would be repaired to the condition they were in when built, without handrails if none had been installed originally. For those policies, therefore, the principal issue is whether the damaged item should be repaired or replaced.

[52] Although that is also true of policies with the "as new" standard, they have an additional problem: what is the "as new" policy standard for a repair? How do you repair a non-complying staircase to be the equivalent of a staircase in a new house? What if the damaged stairs are too steep, the risers are too high, or the tread depth is insufficient? What if the damaged handrail only needs the bracket re-fastened but the handrail itself is too low or of the wrong shape? Does the policy standard mandate a replacement: that the damage be repaired by the replacement of the staircase or the handrail?

[53] The H Trust says it does; SR disagrees.

[54] Counsel for the Trust, Mr B, claims that the "as new" standard requires the damaged systems, components and elements to be repaired so as to be directly comparable with a new equivalent system, component, or element, which he says means that the damaged property should be repaired to the same standard as if it had been constructed today. If this is not possible, then the damaged item must be replaced with its new equivalent. He strongly submits that remediating the element to the condition it was in when the house was built in the 1960s would not satisfy the "as new" policy standard.

[55] Counsel for SR, Mr F, says that the Trust's approach is absurd, as it would mean that if an obsolete item were damaged it could never be repaired, no matter how minor the damage.

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[23] Building Act, s 112

[24] This is because the compliance standard involves a comparison between the repaired item and its state before the repair, whereas the policy standard involves a comparison with the item's state when it was built or if it were to be built today, depending on the type of policy.

[56] The evidence in this case establishes that the repair proposed by SR would not result in the foundations meeting the standard expected of new foundations but, instead, would leave them performing as they were originally intended to perform.

[57] The Trust says that this standard of repair is not a repair to the "as new" standard but to the "as when new" standard. It goes on to argue that, because the foundations cannot be repaired to perform as well as new foundations, they should be replaced with new Code compliant foundations. In answer to SR's suggestion that this is neither practical nor cost efficient, the Trust replies that these are not factors to be considered when determining the policy standard.

[58] SR claims that the policy standard suggested by the Trust would make foundation repairs impossible, as most old foundations could not be repaired to comply with the current Code. It asserts that it is the repair that must comply with the Code, not the repaired foundations. Thus, if the damage to the foundations is dislevelment caused by seismic settlement, then the repair must bring them back to level and meet the current Code requirements for levelment, not those relating to structural strength.

[59] This is an important legal issue that has been addressed in two legal decisions:

(a) *MAS v East* in the Court of Appeal;[25] and

(b) *C & S Kelly Properties Ltd v Earthquake Commission (CS Kelly v SR)* in the High Court.[26]

MAS v East

[60] The house in question was built in 2007 on a concrete slab, which settled by 44 mm with slopes of greater than 1:200 during the Canterbury Earthquake Sequence but was otherwise undamaged. Although the experts agreed that the foundations must be repaired by re-levelling in compliance with the Building Code and that the repair required a building consent, they were unable to agree on the method of repair.

[25] *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250.
[26] *C & S Kelly Properties v Earthquake Commission* [2017] NZHC 1583.

[61] In the High Court, Whata J rejected liquid mobility grout as proposed by the insurer, favouring, instead, the homeowner's proposal that the foundations be repaired or replaced using a specifically engineered solution such as underpinning.

[62] In the Court of Appeal, the insurer argued that the "as new" and "as when new" policy standards were equivalent. It submitted that code compliance was not necessary as the foundations were undamaged, claiming that the homeowner was wanting to upgrade elements not being repaired or replaced.

[63] The Court of Appeal dismissed the insurer's argument that the two policy standards were the same as a "detailed semantic argument" and considered that it was irrelevant that the foundations had not been structurally damaged. It upheld Whata J's conclusion that the "as new" policy standard implied a rebuild or restoration of the home in accordance with contemporary standards and pointed out that, without a specific engineering design such as underpinning, the house would not be restored to a condition the same as new in accordance with the contemporary Building Code.

[64] It seems that the foundations with which the Court of Appeal was concerned had not been damaged structurally but had been damaged by dislevelment. The Court held that the repair required to correct this dislevelment must comply with the relevant contemporary standards for levelment. Its decision, therefore, is authority for the proposition that repairs to an "as new" policy standard must meet the contemporary standards that apply to the repair of the damaged aspect of the building element, not those that apply to the building element as a whole. This amounts to an acceptance that foundations that have settled without being structurally damaged can be repaired without being replaced.

CS Kelly v SR

[65] The homeowners' 100 years old house was situated on TC3 land. The Canterbury Earthquake Sequence resulted in the wooden floor supported on piles being significantly out of level. The Kellys, who had an "as new" policy with SR, argued that repairs would cost between $529,000 and $547,000 when compared with a complete rebuild at $591,000.[27] By contrast, EQC and SR considered that the house could be repaired for less than $115,000.

[27] The high cost of repairs was probably the result of their contention that a type 2A foundation was necessary.

[66] In the hearing before Faire J, the argument focused upon whether the foundation repairs should meet the stringent standards of NZS 3604, as proposed by the homeowners, or the more relaxed standards in the MBIE Technical Guidance. The Judge found that NZS 3604 was of limited relevance and, although he did not criticise the MBIE Technical Guidance, he noted that there were difficulties in applying a 2017 standard to a house built in the early 1900s. He concluded that "special engineering designs, with emphasis on practicality over strict adherence to recently developed guidelines, are required to repair the house to a current "as new" standard."[28]

[67] Once again, the Court decided that an "as new" repair of foundations that are out of level does not require their replacement.

[68] As can be seen, the two reported cases about the "as new" policy standard for out-of-level foundations have both approved repairs. Both have emphasised that the repairs must comply with the contemporary Building Code, but each has fallen short of ruling that the "as new" policy standard required replacement of the foundations, even those that were 100 years old.

[69] The "as new" policy standard, therefore, requires repairs to comply with the contemporary Code. The policy standard and the compliance standard are the same. However, this does not entitle a Court or this Tribunal to identify the compliance standard by interpreting the Building Act and the Building Code: that is the function of the consent authority, or the Chief Executive of MBIE if a determination is sought.

[70] Although the "as when new" policy standard is historical and generally lower than the "as new" policy standard, the repairs themselves must meet the current compliance standards.

[71] Although the "as new" and "as when new" policy standards may be different, they arrive at the same conclusion: that repairs must comply with the contemporary Building Code.

[28] *C & S Kelly Properties v Earthquake Commission*, above n 26, at [126].

What repairs are required?

Generally

[72] The insurer must undertake repairs that are sufficient to render the fact of the earthquake damage immaterial.[29]

[73] Just how that damage is to be repaired is a question of fact that has significant ramifications. Most policies speak of "repair" or "rebuild" but in many instances the issue is whether a damaged element of the building should be repaired or replaced. Many insurance disputes focus on this issue as it can have major cost implications for the insurer.

[74] Repair is a continuum from minor at one end to replacement of a component at the other. Some repairs can amount to replacement. Generally, replacement must meet the Code for the element being replaced, but a repair does not. Where that line is in any individual case is a question of fact.

[75] Foundation repairs are a complex subject, particularly in Christchurch, as the standards for new foundations (NZS 3604) only apply to foundations footed on “good ground”, defined in such a way as to exclude land subject to liquefaction. There are no Acceptable Solutions or NZ Standards to help engineers comply with the Building Code when designing foundations on land subject to liquefaction. In every case, the engineer must submit a special engineering design for the foundations to obtain a building consent.

[76] After the initial earthquakes, there was very little international guidance to draw on for repairing/rebuilding foundations of houses on land subject to liquefaction, particularly on the scale facing Canterbury.[30] MBIE prepared its Technical Guidelines, after consulting widely, to encourage consistency of approach, reduce the demand for geotechnical investigations, give robust and well-balanced engineering solutions that would reduce the risk of injury to people and damage to homes in future earthquakes, and reassure insurers and reinsurers worried about

[29] *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675 at [117].
[30] Mike Stannard “Letters to the editor [online]” (2019) 32(1) SESOC Journal 12.

aftershocks that repairs would be robust. Its hope was that they would meet the requirements of that Building Act and the Building Code while avoiding "over-design".[31]

[77] But, as s175(2) BA makes clear, the contents are only guides, and do not relieve anyone of their statutory obligations. Although they have been endorsed by the three principal consent authorities in Canterbury, they are not mandatory. The indicative criteria used in the Guidelines are not absolute and should be applied using a certain amount of judgment and having regard to issues of practicability. Mike Stannard, MBIE's Chief Engineer at the time the Guidelines were produced, said that the Guidelines provide "good practice methods to assist engineers designing repair solutions and Building Consent Authorities to consent the work." [32]

[78] In deciding to publish Guidelines rather than Standards or Acceptable Solutions, MBIE has chosen not to be prescriptive, deciding instead to categorise the options it proposes as "Alterative Solutions" intended to provide "reasonable grounds" for consent authorities to grant building consents for such designs. [33]

[79] Although a building consent is unlikely to be issued for new foundations on land subject to liquefaction without a specifically engineered solution, the reality is that the consent authority will pay close attention to the Guidelines in the same way that it would to determinations from the Chief Executive in relation to similar matters.

[80] Homeowners need to be cautious, however, about the weight to be given to comments in the Guidance about repair standards. First, these are governed jointly by the insurance policy and the Building Code, and secondly, the Guidance cannot over-ride s 112 of the Building Act.

Scope disputes

[81] Unfortunately, many of the Tribunal's cases involve disputes about the scope of the repairs. These disputes often leave the parties polarised and paralysed, so that it is natural for them to turn to the Tribunal and ask it to decide how the property should be repaired.

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[31] An interesting choice of phrase, bearing in mind that some engineers (notably Mr Scarry who gave evidence in this case) consider that the standards used by MBIE in its guidance fall well short of what is required under the Building Code.

[32] Ministry of Business, Innovation & Employment, above n 4, at [2.0].

[33] At 8.2.1

[82] These disputes can be about anything ranging from whether the foundation should be repaired or replaced, to whether the building work should be covered by a Master Build guarantee.[34]

[83] As I discussed in *M*, the general law of insurance imposes a duty of utmost good faith on both parties to an insurance contract.[35] I said at [18] that the insurer's decision-making process requires it to:

(a) correctly interpret the policy by considering and determining the correct questions;

(b) provide any expert whose opinion has been sought with all relevant information; and ask that expert the right questions;

(c) address the issues either directly, or indirectly with the aid of the expert's opinion, and take account of relevant information; and

(d) observe its duty of good faith and fair dealing, particularly by having regard to the interests of the insured, as a mortgagee would do when exercising a power of sale of mortgaged property.

[84] It is inevitable in disputes about the method of repair, that the reasonableness of the insurer's position will largely be determined by how it has struck the balance between its interests and those of the insured. Homeowners are constantly balancing cost and risk when they undertake their own renovations or building projects. Insurers refer to this issue when they ask homeowners how they would manage the risk if they were using their own money, but insurers could equally be asked how much they would pay if they were bearing the risk themselves. The truth lies in the middle: a balance must be struck between the cost to the insurer and the risk to the insured. When the insurer takes control of the decision-making, it must not act unreasonably in striking that balance.

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[34] *M and M v IAG New Zealand* [2019] CEIT 0047.
[35] At [16].

[85] When two alternative repairs are being considered, one proposed by the homeowner and the other by the insurer, it is not the Tribunal's role to decide which of the two proposals is the most reasonable. Rather, it is to decide whether the insurer's proposal is unreasonable.

[86] Although the Tribunal cannot determine whether a building consent will be issued, if the insurer wishes to submit that an Acceptable Solution is reasonably open to it, the Tribunal expects that:

(a) the Alternative Solution is supported by plans and specifications prepared by a suitably qualified designer who is prepared to contract with the homeowners to supply a PS1 certificate to the appropriate building consent authority in support of a consent for that Alternative Solution;

(b) the designer has provided the insurer with the information it would submit to the consent authority in support of its proposal;

(c) the insurer has closely questioned that designer about that information and received satisfactory responses;

(d) the insurer has evaluated the above material and decided that there is a reasonable prospect of a building consent being granted for the Alternative Solution; and

(e) the insurer has obtained an assurance from:

(i) the manufacturer of any controversial product that it will provide a warranty for its product if installed in accordance with the Alternative Solution; and

(ii) a suitably qualified tradesman is prepared to contract with the homeowners to undertake the work for a specified sum and provide a warranty for that work.

Remedies

Contractual remedies and special damages

[87] The Tribunal may make any order that a court of competent jurisdiction could make under the terms of the insurance contract in dispute and under the general law of New Zealand, particularly the law of contract as it relates to contracts of insurance and the Earthquake Commission Act 1993.[36] In doing so, the Tribunal may determine the liability of any party to any other party.[37]

[88] In addition to enforcing the terms of the contract between the parties, the court also has the power to award either special or general damages against a party who is in breach of the terms of that contract.

[89] The High Court's decision in *Young v Tower Insurance,*[38] affirmed in *Dodds v SR,*[39] found that the following duties should be imposed upon the insurer as implied terms in every insurance contract:

(a) to disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;

(b) to act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and

(c) to process the claim in a reasonable time.

[90] Any breach of these duties is, therefore, a breach of an implied term in the insurance contract for which the insured is entitled to compensation by way of damages. It is difficult to establish a breach of these implied duties as the standard is a high one, but as time passes the threshold is becoming easier to cross.[40]

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[36] CEIT Act, s 46.
[37] CEIT Act, s45.
[38] *Young v Tower Insurance Ltd* [2016] NZHC 2956; 2 NZLR 291
[39] *Dodds v SR Earthquake Services Ltd* [2019] NZHC 2016 at [152] – [170]
[40] *Kilduff v Tower Insurance Ltd* [2018] NZHC 704 at [114]

[91] If the breach of the contract has forced the innocent party to incur costs that would have otherwise been avoided, such as consultants' fees, then these costs can be reimbursed by the making of an award for special damages.[41]

General Damages

[92] The Tribunal also has power to award general damages in cases where the breach of contract has caused the innocent party to suffer inconvenience.

[93] None of this is controversial, but there is debate about the Tribunal's power to award general damages for mental distress.

[94] The original draft of the Canterbury Earthquakes Insurance Tribunal Bill gave the Tribunal the ability to "require the payment of general damages (for example, for mental distress)". "Mental distress" was defined as meaning "emotional or mental anxiety; distress or stress."[42]

[95] Following submissions made to the Select Committee, the references made to mental distress in clause 44 (later enacted as section 46) were omitted. The Tribunal's jurisdiction is now simply to award general damages "in accordance with the general law of New Zealand."

[96] It is a moot point whether damages for mental distress are available in New Zealand under the law of contract, and the two principal texts on insurance law in New Zealand are divided on the issue:

(a) Colinvaux says:[43]

> The common law rule is that damages for emotional distress cannot be awarded under a policy of insurance, because an insurance contract is not designed to protect against such distress.[44] The English courts have thus taken the view that, even if damages were available, they would not extend to damages for distress, because a contract of insurance is not one which has

[41] See the claim for $24,339.13 in *Kilduff v Tower, n40 at [102].*
[42] Clause 44(3) and (8)
[43] Merkin, Robert Nicoll, Chris *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters NZ, Wellington, 2017) at 34.8.4.3 (8).
[44] Such damages are not awardable in the general law: Addis v Gramophone Co Ltd [1909] AC 488.

as its specific objective the assured's peace of mind.[45] That view probably represents the law in New Zealand. In *Edwards v AA Mutual Insurance Co* the High Court accepted that mere annoyance did not give rise to damages, but the Court awarded $2,000 to represent the inconvenience suffered by the assured.[46] In *Kerr v State Insurance General Manager*[47] the High Court refused to award damages for injured feelings. It was subsequently held in *Stuart v Guardian Royal Exchange Assurance Co of New Zealand Ltd (No 2)* that damages were awarded for a combination of physical inconvenience and mental distress.[48]

(b) The editors of the CCH loose-leaf publication on insurance law in New Zealand say:[49]

> As a general rule damages for anxiety, injured feelings, upset and annoyance may not be awarded for breach of contract: *Addis* v *Gramophone Co Ltd* (1909) AC 488. However, general damages may be awarded for substantial physical inconvenience, provided the general principles relating to remoteness (see 23-330) are satisfied. Thus in the insurance context, the insured must prove that he has suffered substantial inconvenience as a direct result of the insurer's breach and that the inconvenience would have been reasonably contemplated as a probable result of the insurer's failure to indemnify the insured: *Edwards & Anor* v *AA Mutual Insurance Co* (1985) 3 ANZ Insurance Cases 60-668, per *Tompkins* J (New Zealand High Court) at p 79,174; see also *Stuart* v *Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Insurance Cases 60-844, per *Heron* J (New Zealand High Court) at pp 75,281-75,282 (where his Honour said that an adequate award for physical inconvenience will largely take care of and compensate for mental anguish).
>
> Certain types of contracts have as one of their objects the provision of peace of mind, convenience and freedom from distress to a party. Where it is breached in a manner causing distress, pain, suffering or physical inconvenience, the court may award a sum as compensation. Although certain types of insurance contracts clearly fit within that class of contract, there are types of insurances which do not, for example a contract of marine insurance is not one to provide peace of mind or freedom from distress: *Ventouris* v *Mountain (The Italia Express) (No 2)* [1992] 2 Lloyd's Rep 281. A fire insurance policy has as one of its objects the provision of peace of mind to the insured: *Stuart* v *Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Insurance Cases ; *South Pacific*

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[45] Ventouris v Mountain (The Italia Express) (No 3) [1992] 2 Lloyd's Rep 281. CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193, (2007) 69 NSWLR 680. In Pine v Das Legal Expenses Insurance Co Ltd [2011] EWHC 658 (QB), [2012] Lloyd's Rep IR 346 it was held that a legal expenses policy was not one which was designed to give pleasure, relaxation or peace of mind, so that damages did not lie for its breach; in that case the breach consisted of a refusal by the insurer to accept the assured's choice of lawyer.

[46] *Edwards v AA Mutual Insurance Co* (1985) 3 ANZ Insurance Cases 60-668 .

[47] Kerr v State Insurance General Manager (1987) 4 ANZ Insurance Cases 60-781.

[48] *Stuart v Guardian Royal Exchange Assurance Co of New Zealand Ltd (No 2*) (1988) 5 ANZ Insurance Cases 60-844.

[49] *Damages for distress and inconvenience* (online looseleaf ed, Wolters Kluwer CCH IntelliConnect) at [23] – [350].

> *Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*; *Mortensen* v *Laing* [1992] 2 NZLR 282; *Edwards* v *AA Mutual Insurance Ltd* (1985) 3 ANZ Insurance Cases 60-668; *Johnson* v *Australian Casualty Co Ltd* (1992) 7 ANZ Insurance Cases 61-109; *Motor Accident Mutual Insurance Pty Ltd* v *Kelly* (1999) 10 ANZ Insurance Cases 61-420.[50]

[97] Although every discussion of this topic begins with the general rule stated in *Addis v Gramophone Co Ltd*, that damages for injured feelings, upset and annoyance resulting from a breach of contract are not recoverable, it should be noted that this 1909 case involved a claim by an employee for being wrongfully dismissed in a harsh and humiliating fashion. It is scarcely surprising that in 2002, Lord Cooke doubted the permanence of *Addis* in English law, pointing out that employment law in Canada and New Zealand no longer saw the employment relationship of employer and employee as merely an ordinary commercial contract.[51] Every edition of *McGregor on Damages* since 1961 has been predicting the demise of the general rule in *Addis* and the latest edition is still suggesting that it might soon be abandoned.[52]

[98] Judgments in this area frequently refer as well to the following comment made in 1875 by Mellor J in *Hobbs v London and Southwestern Railway*:[53]

> "For the mere inconvenience such as annoyance and loss of temper or vexation or for being disappointed in a particular thing which you have set your mind upon without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental and not a case where the word inconvenience as I here use it would apply."

[99] Contracts normally concern commercial matters and it is realistic that mental suffering resulting from a breach of contract is not in the contemplation of the parties as part of the business risk of this type of transaction. For example, one would "not view with enthusiasm the prospect that every-ship-owner in the Commercial Court having successfully claimed for unpaid freight or demurrage, would be able to add a claim for mental distress suffered while he was waiting for his money."[54]

[100] But not all contracts are commercial contracts, and for the past 50 years, the UK and Commonwealth courts have been developing strategies to avoid the harshness of these principles.

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[50] Para 23-350
[51] *Johnson v Gore Wood & Co* [2002] 2 AC 1, 50F
[52] 20th Ed 5-034
[53] *Hobbs & London v. South Western Railway [*1875] LR 10 QB 111.
[54] Per Staughton LJ in *Hayes v James & Charles Dodd [1990] 2 All E.R. 815*

[101] One such strategy, is to re-cast the claim for mental distress as a claim for "inconvenience" for which non-pecuniary damages have long been allowed. An example of this strategy can be found in *Edwards v AA Mutual Insurance Co* where Tompkins J refused a claim for worry, anxiety and significant disruption caused by the insurer's failure to pay on a fire insurance claim but allowed $2000 general damages to the plaintiffs for the inconvenience involved in abandoning their intention to live permanently on the property.[55]

[102] Another strategy is to conflate the claim for mental distress with the claim for inconvenience, if the former results from the latter. Examples of this strategy being employed can be found in:

(a) *Kerr v State Insurance General Manager,* where the damages of $10,000 which were awarded to the plaintiffs for being deprived of the opportunity to decide whether to rebuild after a fire, also covered inconvenience caused to them by the breach of the contract.[56]

(b) *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd,* where $4000 was awarded to plaintiffs who were forced to live with a family member in cramped conditions causing great inconvenience and stress;[57]

(c) *Johnson v Australian Casualty Co Ltd* where damages of $20,000 were awarded for physical inconvenience and mental distress suffered by the plaintiff when he was evicted from his home and was obliged to live with neighbours after the insurer refused payments under a disability insurance policy;[58]

(d) *Motor Accident Mutual Insurance Pty Ltd v Kelly,* where the New South Wales Court of Appeal upheld an award of $12,500 after finding that the plaintiff had suffered substantial inconvenience leading to emotional stress following the insurer's breach of its obligations under a motor vehicle insurance policy;[59] and

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[55] *Edwards v AA Mutual Insurance Co*, above n 5, at 60-668.
[56] *Kerr v State Insurance General Manager*, above n 7, at [60] – [781].
[57] *Stuart* v *Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Insurance Cases 60-844.
[58] *Johnson* v *Australian Casualty Co Ltd* (1992) 7 ANZ Insurance Cases 61-109.
[59] *Accident Mutual Insurance Pty Ltd* v *Kelly* (1999) 10 ANZ Insurance Cases 61-420.

(e) *Farley v Skinner* where damages were awarded to a plaintiff who suffered discomfort and inconvenience caused by aircraft noise after a pre--purchase investigation had failed to discover that the house was affected in this way.[60]

[103] A third strategy is to allow general damages for mental distress where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation. Examples of this approach can be found in:

(a) *Jarvis v Swan's Tours* where damages were awarded for disappointment, distress, annoyance and frustration caused when the plaintiff's winter sports holiday in Switzerland was cancelled;[61]

(b) *Baltic Shipping Co v Dillon* where damages were awarded for disappointment and distress to a passenger on the "Mikhail Lermontov" after the ship hit a rock and sank while cruising in the Marlborough Sounds;[62] and

(c) *Warrington v Great-West Life Assurance Co* where the British Columbia Court of Appeal upheld an award of $10,000 for the plaintiff's mental distress resulting from the insurer's failure to pay benefits under a disability insurance policy.[63]

[104] This last case is so clearly on point that I will cite from it at length:[64]

> "In what circumstances, then, will aggravated damages be properly awarded where the claim is one in breach of contract? In contract, unlike tort, the purpose of damages is to compensate the wronged party for the loss of benefits that were within the reasonable contemplation of the parties when the contract was made: *Hadley v Baxendale*. Whereas mental suffering is often the foreseeable consequence of tortious conduct, its avoidance is not commonly a benefit contemplated by the contract. Still, the "peace of mind" decisions are proof that this is not always the case and that recovery for mental distress can be contained within reasonable limits. … I for one am content to adopt the suggestion made in *Hayes v Dodd* that damages of this kind should be recoverable "when the subject matter of the contract is to provide peace of mind or freedom from distress.
>
> Was the policy of insurance in the case at bar such a contract? At least one Canadian court has held that parties to a contract of disability insurance should be taken to have

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[60] *Farley v Skinner* [2001] 4 All ER 801.
[61] *Jarvis v Swan's Tours* [1973] Q.B. 446 (CA).
[62] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.
[63] *Warrington v Great-West Life Assurance Co* (1996) 139 DLR (4th) 18.
[64] At [19] – [20].

> contemplated as an important benefit, and indeed a purpose, of the contract the "peace of mind" implicit in the insured's receipt of timely and reliable benefit payments in substitution for his or her wages."

[105] The Court goes on to cite from *Thompson v Zurich Insurance Co*[65] including the following passage:

> "The predominant, if not the sole object of the contract was to provide ease of mind to the insured that his medical accounts would be taking care of by timely payments during the period of rehabilitation."

[106] The Court then says:

> "The long-term policy stated that income benefits were payable monthly in arrears. It is not difficult to imagine that the receipt of bi-weekly or monthly payments upon becoming disabled would be of critical importance to most insureds, who may be expected to have pressing monthly expenses related to themselves, their families and their property that cannot be paid if the wages have stopped. That is just what happened in Mr Warrington's case – he had monthly mortgage payments to make, and a baby on the way at the time he became disabled. As noted by the trial judge, he was obliged to seek social assistance because of Great-West's refusal to perform its contractual obligations. When Mrs Warrington was hospitalised for 10 weeks due to complications in her pregnancy, he was obliged to stay with relatives because of the difficulty he had in driving a car and paying parking fees near the hospital. His illness was one that is likely exacerbated by stress. It seems to me that this is exactly the type of mental distress and inconvenience one buys disability insurance to avoid – in other words, that the *object* of this contract was Mr Warrington's comfort or peace of mind."[66]

[107] The Court concludes this discussion by finding that "a disability insurance policy is one of the few contracts in which damages for mental distress are recoverable when they are proven to result from the breach of contract."[67]

[108] Similarly, I consider that insurance policies like the H's home insurance policy with SR have, as their object, the insured's comfort and peace of mind. In reaching this conclusion I have considered the following factors:

(a) this type of insurance is predominantly taken out to cover the risk of damage to, or loss of, the insured's home by perils such as fire, flood or earthquake;

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[65] *Thompson v Zurich Insurance Co* (1984) 7 DLR (4th) 664.
[66] At [21]
[67] At [22]

(b) for most New Zealanders, their home is their primary asset in which their equity has been built up over their working lives;

(c) as the Canterbury earthquakes revealed, nearly all New Zealanders have their home insured in this fashion;

(d) the expressions used to promote insurance all involve the concept of being kept safe from harm:

(i) "protection", defined in the Oxford English Dictionary (OED) as "to defend or guard from danger or injury; to support or assist against hostile or inimical action; to preserve from attack, persecution, harassment, etc.; to keep safe, take care of; to extend patronage to; to shield from attack or damage;"

(ii) "cover", defined by the OED as "that which covers: anything that is put or laid over, or that naturally overlies or overspreads an object, with the effect of hiding, sheltering, or enclosing it; often a thing designed or appropriated for the purpose;"

(iii) "don't worry", where "worry" is defined in the OED as meaning "a troubled state of mind arising from the frets and cares of life; harassing anxiety or solicitude;"

(e) these concepts dovetail with *Warrington's* category of "comfort and peace of mind" where:

(i) "comfort" means "to soothe in grief or trouble; to relieve of mental distress; to console, solace;" and

(ii) "peace" means "freedom from anxiety, disturbance (emotional, mental, or spiritual), or inner conflict; calm, tranquillity;" and

(f) a Google search of "'peace of mind' insurance" generates 201,000,000 hits.

[109] I conclude, therefore, that homeowners with these types of policies are entitled to damages for any mental distress they might suffer that is caused by a breach by the insurer of the policy's conditions.

[110] As can be seen from the examples given above, however, the damages awarded for mental distress are always modest.

Costs

[111] Although in most courts a successful party can seek costs against an unsuccessful party, the Tribunal may only award costs against a party if the Tribunal considers that:

(a) the party caused costs and expenses to be incurred unnecessarily by:

(i) acting in bad faith; or

(ii) making allegations or objections that are without substantial merit; or

(b) the party caused unreasonable delay, including by failing to meet a deadline set by the Tribunal without a reasonable excuse for doing so.[68]

[112] That power to award costs, however, can be used in favour of any party, whether that party was successful or not, and covers all costs and expenses incurred by that party.

APPLICATION OF THOSE PRINCIPLES TO THIS CASE

[113] This claim, which was transferred to the Tribunal from the High Court, concerns a property at XXXXXX, Christchurch (the property) which is owned by the H Trust (the Trust) and occupied by Mr and Mrs H together with their xxx children. The property is located at the end of a long driveway off the southern side of XXX Road. The XXX stream runs across the rear of the property and then parallel with the eastern boundary on the neighbour's side.

[68] CEITA s 47

[114] The house on the property was built in the early 1960s and bought by the Trust in early 2002. Between then and 2006 the H family extensively renovated the house and grounds to a high standard.

[115] The property, including the house, was damaged in the earthquakes on 4 September 2010 and 22 February 2011. Fortunately, the property was covered against earthquake damage under an AMI Premiere House Cover policy which obliged AMI (now SR) to repair or rebuild the house to an "as new" condition.

Issues

[116] There are three main issues:

(a) Is SR's repair proposal unreasonable;

(b) has SR elected to settle the Trust's claim with cash; and

(c) are damages payable to the H family for an alleged breach of SR's duty of utmost good faith?

[117] As far as the first issue is concerned, the state of the foundations is the primary focus. The parties agree that the property has suffered differential settlement of the foundations but disagree about the extent to which this has been caused by the earthquakes. They also disagree about the repair methodology, SR contending that "jacking and packing" will be sufficient whereas the Trust seeks a full rebuild of the foundations.

[118] The parties also disagree about the extent to which the superstructure of the building was damaged in the earthquakes and the extent of the repairs that are necessary.

[119] The second issue involves an analysis of SR's actions on 4 October 2016.

[120] As far as the third issue is concerned, the focus will be upon the nature of the duty of utmost good faith: whether SR's conduct of the claim has breached that duty of care, and if so, what damages should be payable to compensate for that breach.

Is SR's repair proposal unreasonable?

Has the house suffered damage caused by an earthquake?

Inspection after the Earthquake

[121] A survey undertaken in March 2015 show that the house foundations were out of level, with the highest point near the western (dining room) corner and the lowest point in the eastern (bedroom 3) corner, as shown in Figure 2.

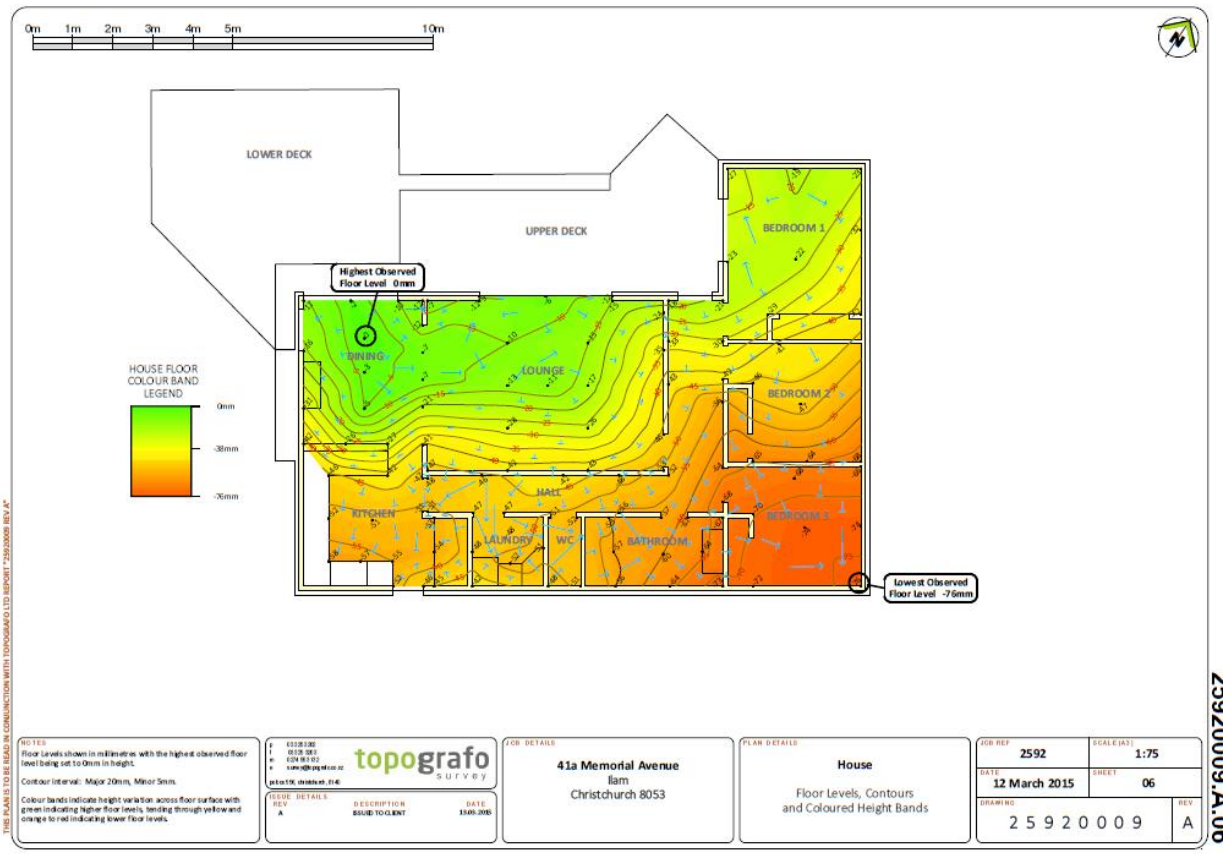


Figure 2

[122] The total fall, diagonally across the house from the dining room corner to the corner of bedroom 3, is 76 mm. An analysis of the brick levels around the house show a 72 mm discrepancy between the highest observed brick level near the dining room corner and the lowest observed brick level on the corner of bedroom 3 Bearing in mind that the highest point of the floor is higher than any part of the floor adjacent to the external walls, I find that the differential settlement in the foundations is 72 mm.

[123] Figure 3 demonstrates, however, that the floor itself does not fall evenly from the dining room corner to the corner of bedroom 3. Similarly, Figure 4 shows non-uniform gradients in cross-sections surveyed across the house from the dining room/kitchen end of the house at 4m, 8m and 12 m intervals.

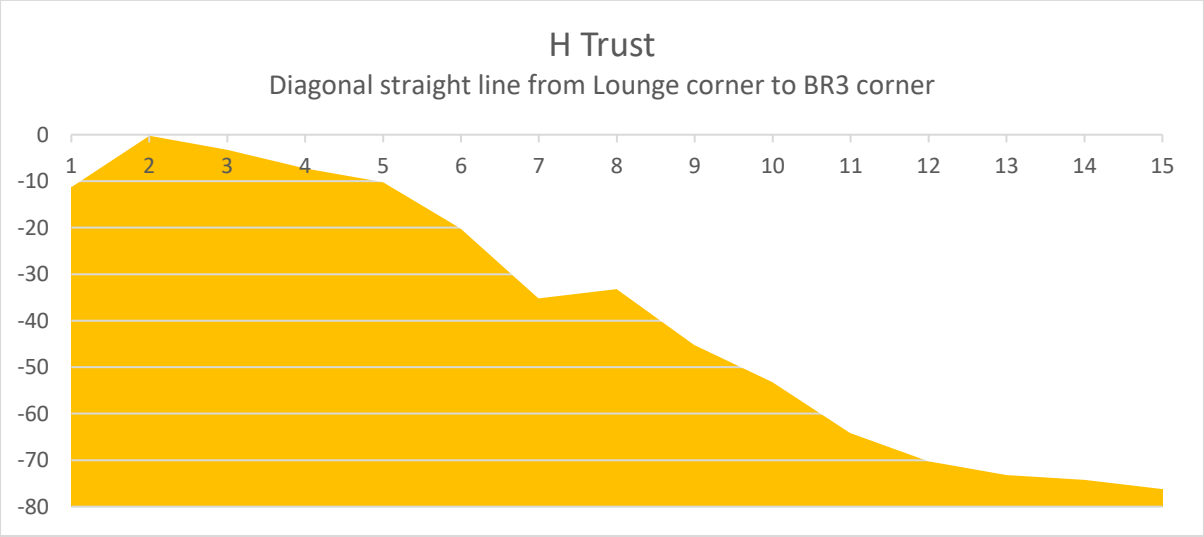
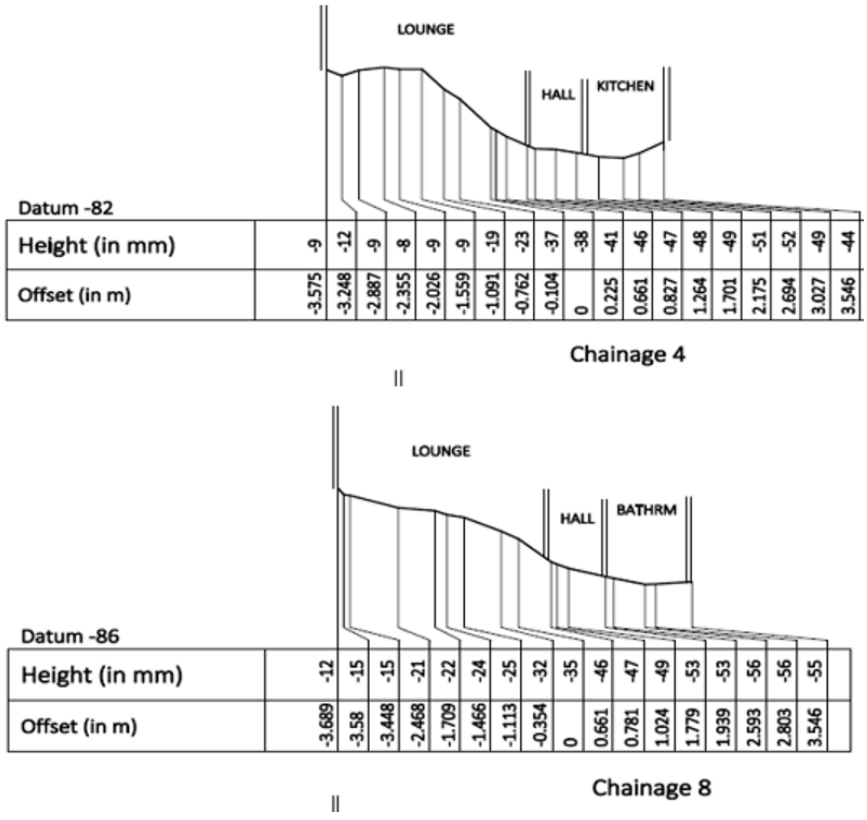


Figure 3



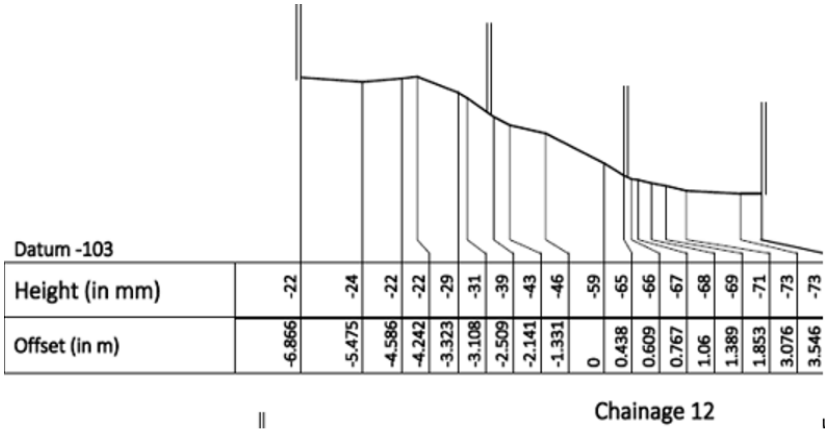


Figure 4

[124] A floor level survey undertaken by Topografo showed that 71 per cent of the house floor area had slopes steeper than a grade of 1:200, 56 per cent was steeper than 1:150, 40 per cent was steeper than 1:100, and 7 per cent was steeper than 1:50. The steepest floor slopes ran through the middle of the house between the dining room and kitchen, between the lounge and the hall, and between bedrooms 2 and 3.

[125] These floor slopes were quite noticeable to the Tribunal when it inspected the property prior to the hearing.

[126] Measurement of the verticality of the walls revealed leans of up to 14 mm/1.1 m and 15 mm/1.9 m, with a general trend of these leans being towards the corner of bedroom 3.

[127] An engineer's report prepared in August 2015 for the Trust by Gridline Ltd, disclosed the following damage in addition to floor dislevelment and loss of verticality in the walls:

(a) doors and windows jamming and requiring adjustment;

(b) damage to door and window frames, skirting boards and linings;

(c) cracking in ceilings;

(d) collapsed ceiling in the bathroom;

(e) roof wracking;

(f) damaged roof tiles around the chimney;

(g) chimney toppled above roof level;

(h) mortar cracking damage and tile movement in the ridge capping tiles;

(i) roof frame deformations; and

(j) damage to fireplace surrounds.

[128] Topografo reported that:

(a) the paver levels in the side yard were generally flat or sloping back towards the house;

(b) there was little or no cross-fall in the pavers away from the house around bedroom 3;

(c) the fall on the north east side of bedroom 1 was towards the house; and

(d) there were clear depressions in the pavers around bedroom 3. [69]

[129] Cone penetration tests (CPT) tests revealed that the soils near the kitchen corner were very soft. Although the Trust's land has been officially classified as TC2, the parties' respective geotechnical engineers agreed that the land had behaved as TC3 during the Canterbury Earthquake Sequence. They also agreed that the house was situated on a 1.4 m deep non-liquefiable crust below which was a layer of soil that could liquefy during a significant earthquake.

Improvements made prior to the earthquakes

[130] Prior to the Trust's purchase of the property, the real estate agent provided it with a building inspection report from Don Turner and Associates disclosing that the exterior

[69] The sideyard is adjacent to the XXXX stream and between the kitchen and bedroom 3

foundation had subsided in the kitchen corner.[70] Mr Turner noted in this report that the foundations adjacent to the side yard had cracked on the "right side of the back door" and tilted from that point towards the corner, whereas the foundations adjacent to the backyard were undamaged. Two weeks later, the Trust obtained its own property report which commented that, although the foundations were in a structurally sound condition, there was "unevenness to the floors in isolated areas, this is particularly evident to the kitchen/dining room and the master bedroom, and is due to some settlement over the years[sic]." The report writer, however, did not consider the settlement to be excessive for a 40-year-old house and found no evidence of any recent subsidence, concluding that the foundations were structurally sound.

[131] Mr H, who had been negotiating the purchase on behalf of the Trust, was aware from these reports that the house needed improvement and planned to modernise it. Over the next six years the Trust:

(a) landscaped the grounds, with new decking over the patio;

(b) painted and sealed the ridge caps which were in poor condition;

(c) removed the old concrete paths from around the house, replacing them with paving stones;

(d) demolished the old garage and re-built it with sleep-out attached;

(e) built new boundary fences and entrance gates as well is asphalted the drive;

(f) repainted the interior of the house;

(g) painted the exterior brickwork after filling all cracks in the mortar;

(h) sanded and polyurethaned all interior wooden floors apart from the bedrooms and hallway;

(i) fully renovated the bathroom;

[70] Although the Turner report refers to the "south-east corner" of the dwelling, I accept that it was referring to the kitchen corner, for the reasons given by Mr Scarry at [30] to [39] of his affidavit.

(j) replaced the kitchen joinery and fittings, changing the layout and dimensions;

(k) installed a heat pump and gas hot water;

(l) installed an alarm, and security intercom;

(m) replaced the French doors with bifold doors; and

(n) replaced the single-glazed window joinery with thermally broken double glazing.

[132] Most significantly, these renovations were preceded in early 2003 by foundation improvements that included removing the fireplace in the lounge, replacing nine piles, and underpinning the foundations in the kitchen and bedroom 1corners.

[133] An underfloor survey undertaken after the earthquakes revealed the presence of 22 wooden piles. As the original piles were concrete, it is reasonable to infer that these wooden piles had been installed in 2003 as they were congregated under the kitchen area, under the lounge where the chimney was removed, and under bedroom 1 where Mr H had noticed that the floor was out of level after the Trust had bought the property.

[134] Although an examination of the new kitchen joinery after the earthquakes revealed some compensation for a slope on the floor in that area despite the re-piling, I accept that, after the under-floor renovations had been completed, the Hs, who were renovating their house to a high standard, perceived the floor in the rest of the house to be level.[71]

Mr H's earthquake experience

[135] Mr H, who was at home during the earthquakes of 4 September 2010 and 22 February 2011, was able to describe the two events. In respect of the earlier earthquake, he recalled hearing a huge noise, feeling the house "going all over the place", and being unable to stand up in the hallway. The February 2011 earthquake was different. He described it as being like an explosion in which the house was thrown vertically into the air and then violently shaken.

[71] I am ignoring the level of the benchtop because it was adjusted by Mr H after the earthquakes.

During both earthquakes he could feel the house moving and see the floors flexing. On both occasions he felt that the house would collapse.

[136] After the September 2010 earthquake, Mr H noticed that:

(a) the flooring was uneven with large slopes and squeaking floorboards;

(b) the kitchen bench was unlevel and needed to be adjusted to prevent items falling off;

(c) the bifold doors were jammed shut and needed to have the flashings removed and extensive adjustments made;

(d) there were humps on the lawn;

(e) his son was unable to skateboard on the drive because of the undulations in it; and

(f) the pavers were not straight.

Analysis

[137] Although the geotechnical engineers relied upon by the parties initially took differing positions, they eventually agreed that the house had seismically settled into the ground. They believed that this was most probably because the weight of the house, with its heavy cladding and heavy roof, had put downward pressure on the 1.4m deep non-liquefiable crust, displacing the liquefied layer below it, and causing the house to tilt towards the corner of bedroom 3.

[138] It is clear from the renovations carried out by the Trust in the eight years preceding the September 2010 earthquake, that the Hs were keen to transform their 40-year-old house into a comfortable, modern living environment and were able to fund the necessary renovations. I accept that, before the earthquakes, the floors in the house were not perceptibly out of level, the doors and windows (installed only months before the first earthquake) were not wracked, there were no cracks between the floorboards in the lounge, there was no mortar damage in the ridge tiles, the pavers sloped away from the house, and there were no undulations in the drive.

[139] The only logical explanation for the damage described at [124] above is that it was caused by the earthquakes. This is consistent with Mr H's eyewitness evidence. It also explains why the greatest settlement was in the bedroom 3 corner and not in the kitchen corner where the softest soils had caused pre-earthquake static settlement.

[140] Accordingly, I find that the house suffered the following damage caused by the Canterbury Earthquake Sequence:

(a) differential foundation settlement with:

(i) tilted and cracked perimeter foundation footings;

(ii) tilted or displaced piles;

(iii) twisted, warped and unlevel floor bearers;

(b) wracking of walls, doors and windows;

(c) cracking of floorboards;

(d) collapse of ceiling;

(e) damage to door and window frames, skirting boards and linings;

(f) cracking in ceilings;

(g) collapsed ceiling in the bathroom;

(h) roof wracking;

(i) damaged roof tiles around the chimney;

(j) chimney toppled above roof level;

(k) mortar cracking damage and tile movement in the ridge capping tiles;

(l) roof frame deformations; and

(m) damage to fireplace surrounds.

[141] The insurance policy must respond to this damage, which far exceeds de minimis, and which has impaired the value and usefulness of the house as a home.

What is the policy standard that applies to the rectification of that damage?

[142] Because the policy promises that SR will pay to repair or rebuild the Trust's house to an "as new" condition, the appropriate policy standard is the "as new" standard.

[143] As discussed above at [41] to [71], the repairs to be made to the house under the "as new" standard of SRs' policy must comply with the contemporary Building Code.

What repairs are required?

[144] The Trust and SR have divergent views on how to repair the damage.

[145] The Trust submits that the foundations, which are a unified building element, have been damaged by the earthquakes and must be repaired to meet the standard required of new foundations in 2020. It contends that a repair to that standard is not possible as the current standards are so different from those applying in 1960 when the foundations were built; the only viable option is for them to be replaced.

[146] SR submits that the only aspect of the foundations that has been damaged and needs repair, is that of levelment. It contends that the foundations can be re-levelled to meet the requirements of the current building code without needing to be replaced.

[147] However, this dispute is about the applicable policy standard and is resolved by the discussion in [41] to [71] above.

[148] The engineers for both parties agree that:

(a) the foundations (including the piles) have not failed structurally, in that they continue to bear the load for which they were originally designed;

(b) the land has not been damaged, in that it continues to be able to support the house just as it did before the earthquakes; and

(c) there is no reason why the foundations, once re-levelled, would not continue to act as they had prior to the earthquakes.

[149] I conclude from that evidence, that the structural function of the foundations has not been affected by the earthquake damage and that, therefore, no structural repairs are required.

[150] However, because of the dislevelment, the foundations no longer provide the amenity they once did. This damage, therefore, should be repaired to the standard expected of new foundations in 2020.

[151] The engineers for both parties agree that the method of over-pinning proposed by SR will meet the current requirements for levelment in the Building Code and is likely to receive a building consent from the Christchurch City Council. As SR has proposed a foundation repair that meets both the policy and the compliance standard, it cannot be said to be acting unreasonably.

[152] As far as the other repairs to the property are concerned, including the repairs to the superstructure, I believe that the parties should be able to reach agreement but am available to provide further assistance should that be required.

Cash settlement

[153] The Trust's insurance policy with SR provides in clause 1d:

> "If your house is damaged and can be repaired, we can choose to either:
>
> (i) repair your house to an "as new" condition, or
>
> (ii) pay you the cash equivalent of the cost of repairs."

[154] On 4 October 2016, SR elected to cash settle the claim, as it was no longer able to offer a managed repair due to a re-structure.

[155] In his opening, Mr F for SR, claimed that the only cash settlement available to the Trust was for the market value of the house at the time of the damage, but in his closing submissions he indicated that one of the issues to be determined at a subsequent hearing was: "what is the cash equivalent of the cost of repairs that is payable by SR to the H's?".

[156] I infer from this, that Mr F no longer maintains the position he indicated in opening. I will therefore treat this issue as having been conceded by him.

Damages claim

[157] The H's are seeking damages of $140,000, claiming that SR has breached the duty of good faith it owes them.

[158] Their claim is based on the finding in *Young v Tower Insurance Ltd* that, because of the duty of good faith owed by insurers to their customers, there is as an implied term of the contract of insurance that the insurer must:

(a) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of the claim; and

(b) process the claim in a reasonable time. [72]

The first alleged breach

[159] Although Mr H has been upset at the condescending attitude of SR's staff, it has been actions of his claim's manager, MW, that have most offended him.

[160] At a meeting on 10 October 2012, Mr H discussed the Detailed Repair/Rebuild Analysis (DRA) with MW from SR and PM from Arrow. It was agreed during that discussion that Arrow would re-scope the DRA to confirm whether there was further damage as alleged in an independent report submitted by Mr H during the meeting. Specifically, the re-scope would address the roof rafters, the deck, floor levels, and drainage. Mr H agreed that Arrow would manage the repair; Arrow promised to arrange for an engineer to look at the house and comment whether it was safe to live in as Mr H was concerned about the state of the rafters.

[72] *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291 at [163].

[161] At that meeting Mr H was also given a Memorandum of Understanding that included the following statements:

(a) "The next step includes defining and preparing the specific details of the building work which will be used as schedules for the building contract";

(b) "SR will give you the contract work schedules for you to review and approve."

(c) "Your approval of the contract work schedules will commence the process and form the basis for selecting the builder to be contracted, pricing of the building work, and finalising the building contract."

(d) "If you want to use an alternative builder, they will need to complete a pre-qualification process with Arrow."

(e) "If Arrow (on behalf of SR) is satisfied with the overall response from the builder and you are satisfied with the cost of any uninsured work, the nominated builder will then be requested to proceed to the contract phase."

(f) "Arrow will contact you directly to go through the pricing and the scope of the building work. The building work will be set out in the contract works schedules which will form part of the building contract documents. Arrow will also go through the building contract documents with you."

(g) "You're welcome to take some time to consider the building contract documents before signing them."

[162] Although Mr W recorded that meeting as having occurred on 15 October 2012, I am satisfied that it occurred on 10 October 2012 and that he did not record it until he signed the Memorandum of Understanding on 15 October 2012 when it was returned to him signed by all three of the trustees.

[163] From what was discussed at that meeting, reinforced by the contents of the signed Memorandum of Understanding, Mr H could reasonably expect that:

(a) the work would be re-scoped and the DRA amended, if necessary;

(b) the contract works schedules would be prepared by Arrow and sent to him by SR for review and approval;

(c) he would be consulted about the choice of builder and given an opportunity to nominate an alternative builder;

(d) Arrow would go through the pricing and scope of the building work with him;

(e) a building contract would be drawn up and discussed with him by Arrow; and

(f) he would be given a reasonable time to consider the building contract.

[164] The reality was that:

(a) Arrow re-examined the house with its engineer but did not discuss its findings with Mr H;

(b) no contract work schedules were sent to Mr H for review and approval;

(c) he was not consulted about the choice of builder or given the opportunity to nominate an alternative builder;

(d) the scope and pricing of the work was never discussed with him;

(e) in May 2013, without consulting Mr H, SR placed his repairs in a queue of work to be undertaken during the second half of 2013; and

(f) the building contract was not submitted to Mr H or discussed with him until it was posted out on 12 September 2013.

[165] Mr W telephoned Mr H on 26 September 2013 after reading a file note of a telephone complaint made by Mr H on 17 September 2013 that he had been expecting a re-scope which, he said, had not taken place.

[166] The only oral evidence of this telephone conversation was given by Mr H, who said that Mr W was aggressive and forceful. When Mr H complained that SR had not followed the process outlined in the Memorandum of Understanding and said he wanted two months to look through the contract he was told that if he did not sign the contract within five days he would go to the back of the queue.

[167] Mr H also alleges that, during this conversation Mr W said to him: "We can't bloody well hang around waiting for you. We might just have to cash you out less everything we have paid to date."

[168] According to LF who gave evidence on behalf of SR, Mr W had mistakenly believed that all the processes outlined in the Memorandum of Understanding had been completed by its contractor, Arrow. However, the file note of Mr H's complaint should have prompted him to check the matter out before he rang him. Moreover, it is quite clear from Mr W' own notes that, before his threatening outburst, he had been told by Mr H that these processes had not been followed.

[169] Mr H was understandably upset and this exchange completely coloured view of SR. Although it quickly made genuine efforts to placate him, probably in the realisation that Mr W had overstepped the mark, it was too late. Mr H is clearly affected by this exchange even now.

[170] I consider that Mr W' behaviour was inexcusable and constituted a breach of the implied term that required SR to act reasonably, fairly and transparently.

[171] On the other hand, I do not consider that Mr H should be awarded the $15,000 he claims in damages under this head. The damages awarded in *Young v Tower Insurance Ltd* were $5000 for failure to disclose a report received by the insurer that the property should be demolished and rebuilt. I cannot see that Mr H should receive any more than did Mr Young. I therefore fix the general damages for this breach at $5000.

The second alleged breach

[172] Mr H also seeks $125,000 general damages for the delay in having the Trust's claim resolved, during which he and his family lived in a damaged house. The damages have been calculated at $25,000 per occupant in line with the damages awarded in *North Shore City*

Council v Body Corporate 188529 [Sunset Terraces].[73] Although in that case the damages were based in tort, damages in contract have been allowed for inconvenience caused by the delay in settling an insurance claim.[74]

[173] Although there have been extensive delays, I consider that Mr H is just as much at fault as SR. He has believed from very early in his claim that he was entitled to have his house rebuilt. The type of repair now approved by the Tribunal was offered to Mr H years ago but was rejected because he believed that it did not meet the policy standard. Although SR's comments from time to time about the policy standard might not have been correct, there is no effective difference between the policy standard they articulated and my determination on that issue. I consider, therefore, that SR has not breached its obligation to process the Trust's claim in a reasonable time. The question of damages for delay, therefore does not arise.

Outcome

[174] I find that:

(a) the Trust's house was damaged in the Canterbury earthquake sequence;

(b) its insurance policy with SR entitles it to have that damage repaired to the "as new" standard;

(c) That standard requires that the repairs comply with the contemporary Building Code;

(d) SR's proposed method of repairing the foundations is not unreasonable; and

(e) SR has breached an implied condition of the policy to act reasonably, fairly and transparently.

[175] I award general damages of $5,000 to Mr H to compensate him for the distress he suffered because of that breach.

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[73] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486.
[74] *Dome v State Insurance (1988) 5 ANZ insurance Cases* ¶75-199 where damages of $15,000 were allowed calculated as being two years of a modest rental for a similar house.

Costs

[176] Because it is not easy to see why this case required 6 days of hearing the question of costs is reserved.

[177] If either party considers that the other party has acted in bad faith, made allegations or objections that are without substantial merit, or caused unreasonable delay they should advise the Tribunal by electronically filing and serving a costs application setting out the basis of their application. That application should be filed within one calendar month of the date of this decision.

Finally

[178] The claim is adjourned for the remaining issues to be canvassed at a telephone conference to be arranged by the case manager.

C P Somerville
Chair
Canterbury Earthquakes Insurance Tribunal