IN THE CANTERBURY EARTHQUAKES
INSURANCE TRIBUNAL CEIT-0014-2020

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	WD Applicant
AND	IAG NEW ZEALAND LIMITED Respondent

Hearing: 18, 19 and 25 March 2021 and 3, 4 and 18 June 2021
Further submissions 23 August 2022

Date: 21 December 2022

Representatives: Peter Woods and Kate Vilsbaek for the Applicant
Brad Cuff, Hannah Stanford and Matthew Booth for the Respondent

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DECISION
Member C A Hickey

Table of Contents

WD's claim

[1] WD's home was damaged by earthquakes in the Canterbury Earthquake Sequence (CES), beginning with the severe 22 February 2011 earthquake, which caused the most significant damage.

[2] WD's view is that his home was so damaged by the CES that it must be rebuilt. He does not consider that the repair strategy proposed by IAG's structural engineer meets the policy standard. He says IAG has a policy that when repair costs amount to 80% or more of the cost of a rebuild that IAG will pay for a rebuild instead. Therefore, IAG should pay him what it will cost him to rebuild his house.

[3] IAG disputes that it is obliged to pay to rebuild WD's house and says IAG's repair strategy, and its cost, are reasonable.

[4] If the Tribunal finds that rebuilding his home meets the Policy standard, WD claims some of IAG's proposed repairs are insufficient and that other repairs are necessary.

[5] WD also claims that IAG should pay him to rebuild or repair his house immediately upon entering into a contract to do the work. In contrast, IAG considers it should pay such costs as they are incurred as progress payments and that IAG needs to approve the builder.

[6] WD claims that IAG should reimburse him for the costs of expert reports and temporary repairs he incurred during the last 11 years. WD also claims interest on these amounts from the date he paid for the materials and/or labour.

[7] Neither party seeks costs related to these proceedings, although WD seeks expert costs incurred prior to his application being filed in the Tribunal.

The Policy

[8] WD's house was insured at the relevant times under an NZI Supersurance House policy. The Policy applies to sudden unexpected and unintended physical loss or physical damage that is not excluded and that is in excess of any Earthquake Commission (EQC) payments.

[9] The Policy includes:

If the house can be repaired:

> If the house can be repaired, **we pay the reasonable cost of repair. We choose either to repair it, or to pay you the cost to repair it.**
>
> If you do not repair the house, the most we pay is the present value, plus the reasonable cost of any demolition and the removal of debris and contents which is necessary…

If the house cannot be repaired:

> If the house cannot be repaired, we pay the reasonable cost to replace it with a new one at the situation. We choose to either replace it, or to pay you the cost to replace it.
>
> If you do not replace the house, the most we pay as the present value, plus the reasonable cost of any demolition and removal of debris and contents which is necessary.
>
> If **we** settle a claim by paying for repair, **we** automatically reinstate this insurance without making any extra charge to **you**.

How repair or replacement is made:

> We pay for repair or replacement **using materials and methods which are in common use at the time of the loss.**
>
> Repair or replacement will be **to the same condition and extent as when the house was new**. If this is not practicable, repair or replacement will be as close as is reasonably possible to that condition or extent.
>
> You must take all reasonable action to allow repair or replacement work to be carried out promptly.
>
> (emphasis added)

The hearing

[10] I heard evidence from WD, from three structural engineers Mr Lust, Mr de Vocht and Mr Frost. These engineers were retained respectively by WD, IAG, and by the Tribunal. I also heard from:

- Stewart Harrison, a quantity surveyor engaged by WD to give evidence of the cost of repair using IAG's reinstatement strategy and the cost of a rebuild;

- Nathan Cumming, WD's preferred builder; and

- John Creighton, a builder engaged by IAG to provide costings for the repair.

[11] All the witnesses were sworn in or affirmed. All the witnesses apart from WD gave evidence after confirming that they understood their duties to the Tribunal as expert witnesses. The engineers were very helpful in their evidence during the hearing. They discussed several relevant issues that arose during the hearing that they had not initially covered in the facilitation process or in their written evidence prepared for the hearing. They also gave evidence on the issues that remained in dispute between them, such as the extent and cause of the differential settlement of the ground floor slab.

[12] Mr Harrison, Mr Cumming and Mr Creighton were also helpful. Each of them made appropriate concessions after discussions about how Mr Harrison and Mr Creighton had calculated their costs. Mr Harrison and Mr Creighton cooperated to produce a further joint statement with amended costings. Mr Cumming agreed that he could repair the house at the hourly rate Mr Creighton used, of $55 per hour (exclusive of GST), and made other appropriate concessions, including on the number of weeks scaffolding would be needed.

Matters resolved or withdrawn during the hearing

[13] At the hearing, both parties gave opening statements that defined the remaining issues from their points of view. However, as the case progressed some issues were agreed, some fell away, some were withdrawn, and some were redefined.

[14] On the first day of hearing after some questioning of WD, counsel told me that WD wished to withdraw his claim for general damages against IAG.

[15] Later in the hearing process I was informed that WD had withdrawn a claim for the maximum amount of alternative accommodation costs as he agreed that IAG had already paid that.

[16] On the day set aside for submissions Mr Woods informed me that WD would not pursue the claims for the replacement of the oven, the dishwasher, the hot water cylinder and the

garage door. WD acknowledged that those claims were more appropriately part of one of his Earthquake Commission (EQC) claims.

[17] WD and Mr Cumming agreed that the 10% contingency that Mr Creighton had allowed for was sufficient so did not continue to pursue the 15% contingency allowance recommended by Mr Harrison.

[18] In its opening statement at the hearing, IAG confirmed that under the Policy it is obliged to and will pay:

- the cost WD incurs in reinstating the house to the Policy standard of "to the same condition and extent as when the house was new"

- the extra costs to rebuild the house needed solely to comply with any statute or local body regulation, and

- other necessary and reasonable costs including architects, engineers and surveyors fees, demolition and removal of debris, and up to $2,000 (including GST) to restore or reconstruct any part of the garden or lawn at the situation which is damaged or destroyed.

Does IAG's proposed repair strategy meet the Policy standard?

[19] There is no question an insured loss has been suffered that caused structural damage to WD's property. However, WD must prove that all the losses he claims are insured losses or flow from work required to remediate insured losses (so-called "enabling damage"). He also needs to prove the extent of those losses.[1] Then he must establish what is required to remedy that damage.

[20] The issue of whether IAG's proposed repair strategy meets the Policy standard is the key issue I need to decide and is not necessarily part of an engineer's expertise, although I have used expert engineering evidence to reach my decision.

[1] *He v Earthquake Commission* [2017] NZHC 2136.

[21] To understand the extent of earthquake damage to the property and the proposed repair strategy it is useful to describe the building's structure.

[22] The property is a two-storey dwelling on a hill. The back of the house is cut into a sloping site, with a retaining wall and a structure that supports the adjacent area of the first floor. The ground floor is a concrete slab on grade. On the ground level there is a garage, a small self-contained flat and a car port. The ground floor walls are concrete block.

[23] WD and B live on the first floor, which has timber framed walls and fibre-cement cladding with battens at the joints. The roof is corrugated iron with timber roof trusses.

[24] WD and B have the exclusive use of the garage. Prior to the earthquakes the flat was rented, although it was empty at the time of the February 2011 earthquake. Given its state of disrepair, it has not been able to be rented out since.

[25] The Tribunal is able to assess whether the respondent's proposed repair strategy would be more likely than not to meet the Building Code and, therefore, get building consent. However, ultimately Building Act 2004 compliance is a matter for the consenting authority, the Christchurch City Council.[2]

[26] The repair work needs to comply with the Building Act, the Building Code and all other government and local authority by laws and regulations. It goes without saying that the work will also have to be carried out competently.

[27] IAG engaged Ivo de Vocht, a structural engineer, from Miyamoto International New Zealand Limited (Miyamoto) to prepare detailed designs for its proposed repair methodology to the standard necessary to receive building consent. The designs were provided to the Tribunal and to WD in late August 2020. WD's structural engineer, Endel Lust, disagreed that the repair scope and plans were enough to meet the Policy standard. Mr Lust's general disagreement was that the planned repair was "patchwork" and would not give WD's house the same kind of strength a newly rebuilt property would have. Therefore, Mr Lust says that the repair does not meet the Policy standard.

[2] Minute of Member Hickey dated 13 August 2020.

[28] The parties agreed that the Tribunal should appoint an independent engineer to facilitate agreement between their structural engineers on the extent of structural damage and on a repair strategy. The Tribunal appointed Murray Frost from Engineering New Zealand's panel of engineers.

[29] In the first facilitation outcome statement, the three engineers largely agreed on the damage but did not fully agree on the appropriate repair strategy, because of Mr Lust's ongoing "patchwork" concern.

[30] The three engineers agreed the design package for reinstatement should be updated to include additional work. The Miyamoto design package was updated to reflect this further engineering work.[3] Therefore, the only repair strategy considered in these proceedings was the Miyamoto one.

[31] I directed the engineers to meet again to answer five questions identified and agreed to by the parties and their counsel as the key concerns. On 2 December 2020 Mr Frost issued a second facilitation outcome statement that gave agreed answers to questions 1, 3, 4 and 5.

[32] Question 2 asked what the extent of earthquake-related dislevelment was to the ground floor, particularly in the garage and the hallway/kitchenette area. The engineers could not agree on that or on a reinstatement methodology for that aspect of the repair.

[33] Therefore, the parties asked the Tribunal to direct Mr Frost to give his own answer to the question about the extent of earthquake-related dislevelment of the ground floor around the garage and the hallway/kitchenette area downstairs.

[34] On 11 February 2021 Mr Frost provided his report on that question. WD and Mr Lust do not agree with Mr Frost's opinion, so this issue was examined during the hearing.

[35] I find that Mr Lust's view that a rebuild, as opposed to a repair, would be a stronger building is not the test for whether the Policy standard of repair "to the same condition and extent as when the house was new" will be met by the repair scope.

[3] Transcript, 175, line 21, Mr de Vocht.

[36] The phrase "as when new" has been the subject of recent CES-related case law that has clarified its meaning, when contrasted with another common standard in insurance policies of "as new." The meaning of "as when new" is that the property has to be restored to the condition it was in when it was originally built.[4] Therefore, if the Miyamoto repair strategy will restore the property to the condition and, therefore, the same strength it was in when it was originally built it will meet the Policy standard.

[37] IAG is not bound under WD's policy to deliver a repaired house that is as strong as a new house built today.

[38] After extensive consideration of the evidence, principally the weight of the engineering evidence, and the parties' submissions I am satisfied that the Miyamoto repair strategy is more likely than not to meet the Policy standard of "as when new."

Does WD have to use and rely on the Miyamoto engineering scope, plans and drawings that IAG produced for these proceedings?

[39] The Policy states, at C4 the "other costs covered":

> We also pay any of these other costs which result from accidental loss to the house… Payment is in addition to any payment made to repair or replace the house.
>
> We pay for any of these if it is *reasonably and necessarily incurred* to repair or replace the house: …
>
> 2. architect's, engineer's and surveyor's fees;
>
> (emphasis added)

[40] Miyamoto's contract for the repair strategy design work done so far was with IAG, not with WD, and was undertaken specifically for these proceedings, so IAG could prove that its proposed repair strategy would be likely to get building consent. While it provides the basis for a consent application, additional work would be necessary for a complete consent application.

[4] See *Parkin v Vero Insurance New Zealand Limited* [2015] NZHC 1675.

[41] IAG acknowledges that the Policy allows WD to select and engage the builder, architect, structural and geotechnical engineer and any surveyor needed to repair the house and garage. The parties agree no geotechnical engineering work is necessary for the repair.

[42] IAG says the correct interpretation of the Policy is that it only has to pay for WD's chosen engineer if those costs are reasonably and necessarily incurred for the repair of the house. IAG submits that because all three engineer witnesses, including WD's own engineer, agree that the Miyamoto design package is likely to get a building consent IAG is not liable to pay for another engineer of WD's choosing because such costs would not be reasonably and necessarily incurred.

[43] WD says that under the Policy he remains entitled to engage an engineer of his choice at IAG's cost.

[44] I reiterate that I have found, based on the three expert engineer's evidence, that the IAG/Miyamoto repair strategy will be likely to get a building consent. It is also my decision that the strategy executed competently will meet the Policy standard. Therefore, I find that any "from scratch" engineering costs incurred by WD engaging another engineer to design a repair strategy would not be reasonably and necessarily incurred. So, any such costs are not payable by IAG.

[45] IAG should ensure that a digital version of the plans and drawings done by Miyamoto for evidence in these proceedings are supplied to WD and his chosen engineer within five days of this decision.

[46] However, I find that WD is entitled to have an engineer of his choice review the Miyamoto designs and do whatever work is necessary to present them to the Christchurch City Council to gain building consent. IAG must reimburse WD the reasonable cost that he incurs for this work within five days of him presenting it with an invoice for this work.

[47] It is possible that there may be further engineering and/or design work necessary prior to or once the application has been made to the Council, despite the expert engineers' agreement and my decision that the Miyamoto design package is likely to gain building consent. If so, IAG needs to fund any alterations to plans or further engineering design work required by the

Council to gain consent to the repair strategy over and above the amount WD incurs for preparatory work prior to the submission of the plans for consent also within five days of him presenting it with an invoice for this work.

[48] WD can seek variations to the repair design/s as he wishes that are additional to repair strategy established in these proceedings so long as any costs, including engineering costs, are paid by him and not by any money he receives from IAG.

[49] Any structural engineering costs incurred that are not yet known about are covered by the contingency sum.

[50] Further, WD's chosen engineer will carry out the inspections that will be required during the repair process. The parties agreed that IAG should pay the cost of that work as it is reasonable and necessary for the repair strategy. However, they did not agree on the number of site visits that will be necessary for the engineer to make or the reasonable cost of those visits overall.

Further issues to be decided

[51] The following issues the parties disagree on need to be decided:

1. How should the Tribunal decide on the reasonable cost of repair?

2. If the reasonable cost of repair amounts to 80% or more of the cost of a rebuild, is IAG obliged to pay to rebuild the premises instead?

3. Does IAG have to approve the builder chosen by WD?

4. When should IAG pay WD, up front or as he incurs costs?

5. Is IAG liable to pay WD his costs incurred in making temporary repairs?

6. Is IAG liable to pay WD his costs incurred in engaging advisers and experts prior to lodging his claim with the Tribunal?

How should the Tribunal decide on the reasonable cost of repair?

[52] I need to objectively assess the reasonable cost of the Miyamoto design. I have evidence of repair costs from the applicant and his experts. To test WD's evidence I must consider the evidence raised by the insurer, and its expert.

[53] WD has used a quantity surveyor for evidence of the cost of repair. Mr Cumming did not provide his own costing but rather relied on the estimate provided by Mr Harrison. In contrast, IAG has used a builder who provided a "fixed price quote".

[54] We spent a considerable amount of time at the hearing considering and testing evidence from Mr Harrison and Mr Creighton in relation to the cost schedules they had developed. During the hearing Mr Harrison and Mr Creighton co-operated on a joint document that incorporated the areas of agreement and disagreement. However, the final costing schedules I received were from each of them separately. Where the experts' opinions differ, I need to decide whose evidence I prefer and what weight I will give it.

[55] Mr Harrison and Mr Creighton used different formats for their costing. Mr Harrison's format is a standard template used by quantity surveyors, NZ Standard 4202. The template allows for itemised scoping to be provided. This aids with the transparency of costs as the reader can see on a line-by-line basis, what actions need to be taken, what materials are to be used and what the cost will be.

[56] Mr Harrison's costing is stated to be an estimate, as is common practice for quantity surveyors. His evidence consists of market rates and is based on the norms and standards of his profession as a quantity surveyor.

[57] Mr Creighton presented his costing report as a "fixed price quote." He gave evidence that he had provided the quote "intending that we may be asked to do the job."[5] Mr Creighton's quote combined several aspects of the repair that Mr Harrison's document set out separately, which made a line-by-line comparison difficult.

[5] Notes of Evidence at 419.

[58] Mr Creighton's evidence was that he used his years of experience as a qualified builder, and consulted a quantity surveyor his business employs, when producing his quote. His quantity surveyor did not give evidence.

[59] As the hearing progressed it became clear that Mr Creighton's employed quantity surveyor was not a member of the New Zealand Institute of Quantity Surveyors, which is the professional membership association for quantity surveyors. Mr Harrison is a member of the Institute and is obliged to comply with the Institute's Code of Conduct. He said in evidence that he had complied with it in this case.

[60] Mr Creighton's employed quantity surveyor did not visit the site. Instead, they relied on discussions with Mr Creighton based on the measurements and photographs taken by him during his one approximately two-hour visit to the site in about August 2019.

[61] Mr Harrison visited the site twice. The second time was in March 2021, so he could re-familiarise himself with the site and the CES-related damage. I appreciate that Mr Harrison's second site visit was easily arranged because he was engaged by WD. However, I am sure that if IAG's counsel had requested that Mr Creighton and/or his quantity surveyor go to or back to the site, that permission would have been granted.

[62] The leading authority on "reasonable costs" is the High Court case of *Ginivan v Southern Response Earthquake Services Limited.*[6] Gendall J found that in determining what is objectively reasonable a consideration of different market rates for similar charges, the prevailing circumstances of the local building industry and evidence from qualified and independent professionals can assist in determining a "proper and fair calculation." He stated that insurers need to objectively assess the evidence supplied by the insured in relation to their claim:[7]

> With these matters in mind, I find that what are reasonable costs are determined by what is objectively fair. This requires considering the general market rates for equivalent charges, bearing in mind all the circumstances prevailing in the Christchurch building industry at the time. Clearly some evidence from qualified and independent professionals such as quantity surveyors would assist in making what needs to be a proper and fair calculation.

[6] [2018] NZHC 2403.
[7] *Ginivan v Southern Response Earthquake Services Ltd* [2018] NZHC 2403 at [23].

[63] The *Ginivan* decision suggests that quantity surveyors are well placed to determine reasonable costs.

[64] Submissions for WD are that I should place more weight on Mr Harrison's evidence. WD submits that Mr Harrison can provide a reasonable and fair costing having taken into consideration the different market rates.

[65] However, IAG submits that because Mr Harrison is not a licenced building practitioner, he does not have the expertise to cost the most efficient way to carry out the repair work. IAG says he cannot accurately estimate the most reasonable repair costs. It submits that I should place more weight on Mr Creighton's evidence because he is an experienced registered master builder.

[66] Mr Harrison is a very experienced quantity surveyor, with over 30 years' experience. His firm has been involved in the preparation of over 5000 repair and replacement estimates for earthquake damaged properties, and he personally has been involved in over 2000 of these. If the question was about what particular strategy was required for the repair of particular building elements, the evidence of a licensed building practitioner would be preferred. However, in this case the exercise involves estimating the reasonable cost to undertake a largely agreed scope of repairs.

[67] Mr Harrison changed some of his costings as the hearing progressed. Since his costings were an estimate of market rates it was not surprising that he was able to change with, for example, Mr Cumming's agreement to accept the hourly rate Mr Creighton had used. Mr Harrison's estimates moved downwards after discussions with Mr Creighton and Mr Cumming. I consider that in working co-operatively with Mr Creighton and Mr Cumming and by amending his costings Mr Harrison overcame IAG's objection to him not knowing enough about building techniques to give the best evidence of reasonable cost.

[68] IAG was aware that reliance on one expert witness, if that witness makes a mistake perhaps, is risky. Mr Creighton was an expert witness for IAG in *M&M v IAG New Zealand Limited*.[8] As noted in *M&M* case, any flaws in Mr Creighton's reasoning will inevitably affect

[8] *M&M* at [80].

the quality of IAG's decision-making and therefore of the Tribunal if I accepted Mr Creighton's evidence without question.

[69] Mr Creighton misread the Miyamoto designs in relation to the repair of cracks to the mortar.

[70] Despite Mr Creighton's costing being presented as a fixed-price quote, his evidence during the hearing was that he had included 18 provisional sums. That meant that there were 18 items that might cost more, or less, than the estimate he made. Mr Creighton explained that if his pricing was accepted, he would also fix those sums, so long as he was paid the 10% contingency sum in advance once the contract was signed.

[71] Significantly though, in his oral evidence Mr Creighton conceded IAG would not pay the contingency upfront.

[72] Mr Creighton has a business of a reasonable size. At any one time his building business can have several projects on the go. Mr Cumming's business is much smaller. My impression from Mr Creighton's evidence was that he understood that he could afford to take on a project, such as WD's, where he risked making a loss because his business is of a scale that can balance that out with other more profitable projects. Therefore, Mr Creighton's evidence of the price his business could complete the project for is not necessarily a reasonable market rate.

[73] During the hearing Mr Cuff for IAG made a comment that I have treated as a submission. He said that when the Tribunal needs to assess the objectivity and independence of the witnesses, it should consider that pecuniary interests can be seen to weigh against a certain level of objectivity and independence in a witness. While these comments were directed at Mr Cumming being the builder to be employed to carry out the work, the submission about pecuniary interests cuts both ways.

[74] WD submits that Mr Creighton is not an independent or impartial witness because a significant part of his business, for five years, has been providing evidence for IAG and other insurers in the High Court, and now the Tribunal, for cases on the cost of repair of earthquake damage.

[75] Mr Creighton's evidence was that for about the last 5 years he has worked for an average of 10% to 20% of his time preparing repair scopes and costings and/or giving the kind of costing evidence he gave in these proceedings. He also does so in judicial settlement conferences in the High Court and in this Tribunal. He gives such evidence for IAG and two other insurance companies. He estimates he has done so in around 100 cases.

[76] In that time, Mr Creighton's evidence is that his business has only been engaged by an insured party to undertake the repair or rebuilding of their home an estimated six to ten times. In none of those cases was he paid a contingency amount upfront as he gave evidence he would have to be if he entered into a fixed price contract with WD.

[77] I do not dispute that Mr Creighton is a very experienced builder. He made a valuable contribution to moving the parties' costs closer to one another during the hearing, including in relation to how parts of the complex repair could be cost effectively carried out.

[78] However, during the hearing Mr Creighton often used the term "we" when discussing whether work needed to be done as part of the scope and, therefore, whether it needed to be costed. For example, on day four, when discussing whether wall and ceiling insulation would need to be replaced, he said:

> we don't have it in there because we don't believe there's [even] a reason to do the work.

[79] When I asked him who "we" was he replied:

> Sorry, IAG, and we believe that there is no need for decontamination of, that IAG doesn't need to pay the cost of decontamination.

[80] That point, which goes to what the Policy means legally, is an issue outside of Mr Creighton's expertise as a builder. That is a question for the Tribunal based on submissions from counsel.

[81] Experts called to give evidence of reasonable costs need to simply give evidence of the cost of, for example, replacing insulation, and recognise that it is up to the Tribunal to decide whether IAG is liable to pay the cost of, for example, decontamination. When instructing their

experts both parties, but particularly insurers in this area, need to ensure they remind their experts about their duty of independence and impartiality.

[82] Commentary on legal issues from experts demonstrates a lack of appropriate distance and independence from their principal. When providing evidence an expert's duties are to the Tribunal; their role is not to advance their principal's case.[9] Overall, despite agreeing to the Code of Conduct for Expert Witnesses, Mr Creighton appeared very identified with IAG and I could not be sure all his evidence was impartial.

[83] Taking all the above considerations into account, where there was a disagreement between Mr Creighton and Mr Harrison in relation to cost I have put more weight on Mr Harrison's evidence.

If the reasonable cost of repair amounts to 80% or more of the cost of a rebuild is IAG obliged to pay to rebuild?

[84] Both parties agree that if I find the cost of repair to be the same, or more than, Mr Creighton's cost to rebuild the house ($782,056.33 plus 16%) it should be rebuilt.[10]

[85] WD asks for IAG to be ordered to pay the cost of a rebuild of the house if the objectively assessed reasonable cost of repair, as determined by the Tribunal, reaches 80% or more of the objectively assessed reasonable rebuild cost.

[86] IAG denies that it is bound to pay for a rebuild on that basis, and, in any event, says that the objectively assessed reasonable cost of repair is below 80% of the rebuild cost.

[87] In the 2013 High Court case of *Rout v Southern Response Earthquake Services Limited,* Justice Gendall ordered Southern Response to pay for the cost of a rebuild of Mr and Mrs Rout's damaged house on the basis the house was "beyond economic repair."[11]

[88] In the Routs' insurance policy, there were four options set out for them to choose from. However, because the land under the Routs' house was red zoned, the only realistic options for

[9] See *Pratley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67.
[10] The parties both made submissions on the amount that construction costs had increased over the 14 months between the end of the hearing and the issuing of this decision. I have accepted their evidence and found that 16% is a fair amount of increase to be added to the reasonable costs I have found proved in this decision.
[11] [2013] NZHC 3262.

them were to rebuild the house on another site or buy another house.[12] The High Court needed to set the amount available to the Routs either to rebuild the house or buy another house. First, it needed to be satisfied the house was beyond economic repair.

[89] In assessing whether the cost of repair was uneconomic Justice Gendall used what he referred to as an insurance industry "rule of thumb" that if the reasonably assessed repair costs amounted to 80% or more of the rebuild cost the rebuild cost should be paid.

[90] I heard no evidence on IAG's internal policy in relation to the "rule of thumb" Justice Gendall referred to. However, in submissions Mr Cuff told me that IAG used to do that for a time, including in 2013 when the *Rout* decision was made, but had not done so for some years.

[91] To assess whether *Rout* applies to WD's case my starting point must be to consider the IAG policy wording. I note that the Routs' insurance policy wording was different to WD's policy. The Routs' policy included (my emphasis):

> If your house is damaged **beyond economic repair** you can choose one of the following options …

[92] WD's Policy includes the following:

If the house can be repaired:

> **If the house can be repaired**, we pay **the reasonable cost** of repair. **We choose** either to repair it, or to pay you the cost to repair it.
>
> **If you do not repair the house**, the most we pay is the present value, plus the reasonable cost of any demolition and the removal of debris and contents which is necessary.
>
> (emphasis added)

[93] Unlike the Routs' policy, WD's policy does not use the phrase "beyond economic repair." The IAG policy wording is "if the house can be repaired". In this case there is agreement that it is more likely than not that the house can be repaired.

[12] Red zoned land was deemed unsuitable to be rebuilt on.

[94] A key difference between the *Rout* policy and WD's policy is which party gets to choose the way forward. In the Routs' case the homeowners had the choice of four options. In WD's case, when it is possible to repair the house, IAG has the right to choose "either to repair or pay you the cost to repair." IAG has chosen to pay WD the cost to repair. IAG has chosen that option because it says, along with WD's engineer, Mr Lust, although reluctantly, that the house can be repaired. The issue is at what cost.

[95] I need to assess "the reasonable cost of repair" to an "as when new" standard.

[96] Also, *Rout* does not establish the 80% cost rule of thumb to be an obligation on all insurers. In the Rout's case, Southern Response engaged Arrow International (NZ) Limited (Arrow) to assist in processing its claims. At paragraph [92] Justice Gendall wrote that Arrow:

> had been conservative in the past in assessing whether a house was a repair, and would favour assessing a house as a rebuild if a repair and rebuild were both indicated as possibilities and close from an economic perspective.

[97] IAG is not bound to pay for WD's house to be rebuilt if the reasonable cost of repair amounts to 80% or more of the cost of repair because the Policy does not require it to do so. The Policy simply requires IAG to pay WD the cost to repair because it is accepted by both parties that it is likely the house can be repaired. This decision establishes the reasonable cost of repair and therefore the amount that IAG must pay WD as the cost of repair of the house.

Does IAG have to approve of the builder chosen by WD, that is, must IAG be satisfied that the builder can complete the required work to a satisfactory standard?

[98] As set out above, when I considered whether WD needs to retain Miyamoto as his engineering firm, the Policy states that he is entitled to select and engage the builder, architect, structural and geotechnical engineer and other consultants to repair the house and garage.

[99] IAG submits that it needs to ensure that the repair work is done to a high standard so that it has completely discharged its obligation to repair the property "to the same condition and extent as when the house was new." Therefore, it submits that it must be satisfied that the builder chosen by WD is competent to carry out the planned repairs.

[100] IAG and Mr Creighton suggested that WD would do well to engage Mr Creighton and that Mr Creighton's offer of a fixed price contract could be made available to WD. However, it was clear during the proceedings that WD is not going to engage Mr Creighton.

[101] In his submissions, Mr Cuff briefly referred to the High Court decision of *Sleight*, which he submitted imposed greater obligations on insurers to be certain that any rectification of damage they pay for under an insurance policy is correctly done.[13]

[102] In the *Sleight* case IAG had contracted with Hawkins to manage the repair and engage all sub-contractors to undertake the repairs directly. The repairs were defective, and the Sleights alleged that IAG, not Hawkins (or its insurer), remained liable to them to repair their property to the policy standard. The High Court found that despite engaging Hawkins to manage repairs IAG remained liable until the property was repaired to the policy standard.

[103] This case is different from *Sleight*. This is not a defective repair case. This case has come to the Tribunal for a ruling on how much it will cost to rectify the earthquake damage to the house. There have not been any repairs undertaken by IAG that they held out to be the full repair necessary under the Policy as they did in the *Sleight* case. I do not consider that the ruling in *Sleight* applies to this case.

[104] There is no suggestion that WD would not consider this matter finalised based on what I order IAG to pay for his property under the Policy, and subject to his right to appeal this decision. That is, it is WD who seeks a lump sum to finalise his claims against IAG once and for all, as opposed to wanting to hold IAG liable for further as yet unclaimed payments as the repair progresses. My decision is a judicial decision and as such is subject to issue estoppel. That means that the issues decided upon, being the extent of earthquake-related damage and the cost of repair, cannot be re-litigated unless appealed.

[105] During the hearing, IAG understood Mr Cumming was WD's chosen builder. Through questioning, IAG sought to explore what Mr Cumming's experience was in complex repair cases such as this. The evidence was that Mr Cumming is an experienced builder but had not undertaken any repair jobs on the scale of this proposed repair.

[13] *Sleight v Beckia Holdings Ltd and Others, including IAG New Zealand Limited* [2020] NZHC 2851.

[106] I consider IAG's questioning was useful in assisting me to assess Mr Cumming's expertise to give evidence of reasonable building costs. He agreed to reasonable concessions from Mr Harrison's figures and agreed at times with Mr Creighton. There was no evidence to establish that Mr Cumming would not be competent to carry out the repair strategy put forward by IAG. Mr Cumming was present during the proceedings and heard all the evidence presented by the engineers, by Mr Creighton and Mr Harrison. Some significant aspects of how the repair could best be undertaken practically were discussed between the witnesses and Mr Cumming was fully involved in those discussions.

[107] The Policy wording is clear. WD is entitled to select and engage his own builder to undertake the necessary repairs at the reasonable cost established by this decision. WD may engage Mr Cumming or any other builder of his choice.

When should IAG pay WD?

[108] The parties agree that WD has already been paid a sum of present value from IAG of $335,250.00, an amount of $437.18 from EQC towards repair of the northern retaining wall and a further amount from EQC for damage to the premises. IAG says those amounts total $338,243.45. WD does not dispute that.

[109] WD submits that IAG's liability to pay the further cost of repairing the building, as established in this decision, is incurred once he enters into a building contract.

[110] IAG disagrees. That position appears to be based on a belief that the *Sleight* case has burdened IAG with potential ongoing liability if WD's chosen builder does not adequately repair the property.

[111] In its submissions on the increase in construction costs, IAG argued that the Court of Appeal's decision in *Medical Assurance Society v East* would be misconstrued if it was taken to mean the insured has a right to full payment of reasonable repair costs immediately once they enter into a contract for repair or rebuilding.[14] IAG says the Court of Appeal was clear to differentiate between the insured's right to indemnity once the reasonable cost has been

[14] Received in August 2022; and [2015] NZCA 250.

crystallised by entry into a contract for that repair, and the timing of the insurer's responsibility to pay that cost.

[112] Therefore, IAG submits that it is only bound to pay WD any further amounts for repair once he has exhausted the amount already paid to him by EQC and IAG. Further, it submits that it is only bound to pay him those further amounts as progress payments. That is, IAG will only pay anything further once WD has incurred the costs, submitted invoices to IAG and if IAG assesses that the work detailed on the invoices has been completed to a good standard.

[113] In the *East* case, the Easts asked the High Court, for a declaration that MAS was bound to pay the upfront estimated repair costs. The actual repairs necessary and the reasonable cost of them were not established in the High Court. There was only a repair cost estimate. In the Court of Appeal, the estimate to repair was discovered to be significantly inaccurate.

[114] The Court of Appeal stated that problems arose:

> [28] … because the interpretation adopted by the Judge is contrary to the insurer's underlying obligation to indemnify against a liability to pay the actual amount required to reinstate nothing more, nor nothing less: the insurer does not agree to pay in advance of liability being incurred by the insured party on an estimate or some other undefined measure of the amount required to rebuild.

[115] The Court of Appeal clarified that a claimant's: [15]

> right to settlement is absolute … once they incur a contractual obligation for the purpose of restoring the building.

[116] So, WD's right to be paid the reasonable cost to repair the building to the Policy standard is absolute once he ethers into a contract for that repair. However, the Court also held that the right to settlement upon incurring the contractual obligation "has no bearing on *the timing of* and basis for liability." (emphasis added)

[117] That is what IAG relies on for its position that it need not pay WD as soon as he enters into a building contract to repair his home.

[15] At [29].

[118] The relationship between IAG and WD in relation to the repair of his earthquake damaged property has been ongoing for over 10 years. Both parties deserve certainty and finality once these proceedings are concluded.

[119] Unlike in the *East* case, the parties in this case have agreed that the insurer's repair methodology is likely to receive building consent. I have found that the repair strategy meets the Policy standard. In addition, the parties have agreed a number of costs and I have decided the remaining damage and repair issues between the parties, including their reasonable cost. Barring any appeal, there is certainty at the end of these proceedings.

[120] In asking for a final lump-sum payment to be made once he has entered into the necessary contracts, WD is taking on some risk, especially in such an uncertain and inflationary climate. However, he is knowingly and willingly doing so.

[121] In these circumstances I do not consider that IAG is exposed to the same risk that MAS was exposed to in the *East* case. I order that IAG pay WD the balance of the amount needed to repair the premises to the Policy standard as found by this decision within 5 working days of his presenting IAG with the completed contract to repair.

Repair scope and cost issues

[122] There are outstanding issues about some aspects of what should be included in the repair scope, and what their reasonable cost is:

(i) repair or rebuilding of the northern retaining wall;

(ii) garage floor slab - dislevelment and void/s;

(iii) rangehood and insinkerator replacement;

(iv) ceiling and mid-floor batts (including vermin decontamination) replacement;

(v) How should the steel beam across the garage roof/mid-floor area affected by rust be repaired and at what cost?

(vi) What amount of repair to the cracking of the blockwork mortar is required and what is the cost of repair?

(vii) polyurethane finish and carpet to first-floor dining/living/lounge floor;

(viii) the carpet in the first-floor dining/living/lounge being lifted, stored and re-laid;

(ix) What amount should be allowed for professional fees?

(x) What should the contingency allowance be?

(i) Should the northern retaining wall be rebuilt or repaired? If repaired what is the most appropriate repair strategy?

[123] The concrete block retaining wall, which is towards the rear of one side of the house is beside a concrete path where WD keeps his refuse and recycling bins. The wall suffered some cracking damage in the CES. WD argues that should be reconstructed out of concrete blocks to make it the same as prior to the earthquakes.

[124] WD's main concern with the wall was an aesthetic one. His evidence was that because the existing wall did not have a plastered finish, he does not want a plastered finish on it now. He was worried that there would be extra maintenance required if such a coating got chipped or scratched by his Council bins.

[125] This contrasts with WD's 13 May 2013 claim to the EQC for repair to the damaged to the wall. In that claim, he described the repair he intended to make to the wall as *an easy repair I expect to inject epoxy and paint.*

[126] IAG submits that EQC has paid $437.18 for the damage to retaining wall 2, which was accepted by WD at the time. It says that if WD requires more funding for the wall, he should contact EQC as IAG is not liable for its repair.

[127] However, IAG submits that if the Tribunal considers it is liable to fix the wall, it can be repaired by Mr Creighton's suggested method of a coloured slurry plaster finish, which is costed at $900.00.

[128] WD makes the claim for the wall to be reinstated to its pre-earthquake state with the benefit of legal advice that he did not have when he asked for compensation from the EQC.

[129] I find that WD's current concern that a painted/plastered finish may get scratched or chipped when the bins are moved past it is a reasonable consideration. A painted or plastered finish to the wall means it would not have the serviceability it had prior to the earthquakes.

[130] I find that IAG must pay WD the amount Mr Harrison has allowed for rebuilding the wall (to which 16% should be added) less the $437.18 already paid by EQC.

(ii) Are there voids under the ground floor slab and what is the extent of earthquake-related dislevelment?

Voids under the concrete slab

[131] On 13 May 2015, WD obtained a report from Canterbury Locating Services (CLS). After using ground penetrating radar CLS reported that there were several cracks and four voids of differing sizes under the concrete slab.

[132] IAG was provided with the CLS report on 23 July 2015. IAG did not call any evidence to challenge the report in these proceedings, although it does not accept the report's accuracy.

[133] The engineers did not consider the possibility of voids under the concrete slab at any of the site meetings, because that issue was not drawn to their attention at the time, so there were no conclusions or comments on this issue in the facilitation statements. However, at the hearing they gave evidence on whether there were likely to be voids of any structural significance under the concrete floor. It became common ground that the only potential void of any concern could be in the garage.

[134] Mr Frost's opinion was that determining voids under slabs is very difficult and ground penetrating radar is not the only way to detect them. Overall, he said that:[16]

> if there are voids of this size, then they would not be of concern to me. Concrete slabs span voids, it's like bridges.

[16] Notes Of Evidence (NOE), pp 114-115.

> … when the concrete is poured fresh there would be essentially 100% contact between the underside of the slab and the ground. But with the process of time things change under slabs and under concrete [even without earthquakes].

[135] Mr de Vocht's evidence was:[17]

> … the GPR process of scanning is very imprecise and what we would normally recommend is that the slab is drilled with a cavity camera to check locations identified and a GPR scan to see if there are voids. … on the Port Hills there is no mechanism for earthquake liquefaction of the ground underneath the tailings and so, therefore, it's probably not possible for a void to form that's of that depth.
>
> I agree that the slab can span to a certain extent depending on the size of the void.… the depth of the void is of no consequence because as soon as the slab raises support then it is expanding
>
> The void in the garage, … would have different loading on it because there are vehicles that will be parked in there so you do have concentrated point loads from the tires of the cars.… I think we need some more certainty around the size of the void, the width and then if there are voids then these can easily be remedied by injecting under the slab with the grout fill.

[136] Mr de Vocht said that although there was a drop in the floor levels towards the south west corner of the garage there was no sign of any dishing of the slab in the area where the void is shown on the CLS drawing. Therefore, he did not expect any voids to be found after further inspection.[18]

[137] Mr Lust agreed that the science of detecting voids under the floor is an imprecise one. However, he said there was a reasonable probability there may be some voids.[19] Mr Lust maintains that a good portion of the ground floor should be replaced in which case any voids would be picked up and dealt with as a matter of course. However, he would agree with Mr de Vocht that further assessment is necessary.

[138] Mr Frost raised a concern about the possibility of disturbing the damp-proof membrane when holes are drilled in a slab to do either the camera inspection suggested by Mr de Vocht or to inject grout under the slab.

[139] In response, Mr de Vocht gave evidence of the 2015 MBIE guidance on drilling holes to fill voids and what effect that has on the damp-proof membrane. He said that it is acceptable

[17] NOE, p 116.
[18] NOE, pp 117-118.
[19] NOE, p118.

to drill holes in the slab so long as they are less than 10% of the slab area and meet one of three additional conditions. In this case, he says that one of those three conditions is met because all three engineers are sure there is no liquefaction material in the tailings.

[140] WD has not proved it is more likely than not that there is a void under the garage slab. It will be up to the structural engineer WD engages to decide whether it is necessary to do any intrusive inspection under the slab. If they decide to do so, I accept Mr de Vocht's evidence that it would be appropriate to do a drill inspection (with camera) to check for a void under the garage. That is because it will not be necessary to drill anything amounting to 10% of the slab area to establish whether there is a void and if so, what size it is. In addition, because of the nature of the land under the house, I can be satisfied there is no liquefaction material under the slab. Any void discovered by further investigation can be fixed by the injection of grout within the contingency cost.

Extent of ground floor earthquake dislevelment

[141] The parties agree that there is dislevelment on the ground floor. However, they disagree on whether the dislevelment was caused by the CES. They also disagree on whether the dislevelment is significant enough to amount to structural damage or significant enough to be covered by the policy.

[142] There is no disagreement that there is a crack or cracks in the concrete slab in the hallway/kitchenette area, probably caused by the CES, which need to be repaired.

[143] In *Body Corporate 335089 v Vero Insurance New Zealand Limited* Justice Osborne took guidance from the many cases involving claims for earthquake damage to draw the following conclusions in respect of what constitutes damage:[20]

(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.

[20] *Body Corporate 335089 v Vero Insurance New Zealand Limited* [2020] NZHC 2353 at [57].

[144] The Facilitation Outcome Statement dated 2 December 2020, records the outcome of the engineers' consultation on the issue of "the extent of the earthquake dislevelment of the ground floor around the garage and the hallway kitchenette area downstairs."

[145] The engineers looked at all available floor level surveys.[21] They noted that not all the levels used the same data points. Only one report had measured the ground floor levels. They agree that in the garage:[22]

> the current maximum floor differentials … occurred along the south and across the west wall of the garage…
>
> along the line of the south wall of the garage falling to the west, on the first floor was reported in the range of 2 mm to 8 mm, while on the garage floor it was in the range of 13 mm to 20 mm.
>
> the current maximum floor differentials along the line of the west wall of the garage falling to the south, on the first floor was reported in the range of 0 mm to 7 mm while on the garage floor it was in the range of 11 mm to 12 mm.
>
> In the hallway kitchenette area comparison between the ground floor and the first floor immediately above was imprecise due to a lack of levels. The first floor essentially had a 4 mm maximum floor differential and the range on the ground floor is 10 mm to 19 mm.

[146] Mr Lust considers that the drop of 12 mm in the southwest corner of the garage is due to the CES.

[147] On the other hand, Mr de Vocht [23]

> was of the opinion the maximum settlement caused by the CES was a less than 20% of the current maximum differentials and on this basis the size of the differentials were so small as to be de minimus.

[148] In Mr de Vocht's witness statement he wrote that he considered 73% to 75% of the floor level variation in the hallway/kitchenette area and along the west side of the garage "is, more likely than not, construction related."[24]

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[21] Terra Consultants, NMC Construction Ltd (Nathan Cumming), Frontier Engineers Ltd, Sinclair Builders Ltd and Phoenix Consulting Ltd.
[22] Facilitation Outcome Statement, 2 December 2020.
[23] Facilitation Outcome Statement, 2 December 2020.
[24] Brief of evidence of Ivo Adrian de Vocht, 9 March 2021, at [26] and [31].

[149] His evidence was that there is some portion of earthquake-related settlement that is not damage as any further earthquake related settlement did not substantially worsen the floor slopes given the majority of the slopes were present after construction.

[150] Given the parties' engineers' disagreement, I directed Mr Frost to give his opinion on how much of the floor dislevelment was due to the CES.

[151] Mr Frost's theory was that if the ground floor dislevelment was caused by the earthquakes then the first-floor levels would have been affected in line with the slope and levels of the ground floor. His analysis led him to conclude that the first-floor levels differed from the slopes on the ground floor. Therefore, most of the ground floor dislevelment was not caused by the CES. He commented:[25]

> the maximum range in the proportion of earthquake dislevelment on the ground floor will be:
>
> - South Wall of Garage 2 mm to 8 mm
> - West wall of Garage 0 mm to 7 mm
> - Hallway Kitchenette Area 4 mm
>
> It should be noted that the above range in the proportion of earthquake dislevelment on the ground floor is expected to be a maximum. The actual amount may be different due to construction tolerances and changes over the life of the structure.

[152] Mr Frost only considered some of the floor level surveys that were in evidence. For example, he discounted the levels taken by Mr Cumming and Phoenix Consulting Limited as they were so different to the other levels recorded.

[153] Mr Cumming's evidence was that the block walls in the southwest corner of the garage have bowed in the same direction as the falls between the first and ground floors. In Mr Cumming's view, this means that the levels in that area are not likely to have been a construction issue as the walls would have been built plumb. There was agreement that it was likely the walls were built plumb.

[25] Report dated 11 February 2021.

[154] Mr Cumming gave evidence that the falls between the first floor and the ground floor in the south west area of the building are consistent in direction. Along with the bowing of the wall in the same area this means that the settlement of the garage floor in the south west area of the house is unlikely to be a pre-existing or construction issue.

[155] Mr Cumming's measurements were the same as the Terra levels giving a fall in the garage slab of up to 20 mm in the south west corner.

[156] WD's evidence is that the ground floor slab was more level prior to the CES. Before the earthquakes he used a custom-made level work bench in the garage and the garage floor to set hang glider dive recovery systems to a precise measurement by making up components to within fractions of a millimetre.

[157] His evidence is that that the bench has sagged significantly since the earthquakes, and he now needs to use blocks to prop up the bench. Therefore, he concludes that the ground floor has become less level due to the earthquakes.

[158] Miyamoto has already designed a repair strategy that replaces a relatively significant area of the ground floor adjacent to the rear retaining wall. That repair will be done in conjunction with the repair to the retaining wall.

[159] Mr De Vocht's evidence was that any void under the study floor will be remedied as a consequence of the Miyamoto design which includes replacement of the slab in that area with the new retaining wall foundation.

[160] There was agreement that if the floor slopes of the ground floor were rectified by lifting the foundation the correction of the ground floor levels would cause the floor slopes on the first floor to worsen.

[161] I agree with Mr de Vocht's evidence that any minor lifting of the foundation beneath the garage only to the extent of the first floor dislevelment would be unlikely to result in an improvement of the ground floor amenity and is unnecessary and unjustified. If the drill inspection shows any void under the garage floor where a vehicle is usually parked, the evidence satisfies me that it could be rectified by grout injection. The majority of the

engineering evidence is that much of the garage floor slab dislevelment was pre-existing. I accept that.

[162] Mr Lust's evidence is that in the process of removing part of the concrete slab floor to replace the rear foundation wall, the graded fill under the garage floor will be disturbed. It will migrate away from the unaffected parts of the slab leaving those parts unsupported. This opinion was not challenged by the other engineers. In addition, the engineers discussed the kind of graded fill that would have been used when the house was built. I am satisfied that the engineer engaged to do the agreed repair work can take account of any movement of the grade out from under the slab in the area adjacent to the parts of the slab that are being replaced and minimise its negative effect as part of the slab repairs.

[163] The slopes in the hallway/kitchen floor slab can be rectified by using a relevelling compound under the floor coverings which will then need to be reinstated.

[164] I accept that the CES caused some dislevelment in the southwest area of the garage floor. This is physical damage in the sense of an alteration in a negative way to the physical state of the concrete slab. However, it is not structural damage. The change between the slab's pre-quake and post-quake levels does not affect the functionality of the garage floor by impairing the value, amenity or usefulness of the garage in more than a minimal way.

[165] Therefore, I do not consider the concrete slab needs to be replaced in its entirety or in the south-west corner.

[166] The use of relevelling compound can be used to address any floor slopes not dealt with by the partial replacement of the slab which is part of the Miyamoto repair to the rear foundation and retaining wall. This will restore the functionality and amenity value of the concrete floor and allow WD to use it again for re-setting hang gliders.

(iii) Do the rangehood and insinkerator need to be replaced?

[167] WD's evidence is that the rangehood was significantly damaged in the February 2011 earthquake. He has photos of that evidence. I accept his evidence of the cause of the damage.

[168] An inspection report from Dell that was provided to IAG in 2013 records that the rangehood was damaged. Because the ceiling was leaking the rangehood was removed from the ceiling. I have not seen or heard any evidence that substantiates IAG's claim that WD has claimed for the rangehood replacement through any earlier claim with either the EQC or IAG. I am satisfied that WD has proved that the rangehood was damaged during the CES and had to be removed. It has not yet been replaced.

[169] IAG is liable to replace the rangehood as part of the repair of WD's house. I accept Mr Harrison's evidence of the reasonable cost of a new rangehood as $3,450 including GST.

[170] In closing submissions for WD, Mr Woods claimed that the pre-earthquake insinkerator was damaged by the CES. There was no evidence of that given in the hearing. It did not appear as part of the claim until submissions.

[171] I dismiss the claim for the replacement of the insinkerator.

(iv) Does wall ceiling and/or mid-floor insulation need to be replaced because of water damage or contamination by rats?

[172] The full extent of water damage or other contamination to insulation is unknown because it will only become apparent once the repairs are under way.

Rat infestation

[173] The Policy specifically excludes loss from "vermin, other than possums." Therefore, at first consideration, WD cannot claim any cost of rectifying any contamination to the property from rat infestation of the ground floor walls and ceiling.

[174] IAG also submitted that the length of time between the earthquakes and the first problem with the rats was around 8 years, given that period of time WD has not proved causation.

[175] However, WD argued that the incursion of rats into the building was an indirect result of the CES damage to the premises.

[176] WD's evidence was that he had never had a problem with rats before the CES. WD's evidence is that there was no incursion of rats in the premises until the wall linings on the ground floor were removed by an IAG contracted worker to assess the damage to the block walls in 2019. His evidence was that the first time rats entered the building was November 2019.

[177] WD says that to try and deal with the rat problem he cut down a tree near the house that provided food for the rats.

[178] In the usual course of events the Policy provision means IAG would have no liability to indemnify WD for costs associated with getting rid of or damage caused by vermin, like rats. However, this claim is not merely a claim for costs associated with an infestation of rats. In the ordinary course of a homeowner's life, they are responsible to keep the insured premises maintained in such a way as to minimise or prevent damage caused by vermin.

[179] I find that the incursion of rats into the lower storey of the building and the resultant contamination of wall and ceiling insulation was as a result of the removal of the wall linings by IAG's contractor aimed at examining the extent of damage to the block walls. That is more likely than not how the rats gained access to the inner parts of the building.

[180] I find that in undertaking the removal of the wall linings to assess damage IAG was unable to foresee that may have led to the incursion of rats. However, that is what happened. IAG did not replace the wall linings after removing them, no doubt because the flat was not occupied at the time. However, easier access to the inside of the premises, especially the space between the ground floor ceiling and the first-floor floor, meant that the rats were able to gain a foothold.

[181] While I accept that the growth of a tree near the building provided the rats with a food source the fact that existed was not any kind of negligence on WD's part. Indeed, he cut it down when he discovered the rats were feeding from it.

[182] Any costs associated with the damage by rats is damage consequential on earthquake damage and the investigation of the extent of the damage. Therefore, I find that any insulation

that needs to be replaced dues to rat contamination should be paid for by IAG under the Policy as it is part of rectification of earthquake damage.

Water damage to insulation

[183] The February 2011 earthquake caused two separate flooding events when water flowed into the first floor, though the floor of that level and down through the ground floor ceiling soaking the insulation in the floor/ceiling.[26] The insulation in the floor/ceiling space was replaced by EQC after the two flooding events. Mr Cuffs' submissions were that as EQC has replaced the wet insulation IAG has no liability to replace it again.

[184] Any insulation in that area that needs to be replaced because it has been wet, as opposed to contaminated by rats, falls to be replaced within the 10% contingency allowance.

[185] The other possible area that may have water damaged insulation is in the roof space. There is agreed earthquake damage to the roof which has leaked over time as a result. There are at least two split trusses, purlins have been displaced from the top chord of trusses and the roofing needs to be replaced. Although some of that damage has been mitigated by WD's efforts and by EQC's temporary repairs there may still be leaks. Mr Cumming's evidence was that he has seen some evidence of water damage/ingress in the roof space, including some pooling.

[186] I am satisfied that any roof or wall insultation which is simply wet, as opposed to contaminated by rats, is wet because of damage caused directly or indirectly by the CES. However, it is not likely all insulation will need to be replaced due to events for which IAG is liable.

Cost to replace insulation as necessary

[187] Mr Harrison's estimates for removal of all insultation (roof space, wall and ceiling) should be paid by IAG. WD's builder must make an assessment of the amount of insulation that needs to be disposed of and replaced due to CES damage as outlined in this decision. The cost of this is to be calculated from Mr Harrison's costs and paid by IAG.

[26] From aquaria and from the hot water cylinder and broken pipes.

(v) How should the steel beam damaged by rust be repaired?

[188] After the examination of what could be seen of the steel beam in the roof of the garage the engineers agreed that the rust on the beam was caused by the earthquakes, specifically the flooding that went through the first-floor flooring and the ground floor ceiling.[27]

[189] The engineers' third facilitation outcome statement identified the following as necessary to repair the corrosion on the steel beam in the garage:

> The corrosion on the steel beam should be treated by appropriate preparation and application of an anti-corrosion coating to be approved by the engineer during construction. Particular attention to possible corrosion at the south end of the steel beam where it is embedded into the concrete block work is required.
>
> Once this work is completed the steel beam should be encased again matching the existing and finished to match the as new condition.
>
> The staining to the concrete block wall should be removed by an appropriate cleaning method.

[190] Mr Harrison and Mr Lust, on the one hand, and Mr Creighton, on the other hand have different views about the likely extent of corrosion and how it could best be repaired, as well as the cost of repair.

[191] The reality is that the extent of the corrosion, and therefore the extent of repair necessary, will only be discovered once the beam is fully uncovered in the process of repairing the flooring above it so, its cost cannot be accurately established with total accuracy at this stage.

[192] Any further work discovered to be necessary once the beam is exposed can be agreed between WD and his engineer and builder and can come out of contingency costs.[28]

(vi) What percentage of the mortar needs to be replaced?

[193] The engineers agreed after their first facilitated meeting that:

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[28] A contingency allowance is an amount of money set aside to cover any unexpected costs that can arise throughout a construction project. This money is on reserve and is not allocated to any specific area of work. Essentially, the contingency acts as insurance against other, unforeseen costs.

> the lower storey concrete blockwork has cracking in the mortar both vertically and horizontally as well as through the concrete block in some places. This cracking is most pronounced in the unfilled sections of the block walls.

[194] They agreed that the following additional work should be done and added to the Miyamoto design strategy:

> A CPEng Structural Engineer should supervise the repointing repairs to the cracks in the concrete block and mortar joints;
>
> In addition all unfilled concrete block cells be filled to the underside of the top concrete block bond beam

[195] Miyamoto added that work to its designs. Mr de Vocht explained at the hearing that the engineers agreed to fill the unfilled concrete block cells with grout to completely restore the stiffness of those walls. This restores more strength to the walls than if they were only raked out and repointed. He said that the grout filling gives an extra guarantee of the stiffness of the walls and puts a little less reliance on the crack repairs. Nonetheless, the crack repairs are also necessary.

[196] There is a disagreement between the parties as to the meterage of the mortar needed for the crack repairs. The parties were very close on the cost per metre with $45 and $50 allowed by Mr Creighton (depending on whether he was estimating the cost for inside or outside) and $50 per metre allowed by Mr Harrison for inside and outside.

[197] Mr Harrison's provisional sum is for 75% of the mortar to be repointed; that is, approximately 515 lineal metres. Mr Creighton's initial repair quote allowed to rake out and re-mortar 200 metres only.

[198] IAG submits that Mr Harrison has wrongly relied on green tape WD put on the exterior walls that WD says showed sections of the mortar with no cracking to reach the required lineal meterage. IAG says that in placing the green tape WD did not differentiate between cracks that would need re-mortaring and hairline cracks that IAG says would not need to be re-mortared.

[199] Submissions for WD point out that under cross-examination it became apparent that the difference in meterage of mortar to be raked out and re-pointed was due to a misunderstanding by Mr Creighton of the Miyamoto specification.

[200] The Miyamoto Design Package, at S21 Rev A, specifies:

> Rake out and repoint cracks to mortar with epoxy mortar to both faces of the wall. Where cracks intersect with grout fill, repair crack to grout with epoxy injection as per table below.

[201] Mr Creighton incorrectly interpreted the above sentence as meaning that only the cracks intersecting with grout fill required repair by epoxy injection to both faces of the wall.

[202] That is not correct. All cracks on both faces of the walls need to be raked out and repaired with epoxy mortar. In addition, where the cracks intersect with grout fill the correct repair is by epoxy injection as set out in the drawings. The correct repair depends on the size of the crack.

[203] IAG is correct that hairline to 0.2mm cracks only need to be painted with an elastomeric paint on the outside face and no repair is required to such small inside cracks.

[204] I accept that Mr Creighton checked his estimate of meterage with Mr De Vocht whose opinion was that his allowance was sufficient. However, I find that Mr Creighton's misreading of the Miyamoto specification is likely to mean he has underestimated the lineal meterage necessary for proper repair to the block work. Significantly, since the discovery during the proceedings that he had misunderstood the specifications Mr Creighton did not amend his quote.

[205] I put more weight on Mr Harrison's calculation because he measured the cracked mortar requiring rake out on site. He did not just rely on WD's green tape. His evidence was that he reached his estimate of 515 lineal metres after calculating the size of the blocks (400mm by 200mm) and considering that horizontally there is approximately 230m of mortar joints and vertically there is approximately 115m of mortar joints. He estimated that approximately 75% of the mortar (external and internal) required remedial work.

[206] I find that Mr Harrison's lineal meterage estimate is a reasonable measurement and that the reasonable repair cost is $50 per metre plus 16%.

(vii) Is IAG liable to pay WD for the costs of temporary and make safe repairs he has undertaken?

[207] The issue is who should bear the burden of the temporary repairs or make safe costs. Should that fall on the home owner or on their insurer?

[208] WD claims $8,934.56 for materials used for temporary and "make safe" repairs which he undertook to reduce or eliminate consequential damage to the house which otherwise would have occurred over the more than 10 years during which the house has stood unrepaired. For example, WD says that after roofing repairs were undertaken by an IAG engaged contractor, he had to do further work as there were still leaks and he had to ensure moisture would not continue to short-out the downlights over the kitchen and a rear security light.

[209] The Policy contains the following:

> **G2: MAKING A CLAIM**
>
> What you must not do…
>
> 2. Start repair or replacement until we give permission**, unless it is necessary to minimise loss or liability, or to prevent further loss or liability…**
>
> (emphasis added)

[210] WD was bound to mitigate his loss. The purpose of the mitigation of loss requirement is to prevent the loss from being larger than necessary. That is to the benefit of the insurer and the homeowner.

[211] IAG argues that under the Policy there is no cover for temporary repair works. It submits that any temporary or emergency repair works are within EQC's responsibility to cover the first $100,000 plus GST of earthquake damage. However, IAG would consider paying for temporary repairs that were necessary to prevent further consequential damage and if the homeowner chose to stay in the dwelling to prevent incurring temporary accommodation costs.

[212] However, the Policy includes:

> **What you must not do**

2. Start repairs or replacement until **we** give permission, unless it is necessary to minimise the **loss** or **liability,** or to prevent further **loss** or **liability.**

[213] WD was entitled to minimise any further loss or liability to IAG and I find that the repairs I have allowed payment for below were undertaken to prevent further loss or liability.

[214] EQC and IAG paid WD and paid contractors for some work done to make the premises weatherproof and safe to live in during the early months and years after the CES began.

[215] From evidence of EQC's various payments to WD IAG has calculated that between 5 May 2011 and 12 January 2012, EQC paid eight separate amounts for emergency repairs, totalling $15,149.14.

[216] In addition, IAG says it has already paid a $30 contribution to a dehumidifier to assist with drying out the premises after earthquake-induced flooding, and $500 as an acknowledgement of WD's clean-up efforts even though WD was obliged to mitigate his losses and prevent any further loss.

[217] IAG submits in addition it has already paid Fairway Resolution costs, presumably for a dispute resolution process. It has also paid the following temporary repairs:

- Premium Homes, roofing repairs;
- Wat'sOn Building; and
- Flo-Rite Drainage.

[218] According to WD, IAG also engaged Polcon to do some work on the leaking roof.

[219] IAG submits the majority of the costs claimed are from 2011 when WD should still have been claiming from EQC for temporary repair costs. Even in WD's updated schedule prepared for the hearing it appears that EQC had already paid for a water filter and replacement insulation.

[220] WD's evidence was not given with pinpoint accuracy. However, Mr Woods submits that I need to consider:

- that the earthquakes began over 10 years prior to WD giving his evidence;
- WD's home was extensively damaged and initially uninhabitable;
- his neighbourhood was also extensively damaged;
- the earthquakes were traumatising events;
- WD and B stayed on the site in a caravan and WD undertook a number of temporary make safe works to ensure they could move back into the house;
- when they did move back into the house, it was still in a very poor state of repair;
- there is a significant amount of photographs and documentation relating to the claim from over the years; and
- EQC's files including its records of payments are unclear and unable to be interpreted.

[221] I acknowledge WD was a traumatised homeowner and resident. He was affected by the more than 12,000 ongoing aftershocks over the subsequent years while still living in a damaged home. WD is a lay person who was not, in the early stages, represented by an advocate or lawyer and would not have been aware of the necessity to chronicle every cost incurred in a way that litigation requires. I accept too that dealing with EQC and IAG in the early stages caused him some confusion.

[222] For example, WD was unaware that fixtures secured to one's house, such as an oven and carpet that is glued and/or tacked to the floor, is covered under the house policy rather than a contents policy. That caused some confusion for him in working out which claims fell under contents or house insurance and which claims should go to EQC or to IAG.

[223] I have carefully analysed WD's documentation as explained in the schedule to his third affidavit and the receipts/invoices attached to it. I am satisfied that some of the expenditure can properly be said to have been necessary for temporary make safe or weatherproofing repairs that were necessary because of earthquake damage and were done to ensure that WD and B

could stay resident in their home and to prevent any further consequential damage to the property. That is, WD was mitigating the loss as he was required to do.

[224] However, by considering submissions for IAG and doing my own analysis I have identified a number of WD's claims are not within IAG's liability. At least two of them have already been met by EQC. There are also claims I have declined because they were not adequately explained and/or because there were no invoices or receipts.

[225] Some materials bought were used to prevent further damage from the ongoing after-shocks such as using bungees to keep cupboards closed and to strap the hot water cylinder, such as 42. I do not consider IAG is liable to pay for those costs as they are the kind of costs a homeowner could reasonably be expected to meet in the ordinary course of caring for their property and mitigating their loss from any future earthquake events.

[226] I accept that WD did not initially understand that he could not claim for his own personal time in undertaking such repairs. He initially understood that he was saving IAG money by doing the work himself so that it did not incur more expensive tradesperson rates. WD withdrew those aspects of his claims. I find that there was no attempt during these proceedings to mislead IAG by claiming for his time.

[227] WD presented all of the invoices and receipts he had to IAG in 2018 hoping to be reimbursed for them at that point. Up until the Tribunal hearing WD understood that IAG had agreed to treat all damage from the February, April and June 2011 earthquakes as well as the flooding damage as being costed together. That is why his claims were presented together.

[228] My findings on whether IAG is liable to reimburse WD for specific claims follow.

[229] For claim 2, I accept that some of the month's power bill from 22 February to 24 March 2011 was spent on power for blowers and the dehumidifier to dry out the earthquake-induced flooding. However, there is no way of knowing what other power was used for. In all the circumstances, I award $50 for the cost of power used for drying the premises out.

[230] The links of claims 3, 4, 5, 6, 8, 9,10, 11,12, 19, 27 and 42 to earthquake damage, direct or indirect, have not been adequately established.

[231] Claims 43 and 48 for plumbing services in 2018 were not adequately linked to the earthquakes and are declined.

[232] Claim 47 for carpet cleaning in one room in 2017 was not adequately linked to the earthquakes and is declined.

[233] Claims 23-24 were related to appliances that are now not claimed for in these proceedings.

[234] Claim 27 for a garage door seal is not adequately explained as relating to earthquake damage.

[235] Claim 35 for a Showerdome is not adequately linked to earthquake damage and is declined. A Showerdome is the kind of thing any homeowner might install to prevent excessive moisture in a bathroom from showering.

[236] Claim 14 for replacement of water damaged insulation is clearly linked to the flooding from the earthquakes as it refers to replacing water damaged insulation and I have allowed it. Claim 32 for $2,080.35 is from the same date and I have allowed it.

[237] I have already decided that IAG is liable to pay for replacement insulation as per Mr Harrison's costs schedule plus 16%. Therefore, any further insulation that needs to be replaced through the repair process will be covered by that or under the contingency allowance.

[238] I consider that the remaining claims were necessary to prevent consequential loss, were not claims made to or reimbursed by EQC and occurred when the earthquake sequence was an ongoing instability for the house and for WD and B's nerves. The fact that they were able to remain living in the house was of value to them and to IAG in that it allowed the prevention of potentially significant consequential damage and increased the security of the premises.

[239] I have allowed the following claims referred to page numbers in WD's Schedule of Expenses, marked R, and revised on 3 May 2021:

- 1 – temporary replacement of bathroom window;

- 7 – electrical safety check due to earthquake damage;
- 13 – $31.20 only for tape and tarpaulin;
- 14 and 15 for insulation – WD's evidence is that neither he or EQC have any record of EQC reimbursing him;
- 16, 17 and 18 – downpipe parts;
- 20 – materials for fixing roof leaks;
- 21 – $138.00 (incl. GST) only for adjusting roller doors - no link to need for new automatic opener established;
- 22 – part of the removal of water damaged insulation;
- 25 – materials to fix leaks and roof/ceiling;
- 26 – materials for temporary floor bracing;
- 28, 29, 30, 31 – materials for temporary fixes of doors and the first-floor floor;
- 33 – nails for floor bracing;
- 34 – materials for leaking roof;
- 36, 37, 38, 39, 40, and 41 – materials for fixing roof leaks and replacement smoke alarm;
- 44 – materials for temporary deck repair;
- 45 – temporary cladding material;
- 46 – more temporary cladding material; and

- 53 - $62.60 – materials for fixing roof leaks only. The link to earthquake damage for a non-slip liner, duct tape and garage shelving is not adequately proved.

[240] Given my findings about the rat infestation being consequential on earthquake-related damage or alteration of the building, I consider it reasonable that WD is also paid for the costs of exterminating rats and stopping their ingress into his home, so I award a total of $218.81 for claims, 49, 50, 51 and 52 made up of poison and wire mesh to block ingress.

[241] All in all, the total that I order IAG to pay WD for temporary and make safe repairs and rat extermination materials is $6,188.41.

(viii) What amount should be allowed for professional fees?

[242] Mr Harrison's allowance for professional fees is $54, 472, which has been calculated as a percentage of the total cost of repairs.

[243] Mr Creighton's allowance for professional fees is $8,120.00 for "engineering on-site inspections and sign off."

[244] Mr Creighton's evidence was that if a job such as WD's was started from scratch it would require a 5% contingency for all professional fees. However, he said that was not necessary in this case because engineers have already put together the designs and no drafting is required.

[245] Mr Cumming's evidence was that he does not include professional fees in his building contracts and leaves it up to his customers to deal directly with and pay professionals such as engineers, geotechnical engineers and project managers during the repair or build process.

[246] Mr Creighton says he had email correspondence with Mr de Vocht about what engineering inspection fees would be. They agreed a number of inspections could be conducted at the same time so there would not need to be as many as the 12 separate on-site inspections identified in the Miyamoto designs.

[247] Mr de Vocht suggested $9,200 plus GST would be a reasonable allowance for on-site inspections and signing off required under the Miyamoto designs. That estimate is based on

Miyamoto completing the engineering inspections and signing off. However, WD is not bound to use Miyamoto for that work.

[248] Since I have found that the concrete floor slab does not need to be replaced entirely, not even to the lesser extent WD submitted, I am satisfied there is no need for any further geotechnical engineering involvement. The engineering design and drafting has been largely completed. I have made an allowance for the reasonable costs of an engineer of WD's choice to review the design and to present them for building consent.

[249] The Miyamoto plans lists 14 engineering checks or observations as being necessary. I find this number of site inspections to be unnecessary. A number of the checks and observations could be inspected and signed off at the same time.

[250] For the reasons above I consider Mr Harrison's allowance is an over-estimate of the reasonable cost of professional fees necessary even, on this complex repair.

[251] However, I consider that in addition to the necessary engineering fees from the beginning to the end of the project and because of the complex nature of the job, it is reasonable for WD to expect to have a project manager for this quite complex repair. Based on the evidence given by Mr Harrison and by Mr de Vocht I am satisfied that it is reasonable to allow $35,000.00 for on-site engineering inspections and sign-off and project management.

(ix) What should contingency fees be?

[252] During the hearing Mr Cumming said he would be able to enter into a contract for repairs with a 10% contingency; the amount Mr Creighton allowed for unforeseen contingencies. That was instead of the 15% Mr Harrison allowed for in his evidence. Mr Harrison later adjusted his contingency figure to 10.13% after conferral with Mr Creighton.

[253] Generally, in CES litigation the courts have considered 10% contingency fees to be reasonable.[29] I consider the contingency fee should be 10% once the increased construction

[29] *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483 held that an allowance of 10 per cent was standard and appropriate, see [54]. In *Myall v Tower* [2017] NZCA 561 the Court said it preferred a risk-weighted approach when dealing with professional fees. It upheld the High Court in that 10% for a contingency sum is orthodox and covers all construction costs, see [56].

costs allowance of 16% has been added. That includes any further repair costs discovered, such as any engineering or other repair costs in relation to the rusted steel beam or the cantilevered window on the first floor.

(x) Should the first-floor living/dining area floor be polyurethaned? What is the reasonable cost of lifting storing and replacing the living/dining area carpet?

[254] WD's evidence is that the wooden floor in the dining/living area was polyurethaned before the earthquakes with loose mats over it. Some years later carpet was laid on the floor.

[255] There was some confusion about this claim and the claim about the carpet. However, it became clear toward the end of the hearing that WD claims that the wooden floor should be polyurethaned before the existing loose carpet is re-laid on it.

[256] I agree with WD that the floor should be repaired to the same condition as it was prior to the earthquakes. The amount that Mr Harrison has estimated to polyurethane the floor and remove, store and relay the loose carpet, plus the additional 16% should be paid to WD.

Should IAG reimburse WD for the costs of professional reports on the extent of earthquake damage and on repair strategies?

[257] WD filed his case in the High Court on 27 June 2018. Any costs he incurred during the High Court proceedings are for him to claim through the High Court.

[258] WD's case was transferred to this Tribunal on 25 March 2020 by the High Court. Only expert costs prior to the matter being transferred to this Tribunal, and prior to lodging in the High Court, can be awarded in this jurisdiction. That is because s 47 of the Canterbury Earthquakes Insurance Tribunal Act 2019 restricts which costs can be awarded. Neither party is seeking legal costs.

[259] WD says he has incurred costs for commissioning his own experts to more accurately assess the scope of damage and suggest a suitable repair strategy. He asks that I order IAG to reimburse him for the cost of those expert reports he commissioned prior to lodging his claim in the High Court.

[260] Mr Woods submits that had it not been for WD's persistence and his willingness to engage and pay for a number of experts, IAG would have repaired WD's home based on a defective scope.

[261] The Policy includes the following:

> **Costs and Fees necessary for repair or replacement**
>
> **We** pay for any of these if it is reasonably and necessarily incurred to repair or replace the **house**:
>
> 1. demolition and removal of debris and contents;
>
> 2. architect's, engineer's and surveyor's fees …

[262] The cost of demolition and removal of debris and contents is allowed for in Mr Harrison's estimate. I find his evidence establishes a reasonable estimate of the cost of the partial demolition and removal of debris and contents.

[263] There is no monetary limit on the architect, engineer and surveying fees so long as they are necessary for the repair of the house. Therefore, under the Policy, WD submits that IAG is liable to reimburse him for the costs of expert reports from geotechnical and civil engineers he incurred prior to lodging in the High Court.

[264] Alternatively, WD submits that if IAG is not liable to pay for his expert costs as professional fees under the Policy, it should pay them as they were necessary and reasonably incurred as part of the process of resolving the repair strategy for his property.

[265] WD says that IAG's actions were in breach of:

- his rights under the Policy;
- IAG's obligation to settle the claim within a reasonable time;
- IAG's obligation to assess all of the earthquake damage;
- IAG's obligation to include all of the earthquake damage within its repair scope; and
- IAG's obligation to act reasonably, fairly and transparently.

[266] Mr Woods submissions state that the Policy is a contract of utmost good faith, including that IAG must act in good faith when handling claims, which includes:

a. settling the claim within a reasonable time;

b. properly assessing all of the earthquake damage;

c. if choosing to repair, it must include reinstatement of all of the earthquake damage within its repair scope; and

d. if choosing to repair, it must repair to the policy repair standard.

[267] In addition, WD submits that the Insurance Council Fair Insurance Code applies to IAG. The Code includes an undertaking by the insurer to "settle all valid claims quickly and fairly."

[268] Mr Woods submits that IAG failed to settle WD's claims quickly and fairly and that it did not properly assess all earthquake damage and/or did not initially at least include reinstatement of all the earthquake damage in its repair scope.

[269] Mr Woods submits that those breaches caused WD to engage experts above and beyond those of IAG in order to prove his claim.

[270] Before filing proceedings in the High Court, WD obtained engineering and costing reports from:

- Powell Fenwick – engineering consultants;
- Structura – structural engineers;
- CCS Group – engineering consultants;
- Simplexity – residential homes builder;
- AJ Minkley – roofing advice;
- Phoenix Consulting – consulting engineers – structural and geotechnical; and
- R.B.Knowles & Associates - engineers.

[271] IAG also says that it and EQC have already paid for numerous reports on the extent of damage and on the best repair strategy for WD's home. IAG submits that it has already paid a significant amount in terms of expert fees.

[272] IAG submits expert engineering reports WD has paid for have not shifted the repair strategy. WD has paid for reports from five structural engineers. However, he is only relying upon one engineer, Mr Lust.

[273] IAG argues that under the Policy the costs must be from the three professions listed – architect, engineer and surveyor. Therefore, IAG submits that only Powell Fenwick, Phoenix Consulting, GPR Scan – CLS, Structura, Endel Lust and Barry Knowles fall within those categories.

[274] Secondly, IAG submits the costs must be reasonable and necessary and, thirdly, relate to the repair of WD's home.

[275] IAG says it has no obligation to pay for any duplication of costs between IAG and WD's experts or between WD's own experts.

What costs must be reimbursed?

[276] The Insurance Council Fair Insurance Code applies to IAG. The Code includes an undertaking by the insurer to "settle all valid claims quickly and fairly." This has been interpreted by the High Court in *Young v Tower* as requiring an insurer to: [30]

> … act reasonably, fairly and transparency, including but not limited to the initial formation of the contract and during and after the lodgement of the claim and [to] process the claim in reasonable time".

[277] In reaching this conclusion Gendall J referred to the need for the insurer to assess all aspects of the claim. In light of my findings above, it is not open to IAG to argue that the assessments of the damage, and proposed repair methodology it had proposed to WD were complete or comprehensive.

[30] *Young v Tower* [2016] NZHC 2956 at [163].

[278] In *LS v Medical Insurance Society,* the Tribunal recognised that insurers have a duty to accurately assess claims, and communicate the details to the insured, so the insured can make the choices the policy requires of them in any informed manner.[31]

[279] EQC determined that the damage was beyond its statutory cap ($100,000 plus GST) and the claim was therefore passed to IAG in about March 2012. After IAG took on the management of the claim, and before proceedings were lodged in the High Court, it produced 10 costed scopes of work ranging from $136,738 in April 2012 to $488,511 on 21 August 2017. Then the cost of repair estimated by IAG rose to $632,996.01.

[280] In this case the various assessments of the damage by IAG were inadequate, at least until the matter was filed in High Court. Had WD accepted IAG's advised position on the damage and followed its repair strategy he would not have been fully indemnified under the policy. Therefore, I proceed on the basis that if WD has obtained a report to reasonably address an aspect of IAG's inadequate assessment, the reasonable costs of this report should fall for cover by IAG. This conclusion is reached based on either policy coverage for professional fees, or that the cost incurred by WD has followed from a failure of IAG to properly undertake assessments.

[281] I consider that IAG breached its duties to WD by failing in its duty to adequately assess the damage to his property and therefore failed to adequately scope, and cost, the repair strategy necessary. If WD had not commissioned a number of his own experts, including engineers and AJ Minkley and Simplexcity to make their own assessments of the earthquake damage and consequently repair strategies and costs beyond what IAG had prepared, his house would not have been adequately repaired.It is highly likely this case would have instead been one about defective scoping and repairs.

[282] Because of IAG's failures I do not consider that reimbursement for expert reports needs to be limited to those professions listed in the Policy.

[283] IAG gives as an example of a duplicate report examining the same issue as IAG's reports earlier report the Powell Fenwick report that looked at whether the house was safe to occupy, when IAG had already engaged Hawkins, which engaged Aurecon to do that work.

[31] *LS v Medical Insurance Society* CEIT 0024-2020 at [34]. See also *E v IAG*.

[284] In response, WD submits that before he engaged Powell Fenwick to undertake the first report, IAG had not advised him that it had also engaged Powell Fenwick. Rather oddly, Powell Fenwick undertook the work without advising WD that it had already been engaged by IAG to do exactly/largely the same work. Therefore, it is reasonable for IAG to pay for a "double-up" of reports.

[285] IAG did not provide a copy of any written advice to WD that enclosed the Powell Fenwick report that it submits reasonably concluded that the house was safe to live in.

[286] However, I accept IAG's submission that on 26 March 2011 IAG's loss adjuster recorded that although IAG's engineer had done a safety check and:

> house is liveable but insured scared of upper level creaking … insured wants second engineer opinion.

[287] The Powell Fenwick report paid for by IAG had confirmed the house was safe and liveable. In those circumstances, when WD had been told the house was liveable but decided to get another opinion and the result of that expert opinion confirmed IAG's report conclusion, IAG is not bound to pay for the "second opinion" report.

[288] In submissions for WD, the point was made that as a result of WD challenging IAG's view of the extent of earthquake damage and the proposed repairs, IAG increased its cost estimate to repair from $136,783 to $632,996.01 over the years. Mr Woods submits that had it not been for WD's persistence and his willingness to engage and pay for a number of experts, IAG would have repaired WD's home based on a defective scope.

[289] I find that the reasonable cost of repair of the earthquake damage is greater than IAG had allowed for prior to WD's application to the Tribunal. I find it was necessary for WD to engage experts of his own to either comment on reports produced by IAG's experts or to do their own independent assessments, in order to challenge IAG's assessment.

[290] Just before the hearing WD paid an RB Knowles and Associates Consulting Engineers invoice that had been outstanding for eight years. IAG says that it is not credible that Mr Knowles expected WD to pay that invoice at all after so long. It is clear that WD paid and that Mr Knowles accepted the payment. It was reasonable to pay an outstanding bill even after such a period of time.

[291] I accept IAG's submission that the claimed reimbursement for KSL's work is a claim for advocacy services and I cannot award those costs.

[292] IAG submits that it is not liable to reimburse WD for the Aurum costs. Aurum was engaged by KSL but WD had to pay its costs. At the time WD was not legally represented and I consider that in all the circumstances at the time Aurum's engagement was reasonable. The Aurum costs were reasonable and necessary for WD to make progress in his claim. I consider IAG is liable to reimburse WD for those expenses as claimed.

[293] The further claims for expert reimbursement costs I consider as being sufficiently linked to the increase in the assessment of damage and the cost of repair are set out in Schedule A to Mr Woods' submissions.

[294] That does not include the CLS report on voids, which the majority of the engineers agree are unlikely, or the CCS Group rebuild valuation of 31 August 2015. I understand why WD was pressing for a rebuild instead of a repair. However, although IAG's assessments of scope of damage and repair were initially and for some time inadequate, the rebuild of the premises has not been found to be necessary or proved by WD's expert reports.

[295] I am satisfied the following reports were supplied to IAG as set out in Schedule A. Although IAG and its experts may not have agreed with the reports, they did play their part in increasing the scope of repair and its cost, which were obtained before any proceedings were filed and their cost should be reimbursed to WD:

- RB Knowles and Associates engineering report- 26 May 2012;
- RB Knowles and Associates engineering report – 3 September 2013;
- Phoenix Consulting & Construction Limited – 13 February 2015;
- Structura – 7 July 2015;
- CCS Group – repair valuation – 31 August 2015;
- AJ Minkley – roof report – 19 August 2016;

- Simplexity Building Survey Inspection report – 8 September 2016; and

- Simplexity site visit report – 21 March 2017.

[296] In light of my earlier findings, I also find that IAG should reimburse WD for the cost of the Elite Pest Control work in 2019.

[297] IAG should reimburse WD the cost of these reports within 10 working days of receiving this decision.

Should IAG pay WD interest on the reimbursement cost of the expert reports?

[298] WD has claimed interest to be paid on the total cost of the reimbursement for the reports. Under s 48 of the Canterbury Earthquakes Insurance Tribunal Act 2019 the Tribunal may order interest on all or part of the money ordered to be paid for all or part of the period between the date on which the cause of action arose and the date of payment.

[299] Interest must be calculated on the basis set out in the contract of insurance or under the Interest on Money Claims Act 2016.

[300] The Policy does not contain an interest clause. I find that IAG must pay WD interest on the total amount that it must reimburse him for expert reports calculated under the Interest on Money Claims Act 2016 from 21 March 2017 until the date of payment.

Construction cost escalation since the hearing

[301] Unfortunately, this decision has been issued 19 months after the submissions were heard. That significant delay has been largely unavoidable and related to my infection with Covid-19 and my development of Long Covid.

[302] In early August 2022, I sought the parties' views on how much construction costs had climbed since the hearing ended. WD's counsel included Mr Harrison's estimate of 15.99% in their submissions on the issue. After consulting Mr Creighton, IAG submitted that costs had risen 15%.

[303] I accept that costs have risen at least 16% until now and have taken that into account in making orders for what reasonable costs for a Policy compliant repair are.

Conclusion and Orders

[304] I consider it more likely than not that the house can be repaired using the repair strategy outlined by Miyamoto and further agreed by the engineer witnesses during these proceedings.

[305] I also find that repair strategy, properly carried out, will restore the house to the Policy standard of "to the same condition and extent as when the house was new."

[306] My finding that the house can be repaired allows IAG to choose to pay WD the reasonable cost of repair to meet the Policy standard.

[307] This decision also establishes the reasonable cost of repair. That figure of the cost of repair, including the contingency allowance and the professional fees, less what has already been paid to WD by the EQC and IAG for property repair, should be paid to WD within 10 working days of WD providing IAG with a copy of a building contract to repair his property.

[308] The $2,000 due for landscaping costs should be paid at the same time.[32]

[309] The EQC have also paid WD for excavation works, specifically areas B and C in EQC's diagram, which was confirmed by Mr Creighton and Mr Harrison in evidence. As WD has already been paid by EQC for excavation works, $1,142.62 should be deducted from the scope of works. In total for land, WD was paid $4,229.23 minus the EQC excess.

[310] IAG should reimburse WD the cost of those professional reports and the interest on that cost I have ordered to be reimbursed, within 10 working days of receiving this decision.

[311] The reasonable cost of the engineer to review before submitting to Council or for any engineering work necessary after submitted to Council can't be established until that work has been done. Once WD presents the engineers invoice for that work to IAG, it should pay it within 10 working days.

[32] Due under C43 of the Policy.

[312] WD accepts EQC paid him total of $161,545.23 (incl. GST) for EQ damage to his home over two claims. being $107,957.59 plus $53,587.64

[313] IAG paid WD the present value of his home of $172,012.41 being the present value it calculated as $335,250 minus the EQC payment total of $161,545.23. However, I calculate there is a difference of $1,692.36.

[314] The costs associated with getting a building consent from the CCC. The amount is included in Mr Harrison's schedule of costs as .98% of the total cost of the project. This should be paid within 10 working days of IAG being presented with evidence the building consent application has been lodged.

[315] IAG is to pay WD $6,188.41 by way of reimbursement of costs he incurred for temporary and make safe repairs and professional fees within 10 working days of this decision being issued.

[316] The parties should cooperate in calculating the further amounts payable by IAG for repair as set out in this decision. If they are unable to agree WD may come back to the Tribunal to set the final outstanding costs.

C A Hickey
Member
Canterbury Earthquakes Insurance Tribunal