IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-0074-2019

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	RM, ND and DD Applicants
AND	EARTHQUAKE COMMISSION First Respondent
AND	VERO INSURANCE NEW ZEALAND LIMITED Second Respondent

Appearances: K Robinson, counsel for the Applicants
E Light, counsel for the First Respondent
C Langstone and A Cornwall, counsel for the Second Respondent

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DECISION OF P R COGSWELL

DATE: 20 APRIL 2022

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Introduction

[1] The applicants are the trustees of the HT, a trust associated with Mr and Mrs D. In this decision, the applicants are referred to as "the Trust".

[2] The house, the subject of this claim, was insured with EQC and Vero Insurance New Zealand Limited (Vero).

[3] The house was damaged in the September 2010 and February 2011 Canterbury Earthquake Sequence (CES) events. Claims to EQC and Vero were made by the Trust arising from those events.

[4] The Trust opted out of the EQC managed repair program.

[5] EQC investigated the damage to the house and made payments for repairs arising from both events based on a scope of works it prepared.

[6] The Trust then had Mr Coombs, a builder known to Mr D over many years, carry out repair work to the house.[1] Repair work was undertaken to most of the house but stopped following discovery of water entry and damage to the ceilings in bedrooms 7 & 8 and ensuite 4.

[7] The discovery of that damage led Mr Coombs and the Trust to revisit the damage suffered to the house.[2] They formed the view that there was damage to the building envelope allowing water entry which required more significant repair work than had been scoped by EQC and undertaken by Mr Coombs to that point. Mainly, the stone cladding forming a large part of the building envelope was cracked and it was thought that it was allowing water to enter the building. In addition, the damage to the ceilings in bedrooms 7 & 8 indicated leaking from the roof above.

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[1] Through his company A and A Coombs Builders Limited.

[2] EQC Opt-Out Form p44 Factual Witness Common Bundle (FWCB), "if further damage is discovered during the repair process, I must notify EQC immediately and stop all work related to the affected area until EQC has inspected the additional damage and authorised any additional work."

[8] This led to the Trust making further claims to EQC and Vero. At that stage, Vero had not made any payment, as the sums paid had not exceeded the EQC statutory caps.

[9] Vero takes the view in this claim that the repairs were not required or were overstated or that exclusions applied to entitle it to decline the claim.

[10] The parties have not been able to resolve their differences as to Vero's response to the claim.

[11] The position of EQC was clarified during the hearing. It now concedes that the two CES events caused damage exceeding its statutory cap on each occasion. It has already made payments to the Trust but now accepts that it must pay up to the two "caps" to the Trust for the damage suffered by the CES.

[12] The Trust seeks orders from the Tribunal that the property be repaired in accordance with a scope of works its expert advisors have prepared. The Trust called Ms Crilly, a building surveyor and Mr Harrison, a quantity surveyor, as experts. They prepared the scope of works the Trust says is required to repair the house.[3]

[13] Vero's position is twofold.

[14] First, it says that it is entitled to decline the claim in reliance on exclusions contained in the policy. It states that it seeks "the right not to pay the Trust's claim". Secondly, it says that if it is liable to the Trust, the scope of works is excessive and addresses extant building defects that are not recoverable as earthquake damage under the policy.

The property

[15] The property is a substantial 2-story home, built in a lodge style high up in the hills outside Christchurch city. The house commands extensive rural views. The location, whilst stunning, is also remote and exposed. The Tribunal visited the property to view its location and layout.

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[3] The Trust's repair methodology is contained in Ms Crilly's affidavit sworn on 24 August 2020 at exhibit "G" and Harrisons Quantity Surveyor's report at page 1193 of the Expert Witnesses Common Bundle (EWCB)

[16] The house is large, somewhat complex in design and comprises some 8 bedrooms, numerous bathrooms and living spaces. There is a double garage attached to the house.

[17] The ground floor load bearing walls and the perimeter walls are formed with concrete filled extruded polystyrene sheet (EFS) block.

[18] The roof is timber framed with corrugated steel cladding and some areas of butyl membrane over a plywood substrate.

[19] The wall cladding is mostly stone masonry veneer cladding directly fixed over a damp proof membrane applied directly to the outer face of the insulation, with some small sections of direct-fixed timber board and batten. Ms Crilly's evidence is that the stone cladding appears to have been installed in accordance with the consented plans and the manufacturer's details.[4]

[20] The property was acquired by a company associated with Mr D in 2005. It was acquired at a mortgagee sale and at the time of sale the house was not complete. Litigation followed that purchase, discussed later.[5]

[21] Initially acquired as an investment, Mr D and his wife ultimately decided to retain the house and it was transferred to the Trust. The house is used as a weekender rather than Mr and Mrs D's primary residence. Their primary residence is in Christchurch.

[22] The Trust then carried out work to the house to finish it, including landscaping works and other finishing and maintenance work.

[23] It is the Trust's position that at the time of the CES the house was in good condition. In particular, the Trust denies that the house was suffering from "leaky building syndrome" as Vero now asserts or that the Trust knew of any such problems existing. Vero's position is that the house suffered from various design and construction defects in existence from the date of its construction in 2001.

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[4] Affidavit of Ms Crilly sworn on 24 August 2020 at paragraph 14.10
[5] *Orongomai Reserve Limited v Cashmere Lakes Reserve Limited* (CIV 2005-409-2171)

[24] The house repairs carried out by Mr Coombs were carried out following EQC's scope of works dated 28 November 2013. Those works were costed at almost $70,000.

[25] They were not completed due to the discovery of the water ingress and damage as described above.

[26] From that time, no further repair works have been undertaken, with the consequence that the Trust says the house requires the repair work set out by Ms Crilly and Mr Harrison, experts retained by the Trust.

Procedural background

[27] The Trust initially commenced a claim in the Christchurch High Court.

[28] That claim was transferred to the Tribunal.

[29] The Tribunal directed the conferral of experts in three disciplines, structural engineering, weathertightness and stonemasonry. The outcome of those conferrals were joint reports provided to the Tribunal and the parties as follows:

(a) weathertightness joint report – 21 May 2020;

(b) structural engineering joint report – 11 June 2020; and

(c) stonemasonry joint report – 17 October 2020.

[30] The Tribunal will take due notice of the joint report of the experts, noting that the experts owe an independent duty to the Tribunal in the discharge of their expert functions.

Statutory and contractual framework

EQC

[31] EQC provides statutory insurance cover to owners of residential buildings and land for "natural disaster damage", being "physical loss or damage to the property occurring as the direct result of a natural disaster".[6]

[32] "Physical loss or damage" requires a material physical change to property that impairs its value or usefulness.[7] In this context, this means an earthquake induced physical change to the material or structure of the property which affects its use or amenity and which is material.

[33] Section 30 of the Earthquake Commission Act 1993 (EQC Act) and Vero's policy terms mean that Vero only insures loss or damage beyond EQC's liability for any given event. That liability is the amount of $100,000 plus GST per event. This is referred to as EQC's "cap", so that only claims "beyond cap" become claims that Vero must respond to.

[34] So, for the Trust the position is that it is entitled to recover up to the statutory cap from EQC for any accepted event of loss or damage. And, for any particular event, should the loss or damage exceed the statutory cap, it is, subject to any particular policy exclusions, entitled to recover from Vero the costs of repairing the damage in excess of that.

[35] EQC accepts that the events causing damage to the Trust's house exceed the statutory cap on both events and so the amounts of $100,000 plus GST are payable for each event, less amounts already paid to the Trust by EQC.

Vero Insurance Policy

[36] The parties agree that the policy insuring the Trust's home is the "Vero/Broker Web Group Home Policy".

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[6] Earthquake Commission Act 1993, ss 18, 19 and 2(1).
[7] *He v Earthquake Commission* [2019] NZCA 373 at [8].

[37] The policy provides cover for accidental loss or damage caused by, inter alia, the CES. This is defined in the policy as "a sudden and unforeseen event causing physical loss or damage that is not intended or expected".

[38] The policy contains a natural disaster insurance additional benefit, meaning damage caused by the CES is covered. Vero accepts that damage caused by the two CES events is covered under the Trust's policy.

[39] The policy covered the Trust for damage to the house caused by the CES on certain terms. They include:

(a) EQC must have accepted liability for the damage under the EQC Act;

(b) The amount payable under the policy is the cost incurred in rebuilding or repairing the damaged portion of the house using currently equivalent building materials and techniques to a standard or specification similar to but no more extensive, nor better than its condition when new, less any amount payable under the EQC Act and any excess. The upper limit of cover is the cost to rebuild the house as it was when new, up to the sum insured, less excess.

[40] Any building work undertaken must comply with the Building Act 2004 and Building Code.

[41] Terms relevant to cover are:

(a) the limit of Vero's liability is $1,869,840;

(b) there is a policy extension for "Full Earthquake Cover"; and

(c) an excess of $500 applies per claim.

[42] Various additional benefits apply to the policy providing cover for:

(a) alternative accommodation;

(b) professional fees and site clearance costs;

(c) landscaping costs; and

(d) statutory requirements.

[43] The statutory requirements benefit covers the extra costs to repair damaged items required solely to meet a statute or local body regulation. There are exclusions, which are design issues excluded by the home defects exclusion, items that did not comply with a statute or local body regulation when built and an item that is undamaged, irrespective of whether it complies with a statute or local body regulation.

[44] Vero says that there are such items in the Trust's house, which entitle it to exclude cover for those items. It points to ss 17 and 112 of the Building Act in support of its position that items of the house that are being repaired must meet the Building Code, but that items that are not being repaired may be left at the same level of compliance as they were originally.[8]

[45] Further, the provisions of the Fair Insurance Code are incorporated into the policy. This requires Vero to, inter alia, settle all claims quickly and fairly.

[46] Finally, implied into the Vero policy as a matter of law is the proposition that an insurance contract is a contract of utmost good faith. This duty is owed by the insurer and the insured to each other.

[47] The policy held by the Trust with Vero is a cost incurred policy. That means that the Trust must actually incur the cost of repair before it can recover it from Vero.

[48] Vero submits therefore, that, if it makes any order against Vero, the Tribunal should make a declaration that the Trust is entitled to recover payment up to the costs of the repair the Tribunal concludes is required.

[8] *Fitzgerald v IAG New Zealand Limited* [2018] NZHC 3447 at [50].

[49] It follows from Vero's position that as it is not electing to carry out the work itself, the Trust may engage contractors to attend to those repairs that are accepted as recoverable losses under the policy.

[50] Such a declaration is within the jurisdiction of the Tribunal to order.

[51] Section 45(1) of the Canterbury Earthquakes Insurance Tribunal Act 2019 provides that the Tribunal has jurisdiction to decide any liability of any party to any other party and any remedies for that party. Section 46 of the Canterbury Earthquakes Insurance Tribunal Act 2019 provides that the Tribunal may make any order that a Court of competent jurisdiction may make in terms of the general law of New Zealand and specifically under the terms of the insurance policy between the parties. The policy entitles Vero to make the election it has.

[52] The general law of New Zealand permits a Court (or this Tribunal) to make an order in the nature of specific performance of the insurance policy terms which provide for Vero to elect to pay such sums as are payable to repair CES damage. Accordingly, the Tribunal has jurisdiction to order specified work be carried out by the Trust and that Vero meet the costs of that work. That is an order in the nature of specific performance under which Vero must pay money.

Legal principles

[53] There are a number of legal principles applying to the case. They are discussed below.

Burden of Proof

[54] The Trust bears the onus of proving the claims against EQC and Vero. It must prove on the balance of probabilities that the earthquake(s) caused the damage identified.[9] Balance of probabilities means more that 50% or more likely than not. The existence of damage is insufficient, there must be evidence to prove that the earthquake(s) caused identified damage.

[55] Vero takes issue with a number of claimed damage items, stating that the Trust did not prove that they were caused by the CES. It also argues that many items were the result of pre-

[9] *He v Earthquake Commission* [2019] NZCA 373 at [7]

existing weathertightness and other defects and hence not recoverable. That is a matter of fact for the Tribunal.

Physical Damage

[56] Both the EQC Act and Vero's policy require physical loss or damage to the property. That expression is described as "a material physical change to property that impairs its value or usefulness."[10] The change must be material or more than de minimis.

[57] "Damage" has the following characteristics:[11]

(a) there has been physical damage in the sense of an alteration in a negative way to the physical state of the insured property;

(b) what has been impaired is the value, amenity or usefulness of the property; and

(c) the impairment has been material in the sense that it can be described as more than de minimis.

[58] Where there is pre-existing damage, then the Tribunal must make an objective assessment of whether the earthquake has caused any material difference. Pre-existing damage to a building element may be so significant that minor additional damage makes no material difference to its value, amenity or usefulness. It is again, a matter of the Tribunal making a robust assessment based on the evidence before it.

[59] That loss of amenity will be informed also by the type of building element. A structural element will be considered in terms of its structural or functional performance, whereas for an element with an aesthetic purpose, the damage must affect that aesthetic purpose.

[10] At [8].
[11] *Body Corporate 335089 v Vero* [2020] NZHC 2353 at [57].

Causation

[60] The Trust must show that the damage claimed for was caused by the relevant earthquake. It must prove that the loss was:[12]

> the direct cause, the immediate cause from which the loss arose as a natural consequence, the dominant cause, or the real efficient cause…

[61] The Tribunal must apply common sense to this determination, as it is accepted that it may not be possible to determine causation with absolute certainty. The Tribunal may draw "robust inferences of causation", but must do so only where there is sufficient supporting material to prove causation.[13]

[62] In this case, that means that the Tribunal will need to make a decision on the state of the Trust's property before the earthquake and now and decide if it is more likely than not that the earthquake(s) caused any proven damage.

[63] Vero makes the observation that in *He v EQC & Anor* the Court of Appeal stated:[14]

> …It is not sufficient for [the insured] to point to the [undisputed] dislevelment of the house's floor or to establish that it is possible that this might have been caused or contributed to by the earthquakes. He needs to show on the balance of probabilities that differential settlement of the house was caused or materially contributed to by the earthquakes." "…It is not sufficient for [the insured] to point to the [undisputed] dislevelment of the house's floor or to establish that it is possible that this might have been caused or contributed to by the earthquakes. He needs to show on the balance of probabilities that differential settlement of the house was caused or materially contributed to by the earthquakes.

[64] Vero says that the terms of the policy applying an exclusion for damage "in connection with" the weathertightness exclusion means that only a "weak causal link" is required to exclude that damage from cover.

[65] Vero's position is that it is entitled to decline the claim on grounds provided by the policy terms, including that the house was a leaky home and that the Trust knew that but did not disclose that to Vero, in breach of the obligations of good faith and an exclusion clause in the policy.

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[12] *Moore v IAG* [2020] NZCA 319 at [34].
[13] *Accident Compensation Corporation v Ambros* [2007] NZCA 304.
[14] *He v EQC and Anor* [2019] NZCA 373 at [7].

[66] It goes on to argue that the *Wayne Tank* principle applies which means that if there is loss resulting from two concurrent causes, one excluded and one insured, cover is excluded.

[67] To that principle I add the gloss that if the repair of insured damage repairs excluded damage as an unavoidable natural consequence, that work remains recoverable under the policy. That is to say, if it is not possible to repair insured items without repairing excluded items as a direct, natural, consequence of that work, that must be covered under the policy.

Evidential Matters

[68] The Tribunal is not bound by the Evidence Act 2006, however, it will accord different weight to evidence depending upon its probative value.

[69] Vero says that certain other matters should lead the Tribunal to a conclusion that the evidence given by both Mr D and Mr Coombs should be treated with suspicion and given little, if any, weight. It seeks to rely on certain adverse inferences or comments made by the High Court in the Orongomai litigation. I intend to proceed on the basis of the evidence heard by the Tribunal and the witnesses' conduct and demeanour when giving evidence before me, not evidence in an unrelated proceeding.

Approach to repairs

[70] The EQC Act requires repairs or reinstatements of damaged property to be completed to the "replacement value" standard. Similar to the Vero "when new" standard addressed below, the replacement value approach requires the building to be remediated "to a condition substantially the same as but not better or more extensive than its condition when new…"[15]

[71] Vero's policy with the Trust requires it to rebuild or repair damage to his property to a "when new" standard. This standard has been addressed in two cases, *Fitzgerald v IAG New Zealand Limited* and *Parkin v Vero Insurance New Zealand Limited.*[16]

[15] EQC Act s2(1)
[16] *Fitzgerald v IAG New Zealand Limited* [2018] NZHC 3447 at [28], [29] and [70]; and *Parkin v Vero Insurance New Zealand Limited* [2015] NZHC 1675 at [117].

[72] Those cases make it clear that:

(a) the "when new" standard is a temporal standard relating to the state of the house when it was first built. It does not require restoration to modern standards (ie, the "as new" standard);

(b) the "when new" standard (i) does not require replication of the original, and (ii) modern materials and techniques may still be used;

(c) the standard of repair required is to "render the fact of the earthquake damage immaterial". This means that "the house must, as far as possible, be put in the same position it would have been in had the earthquakes not occurred"[17]; and

(d) the standard of repair applies to the purpose of the damaged component:

(i) where a component only has a functional purpose, the insurer's obligation is met by restoring that functional purpose to its "when new" condition; and

(ii) when a component also has an aesthetic purpose, the remediation strategy must also restore the original aesthetic quality of the component.

[73] These comments are subject to the requirement that any building work done will have to comply with the Building Act and Code. This includes the obligations imposed by s 112 of the Building Act 2004, as summarised by the Court in *Fitzgerald:*[18]

> the aspects of the house that are being repaired to be brought up to current compliance levels. Elements that are not repaired may be left at the same level of compliance as they were originally.

[74] The Tribunal will adopt this approach to the remediation of any proven earthquake damage to the Trust's property.

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[17] *Fitzgerald v IAG New Zealand Limited* [2018] NZHC 3447 at [29].
[18] At [50].

Issues

[75] The issues for determination in this decision are:

(a) is Vero entitled to decline cover based on an exclusion in its policy;

(b) if not, then, what is the appropriate scope of works for the repairs;

(c) are there any items in the applicants' proposed scope of works that are not recoverable under the Vero policy; and

(d) what orders are the Trust entitled to.

Policy exclusions

[76] A key focus of Vero's case was that it is entitled to decline cover based on exclusions in the policy. There are two exclusions relied on:

(a) home defects exclusion; and

(b) correctness of statements and fraud exclusion.

[77] The home defects exclusion in the policy entitles Vero to decline cover for:[19]

(a) any failure of the house to contain or incorporate materials, a design, a system, or a standard of workmanship which effectively prevents or manages the presence or penetration of moisture or water to which the house might reasonably be subjected; and

(b) loss caused by defect in design or inherent fault, defect in workmanship or gradual damage.

[19] Being exclusion clauses 4(a)(ii) and (v), 4(b)(ii) and (iii) and 5

[78] Vero says that the weathertightness exclusion excludes damage "in connection with" weathertightness issues, which it says means anything to do with pre-existing weathertightness defects are excluded.

[79] It argues that the policy does not cover repairs to pre-existing issues to the house. It contends that weathertightness issues permit the exclusion of many items of repair, due to the home defects exclusion. Ultimately that is a matter of fact for the Tribunal. As will become clear in this decision, the vast majority of the repairs do not relate to alleged weathertightness repairs or repairs of extant design or building defects.

[80] The correctness of statements and fraud exclusion states:

> The proposal, application or declaration form is the basis of this contract. All statements made by you or on your behalf on any of these forms or otherwise in support of this policy must be complete and correct in all respects. If any claim under this policy is supported by any incorrect information or statement all benefits will be forfeited.

[81] In this decision, the correctness of statements and fraud exclusion will be referred to as the "statements exclusion".

[82] Vero says that, should the Tribunal find that the Trust made statements that breached this condition of the policy and/or the general overarching duty of good faith and honesty the Trust owed to Vero, it is entitled to decline the Trust's claim in full.

The statements exclusion

Vero's position

[83] Vero says that it is entitled to decline the claim for breach of the statements exclusion and/or for breach of the duty of good faith owed by the Trust. It relies on three statements made by or on behalf of the Trust about the state of the house that enable it to decline the claim.

[84] It submits that in addition to the implied term to act honestly when making a claim, the policy terms of the statement exclusion modify that duty by requiring, not just honesty, but that

statements made in support of a claim be "complete and correct" in all respects.[20] This, it says, places a greater burden on the insured when making statements than are imposed by the ordinary duty to act honestly when making a claim.

[85] Vero says that the provisions of the statements exclusion clause mean that it is irrelevant if wrong statements are made honestly, they must be accurate. It goes on to submit that [objective] "incorrectness" is the touchstone for its right to decline to pay a claim.

[86] This, they say, raises the need to consider Mr D and Mr Coombs' credibility and the actual state of the house before the CES.

[87] Vero's position is that neither witness was being truthful and their evidence should be given little weight on the issue of the Trust's knowledge of the state of the house prior to the CES. It also criticises the Trust for not calling Mrs D to give evidence, given her close association with the house.

[88] The statements relied on by Vero in support of its exclusion argument are discussed below.

[89] First, it relies on a statement made by Mr D in a schedule setting out repair costs attached to his defence in an unrelated proceeding. The proceeding is the Orongomai proceedings. Those proceedings arose following Mr D' acquisition of the property in 2005. The subject matter of that proceeding is not relevant to this claim.

[90] The schedule Vero relies on is referred to as the "Orongomai schedule". It set out for the High Court in the Orongomai proceeding various costs incurred by or on behalf of Mr D following acquisition of the property.

[91] Vero says that that statement breaches the statements exclusion. To interpolate, it is because the undertaking of the repair work, especially the leak repair work, evidences that the house was a leaky house and that the Trust knew that.

[20] Vero Policy Condition 7.

[92] Mr D and Mr Coombs were recalled to give evidence following Vero's discovery of the Orongomai schedule. Much time was devoted to the examination of Mr D and Mr Coombs about what their state of knowledge was of the state of the building and what the work was that was set out in the Orongomai schedule.

[93] The Orongomai schedule was only discovered by Vero after this claim was before the Tribunal. It never formed part of Vero's decision to enter into the insurance contract or to decline to make any payment under the claims made by the Trust. It had, until the hearing of the claims in the Tribunal, no causative effect whatsoever on Vero's decision.

[94] The Orongomai schedule sets out a number of repair and maintenance items, five of which mention or imply work done to remedy leaks to the house. The Trust was unable to locate the source invoices referred to in the Orongomai schedule. There is uncertainty about exactly what work was carried out.

[95] Second, Vero says that the statement of claim the Trust filed in the High Court against Vero included claims for weathertightness defects arising as a result of the earthquakes.[21] Vero says that those claims make it implicit that there is a statement by the Trust that there were no weathertightness defects in the house before the CES.

[96] Third, it also relies on an affidavit by Mr D in this claim that said that the house was in generally good condition before the CES and that there was no dampness in the house or any indications of moisture damage.[22]

[97] Vero also sought to point out various building elements in situ at the house that must have allowed water to enter the house before the CES. The point of that argument is that it must follow that the opinion expressed by Mr D, even if the Tribunal was to hold that it was honestly given, was objectively wrong, as the house must have been a leaky house.

[98] Taken in its totality then, Vero says that the Trust has breached the statements exclusion or the duty of good faith and that it is entitled to decline the claim in full.

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[21] Paragraphs 10 and 11 of the statement of claim
[22] Paragraphs 4.2 and 4.3 of the affidavit of D D sworn 17 July 2020

The Trust's position

[99] The Trust denies that it has made incorrect statements and denies that Vero is entitled to decline the claim based on the statements exclusion. It says that none of the statements were made in support of a claim under the policy. Rather, they were made in the course of litigating a dispute.

[100] The Trust says that it did not make incorrect statements nor were any of the statements made to support a claim under the policy. They say that the Vero allegations should be taken as being:

(a) an allegation that the Trust is claiming for water damage that was not caused by the CES; and

(b) statements made by Mr D that he did not notice or have any recollection of leaking at the property.

[101] The Trust says that the statements are at most statements about the condition of the house immediately before the CES, noted what the Trust observed about the state of the house and, finally, that the Orongomai schedule does not show that any statement the Trust made was incorrect.

[102] The Trust says that the statements should be considered in their context. It says that the Trust noticed water ingress and damage after the CES but had no knowledge of such issues before the CES.

[103] Regarding the Orongomai schedule, the Trust's position is that the evidence contained in it is unclear and not material to the statements exclusion. The description of the work set out in each of the five relevant entries is ambiguous and supports the Trust's position that any leaks were repaired and so the statement that the house was in good condition was correct.

[104] The Trust submits that it is more correct to interpret the Orongomai schedule as supporting the proposition that any leaks located were fixed so that the statement that the house did not leak was correct. The Trust says that it is important to locate the statement in a

continuum, it is not a statement that there was never a leak, it was a statement that the house did not leak immediately prior to the CES.

[105] The pleading issue is addressed by noting that the insurance claim came to an end following Vero's declinature of liability whereupon the judicial process commenced, first in the High Court and now in this Tribunal. The Trust makes the point that a pleading is not evidence and cannot be an incorrect statement justifying declinature.

[106] The affidavit of Mr D is described as no more than the expression of an opinion honestly held as to the state of the house. They say that Vero has not proved that Mr D did not hold that view. Neither, they say, has Vero shown the statement to be incorrect.

[107] The Tribunal did ask Mr D questions about the state of the house and any repairs of a weathertightness nature.[23] Mr D was clear in his recollection that he did not have any recollection of leaks in the house prior to the CES. Having heard the evidence, I did not form the view that Mr D was being evasive or dishonest in his opinion that the house was and was kept in good condition. He was clear that any work required to the house was carried out promptly and with little regard for the cost of that. Mr Coombs was given a broad discretion to deal with any work requested, by him or Mrs D.

[108] The Trust then says that any statement about the weathertightness of the house was not material. It focusses on the fact that any damage arising from water entry is de minimus in the overall context of the repairs required. It makes the point that it is not seeking to recover any amounts to remediate pre-existing weathertightness damage, only damage caused to the house by the CES. This point is clear, other than potentially in regard to one area, the butynol roofs, which are discussed later.

[109] Finally, the Trust says that none of the statements relied on by Vero were made "in support of a claim" under the policy. It says that following the declinature by Vero, the "claims process" had come to an end and the parties' relationship changed.

[110] It says that from the position before declinature, where the relationship was contractual and governed by the general law, following declinature and the proceedings being commenced,

[23] NOE44LN20 – 45LN6.

the relationship was then governed by the litigation process. The obligations on the parties under the policy ceased following the commencement of the litigation.

[111] Emphasis was placed on two English cases, both in support of an argument that the duty of good faith concludes following the commencement of litigation.[24] The Trust says that both cases support the proposition that a failure to disclose material facts or the making of a reckless untruth in the process of litigation is not actionable as a breach of the obligation of good faith entitling forfeiture. It says that this approach has been approved in New Zealand[25].

[112] To summarise, it is the Trust's position that it is not possible to import the obligations imposed on the parties in the claims handling process into the litigated proceedings. The result, it says, is that the statements made after the commencement of this litigation are not actionable.

[113] Finally, the Trust says that it is not correct to find that any incorrect statement at all, irrespective of its context or materiality, enables declinature.

[114] It says, therefore, that for those reasons, Vero may not rely on the statements exclusion clause.

Discussion

[115] Vero is not entitled to rely on the statements exclusion to deny the Trust's claim. There are a number of reasons for that.

[116] First, the exclusion itself is not broadly enough phrased to include statements made that are unrelated to the formation of the policy contract or the making of a claim and, therefore, to include statements made in the course of litigation.

[117] The clause, with emphasis added, states:

> The proposal, application or declaration form is the basis of this contract. All statements made by you or on your behalf on any of these forms or otherwise **in support of this policy** must be complete and correct in all respects. If any claim

[24] *Mainfest Shipping Company Limited v Uni-Polaris Shipping Company Limited & Ors* (the Star Sea) [2001] 1 All ER 743; *Versloot Dredging BV & Anor (Appellants) v HDI Gerling Industrie Versicherung AG & Ors* (Respondents) [2016] UKSC 45 at [18]
[25] *Taylor v Asteron* [2020] NZCA354 at [104].

> under this policy **is supported by** any incorrect information or statement all benefits will be forfeited.

[118] Turning to consider the statements the Trust allegedly made that entitle Vero to decline the claim, they are:

(a) the Orongomai schedule entries referring to leak work undertaken;

(b) claims in the statement of claim filed in the High Court that water damage arose following the CES, with an "implication" therefore that no such damage existed beforehand; and

(c) Mr Ds' evidence given to the Tribunal to the effect that he was not aware of existing water entry and problems at the house.

[119] None of those statements can be considered statements made pursuant to either the formation of the policy or the making of a claim under it. The clause must be considered in the context of the contract of insurance as a whole. The general rule should be applied that if a party, otherwise liable, is to exclude his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party.[26]

[120] A strict reading of the clause against the background and context of the statements leads to a conclusion that Vero cannot rely on these statements to decline the claim. They were not made in support of the claim, rather, they were (with the exception of the Orongomai schedule) made in support of the Trust's claim in this litigation.

[121] Vero had already made its decision about the claim. Nothing stated in either the statement of claim or the evidence informed Vero's decision to decline the claim. Its decision was always that no amount over the EQC cap was payable. Later, it decided policy exclusions applied.

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[26] *Dairy Containers Limited v Tasman Orient Line CV* [2005] 1 NZLR 433 (PC)

[122] The statements either post-date the making of the insurance claim and Vero's refusal to accept the claims made by the Trust for relief under the policy (statements (b) and (c) above) or were unrelated to the claim under the policy at all (statement (a)).

[123] It is arguable whether the Orongomai schedule was a statement at all, much less one made to support the policy being formed or a claim being made under it. Vero sought to demonstrate through Mr D and Mr Coombs that the five relevant entries in their totality show that the house was a leaky home.

[124] That is not accepted. This is a large, complex house, requiring completion following purchase. Five isolated entries, some of which are ambiguous, do not put the insured on notice that the house had material, systemic, defects. Rather, it is the case that the entries showed that any repair and maintenance items were addressed.

[125] The allegations in the statement of claim are a matter of pleading, not evidence. They are not a statement made that is caught by the statements exclusion. A party is free to raise any allegation in a pleading, it is for the Court or Tribunal to accept or reject that allegation, once it has heard evidence on the allegations made.

[126] It is not a statement made in support of a claim, other than in the most general sense that it is a statement made to seek judgment or an order of the Court or Tribunal. By the time the pleading was filed, Vero had already set out its position. It had, effectively, declined the claim. The claim had been made, but not accepted by Vero. The pleading was a consequence of the declinature of the claim, not something made in support of it.

[127] Moreover, the evidence given by Mr D in this Tribunal as to the state of the house is a statement of his opinion. Mr D gave evidence that he regularly undertook maintenance to the house and that oftentimes this was at the instruction of his wife. His opinion was not a warranty that the house did not suffer from latent defects. It was not a guarantee to Vero that the house had no construction defects or departures from the consented building plans. It was a statement as to his opinion of the state of the house before the CES.

[128] I do not need to determine whether the *Star Sea* or *Versloot* cases assist the Trust or Vero, because I find that the statements were not made in "support of [the] policy" or to support

a "claim under [the] policy". Neither statement resulted in Vero taking any action to either grant a policy of insurance or to consider and decline to make any payment under the claim. There is no causal nexus between the three "statements" and any action Vero took.

[129] If I am wrong in that, I hold that the decisions are on point that the post-claim declinature litigation statements are not actionable as being a breach of the statements exclusion or the duty of good faith. Rather, if they were actionable as statements at all, they were made in the course of the litigation.

[130] Secondly, the statements made carry a requirement of materiality. None of the three statements were material to Vero's decision to grant a policy of insurance or to accept or decline the Trust's claim. Vero did not even know about the Orongomai schedule until well after this claim commenced in the Tribunal. The other two statements are a pleading and Mr Ds' evidence at the hearing.

[131] Even adopting the broadest possible interpretation of materiality, these "statements" do not rise up to the level of material. Vero says that its exclusion clause does not require materiality as it does not include such a requirement in the wording of the clause. They say further that in any event, the statements made were material.

[132] This argument is answered by reference to the Insurance Law Reform Act 1977. Materiality is a requirement of the policy by virtue of s 5 of the Insurance Law Reform Act, which imports such a requirement into all policies of insurance. Materiality is, therefore, implied into this policy as a matter of law. The terms of Policy Condition 7 do not change that.

[133] "Materiality" is defined in s 6 of the Act. It is not possible to view the statements relied on, coming a long time after acceptance of the risk by Vero as having had any influence in its decision to grant insurance on the terms it did or, by extension, to decline the claim.

[134] Rather, Vero is simply now seizing on the statements to assist in its concluded decision to decline the claim.

[135] The authors of Colinvaux's Law of Insurance in New Zealand Law note that s 6 of the Insurance Law Reform Act 1977 protects the requirement of materiality in s 5 "notwithstanding

any admission, term, condition, stipulation, warranty, or proviso in the application or proposal for insurance or in the life policy or contract of insurance".[27] This, they say, is to avoid the "damaging" outcome of an insurer being able to avoid a policy whether or not the statement was material or whether or not it was untrue to any significant extent.

[136] The New Zealand Courts have proceeded on the basis that warranted pre-contractual representations are subject to the controls in ss 5 & 6 of the Insurance Law Reform Act 1977.

[137] Further, remedies for any established misrepresentation or breach of contract are regulated by the Contract and Commercial Law Act 2017 which replaces avoidance with cancellation. Section 37 of that Act, as relevant, allows for cancellation where:

(a) either:

(i) a party has been induced to enter into [a contract of insurance] by a misrepresentation, whether innocent or fraudulent, made by or on behalf of [the insured] (s 37(1)(a)); or

(ii) a term of the contract is breached by another party to the contract (s 37(1)(b)); and

(b) either:

(i) the parties have expressly or impliedly agreed that the truth of the representation or the performance of the term is essential to the cancelling party; or

(ii) the effect of the misrepresentation or breach of contract is:

(I) substantially to reduce the benefit of the contract to the cancelling party; or

(II) substantially to increase the burden of the contract to the cancelling party; or

(III) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or bargained for.

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[27] Rob Merkin QC Chris Nicoll *Colinvaux's Law of Insurance In New Zealand* (2nd ed, Westlaw NZ, 2017) at [34.4.1.3(4) & (5)]

[138] The effect of the 2017 Act is to substitute cancellation for avoidance in the 1977 Act and to allow the insurer the remedy of cancellation only where the misrepresentation or breach meets the requirements of the 1977 Act, namely that it is material and substantially incorrect. In this context, the breach is the making of the statements relied on by Vero.

[139] So, faced with a misrepresentation or breach by the Trust, Vero could cancel the policy. Looking at each of the three types of statement relied on by Vero, it could cancel if:

(a) the misstatements or breach were expressly or impliedly agreed between the parties to be essential to the cancelling party – which I find they were not; or

(b) the misstatements or breach were individually material to its decision to grant cover – which I find they were not; *and*

(c) the misstatements or breach were individually substantially incorrect - which I find they were not; *and*

(d) the statements induced Vero to offer cover - which I find they did not; *and*

(e) the effect of the misstatements or breach is to substantially alter the benefit or burden of the insurance contract – which I find they did not.

[140] I also note that Vero did not in fact cancel the policy. Instead, it sought orders that it was entitled not to pay the Trust's claim, which is the language of avoidance. The Contract and Commercial Law Act 2017 replaces avoidance with cancellation. Vero did not cancel.

[141] Thirdly, the evidence of Mr D and Mr Coombs was that any identified repair work at the house was dealt with promptly and fully. There is no evidence that the house suffered from water entry or damage at the time of the CES. The evidence is that any repair and maintenance items were carried out as required. The Trust says that at the time of the CES it was correct to say that the house was in good condition. There is no evidence to contradict that.

[142] I do not accept Vero's argument that its extension of the exclusion clause by the importation of an obligation of "correctness" changes that position.

[143] It is not the case that the carrying out of repair work from time to time puts the owner on notice that the house suffered from leaky home syndrome at all. The case law is clear that isolated instances of water ingress do not put the owner on notice of a systemic problem.

[144] In New Zealand the isolated discovery of a building defect is not sufficient to commence a limitation period running against the owner. From *Hamlin v Invercargill City Council* it is the case that the owner is only considered on notice of an actionable building defect from the time when the defect becomes so obvious that a reasonable homeowner would call in an expert.[28] In the case of a latent defect, this can have the result that a homeowner may not be aware of the existence of actual defects for some time. By analogy, this means the owner may undertake normal maintenance-type repairs without being put on notice of a building defect requiring action. A reasonable discoverability element applies.

[145] Even if, therefore, the Trust turned its mind to the existence of occasional leaks in the house, that does not give the Trust actual knowledge of the existence of a systemic failure of weathertightness.

[146] The Tribunal finds that the house was, therefore, in good condition at the time of the CES, or, at the least, the Tribunal finds that the Trust did not have actual knowledge of a failure of such magnitude that a statement that the house was in good condition was false.

[147] Allayed to that point is the final reason why Vero cannot avoid the policy. Vero submits that it is entitled to decline a claim if it can be shown that, objectively, the statement was not correct. Here, it says that if it can demonstrate that the house actually had weathertightness issues, a statement that the house was in good condition was objectively wrong and could entitle it to decline a claim.

[148] Vero seeks to distinguish *Sea Star* on the grounds that its statement exclusion clause is of broader ambit and extends the general duty of good faith to one requiring "correctness" at all times, be that in the making of a claim or during proceedings. It argues that the extension to the clause by the insertion of the words "complete and correct" imposes an objective test of accuracy.

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[28] [1996] 1 NZLR 513 (PC).

[149] That is not accepted in the context of this claim and these statements.

[150] Whilst it may follow that a demonstrably incorrect statement could entitle Vero to decline a claim – if such statement was used to either form a policy or make a claim under it – a general statement of opinion about a fact such as weathertightness cannot be used as grounds to decline if the evidence later proves that statement incorrect and that the maker of the statement did not know of that inaccuracy. No witness in this hearing was able to demonstrate pre-existing actual evidence of water entry to this house unrelated to CES damage.

[151] To hold that a later finding that the house was objectively defective following investigation by building and engineering experts as actionable by Vero against the homeowner would effectively be to turn the statement into a warranty or guarantee by the Trust. That cannot be a justifiable or a common sense interpretation of the statements exclusion.

[152] Weathertight problems are often latent. In the absence of actual evidence that it is incorrect and that the maker of the statement knew that, to hold a statement that a house is in good condition as grounds to decline a claim would put an insured in an impossible position and one that would lead to Vero being able to decline a multitude of claims based on unknown defects in an insured's house. Vero could have independently assessed the house before agreeing to provide cover, but there is no evidence that it did that.

[153] Vero's approach cannot have been the objective intention of the parties when they entered into the policy.

[154] Rather, it was that both parties were to act honestly towards each other and to give each other sufficient information to enable them to enter into or process claims under a contract of insurance. To hold that undiscovered defects about which an insured knew nothing and could not discover when giving a statement of opinion to allow declinature cannot be the intention of the statements exclusion.

[155] An example proves this point. Vero has given evidence about the junction of the stonework and fascia in the location of bedrooms 7 & 8 and submits that that supports a submission that the insured made an incorrect statement when it said that the house was in good condition.

[156] There is no evidence at all to show that the Trust knew that this junction was allowing water into the house, much less, that damage was occurring as a result of this allegedly defective junction. There is no evidence of damage manifesting itself inside the house at that location. Rather, the evidence is of water damage to the ceiling which lead the Trust to suspect failures of the roof above those locations.

[157] To hold that this unproven defect gives grounds to find that the Trust breached the statements exclusion would offend against common sense and accepted approaches to contractual interpretation. The insertion of the word "correct" in this clause by Vero does not change this.

[158] There remains following the conclusion of the evidence some serious doubt as to whether the house actually suffers from leaky house syndrome anyway. There are certainly some questionable construction details that experience suggest could allow water entry, but a lack of proof that that was occurring before the CES.

[159] Accordingly, for the reasons set out above, the Tribunal finds that Vero is not entitled to decline the claim on the grounds of the statements exclusion.

CES damage

[160] Having determined that Vero may not rely on the statements exclusion, the enquiry then turns to identifying the damage the Trust is entitled to recover from Vero under the policy.

[161] There are three types or categories of damage to be considered. They are:

(a) areas where the property has suffered accidental loss or damage from the CES;

(b) areas where Vero says the repair is excluded by the home defects exclusion. This exclusion entitles Vero to decline cover for:

(i) any failure of the house to contain or incorporate materials, a design, a system, or a standard of workmanship which effectively prevents or manages the presence or penetration of moisture or water to which the house might reasonably be subjected; and

(ii) loss caused by defect in design or inherent fault, defect in workmanship or gradual damage.

(c) areas where the repair of accidental loss or damage as a natural consequence repairs an area that would otherwise arguably be excluded by the home defects exclusion.

[162] The repairs sought are set out in a schedule prepared by Harrisons Quantity Surveyors.[29] That schedule incorporates Ms Crilly's advice and addresses the areas of repair in categories, being, external envelope, external works, internal works, P&G, margin, contingency and so on.

[163] Vero has adopted that schedule and commented on the areas where it accepts the work is covered by the policy and recoverable as required to address CES damage. That schedule is attached to this decision as Appendix A. It is the Harrisons Quantity Surveyors schedule, with the addition of numbering for the various items of damage claimed and the Tribunal's finding on whether each item is recoverable against Vero.

[164] There is no dispute amongst the experts that this house suffered damage from the CES. There are substantial areas of agreement between the parties' experts as to the damage and the remediation approach.

[165] There were three separate expert conferrals ordered by the Tribunal. The disciplines were:

(a) weathertightness experts conferral chaired by Graeme Calvert;

(b) structural engineers experts conferral chaired by John Henry; and

(c) a stonemasons conferral attended by the stonemasons instructed by the Trust and Vero.

[166] Each conferral generated significant areas of agreement such that effectively there is little dispute amongst the parties about the damage and the required repairs.

[29] Page 1193 EWCB.

[167] Vero raises arguments about the home defects exclusion and whether that applies to enable it to decline aspects of the repair methodology. It says that the house has existing weathertightness defects and departures from good trade practice in the way the house was built. That is discussed below.

Weathertightness experts' joint report

[168] The weathertightness experts instructed by the Trust and Vero, chaired by Graeme Calvert, met and jointly inspected the house. They produced a joint report dated 21 May 2020.[30]

[169] The joint report records the following areas of agreement:

(a) the house suffered from CES damage;

(b) water has entered the building from the exterior;

(c) there is cracking to the stone veneer and mortar joints;

(d) areas of the butyl roof are considered damaged by the CES; and

(e) a competent stonemason should be engaged to determine the appropriate repair strategy.

[170] The joint report records the following areas of disagreement:

(a) the extent of remedial works to the stone veneer cladding; and

(b) some areas of the house required further invasive investigation to determine the causes of water entry.

[30] Page 1203 EWCB

Structural engineers' joint report

[171] The structural engineer experts instructed by the Trust and Vero, chaired by John Henry met and jointly inspected the house. They produced a joint report dated 11 June 2020.

[172] The joint report records the following areas of agreement as to other repairs required to the house:

(a) northern bay window in dining room;

(i) the northern bay window in the dining room should be lifted up to 10mm;

(ii) a single underpin or pile should be installed to solid rock; and

(iii) grout any void below the foundation beam.

(b) there are no other areas to be releveled;

(c) cracks >1mm in the garage [floor] to be injected with epoxy; and

(d) plasterboard repairs to be completed in accordance with GIB guidelines.

[173] The joint report did not record any areas of disagreement.

Stonemason experts' joint report

[174] The stonemasons instructed by the Trust and Vero met and jointly inspected the house. They produced a joint report dated 16 October 2020.[31]

[175] The joint report records the following areas of agreement:

(a) the areas of CES damage to the stone cladding as agreed as set out in diagrammatic form as attached as Appendix B;

[31] Page 1169 EWCB

(b) the repair methodologies required to repair the agreed areas of damage; and

(c) A 20% contingency should be allowed for un-scoped and missed damage.

[176] The repairs agreed are as set out in Appendix B and are as follows:

(a) red cross hatched – agreed take down and rebuild, with new ties, new membrane – 10% allowance for replacement stone;

(b) green cross hatched – agreed no repointing or repairs required in these areas;

(c) orange solid – agreed full repointing to area; and

(d) pink cross lines – agreed Helibar repair (Trust) or take down 500mm either side and rebuild in modified mortar (Vero)

[177] The joint report records the following areas of disagreement:

(a) The need for full repointing of facades that have multiple repairs vs areas that can be colour matched.

[178] The areas of disagreement are in two areas:

(a) Elevations A-H where the Trust says the white areas require a full repoint of facades that have multiple repairs for aesthetic reasons and the blue circled areas have areas of loose stone that need to be removed and replaced. Vero says for the white areas only repointing of repaired areas is required with pointing colour-matched to address aesthetic concerns and the blue circled areas need colour-matched repointing.

(b) Elevations P-T where the Trust says the white areas require a full repoint of facades that have multiple repairs for aesthetic reasons and Vero says the white areas require only repointing of repaired areas with pointing colour-matched to address aesthetic concerns.

Repairs required

[179] With the background of the significant areas of agreement about damage to the Trust's house resulting from the expert conferrals and noting Vero's arguments about exclusions applying to the Trust's claims, the Tribunal now considers each item of damage set out in the Harrisons Quantity Surveyor's schedule, an amended of version of which is attached as Appendix A.

[180] The same headings and numbering as used in the Harrisons Quantity Surveyor's schedule is used in the discussion below.

Item 1 – Foundation - northern bay window in the dining room

[181] The Trust proposes to implement the recommendations of the structural engineers' joint report and has obtained a quote from Smartlift that adopts that methodology. The Smartlift quote includes engineering fees and the provision of a PS1 and PS4 for the work.

[182] Vero's proposal to do this repair was outlined by John Creighton, Vero's building consultant. However, Mr Creighton's methodology:

(a) does not mention grouting the void between the foundation beam and the ground; and

(b) does not give the detail outlined in the Smartlift quote, nor does it specifically adopt the structural engineers' agreed recommended approach.

[183] The work will likely require building consent and it will be necessary for a PS1 and PS4 to be obtained. There is a lack of detail in Vero's proposal, no mention of grouting the void between the foundation beam and the ground and no provision for Producer Statements to be issued.

[184] The Trust's approach to the repair of the northern bay window in the dining room is appropriate.

Item 2 – Heat pump condenser

[185] The Trust's quantum for this work was not justified at the hearing.

[186] The amount provided by Vero is accepted.

Item 3 – External tap removal

[187] This item is agreed between the parties.

Item 4 – Test pipework for leaks

[188] The Trust claims this amount, but there is no evidence of leaking pipes and so, on the balance of probabilities, this item has not been proven as required as a result of CES damage.

[189] The item is disallowed.

Item 5 – External services

[190] The Trust claims this amount, but there is no evidence to support what it is for or why it is required to address CES damage.

[191] The item is disallowed.

Item 6 – Planter boxes take down and rebuild

[192] This item is agreed between the parties.

Items 7 - 12 – Stonework and Item 26 - Scaffolding

[193] The joint stonemasons report recorded significant agreement as to the remedial work required and that joint agreement will be adopted.

[194] The only areas of disagreement were on:

(a) elevation A-H where the debate is whether the entire elevation should be repointed and loose stones refixed; and

(b) elevation P-T where the debate is whether the entire elevation should be repointed.

[195] The issue is whether the repointing may be done piecemeal and matched to the existing pointing or whether, in order to comply with the policy repair standard, any elevation having repairs done to it should be completely repointed to ensure consistency in colour. There is evidence that prior retouching of the pointing by Mr Coombs following the CES led to noticeable variances in colour in the areas retouched.

[196] Looking at the relevant authorities *Fitzgerald* and *Parkin*, the repair approach to repointing in this case is actually both a structural but also aesthetic endeavour.[32] The standard of repair applies to the purpose of the damaged component:

(a) where a component only has a functional purpose, the insurer's obligation is met by restoring that functional purpose to its "when new" condition; and

(b) when a component also has an aesthetic purpose, the remediation strategy must also restore the original aesthetic quality of the component.

[197] I consider that the aesthetic requirement of repair is met in this case by requiring any elevation having repairs to it being completely repointed. I am not satisfied from hearing the evidence that that is achievable in a piecemeal way, nor do I consider that repointing that results in colour differentials repairs damage to the house a "when new" standard. The fact that historical repointing resulted in colour differentials is not relevant, as it is the "when new" standard that must be achieved.

[32] *Fitzgerald v IAG New Zealand Limited* [2018] NZHC 3447; and *Parkin v Vero Insurance New Zealand Limited* [2015] NZHC 1675

[198] The repair of the loose stone areas is also necessary to meet the policy standard. Ms Crilly notes that the cladding construction is outside the scope of the Building Code acceptable solutions, which means that full design and building consent will be required for any remedial works to the cladding to demonstrate compliance with clauses B1 and E2 of the Building Code.[33]

[199] Vero objects to meeting the costs of replacing the membrane underneath the stone cladding on the grounds that it was allegedly not installed per the manufacturer's specifications and so falls foul of the home defects exclusion. Specifically, it says that it is excluded under the home defects exclusion because the installation of the membrane was a poor standard of workmanship which failed to prevent or manage the presence or penetration of moisture or water to which the house might reasonably be subjected. Ms Crilly's evidence is that the membrane is generally performing from a weathertightness perspective.

[200] The evidence is that the stone cladding is direct fixed to the membrane. The repair of this item is of the type set out in third category of the repairs options above, namely, an area where the repair of accidental loss or damage as a natural consequence repairs an area that would otherwise arguably be excluded by the home defects exclusion.

[201] It will not be possible to remove and reinstall the stone cladding without damaging the membrane. Hence, the membrane, irrespective of its condition in situ currently, would be damaged whilst remediating repairs accepted as covered by the policy. It is a recoverable loss.

[202] Finally, the use of a wrapped scaffold affords safety and efficiency to the repair and is appropriate.[34] It is to Vero's advantage that the remedial works progress in an efficient manner and wrapped scaffolding will assist that.

[203] The Trust's approach to repair of the stonework is appropriate.

Item 13 - Sills

[204] This item is agreed between the parties.

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[33] B1 for Structure and E2 for External Moisture
[34] Item 26.

Item 14 – Concrete heads

[205] This item is agreed between the parties.

Item 15 – Timber cladding

[206] Vero's position is that this replacement is not required if Mr Creighton's approach to repair of the butynol roofs is accepted. For the reasons that are set out below, they are not.

[207] It, therefore, follows that in order to achieve weathertightness in the areas above the butynol roofs, the plywood board and batten areas must be removed and replaced.

[208] The Trust's approach to repair of the timber cladding is appropriate.

Item 16 – Stain cladding to match existing

[209] For the reasons set out in Item 15 above, this work is appropriate.

Item 17 – Rainwater goods & Item 18 – Fascia/bargeboards

[210] These items are related and so are dealt with together.

[211] The fascia/bargeboards in the house are installed, effectively, flush with the stone cladding.[35] That is, it appears that the fascia/bargeboards were constructed first and the stone cladding was then fitted up flush with the fascia/bargeboards.

[212] The repair of the stone cladding may be undertaken without removing the fascia/bargeboards. That is because the stone cladding is to be replaced as it is now, without a cavity and so it will be replaced with the same profile vis-à-vis the fascia/bargeboards as it is now.

[213] Vero says that the fascia/bargeboards do not need to be removed to effect the repairs to the stone cladding. On the evidence, that is correct.

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[35] Affidavit of M Hadley sworn 14 August 2020, photographs 7 & 8.

[214] Vero also says that the fascia/bargeboards are a poor weathertightness design and so excluded and that it is not necessary to meet the costs of the remedial works to the fascia/bargeboards under the statutory requirements benefit.

[215] Accordingly, no order is made to take down and replace the fascia/bargeboards.

[216] The junction between the fascia/bargeboards and the reinstalled stone cladding will need to be replaced. I do not accept that it may remain as it is currently, as it will inevitably be damaged by the stone cladding works.

[217] Nor do I accept that, per *Fitzgerald*, the junction does not need to be repaired because of s 112 of the Building Act 2004. The junction will be damaged by insured work. It is a recoverable consequence of work that is covered by the policy.

[218] The rainwater goods amount is only partially recoverable.

[219] In order to properly and efficiently remove and reinstall the stone cladding and form a weathertight junction at the fascia/bargeboards/stone cladding interface, the rainwater downpipes will need to be removed. However, the rainwater gutters will not need to be removed to carry out the stone cladding repairs and so may remain in situ.

[220] The rainwater downpipes will need to be replaced following the repair of the stone cladding.

[221] Accordingly, in relation to Items 17 & 18, Item 17 is recoverable as to the removal and reinstatement of the rainwater downpipes, but not the rainwater gutters. Item 18 is not recoverable, other than in regard to the replacement of the junction (if damaged) between the fascia/bargeboards and the reinstalled stone cladding which will be required following the reinstallation of the stone cladding.

Item 19 – External windows and doors

[222] The Trust seeks recovery of the costs to have a joiner carry out an inspection of all exterior windows and doors to determine if racking has occurred. If it has, says the Trust, that joinery should be eased.

[223] Vero considers that this is not required, nor proven.

[224] The Trust's approach to easing of the doors at the entrance to the family room from the exterior is appropriate. It has proven that that door requires repair work.

[225] There is no proof that any doors other than the one door identified has an issue with racking. The Trust says that it is typical for joinery to be racked in an earthquake. That may be so, but the Trust bears the onus of proving the need for such work. It has not proven it to be required, other than for the doors at the entrance to the family room.

[226] It is not reasonable, given the high level of investigation that has occurred into the CES damage at this house to embark on further explorative remediation for this item. The Trust should be well aware of what doors were racked. If it had evidence of actual damage, it should have led it.

[227] The structural engineers determined that the building was "fairly stiff" and so it is reasonable to conclude that there would have been little racking of door frames as a consequence of the CES. Damage to internal linings does not necessarily mean that the door frames must be racked.

[228] The one area where this type of damage may yet occur is the dining room where the underpinning work is to be carried out to address dislevelment. Should damage to joinery occur in this area, it should be attended to as well and would be recoverable as consequential damage.

Item 20 – Butynol roofs

[229] There is significant debate about the butynol roofs on this house. The debate includes issues as to:

(a) whether the butynol roofs were damaged before the CES or defectively designed or installed such that a relevant home defects exclusion applies to prevent recovery; and

(b) the type of repair methodology that it appropriate, should repair of the butynol roofs be a recoverable loss.

Were the butynol roofs damaged or defective before the CES?

[230] Vero says that the Trust bears the burden of proving that the CES was the proximate cause of the popped fixings on the butynol roofs. It says that the majority of the popped fixings are located on the garage roof, with some evidence of popped fixings on the roof above bedrooms 7 & 8.

[231] Sealant repairs are visible on the roof of the garage, which Vero argues supports its case that the roof had failed or was failing before the CES and that, accordingly, further damage caused by the CES is not recoverable.

[232] The evidence is that inappropriate fixings were used when the butynol roofs were installed in 2001. At that time, both Mr Creighton and Mr Hadley both gave evidence that the wrong nails were used to fix the plywood substrate. Mr Hadley said that "bright nails" were used when in 2001 "[hot]-dip galvanised" nails should have been used. Ms Crilly noted that while screw fixing was the recommended method, it was nonetheless common for nail-fixing to be used and that the Council granted a Code Compliance Certificate for this method.

[233] Mr Hadley described the mechanism of failure, not as the nails piercing the membrane, but rather pushing upwards and stressing the membrane from underneath, causing it to perish and ultimately rupture.

[234] Vero's case is that the damage to the butynol roofs was pre-existing and that, in terms of the Wayne Tank causation principle, cover is excluded by virtue of the exclusions 4(a) and 5 in the policy.

[235] It also refers to two entries in the Orongomai schedule as showing that roof repairs were carried out. It notes the following entries:

(a) Andrew Coombs – Leaks repairs sth wall, flashings, hardware, butynol – 18/11/2006 ($2,513.25).

(b) Andrew Coombs – water leaks window repairs roof repairs new sump door adjustments – 20/02/2006 – ($4,263.75).

[236] However, neither entry is unambiguous as to what exactly was being done or where. The entries do not evidence that the existence of popped fixings was being attended to or that the butynol roofs had a systemic failure of the type required to invoke clauses 4(a) or 5 in the policy exclusions.

[237] The Trust argues that it must follow that CES damage occurred to the butynol roofs when one considers the internal damage to almost every room, the lounge/dining area dislevelment and the extensive damage to the stone cladding. It argues that the popped fixings are CES damage.

[238] It supports this by noting that, in relation to the butynol roofs above bedrooms 7 & 8, there is corroborating evidence of damage to the roofs as follows:

(a) ceilings in the location of bedrooms 7 & 8;

(b) damage to the fibre cement soffit lining below the roof claimed for, with evidence of dropping of sheet edges; and

(c) cracking and opening of junctions of wall and ceiling linings and at flat roof to pitched roof junctions in the rooms below the membrane-covered roofs where no repairs had been carried out.

[239] There is little doubt that there is significant water damage to the ceilings in bedrooms 7 & 8, but the issue for the Tribunal is whether the damage to the butynol roofs arose from CES damage or whether it was pre-existing but unknown and made worse by the CES. If it is the latter, Vero says that damage is excluded.

[240] The existence of incorrect fixings per se does not give rise to an exclusion unless it can be shown that they have caused damage. There must be a causative link between a building

defect (the use of incorrect fixings) and evidence of damage. The Trust needs to prove on the balance of probabilities that the incorrect fixings did not cause or contribute to the damage.[36]

[241] I consider that the Trust has proven that the butynol roofs were not allowing water to enter the house before the CES but that the CES has caused damage to the roofs such that the damage arising is recoverable against Vero. Ms Crilly's evidence is that the butynol roofs were damaged in the CES.

[242] Whilst it is noted that the experts consider that the building was relatively stiff, applying a common sense approach to the evidence of damage in the house and the likely cause of that damage, the Tribunal concludes that the butynol roofs were damaged by the CES and that Vero is not entitled to rely on any relevant exclusion to avoid cover for the damage to the butynol roofs.

[243] The damage to bedrooms 7 & 8 are a startling manifestation of damage arising from the CES.

[244] To support my view on this, I note that the substrate to the butynol roofs appears to be undamaged. That is consistent with there not having been an ongoing latent defect slowly damaging the substrate through the fixings working their way out of the substrate and damaging and rupturing the butynol allowing moisture entry, but rather that some sudden force damaged the butynol roofs which have allowed water to enter. Had the butynol roofs been allowing water entry following construction because of design or construction defects, it would be reasonable to conclude that the substrate would have been damaged, yet it appears not to be damaged. That supports a sudden CES effect damaging the butynol and then allowing water to enter the house.

[245] I conclude that the butynol roofs were damaged by the CES and that that damage is recoverable from Vero.

[246] As far as the substrate is concerned, the evidence was that it was not damaged. Of course, the experts were only able to examine the substrate from underneath and so they do not know whether it is damaged under the butynol membrane.

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[36] Section 11 Insurance Law Reform Act 1977.

[247] Should it transpire that the substrate is damaged such that it no longer meets the Building Code, then it will need to be replaced. Building work undertaken is required to meet the Building Code and if the substrate is damaged, it will not meet the Building Code and must be replaced.

What is the appropriate repair methodology?

[248] The issue now turns to how to repair the butynol membrane roofs.

[249] For the Trust, it is proposed to:

(a) lift adjoining metal roof sheets and flashings;

(b) remove and dispose of existing butynol roof and substrate;

(c) allow for framing remediation as required;

(d) allowance for furring to create required falls and for tilting fillets as required to create upstands;

(e) allow to create falls for valley flashing to join in;

(f) make flashing for complicated junctions; and

(g) new butynol roofing with upstands and finished at edges.

[250] Vero's proposal is:

(a) remove and replace butynol to areas above 2 ensuites, landing balcony area and garage roof. Replace with TPO to allow for minimum fall. Allow to cut butynol 100mm away from perimeter and lap new TPO under existing butynol;

(b) replace drip edge flashing;

(c) rescrew ply roofing with stainless screws;

(d) allow for edge protection; and

(e) remove and replace flashings as required.

[251] The key difference between the methodologies suggested is that the Trust proposes to replace the butynol roofing completely with associated works required to achieve that and Vero's proposal suggests cutting and patching the butynol by retaining the edges of the existing butynol and installing new TPO product up to 100mm of the existing butynol. Vero's submissions describe this as "removing the existing butynol and slipping TPO beneath it, with the join between the butynol and the TPO then being welded." This approach has the advantage that the existing membrane turnups are retained and the need to remove and replace the board and batten cladding is avoided.

[252] The difficulty for Vero in this approach is that Mr Creighton and Mr Hadley, Vero's two experts, were unable to confirm that this work would meet the Building Code or that a manufacturer's warranty for the work would be obtained.

[253] Mr Hadley was of the view that the complete replacement option would give greater certainty to the Trust.

[254] Mr Creighton confirmed in the hearing that his proposal was an Alternative Solution under the Building Code. While he stated that he had achieved compliance with this methodology on other projects, his evidence had very few details of the type of other work that had achieved compliance.

[255] Mr Creighton had not gone onto the roof at all to inspect the relevant areas, nor had he obtained any other independent support from a building designer, architect or engineer to advance his proposed repair methodology. He had no plans to support and outline his proposal. He could not identify with certainty the product intended to be used. He did not produce a specification sheet for the product he was suggesting be used.

[256] He also gave no details of how the new membrane would bond with the old membrane or whether the manufacturer would give a warranty for the joined membrane. He also did not explain how, in the areas of membrane that were not to be removed, it was possible to rescrew

the ply roofing with stainless screws. Overall, his evidence was lacking in the type of detail required for the Tribunal to accept an Alternative Solution to repair the damaged butynol roofs.

[257] The Trust refers to *M&M v IAG.*[37] That case, whilst of limited value as far as the actual repair methodology is concerned as it was different, gave guidance on what the Tribunal would expect were it to approve an Alternative Solution repair methodology, including:

(a) the Alternative Solution would be supported by plans and specifications prepared by a suitably qualified person who would provide a PS1 to the owners to support a building consent application;

(b) an assurance that the manufacturer would give a warranty for the product if used per the Alternative Solution; and

(c) a suitably qualified roofer prepared to undertake the work and give a warranty.

[258] The Vero repair proposed by Mr Creighton does not achieve any of these criteria and is not accepted as a reasonable approach to repair the butynol roofs damaged by the CES.

[259] Mr Creighton did not confirm that a manufacturer's warranty would be achievable for the repair he proposed. What he did make clear was:[38]

(a) "…the guy who installs the TPO gives you the full warranty on all the TPO area that he has laid."

(b) "…it doesn't cover the existing butynol but we're not replacing the existing butynol…well, so we wouldn't warranty an existing product but we do put a warranty on the join that gets laid and that's not a manufacturer's warranty and you won't get a manufacturer's warranty on any joints of any product".

[260] It follows from Mr Creighton's evidence that the Trust will have to accept a warranty from an unidentified installer and not the manufacturer for the join area of the old and new membrane. The capacity of the installer to meet the warranty is unknown, in particular, whether

[37] *M&M v IAG* CEIT 47-2019, Decision of CP Sommerville, 15/01/20.
[38] NOE304.

the installer has insurance. That is insufficient detail for the Tribunal to conclude that approach as reasonable or in compliance with the policy standard.

[261] It is correct that the work approved by the Trust to repair the damaged butynol roofs will incidentally remediate other building items that may be susceptible to challenge under Vero's home defect exclusion. But, the removal and replacement of the butynol roofs must necessarily affect those other areas, including Item 15 timber cladding and flashing and edge details. That cannot be avoided when recoverable insured work under the policy is being carried out that necessarily affects potentially excluded work.

[262] Accordingly, the Tribunal concludes that the Trust's remediation strategy is appropriate and is awarded. Should the substrate be damaged, it too should be replaced.

Items 21 and 22 – Metal roofing

[263] The Trust seeks recovery of amounts to check and tighten all roof fixings to metal roof sheet coverings, including refixing of barge cappings.

[264] Vero's position is that that level of work is neither evidenced nor reasonable. It also says that the work also seeks to address design or construction defects, both being excluded matters.

[265] For Vero both Mr Hadley and Mr Creighton gave evidence that the metal roofing was poorly installed. Mr Hadley said this was particularly the case in the junctions between the dormers, the membranes and the cladding. The Tribunal's weathertightness expert, Mr Calvert, considered that there were design and workmanship issues with the metal roof.

[266] All that said, it is reasonable to find that the metal roofs should be reviewed and any fixings that have loosened be retightened. Vero accepts that some amount is appropriate.

[267] On the balance of probabilities, I find that there will be evidence of metal roof fixings having moved and needing to be retightened. I award the allowance indicated by Vero for Item 21.

[268] Item 22 is accepted between the parties.

[269] Accordingly, the Tribunal finds an allowance of $1,500 for Item 21 for review of the metal roof and awards Item 22.

Item 23 – External envelope

[270] This item is agreed between the parties.

Item 24 – Soffits and Item 25 – Paint soffits

[271] These items are agreed between the parties.

Item 26 – Scaffolding

[272] This item is appropriate and is awarded.

Item 27 – Asbestos

[273] This house was constructed in 2001, after a requirement existed to test for the presence of asbestos. Asbestos Regulations only require testing for homes built before 2000 where they are being refurbished.

[274] Mr Calvert agreed that asbestos testing would not be required for this house due to its age.

[275] This Item is not recoverable and is not awarded.

Item 28 – Paving

[276] This Item is the uplift and replacement of decorative saw cut concrete hardstands at the entrance to the family room at the house.

[277] Vero says that this item was the subject of the non-EQC settlement entered into with the Trust. The Trust's building consultant, Ms Crilly agreed this item should be removed from the scope.

[278] This Item is not recoverable and is not awarded.

Item 29 – Gravel hardstandings

[279] Vero objects to the recovery of these items as they can be protected by plywood.

[280] It is reasonable to assume that it is more practicable for the repair work to proceed without needing to have tradespersons working around plywood sheets, which could pose a health and safety issue.

[281] It is noted that Vero's own repair strategy for the stone cladding requires 10 tonnes of split stone to be delivered to site.[39]

[282] This item is appropriate and is awarded.

Item 30 – Soft landscaping

[283] This item is recoverable because, whilst Vero entered into a settlement of its non-EQC liability for damage outside the house, these areas are going to be necessarily damaged by insured work.

[284] The settlement does not prevent the recovery of damage consequential on insured work being carried out.

[285] This item is appropriate and is awarded.

Item 31 – Protect trees/plants

[286] This item is settled under the non-EQC settlement with Vero.

[287] It is not accepted that this additional work is required as a consequence of the carrying out of insured works.

[288] This Item is not recoverable and is not awarded.

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[39] Page 1233 EWCB.

Item 32 – External works

[289] This item would have been settled under the non-EQC settlement with Vero.

[290] However, having heard the evidence of the scope of the remedial works, including of course the need to move both scaffolding and large amounts of heavy stone cladding around the site, it is reasonable to find that new, consequential damage to lawn areas will occur.

[291] Whilst Vero entered into a settlement of its non-EQC liability for damage external to the house, these areas are going to be necessarily damaged by insured work.

[292] The settlement does not prevent the recovery of damage consequential on insured work being carried out. Nor does the policy limit on landscaping damage apply, as this damage is a necessary consequence of the insured rebuild of the stone cladding.

[293] This item is appropriate and is awarded, but only to the extent that actual damage is suffered to this item from the repair works.

Item 33 – Fence

[294] The stonemasons agreed that this fence did not need to be removed to repair the stone cladding.

[295] That being the case, it is not required to carry out insured work and is not awarded.

[296] This Item is not recoverable and is not awarded.

Items 34 and 35 – Garage

[297] The Trust seeks to have the garage floor damage repaired by epoxy filling the cracks but also by diamond grinding the floor and decorating with a suitable concrete floor paint.

[298] Vero considers that only the epoxy filling is required to restore the floor to its when new condition.

[299] The Trust says that its approach complies with the approach recommended by the structural engineers. The structural engineers however only say that epoxy repairs are required, they do not mention repainting of the garage floor.

[300] Adopting again the approach set out in *Fitzgerald* and *Parkin*, I consider that the policy standard is met by the epoxy repair of the cracks in the garage floor. The application of specialist paint coating to the garage floor was not a feature of the garage floor before the CES and is not necessary to restore its functional purpose.

[301] Vero's approach to repair of the garage floor is appropriate.

Items 36 – 45 – Internal repairs

[302] The work scoped to repair internal linings is a mixture of unrepaired initial CES damage and later damage suffered following water ingress into the house. Both are CES damage. Both need to be repaired, but it will be necessary for the Trust to expend the remaining amount of $6,095.70 already paid by EQC to the Trust. That is because the Trust was paid that sum from EQC for this work, but has not yet undertaken repairs to those areas.

[303] The Trust's position is that:

(a) there is unrepaired CES damage to bedrooms 7 & 8 and ensuite 4; and

(b) there is water damage to internal linings in the kitchen arising from water entering through the cracked stone cladding.

[304] Vero's position is that EQC already scoped the work required to internal linings and made payment for that work, hence, the Trust must expend those funds first. That is accepted by the Trust.

[305] It also says that the only unrepaired areas of the house are bedrooms 7 & 8, ensuite 4 and the adjacent storeroom and that no work is required or should be ordered, noting as well that any workmanship defects should be raised with the Trust's contractors. That later submission is correct.

[306] However, Vero's approach overlooks the damage suffered to the kitchen, which was not repaired and is CES damage.

[307] It is appropriate that bedrooms 7 & 8, ensuite 4 and the kitchen internal linings be repaired, to remediate CES damage either not repaired before or water damage arising from the non-repair of parts of the building envelope.

[308] No order is made for the repair of bedroom 2 or the hallway and stairs.

[309] The family room is likely to be damaged by the repairs required to attend to dislevelment in that area. It is appropriate to repair internal linings and joinery in that room, should they be damaged during those repairs.

[310] The approach of the Trust to repair of internal linings in bedrooms 7 & 8, ensuite 4 and the family/dining room (if required) is appropriate.

Item 46 – P&G figure & Item 47 – Margin

[311] In this claim, the Trust seeks an order that the work set out in the schedule that is Appendix A be carried out to repair CES damage to the house.

[312] Vero has elected to meet the costs of the work ordered as appropriate.

[313] This decision sets out the work considered as recoverable insured work under the policy.

[314] The numerical amount of the work will follow when the Trust carries out the work and will need to be supported with very clear information setting out exactly what work is carried out, whether it is within or without the ambit of the recoverable insured work as directed by this decision and what the costs of that work is.

[315] Should that occur, then the quantum totals allocated to Items 46 and 47 are not relevant.

[316] Vero has accepted both the P&G figure of 10% and the margin figure of 10% and they are awarded.

[317] How the P&G and margin amounts apply depends on the work to which they are allocated.

[318] Accordingly, the Tribunal awards:

(a) P&G recovery at 10%; and

(b) margin of 10%.

Item 48 – Contingency sum

[319] Vero submits that no amount should be included here as the policy is a cost incurred policy and the Trust is entitled to recover those amounts incurred in carrying out the awarded repairs. Any amount incurred that is not expected or provided for will be recoverable if it is within the ambit of the awarded repairs.

[320] Accordingly, all that is required is an order that Vero pay to the Trust such amounts as are properly incurred by the Trust in carrying out recoverable insured repairs. Should further unforeseen but recoverable insured work be found, then Vero will need to pay for that.

Item 49 – Professional fees

[321] This item can be dealt with in the same way as the contingency sum was. If properly incurred, they are payable by Vero.

[322] Accordingly, all that is required is an order that Vero pay to the Trust such amounts by way of reasonable professional fees as are incurred by the Trust in carrying out insured repairs.

Item 50 – Building consent

[323] Again, for the reasons set out above, if properly incurred, Vero must meet these costs.

[324] The Trust should make reasonable efforts to obtain an exemption from the need to obtain a building consent for the remedial works. If, however, the territorial authority concludes that a building consent is required, then Vero must meet the costs of that.

Item 52 – Insurance

[325] This item is agreed between the parties at the percentage figure recorded of 0.75%.

Item 53 - GST

[326] Again, this figure will vary depending on the actual costs of the awarded works.

Result and Orders

[327] The Trust succeeds in obtaining orders of the Tribunal that the house was damaged by the CES and that the proven CES damage is recoverable under the policy.

[328] Vero is not entitled to decline the Trust's claims in reliance on the statements exclusion.

[329] Vero's policy provides that it may elect to pay the cost incurred in rebuilding the damaged portion of the house using currently equivalent building materials and techniques to a standard or specification similar to but no more extensive, nor better than its condition when new. Vero has made that election.

[330] The clause does not include a requirement that remedial works be carried out by contractors selected by Vero. Rather, the Trust may retain the contractors it chooses.[40]

[331] Vero must pay for repair costs actually incurred. It submits that the Tribunal is being asked to determine the scope of work which is to be paid by Vero under the policy. This decision does that.

[332] The orders are in the nature of an order for specific performance of the insurance policy. Vero is not being asked to do something other than pay money, it is being asked to meet the costs, when incurred, of the directed repair works.

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[40] *Parkin v Vero [2016] NZHC 1675* at [46]-[47], M&M v IAG New Zealand Limited CEIT 0047-2019 at [25]-[28].

[333] The work itself is set out in the expert evidence of Ms Crilly and the Harrisons Quantity Surveyors schedule, as amended by the Tribunal to record the recoverable insured work under the policy and attached as Appendix A.

[334] The Trust must expend all amounts it received from EQC that it holds that are currently unspent on the repairs. In this context, that expression means CES damage as awarded in Appendix A. It may elect to undertake other work to the house not awarded by this decision, but it may not use the EQC payments to fund that or require Vero to meet those costs.

[335] Hence, the sum of $200,000 + GST, a total of $230,000 must be spent on CES damage awarded repairs to the house before the Trust may seek recompense from Vero.

[336] Vero may deduct two excesses of $500 against any claims made by the Trust for recompense for costs incurred, as the Tribunal is awarding CES damage repairs for two events.

[337] There is no award for alternative accommodation. This house is not Mr and Mrs Ds' primary residence, it is their weekender. Further, the experts agree that the house would be capable of habitation during the works.

[338] EQC's counsel filed a memorandum in closing advising that between it and the Trust, only issues remaining are the issues of the remaining High Court costs and interest.

[339] Leave was granted to have the Tribunal determine any remaining matters. EQC and the Trust are directed to advise the Tribunal if its assistance is required to determine any remaining matters.

Costs

[340] The Trust seeks costs. The Tribunal has very limited scope to order costs payable in this jurisdiction[41].

[341] Should any party wish to seek costs, they may file written submissions not exceeding 10 pages within 15 working days of this decision. Any submission in reply to a submission

[41] Canterbury Earthquakes Insurance Tribunal Act 2019, section 47

seeking costs is to be filed within 10 working days of receipt. The Tribunal will then determine costs on the papers.

P R Cogswell
Member
Canterbury Earthquakes Insurance Tribunal

Appendix A - Summary of recoverable insured work to repair CES damage to the Trust's house

Item Number	Scope item claimed	Scope item cost claimed	Vero's scope item/ cost entitled to	Awarded Scope Item (T = Trust methodology) (V = Vero methodology) (A = Agreed between parties) (NA = Not Awarded)
	Foundation			
1.	Relevel house in accordance with Engineer's Outcome Statement dated 29/01/2020; as per Smartlift quote	15,435.50	7,865.00	T
	Services			
	Electrical			
2.	Disconnect heat pump condenser units; set aside and reconnect on completion of works to claddings - Bed 3	2,120.00	650.00	V
	Plumbing			
3.	Disconnect external taps to allow for repairs to stonework cladding and reinstate on completion of works.	390.00	390.00	A
4.	Test and confirm no leaking pipework in floor void at ensuites due to earthquake-related damage (water damage noted to ceilings below ensuites 4 and 5).	780.00	0	NA
	External Services			
5.	Disconnect, take down, store and reinstate all services fixed to external claddings and reinstate/ reconnect on completion of works.	2,540.00	0	NA
	External Envelope			
	Wall Cladding			
	Stone Cladding			

6.	Planter boxes take down and rebuild	1,680.00	1,680.00	A
7.	Agreed areas of takedown and rebuild	116,760.00	116,760.00	A

8.	Agreed areas of repointing	42,120.00	42,120.00	A
9.	Agreed areas of helifix/take down along cracking	19,800.00	19,800.00	A
10.	Agreed areas on no repair or repointing about Remaining areas in dispute - being the balance	14,760.00	0	T
11.	Allowance of 10 tonne stone delivered for rebuild quantities	4,000.00	4,000.00	T
12.	Replace waterproofing membrane	12,844.00	0	T
	Sills			
13.	Replace cracked concrete sill to kitchen window; allow to take out and reinstate existing kitchen window to remove sill.	980.00	980.00	A
	Concrete heads			
14.	Rake out and epoxy crack inject crack approx. 50mm long to corner of concrete head over main entrance; redecorate on completion of repair - Provisional Quantity	250.00	250.00	A
	Timber Cladding			
15.	Replace plywood board and batten cladding complete above butynol roof to garage to accommodate replacement of butynol roof coverings - Provisional Quantity	5,040.00	0	T

16.	Provide new stained finish to cladding to match existing.	1,050.00	0	T
	RW Goods			
17.	Take down, set aside and reinstate rainwater goods as required (copper) to accommodate repairs to cladding.	7,562.50	2,540.00	V

	Fascia/ Bargeboards			
18.	Take down, set aside and reinstate timber fascia and bargeboards as required to accommodate repairs to cladding (including finishes)	8,957.00	0	NA
	Joinery			
	External Windows and Doors			
19.	Ease and adjust all timber doors.	3,590.00	0	Family Room Door only and Dining Room joinery only if affected by Item 1 work
	Roofs			
	Butynol Roofs			
20.	Replace butynol, new substrate and upstands	40,562.72	0	T
	Metal Roofing			
21.	Allowance to check and tighten roof fixings to remaining metal roof sheet coverings, including refixing barge cappings, as required.	6,887.87	1,500.00	V
22.	Replace section of ridge flashing where lifted / deflected 2 Nr (isolated locations to garage roof)	440.00	440.00	A

	External Envelope			
23.	Replace chimney flashings to accommodate chimney rebuild including lifting and reinstating roof sheets as required.	1,480.00	1,480.00	A
	Soffits			
24.	Take down cracked sheets of fibre cement soffits and replace at garage (2 Nr sheet); refix remaining soffits.	630.00	630.00	A
25.	Paint all new and existing soffits at garage with 3-coat system.	525.00	525.00	A
	Access			
	Scaffold			
26.	Provide scaffolding, including boards and ladders to a height to allow access plus support to covers over walls, as necessary to effect the safe and efficient execution of these works.	44,694.00	38,000.00	T
	Asbestos			
27.	Allow for carrying out a pre-refurbishment asbestos survey as required by current H&S legislation.	1,200.00	0	NA
	External Works			
	Concrete and Paving			
	Paving			
28.	Uplift existing decorative saw cut concrete hardstandings (cracked) at entrance to family room on the northeast elevation and replace on completion of stonework repairs.	5,160.00	0	NA
	Gravel hardstandings			
29.	Make good to gravel hardstandings and 3 Nr paving slabs as required at entrance to laundry on southwest elevation	1,020.00	0	T

	Soft Landscaping			
30.	Remove planting and flower beds to allow access to excavate for works to stone cladding and relevelling.	2,900.00	0	T
31.	Allow to protect trees / plants not to be removed.	1,460.00	0	NA
	External Works			
32.	Lawn areas, 150mm topsoil layer, replace, spread and level, sown with grass seed - Provisional Quantity	3,000.00	0	T – only for actual damage suffered
	Fence			
33.	Remove and reinstate timber trellis fence as required to accommodate repairs to stonework - at Laundry room entrance	920.00	0	NA
	Interiors			
	GROUND FLOOR			
	Garage			
	Floor Slab			
34.	Rake out and epoxy inject all cracks greater than 1mm wide - Provisional Quantity	645.00	0	T
35.	Prepare existing concrete slab (diamond grinding) and decorate with a suitable concrete floor paint; 3 coat finish in accordance with manufacturer's instructions.	7,000.00	2,450	V
	Bedroom 2			
36.	Internal repairs	1,679.00	0	NA
	Hallway and stair / landing			
37.	Internal repairs	1,788.00	0	NA
	Kitchen			
38.	Internal repairs (includes replacement of water damaged plasterboard)	1,150.00	0	T
	Family Room			
	Floor Slab			
39.	Lift existing carpet floor coverings and store; reinstate on completion of works.	1,050.00	1,050.00	T

40.	Rake out and epoxy inject all cracks greater than 1mm wide - Provisional Quantity	430.00	430.00	T
41.	Internal repairs (racking out cracking and stop, painting)	2,221.00	0	T – only if affected by Item 1 work
	Joinery			
42.	Gap fill and redecorate timber sillboard at bay following relevelling.	110.00	110.00	A
	FIRST FLOOR			
	Bedroom 7			
43.	Internal repairs (includes replacement of water damaged linings)	4,262.00	0	T

	Bedroom 8			
44.	Internal repairs	3,054.00	0	T
	Ensuite 4 (off Bedroom 8)			
45.	Internal Repairs	902.00	0	T
	Subtotal	**395,829.59**	**243,650.00**	
46.	P&G 10%	39,583.10	24,365	10%
47.	Margin 10%	43,541.50	26,801.5	10%
48.	Contingency Sum 15%	71,843.55	0	NA
49.	Prof Fees 10%	55,080.10	10,000	As reasonably incurred
50.	Building Consent	7,500.00	6,000	If required by territorial authority
51.	CWI / CAR 0.75%	4,600.37	2,148.39	0.75%
52.	GST	92,697.45	43,289.98	As incurred
	TOTAL	**$710,861.00**	**$331,889.87**	

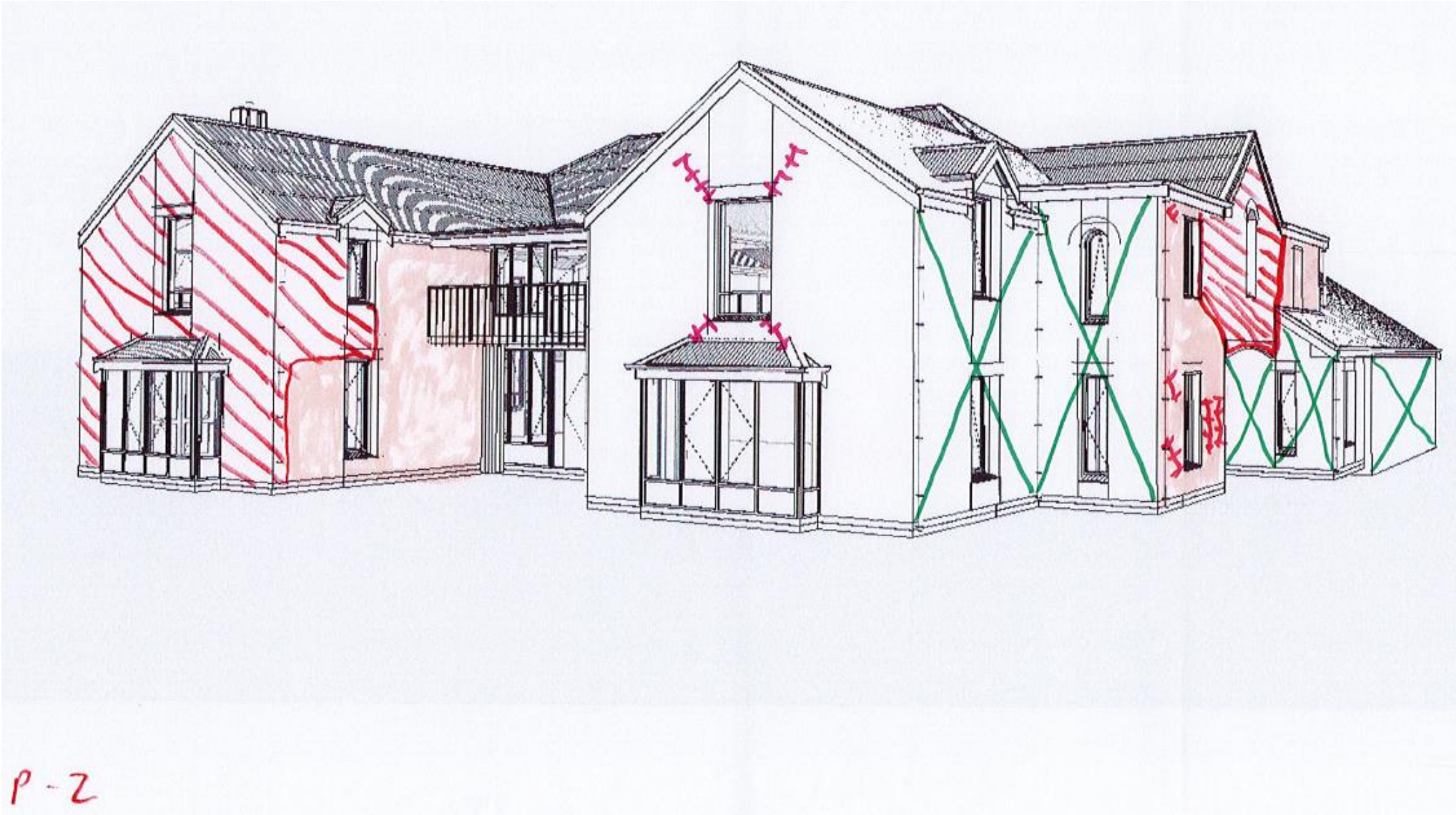
Appendix B – Stone cladding repair

A-N

1-N

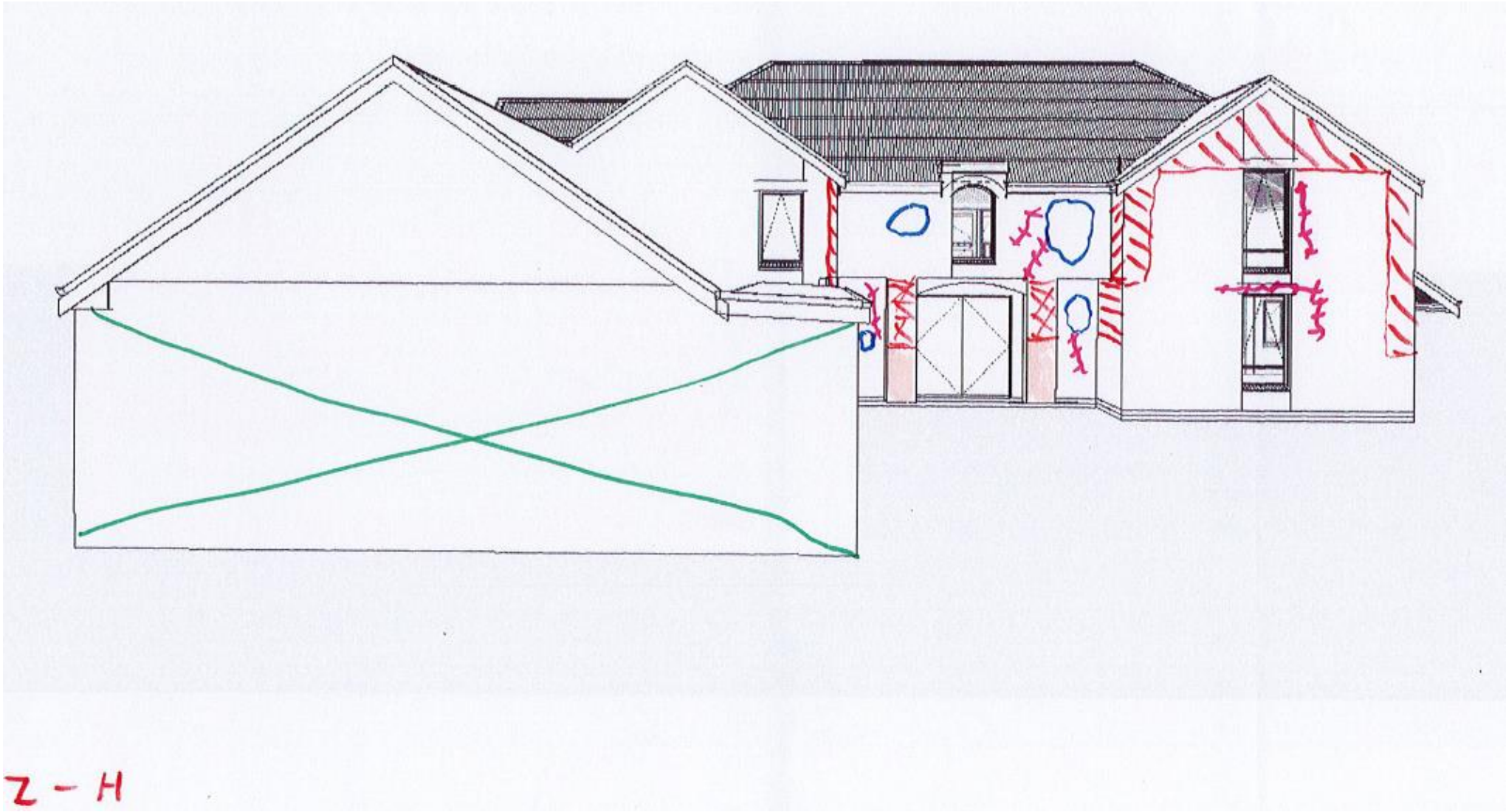
1-N

P-1

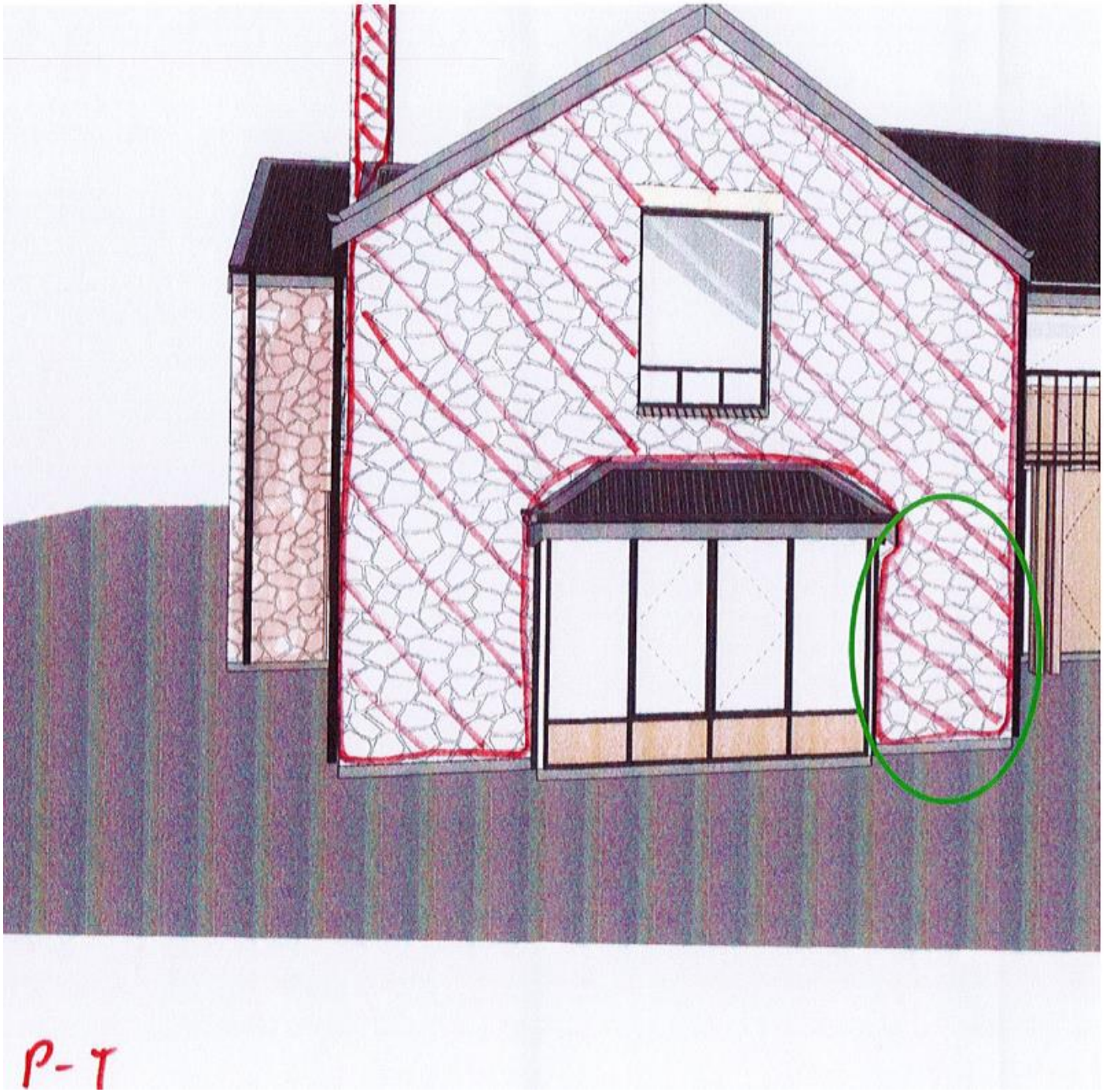


P-2

W-Z



Z - H


P-1