IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA37/2023
[2024] NZCA 415

BETWEEN	MOORHOUSE COMMERCIAL PARK LIMITED Appellant
AND	VERO INSURANCE NEW ZEALAND LIMITED Respondent

Hearing: 17-18 April 2024

Court: Cooke, Moore and Osborne JJ

Counsel: S P Rennie, J E Bayley and F H Scrase for Appellant
C M Brick and A R Cornwell for Respondent

Judgment: 3 September 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal and cross-appeal are dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band B basis together with usual disbursements. We certify for second counsel. There is no award of costs on the cross-appeal.

REASONS OF THE COURT

(Given by Cooke and Osborne JJ)

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Introduction

[1] Moorhouse Commercial Park Ltd (Moorhouse) appeals from the decision of the High Court largely dismissing its claim for breach of contract against Vero Insurance New Zealand Ltd (Vero).[1] Moorhouse claimed under its insurance policy with Vero for damage to its buildings at 33 to 41 and 43 Moorhouse Avenue, Christchurch, arising out of the Canterbury earthquakes in late 2010 and early 2011. Before the High Court, Moorhouse alleged that Vero had breached the insurance policy in a number of ways. Dunningham J dismissed Moorhouse's claims that the damage to its buildings had been more extensive than Vero had accepted.[2]

[2] Moorhouse appeals this finding, and also advances other claims in relation to particular matters. Vero cross-appeals one finding made concerning the basis upon which Moorhouse's entitlement is to be calculated.

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1 *Moorhouse Commercial Park Ltd v Vero Insurance New Zealand Ltd* [2022] NZHC 3260 [Judgment under appeal].

2 At [130]–[133], [166]–[168], [185]–[187], [194]–[195], and [197].

Background

[3] The insured buildings are on a large commercial site covering approximately 4,500 m^2 on the north side of Moorhouse Avenue. There are two insured buildings, one at 33 to 41 Moorhouse Avenue, and a separate building at 43 Moorhouse Avenue (the Buildings).

[4] The building at 33 to 41 Moorhouse Avenue has shallow concrete strip footings and concrete slab on grade, reinforced concrete columns and beams, and brick or concrete block infill walls between the columns and steel rafters. The roof is largely comprised of corrugated asbestos sheets with some glass panels to let in light. The roof over one smaller portion is made from corrugated iron. The overall building was progressively built between 1954 and 1997. It now comprises six separate areas occupied by tenants which operate two gymnasiums, food retail, offices, and other retail premises. The first building was constructed in 1954 as a single storey warehouse (35 Moorhouse Avenue) and a single storey office (37 Moorhouse Avenue). By 1961, two further single storey warehouses were added at 33 and 41 Moorhouse Avenue. Between 1961 and 1964, a second storey was added to 37 Moorhouse Avenue, and in 1962 the two warehouses at 33 and 35 Moorhouse Avenue were extended to the north. There was a further extension in 1980 to form what is now 39 Moorhouse Avenue. In 1980, a mezzanine floor was also added at the southern end of 35 Moorhouse Avenue. In 1992, a reinforced concrete block masonry partition wall was added between 33 and 35 Moorhouse Avenue, and a mezzanine floor was added within the two southern bays of 33 Moorhouse Avenue. At some point between 1994 and 1997, reinforced concrete block masonry partition wall was added between 33 and 39 Moorhouse Avenue, and a mezzanine floor was added over the southern bays of 41 Moorhouse Avenue.

[5] 43 Moorhouse Avenue was built in 2004 as a separate two storey office building. It is constructed from reinforced pre-cast concrete tilt panels which were constructed between concrete columns and steel beams. The foundations comprise reinforced concrete shallow strip footings and pads and a concrete slab floor. The first floor consists of a concrete slab cast on steel tray decking. The roof comprises long run steel.

[6] One further feature of both buildings is they are constructed in very close proximity to neighbouring buildings. The property at 33 to 41 Moorhouse Avenue abuts a neighbouring property to the west, and the east wall of 43 Moorhouse Avenue is also only 100 mm away from a neighbouring property.

The Policy

[7] The Buildings were covered by a material damage policy that Moorhouse had with Vero (the Policy). It provided:

> If, during the Period of Insurance, any:
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> - **Physical Loss or Damage unintended and unforeseen by the Insured happens to any Insured Property;**
> - **Costs or Losses arise for which this Policy is expressly extended;**
>
> then, subject to the terms, conditions and exclusions of this Policy, the Company will indemnify the Insured for the loss, damage and costs.

[8] The Policy then specified the required basis of the insurance settlement. For buildings identified covered by the Policy's "Reinstatement Memoranda" reinstatement cover was prescribed. This cover applied to the Buildings. Cover was also expressly extended to damage arising from earthquakes. Under the prescribed basis, Vero had the ability to elect either to make payment or to undertake the reinstatement or repair required.

[9] The reinstatement cover was identified in the following way:

> **REINSTATEMENT**
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> In the event of any Insured Property to which this Memorandum applies being lost, damaged or Destroyed, the basis on which the amount payable under this Policy is to be calculated will be the cost of Reinstatement of the property, subject to the special provisions of this Memorandum.

[10] "Reinstatement" was defined in the following terms:

> (a) "**Reinstatement**" means:
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> (i) where property is lost or Destroyed, its replacement by Equivalent Property;

(ii) where property is damaged but not Destroyed, the repair of the damage and the restoration of the damaged portion of the property to a condition substantially the same as, but not better or more extensive than, its condition when new, but incorporating such alterations as are necessary to comply with any Act of Parliament or Regulation.

[11] This reinstatement cover was subject to a limitation in the following terms:

> 5. In any of the following circumstances, no payment will be made beyond the amount which would have been payable had this Memorandum not been incorporated in the Policy:
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> (a) if the Insured elects not to Reinstate the property;
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> (b) if the work of Reinstatement is not commenced and carried out with reasonable despatch;
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> (c) until the cost of Reinstatement has actually been incurred, or agreed between the Company and the Insured.

[12] Such a limitation on reinstatement cover is common. An insured is usually only entitled to recover the cost of reinstating their property — with a building, essentially the cost of rebuilding it to the specified standard — if they actually do rebuild. They do not have the option of being paid the cost of rebuilding but then not doing so.

[13] When an insured does not actually rebuild, they are nevertheless covered for the indemnity value.[3] The indemnity value is defined in the following way:

> **Indemnity Value**: The reinstatement cost of the property to a condition not better or more extensive than when new less due allowance for depreciation and deferred maintenance.

[14] The main difference between reinstatement cover and indemnity cover is accordingly the deduction for depreciation and deferred maintenance.

[15] There is no dispute that the Buildings were damaged by the Canterbury earthquakes that occurred between September 2010 and February 2011. But there is a significant dispute as to the extent of the damage, and what is required to reinstate the building to the Policy standard. There is also a dispute about the calculation of the

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[3] See, for example, *TJK (NZ) Ltd v Mitsui Sumitomo Insurance Co Ltd* [2013] NZHC 298, which concerned a similar provision in an insurance contract.

indemnity value. Notwithstanding that the earthquakes and resulting damage occurred more than 13 years ago, Moorhouse maintains the stance that unless and until Vero accepts the extent of the damage caused, and what is required to reinstate the Buildings to the Policy standard, it cannot make the decision on whether it will actually rebuild and be eligible for reinstatement cover, or whether it is now limited to recovering only the indemnity value as prescribed.

[16] It would appear that the reinstatement work Moorhouse says is required would require the Buildings to be largely demolished and reconstructed given their integrated character. There may be some artificiality in the suggestion that buildings which have had substantial repair and upgrade works, and which are occupied by tenants, will nevertheless be demolished and reinstated some 13 years after they were damaged. But we accept that there is a genuine dispute about the extent of that damage and that Moorhouse may not be able to know how to proceed until it knows what its entitlements are. In any event, there is no issue before us arising out of the extent of the delay since the insured events, other than its relevance to the determination of interest payable.

[17] The main dispute focus is on the extent of the damage caused to the Buildings by the earthquakes, and Moorhouse's insurance entitlement as a consequence. There are other issues in relation to particular work that has been undertaken at the Buildings. There is also a dispute about the calculation of "depreciation and deferred maintenance" under the definition of indemnity value.

Epoxy repair and bond loss

[18] The main area of dispute arises from Moorhouse's allegation that the Buildings suffered greater damage than Vero assessed, primarily arising out of what is called "bond loss" (outlined at [20] below), and that Vero's "epoxy repair" methodology would not repair the Buildings to the Policy standard — namely that they be restored to a condition substantially the same as when new.

[19] Vero's epoxy repair solution essentially involves repairing the cracks that had occurred throughout the Buildings by injecting them with epoxy resin. Moorhouse says that whilst this fills in the cracks caused by the earthquake, it does not address

underlying earthquake damage to the Buildings, primarily the loss of "stiffness" caused by that underlying damage.

[20] That underlying damage is said to have arisen by a concept known as "bond loss" or "bond slippage". In short, this is a kind of damage that can arise with steel reinforced concrete, particularly when the steel reinforcing is not "ribbed" but is "smooth". There was a period of construction where it was not appreciated that having ribbed steel reinforcing rods within concrete assisted the steel rods to grip the concrete. Smooth steel reinforcing rods, such as those used in these Buildings, are more likely than ribbed steel reinforcing rods to lose their connection with the concrete during an earthquake event causing the phenomena known as bond loss. This damage occurs before a further stage of damage, referred to as "yielding", where the steel reinforcing rods bend or yield during the event causing further damage. But bond loss alone can cause damage and result in a loss of stiffness of the building overall.

[21] Expert evidence was given for Moorhouse by Ms Jan Stanway, a structural engineer. She is familiar with bond loss damage, including from work she has undertaken on damage to structures in Wellington following the Kaikōura earthquake. She gave evidence that Vero's epoxy injection solution did not meet the Policy standard, including because the Buildings had suffered bond loss damage and a consequential loss of stiffness. She disagreed with the opinion of Vero's expert, Dr Nicholas Brooke, also a structural engineer, that the epoxy injection approach met, what was reasonably required to repair the damage to the Policy standard. Ms Stanway's opinions were supported by further expert evidence of Mr Adam Walker who had conducted the initial engineering assessments that she had reviewed.

[22] The High Court preferred the evidence of Dr Brooke and dismissed Moorhouse's claims in this respect.[4]

Appellant's arguments

[23] Mr Rennie, for Moorhouse, argued that the opinions of Mr Walker and Ms Stanway should have been preferred by the High Court. Epoxy repair is a repair

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4 Judgment under appeal, above n 1, at [120]–[143].

technique that can be used for some aspects of construction, repair, and maintenance of buildings, but there are no textbooks or standards to follow for a repair to the kind of damage arising here. No testing has been performed by Dr Brooke to quantify the loss of stiffness, and none is established by the literature, with knowledge of what epoxy repair can restore in its infancy. The Policy standard of restoring the building to substantially the same as new can accordingly not be met. This was reflected in the fact that the epoxy applicator had not given a warranty.

[24] The Policy standard of "substantially the same as … when new" does not allow the insured to be left with diminished functionality through a reduced ability to resist future seismic forces. Relying on the decision in *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (the Torenia)*, Mr Rennie argued the onus was on Vero to establish that the epoxy repair would meet the Policy standard.[5] The Judge could not, in reliance on Dr Brooke's opinion, safely conclude that the Policy standard would be met by the epoxy injection repair. He relied on the rigour required for establishing the validity of expert opinion identified by the *Daubert* factors that have been applied in New Zealand.[6]

[25] The Judge also erred in relying on engineering evidence and reports that described the damage to the building as minor or moderate and in observing that the damage was "mostly cosmetic".[7] The appearance of cracks after an earthquake event does not evidence how wide they were at the time of the event itself, or the consequential damage. Cracking to concrete elements compromises the stiffness of the building and its ability to resist future seismic forces. Ms Stanway had analysed the cracking that appeared in the building, including cracking at the base of the columns at 33 to 41 Moorhouse Avenue. She said that this cracking was consistent with bond loss. Dr Brooke did not have an explanation for why the cracking appeared at the base of the columns.

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5 *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA* [1983] 2 Lloyd's Rep 210 (QB) [*the Torenia*] at 215.

6 *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 593–594, adopted in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 [*Lundy v R* (PC)] at [139]. See also *Attorney-General v Strathboss Kiwfruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [491]–[492], citing *Lundy v R* (PC), above n 6; and *Lundy v R* [2018] NZCA 410 [*Lundy v R* (CA)].

7 Judgment under appeal, above n 1, at [37].

[26] Further, the Judge erred in relying on Dr Brooke's further evidence that, even if there had been bond loss, the calculated loss of stiffness to the building was not material. Ms Stanway's evidence was that bond loss could result in an overall reduction of stiffness of more than 20 per cent after epoxy repair. She was of the view that in future earthquakes there would be increased non-structural damage as a result of the reduction in stiffness.

[27] The Judge also erred in finding support from Dr Brooke's opinions which relied on materials that related to the use of epoxy repairs generally, rather than the specific question of building stiffness. Mr Rennie referred to the so-called Hamburger Report, commissioned by the Christchurch City Council (the Council), which concluded that epoxy injection would generally not restore earthquake damaged structures to the substantially as when new standard where there was damage of the kind arising here.[8] The Judge also erred in characterising Ms Stanway's evidence as "overly risk-averse".[9]

Analysis

[28] In our view, this is a case that had factual challenges. But, in the end, we consider that the case was and is resolved by the application of the burden of proof.

[29] An insurance policy is a contract. A plaintiff alleging that the contract has not been performed must prove that breach.[10] Here, it is accepted that there has been damage to the Buildings which engaged Vero's contractual obligations. Vero considers it those obligations are met by its epoxy repair solution. Moorhouse alleges that that is not so because the damage to the Buildings is more profound than Vero has assessed meaning that Vero's proposed repair solution is insufficient to repair the damage. To establish this, and thereby prove a breach of contract, Moorhouse must prove that this further damage occurred.

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8 *Evaluation of Epoxy and FRP Repair of Earthquake-damaged Concrete Structures* (Simpson, Gumpertz & Heger Inc, California, November 2014) [Hamburger Report] at 29–30.

9 Judgment under appeal, above n 1, at [127].

10 *The Torenia*, above n 5, at 215.

[30] Mr Rennie relied on *The Torenia* for the proposition that the burden shifted to Vero to establish that its repair strategy met the policy standard. *The Torenia* stands for the general proposition that the person who alleges must prove.[11] But it is Moorhouse alleging that Vero has breached the contract. Vero said in its defence that its repair solution meets the policy standard, but that does not mean that it has a burden to prove it has not breached the contract by adopting that stance. Moorhouse still has the burden.

[31] The burden of proof does not shift to the insurer because this is an insurance contract. The burden can shift to the insurer to show that any relevant exclusion of liability under the policy applies.[12] But that was not the case here. The insurer's duty of good faith will also mean that it has certain obligations in relation to a claim.[13] The insurer would be obliged to investigate the claim in good faith to assess what it considers the damage to the property to be. That will likely require the instruction of competent experts to provide their impartial opinion. But it is not the insurer's burden to prove that suggested damage did not arise. The insured must still prove its allegation that there was additional damage not accepted by the insurer.

[32] As Ms Brick submitted, for Vero, an argument similar to that advanced by Moorhouse was made in *Myall v Tower Insurance Ltd*.[14] This Court concluded that "[n]o question of shifting burdens arises; the Court was applying a policy standard … not considering whether an exclusion applied, and it was doing so in a particular factual context".[15] The same approach applies here.

[33] On appeal, Moorhouse also has the burden of establishing the High Court was wrong. Such an appeal is approached without any question of deference to the High Court in accordance with the standard outlined by the Supreme Court in

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11 At 215.

12 See *Dawson v Monarch Insurance Co* [1977] 1 NZLR 372 (SC) at 374, citing *Bond Air Services Ltd v Hill* [1955] QB 417 at 426.

13 Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [4.8.2(4)].

14 *Myall v Tower Insurance Ltd* [2017] NZCA 561 at [20].

15 At [22].

Austin, Nichols & Co Inc v Stichting Lodestar.[16] The overall position was summarised in *He v Earthquake Commission*:[17]

> [7] [The plaintiff] bears the burden of making out his claim at trial and on appeal. In particular, the burden is on [the plaintiff] to establish that the house suffered damage caused by the Canterbury earthquakes. It is not sufficient for him to point to the (undisputed) dislevelment of the house's floor, or to establish that it is possible that this might have been caused or contributed to by the earthquakes. He needs to show on the balance of probabilities that differential settlement of the house was caused or materially contributed to by the earthquakes.

[34] Equally here, it is not sufficient for Moorhouse to point to the undisputed fact that earthquake damage has been occasioned to the Buildings, or to establish that it is possible that greater damage may have been caused. It needs to show, on the balance of probabilities, that greater damage was caused or materially contributed to by the earthquakes.

[35] We accordingly need to assess whether Moorhouse discharged the burden of proof by showing that the Buildings suffered additional damage, and that epoxy repair is not a sufficient method of repairing that damage. As Mr Rennie accepted, epoxy repairs can be appropriate in some circumstances. The Hamburger Report on which he relied appears to have accepted this.[18] If there has been no greater damage caused to the Buildings other than the cracking itself, then epoxy repairs are an established repair technique. We agree with the High Court Judge that Moorhouse needed to prove that additional damage had been caused in order to demonstrate that epoxy repairs were not appropriate.[19] In reviewing Ms Stanway's evidence criticising the epoxy repair, the Judge concluded:[20]

> [129] These issues are important because, as she said in her evidence, it was the inability to restore the bond between the reinforcement and the concrete which was the key reason for rejecting epoxy injection as a means to restore the concrete columns in most of the 33 – 41 Moorhouse Avenue building. If I am not satisfied on the balance of probabilities that such damage has occurred, her main reservation about the use of epoxy is addressed.

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16 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
17 *He v Earthquake Commission* [2019] NZCA 373 (footnote omitted).
18 Hamburger Report, above n 8, at 36.
19 Judgment under appeal, above n 1, at [131].
20 At [129].

[36] The Judge then reviewed the evidence of Ms Stanway and Dr Brooke and concluded she preferred that of Dr Brooke.[21] She said:

> [132] Having reached the view that, on the balance of probabilities, there is no material damage to the reinforcement, nor is there debonding between it and the concrete, the primary concerns about the efficacy of epoxy to restore the stiffness of the building are eliminated. That accords with the conclusions in the Hamburger report (which Ms Stanway's evidence endorses), which supports the use of epoxy repairs for minor or moderate concrete cracking but raises doubts about its use to repair significant damage, or to completely restore the bond between concrete and reinforcing steel, when that has been lost.

[37] Part of the reason for the Judge's conclusions was that Ms Stanway had, herself, approached the issues on the basis that Vero had an obligation to prove that the damage had not occurred.[22] The Judge also concluded that Ms Stanway had taken an "overly risk-averse approach".[23] We agree that there is some force in these criticisms. The example identified by the Judge was Ms Stanway's evidence that there had been no testing of the lost strain capacity of the reinforcement.[24] The Judge also observed that, in her evidence, Ms Stanway was not prepared to discount the possibility that there had even been yielding of the reinforcing during the earthquakes.[25] We agree that the substance of these opinions involves a suggestion that Vero had to disprove the possibility that Moorhouse's allegations raised, including by conducting tests of some kind.

[38] We have some sympathy for the position that Moorhouse was in. However, we consider that Moorhouse has not proved, on the balance of probabilities, that bond loss did occur. Bond loss during earthquakes is a recognised phenomenon that can arise with smooth reinforcing bars within concrete.[26] We accept that Moorhouse has demonstrated that it is possible that bond loss occurred in these buildings. The Buildings were vulnerable to this phenomenon because smooth round bars were used in some of the construction. There has been earthquake damage to the Buildings as

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21 At [127]–[133].
22 At [131].
23 At [127].
24 At [131].
25 At [127]. Yielding is the further stage of damage when the reinforcing bars bend or yield.
26 See, for example, Aizhen Liu and Robert Park "Seismic Load Tests on Two Concrete Interior Beam-Column Joints Reinforced by Plain Round Bars Designed to Pre-1970s Codes" (1998) 31(3) Bulletin of the New Zealand National Society for Earthquake Engineering 164 at 164 notes that the "utilisation of plain round bars [leads] to bond slip".

evidenced by the cracking. Ms Stanway, a well-qualified expert, believes bond loss has occurred. But there is no real way of knowing whether it has actually occurred, even on the balance of probabilities. No evidence was led to suggest a way of conducting a test to establish whether it has happened. Neither is there any recognised way of establishing it from external damage such as the cracking that has been identified. The fact that it is possible does not mean it has probably occurred. In those circumstances we do not accept that bond loss has been proved.

[39] Mr Rennie was critical of Vero's epoxy injection repair strategy on the basis that it was not a well-established approach. He raised the *Daubert* criteria, used to assess the admissibility and weight to be attached to expert scientific evidence,[27] arguing that the epoxy injection strategy did not meet such standards. He argued that the epoxy repair approach had not been sufficiently peer reviewed, tested, subjected to measurable performance criteria, or generally accepted by the industry, and therefore should not have been relied on by the Judge.

[40] We do not accept these arguments. The first point is that the *Daubert* criteria were developed and applied for a different purpose. They exist to establish whether a particular novel scientific method or technique can be relied upon by a court as admissible expert evidence. They were not developed as criteria to be applied to determine whether a particular method or technique should be used to repair damage to buildings. They can, perhaps, be a helpful guide for the reliability of novel techniques. But that is not their purpose.

[41] Secondly, we also do not consider that the *Daubert* criteria directly apply to expert engineering evidence. The criteria are applicable to novel scientific evidence. The criteria have been applied in New Zealand in relation to cutting edge questions of science in both criminal[28] and civil[29] proceedings to address whether particular evidence is admissible. We do not consider that approach applies in the same way to expert opinion evidence about engineering issues, such as the extent of damage to buildings. Such engineering issues involve the application of judgment and

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27 See *Lundy v R* (PC), above n 6; *Lundy v R* (CA), above n 6; and *Attorney-General v Strathboss Kiwifruit Ltd*, above n 6.

28 *Lundy v R* (PC), above n 6, at [138]–[139]; and *Lundy v R* (CA), above n 6.

29 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 6, at [491]–[492] and [499].

experience as much as the validity of scientific techniques. The criteria do not apply with the same force in this context.[30] Whilst failure to meet the criteria in the context of novel scientific evidence may lead to exclusion of the evidence, or little reliance being placed on it by the court, this is not the case here.[31] But the *Daubert* criteria can nevertheless be helpful — the more criteria are met by a proposed approach or technique of an engineering expert, the more reliable it may be.

[42] More importantly, we consider that the need to follow criteria to establish the validity of particular methods or techniques ultimately has more relevance to Moorhouse's claim than it does to their criticism of Vero's repair strategy. Moorhouse contends, on the basis of Ms Stanway's evidence, that there has been substantial latent damage to the Buildings, primarily arising from bond loss. Based on Dr Brooke's evidence, this is disputed. There are then no well-established tests or standards, known error rates, or peer reviewed articles, that have been provided to us, that can then be applied to identify whether this damage has occurred or not.[32] We do not consider that the High Court can be criticised for concluding that Moorhouse had failed to meet the burden of proof against that background.

[43] The point is illustrated by the competing expert evidence relating to the significance of the location of the cracks at the base of some of the columns. Ms Stanway gave evidence that the existence and location of this cracking was consistent with bond loss. But no literature or other material was identified demonstrating that such cracking can be used to establish the existence of bond loss. The *Daubert* criteria, if applicable, would suggest the need for tests, known error rates, peer review, and wide acceptance if such cracking were to be used to establish the existence of bond loss within the Buildings. As we say, we do not suggest that the *Daubert* criteria need to be satisfied for the evidence to be admissible. But the absence of any recognised way to assess whether the cracking is consistent with bond loss makes the ability to make findings more difficult. The position became further

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30 See, for example, *Lundy v R* (CA), above n 6, at [202]–[204], where the Court considered that one category of scientific evidence was not a "novel technique" so that the *Daubert* criteria did not apply.

31 See, for example, *Lundy v R* (CA), above n 6, at [241]–[242] and [248]; and *Attorney-General v Strathboss Kiwifruit Ltd*, above n 6, at [499].

32 Other than the potential of destructive testing, which is not practicable.

complicated by Ms Stanway's evidence that the cracks appeared in this location in some columns, but not others, because in some cases the reinforcing would not have been anchored to the foundations. Whether that was factually correct or not was then questioned when plans associated with the original construction were found. They suggested that the reinforcing may have been anchored.

[44] It very difficult for the Court to make findings based on expert evidence of this kind. The opinion of an expert may be enough, by itself, in some cases. But the lack of some accepted basis that the court could use to reach conclusions is significant. The position is no easier on appeal where the court is seeking to assess the expert evidence based on the transcript. Moorhouse is unable to prove, on the balance of probabilities and through the application of some recognised test or other technique accepted as reliable in the industry, that the damage occurred. We consider that ultimately means that the High Court was right to reject Ms Stanway's opinion.

[45] For the above reasons, we are of the view that the High Court did not err in rejecting Moorhouse's claim.

[46] But there is a further element. Dr Brooke gave evidence that, even if bond loss had occurred as Ms Stanway suggested, it would not have had any material impact on the ability of the Buildings to resist future earthquakes. He gave evidence that a 20 per cent or less reduction in the stiffness as a result of bond loss — the range assessed by Ms Stanway — would have an insignificant impact on the buildings movement in future earthquakes. For example, he assessed that during the February 2011 earthquake there may have been a movement of approximately 25 mm at the top of the columns at 33 to 41 Moorhouse Avenue. The increase in movement from the reduced stiffness (if it had occurred) was assessed by him as limited to approximately 1 mm.

[47] Ms Stanway had relied on laboratory studies on the extent of impact of reduced stiffness of 5 to 20 per cent.[33] She did not agree with Dr Brooke's evidence, but the point was made by Vero before us that the materials used in the laboratory work had been more significantly damaged, and that it had not been tested in real world situations. The Judge ultimately found that the additional displacement of the building under a moderate earthquake would be so minimal that she accepted that the epoxy repair would restore the building to policy standard.[34]

[48] Mr Rennie argued that the Judge erred in relying on Dr Brooke's evidence. We accept that this evidence only represented Dr Brooke's opinion, and that it was not based on a well-established technique for measuring the effects of decreased stiffness recognised by the engineering profession. But it was for Moorhouse to prove that there had been damage to the Buildings as alleged.

[49] As Ms Brick submitted, the trigger for cover under the Policy is "physical damage" to the Buildings. Not all changes to a building after an earthquake will necessarily meet this definition. The courts have defined physical damage in this context as meaning a detrimental physical change to the insured property which impairs the value, amenity, or usefulness of the property in a way that is material and not de minimis.[35]

[50] If bond loss occurred, there will likely have been physical change within the Buildings. But that change is only relevant if it detrimentally affects the value, amenity, or usefulness of the Buildings. We consider it important that bond loss was not alleged to have made the Buildings any weaker in terms of their ability to resist future seismic events. The contest between the experts was more specific — that the Buildings were less stiff. That is that they would move more in future earthquakes. If they moved more, it could cause greater damage, including to the contents of the buildings, in future earthquakes.

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33 Kai Marder and others "Quantifying the effects of epoxy repair of reinforced concrete plastic hinges" (2020) 53(1) Bulletin of the New Zealand Society for Earthquake Engineering 37; Catherine French, Gregory Thorp, and Wen-Jen Tsai "Epoxy Repair Techniques for Moderate Earthquake Damage" ACI Structural Journal (Technical Paper 87-S41, 1990); and Joseph Plecnik and others "Behavior of Epoxy Repaired Beams under Fire" J Struct Eng 112 (1986) 906.

34 Judgment under appeal, above n 1, at [135].

35 *Body Corporate 335089 v Vero Insurance NZ Ltd* [2020] NZHC 2353 at [57].

[51] For Moorhouse to prove its claim, it needed to prove not only that bond loss had occurred, but also the detrimental effect that bond loss had in terms of the value, amenity, or usefulness of the Buildings. Dr Brooke conducted an analysis and his conclusion was that even with a 20 per cent reduction in stiffness, any increases in displacement of the building during an earthquake would still be "insignificant". Ms Stanway did not agree based on the laboratory tests she referred to. But it was for Moorhouse to prove this detrimental effect. We are satisfied that it did not do so. Once again, it raised only a possibility that the potential latent damage had caused such a detrimental effect.

[52] Again, we acknowledge the potential problem for Moorhouse. It is possible that such latent damage occurred, and its Buildings are less stiff in a way that could cause greater damage in future earthquakes. There appears to be no way of establishing this, however. To succeed with a claim before the court, the party must satisfy the burden of proof. Moorhouse did not do so and has not done so on appeal.

[53] We accordingly reject Moorhouse's arguments on this aspect of its appeal.

Particular repairs

[54] The next aspect of Moorhouse's appeal relates to the findings of the High Court in relation to particular repairs conducted at the Buildings. The High Court found that the repairs conducted or scoped to be conducted had met Vero's obligations under the Policy. On appeal, Moorhouse submits that the Judge erred in this finding.

Relevant legal principles

[55] Much of the argument in this Court, as in the High Court, on two of these repair areas focused on whether the repair work undertaken was a permanent repair, or a temporary repair. The Policy included the following term:

> **DEMOLITION, REMOVAL OF DEBRIS AND OTHER COSTS**
>
> This Policy extends to cover costs necessarily incurred for any of the following purposes in consequence of loss or damage covered by this Policy:
>
> …

- temporary repairs and other measures (including the erection and maintenance of street and/or pavement hoardings and/or scaffolding) to secure the property or to make it safe or suitable for continued use.

[56] On appeal, Moorhouse says that for two areas of repair work there was only a temporary repair under this clause, and that it was entitled to have a permanent repair meeting the Policy standard undertaken.

[57] Before addressing those two areas, we first address the appropriate legal principles that are to be applied in relation to these arguments. They were not referred to other than in passing by the parties, and neither were they addressed in any detail by the High Court Judge given the arguments advanced in that Court.

[58] We consider that the starting point is that the insured is entitled to have any repairs undertaken to the standard specified by the Policy. In the contemporaneous documents and the parties' submissions, reference was made to a standard of "like for like". That is not the standard set by the Policy. The standard is "restoration of the damaged portion of the property to a condition substantially the same as, but not better or more extensive than, its condition when new" in accordance with the definition of "reinstatement".[36] We agree with the High Court Judge's formulation of that standard in the following way:[37]

> [82] The "when new" standard does not require exact replication of the original; modern materials and techniques may be used. The standard of repair required is to render the fact of earthquake damage immaterial. When deciding what standard of remediation is required by the policy, regard must also be had to the purpose of the damaged component. Where an item has a functional purpose only, then so long as the repair or replacement restores that functional purpose to a "when new" condition, the obligations under the policy will be met. Where the component also has an aesthetic purpose, the remediation strategy must restore the former aesthetic to a "when new" quality.

[59] Whether repairs are intended to be temporary, or permanent, may ultimately not matter. What matters is whether the Policy standard has ultimately been met.

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[36] A similar approach applies for indemnity value, although this involves deductions for depreciation and deferred maintenance.

[37] Judgment under appeal, above n 1 (footnotes omitted).

[60] It is not uncommon for the insured and the insurer to have discussions about the nature of repairs that are to be undertaken to satisfy the Policy. It is possible that the nature of those discussions may reach the point where a fresh agreement or variation to the original agreement is reached pursuant to which the insurer is no longer obliged to meet the Policy standard — that is that there has been accord and satisfaction.[38] Alternatively, the point might be reached where the insured is estopped from claiming that particular works did not meet the Policy standard because it would be unconscionable to allow the insured to assert that new work is required because of their effective agreement to work of a different, or lesser standard.[39] Care would need to be applied in reaching a conclusion that an estoppel has operated when the insured may not have a full appreciation of the ramifications of particular repairs, particularly where the insurer had a contractual right to undertake those repairs. The burden would be on the insurer to establish accord and satisfaction or an estoppel.[40]

[61] The discussions between the insurer and insured can have a further dimension relevant to the "substantially as new" standard. Assessing whether that standard is met includes an examination of the purpose and use of the element of the building that is in issue. The discussions between the insured and the insurer may shed light on that question. Agreement may be reached on how the relevant element is to be restored to substantially the same standard as when it was new, bearing in mind its particular purpose and use. The insured may be happy with an alternative construction method, or material, because it is substantially the same in terms of its utility and other factors. So, agreements reached in such discussions may be good evidence that the substantially as new standard has been met.

[62] Given the analysis above, it may be that much of the argument advanced before us on the two disputed areas does not focus on the key issue. It is not whether the repairs were temporary or permanent that counts. It is whether the repairs meet the

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38 See, for example, *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2015] NZHC 1444 at [220]–[226]. Such an agreement would normally be evidenced by a formal release/settlement agreement.

39 Such an approach has not yet been recognised in New Zealand, but see generally *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA). We note also that there may be considerable conceptual overlap with the doctrine of waiver in this context, see the discussion in Hugh G Beale (ed) *Chitty on Contracts* (35th edition, Thomson Reuters, London, 2023) vol 1 at [7-036].

40 See [29] above.

Policy standard. If they do not meet the Policy standard, then Vero remains contractually obliged to meet that standard unless accord and satisfaction, or possibly an estoppel, is made out by Vero.

[63] We address the various elements of the building in dispute against that background.

Northern exterior wall at 41 Moorhouse Avenue

[64] The northern exterior wall of 41 Moorhouse Avenue was originally constructed with unfilled concrete masonry block. The lower sections were concrete block, and the upper sections were lightweight timber construction with metal cladding.

[65] The wall suffered earthquake damage and was repaired in 2012 by removing the infill elements and replacing those and the block elements with a Hardie Board type construction. Vero met the cost of this work at $10,865.52.

[66] The repair scope put forward by Moorhouse at trial provided for the replacement of this repaired wall with concrete filled masonry block. Moorhouse did not directly refer to the 2012 repair in its evidence. At trial, it was submitted for Moorhouse that the 2012 repair was a temporary repair as defined in the Policy.

[67] In his evidence for Vero, Mr Allott, a Commercial Resolution Teams Manager, recorded:

> 57. During 2012, MWH arranged for some urgent works which the owners' engineer advised were required to 33 – 43 Moorhouse Avenue. This included repairs to the northern external wall at 41 Moorhouse Avenue, where sections of block wall were replaced with a timber framed wall. Correspondence on Vero's claims file shows that this work was intended to be a permanent replacement of the block wall. The nature of the replacement wall was as requested by the owner, with involvement from Structex, and the scope of work was agreed by MWH on Vero's behalf. The work was done by Josephs Builders, who discussed the work to be done with Peter Dennis. … Vero paid $10,865.52 (incl GST) for this work … Vero considers it has met its obligations in relation to the earthquake damage to this wall.

[68] Mr Allott referred to email correspondence discussing and agreeing on arrangements for the repair. In particular, he referred to an email on 18 May 2012 from Michael Kean at Vero to Adam Walker at Structex, which says:

> We have decided to deconstruct and permanently replace the blockwall with a hardie board type construction at the request of the owner. Could you please contact the owner (Peter Dennis) … to confirm the type of construction he would like so you can then detail it for Joseph builders.

[69] Mr Allott was not cross-examined in relation to this (or his other evidence).

[70] Mr Dennis, the director of Moorhouse, was cross-examined in relation to the wall's repair and the sentence in the email referring to the permanent replacement of the wall. This exchange occurred:

> Q. Do you accept that it's at your – at the owner's request that this wall was deconstructed and permanently replaced with the block wall – with the Hardie –
>
> A. I think my statement or comments were at the time were you're wasting various money if you're doing a temporary repair. My preference is I can't see any reason why we can't end up with a permanent solution. And there are emails to that effect.
>
> Q. And that's then what happened, isn't it?
>
> A. What's that?
>
> Q. And that's what then happened?
>
> A. That's what was engaged. The architectural detailing came from the Buchan Group.

[71] In closing submissions in the High Court, counsel for Moorhouse submitted Moorhouse was still entitled to a repair scope which provided for a "like for like" replacement because:

(a) the walls as repaired were not as durable and impact resistant as concrete block walls;

(b) the email reference to "permanent" replacement came from Vero's consultants and did not support a finding that Moorhouse had accepted the repairs were permanent; and

(c) there was other documentary evidence (including a subsequent tax invoice) which described the works as "Temporary Works".

[72] The Judge was nevertheless satisfied on the totality of the correspondence and Mr Dennis's evidence in cross-examination that Moorhouse and its agents represented to Vero that the work was to be a permanent replacement and that Vero agreed to pay for it on that basis.[41] The Judge found although it was not a like for like replacement, Moorhouse was not now able to resile from its acceptance at the time that the proposed replacement would constitute a permanent repair.[42] Vero was therefore entitled to exclude further work on the wall from the repair scope.

[73] Mr Bayley, who addressed Moorhouse's appeal submissions on this point, accepted that Moorhouse "evidently wanted a permanent repair" and submitted the evidence had not established that Moorhouse made an "informed and unequivocal decision to compromise or waive its policy entitlement". Mr Bayley also noted Vero had not pleaded there had been a compromise of the policy entitlement.

[74] We consider the Judge correctly concluded Moorhouse was not entitled to include the cost of any further repair of the wall in the repair scope.

[75] First, there is nothing in the pleading point. Whether the cost of any further repair to the wall should be included in Moorhouse's repair scope was in issue at the trial and Mr Allott's previously served brief had clearly set out Vero's evidence with specific reference to the discussions as to the 2012 wall repair.

[76] The second point is that "like for like" is not the Policy standard. The Policy standard is that the repair had to restore the Buildings to a condition substantially the same as, but not better or more extensive than its condition when new. That includes both functional and aesthetic elements. The fact that it is not identical to what was there before does not mean it has not met the Policy standard.

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41 Judgment under appeal, above n 1, at [155].
42 At [156].

[77] Finally, the Judge effectively concluded there had been a meeting of minds on the repair that was to be undertaken, and the materials that were to be used. That was the only reasonable conclusion available once Mr Dennis gave his answers in cross-examination. Mr Dennis opted for a permanent, rather than a temporary repair, and Mr Kean's email clearly identifies that was his (Vero's) understanding of Mr Dennis's request.

[78] It may be doubted whether this meeting of minds would meet the requirements for accord and satisfaction. It might, however, amount to estoppel in the sense that Moorhouse cannot now, in good conscience, contend that Vero must demolish this work and start again simply because it now says the new walls are not as durable and impact resistant as concrete block walls.

[79] But, in any event, we consider the engagement between the parties, in the context of what was intended to be a final repair, informs whether that repair meets the "substantially as new" standard. That is because it is good evidence going to whether in both functional and aesthetic terms it is substantially the same as new. The suggestion, now, that the repair is not as durable and impact resistant as a concrete block wall, was not raised at the time.

[80] The photographic evidence shows that the walls are of the same appearance. They also perform the same function. They are to an "as new" standard. The fact that more modern and lightweight materials have been used in the reconstruction does not mean that they are not substantially the same as new. More modern and lightweight walls may have some advantages over solid walls. If this particular building was rebuilt today, it may well be that this is the material that would be used. We consider that any differences exist within a margin of appreciation that the insurer and insured can be expected to address and agree upon at the time, and that this is what the parties did here.

[81] For these reasons we do not accept Moorhouse's arguments in relation to these infill panels.

Southern and eastern exterior walls at 41 Moorhouse Avenue

[82] Moorhouse also claimed for replacement of the southern and eastern exterior walls at 41 Moorhouse Avenue. In April 2019, two sections of the eastern exterior wall were demolished and replaced with lightweight cladding.

[83] Vero has scoped to replace two infill panels at the southern exterior wall and two infill panels at the eastern exterior wall with filled 150 series block panels. Moorhouse submits that 200 series block is necessary. Using 200 series block would necessitate additional works to the foundations of the building due to the increased weight of the walls.

[84] It appears that 200 series blocks are now more commonly used by the building industry. The Judge found that use of 150 series blocks was nevertheless appropriate and met current building standards.[43] The Judge found that the consequential differences in wall width resulting in an internal setback could be addressed by lining and strapping.[44]

[85] We consider that this is the kind of matter that can be expected to be accommodated in discussions between the insured and the insurer at the time the work is undertaken. Such discussions are relevant to establishing whether the Policy standard has been met. The Policy standard does not require the repair to be identical, only that it restores the building substantially to an as new condition. We do not consider that Moorhouse has demonstrated that this standard has not been met simply because of this difference in the size of blocks used. They are substantially the same in terms of functionality and aesthetics with the lining and strapping proposed. We do not consider that Moorhouse can insist on the use of 200 series blocks given the implications for the foundations of the building. This is not necessary to restore this element to the "substantially as new" standard.

[86] Accordingly, we consider that the High Court Judge was correct to conclude that Vero's scoping using 150 series blocks was appropriate.

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43 At [161].
44 At [163].

Inter-tenancy walls at 33–35 Moorhouse Avenue

[87] The inter-tenancy walls between the buildings at 33 and 35 Moorhouse Avenue were, at the time of the 4 September 2010 earthquake, wholly constructed of infilled 150 series block. Cunningham Lindsey, loss adjusters, were appointed to assess the damage caused in September 2010 (and later). They reported the top layer of blocks on the inter-tenancy wall had fallen out of position and caused damage to surrounding areas.

[88] Moorhouse's property manager, Steven Marshall, managed arrangements for the needed repairs and it was he who engaged Hawkins as the builder. As the wall was a firewall, specifications were obtained from Powell Fenwick for the repair of the damage. The upper portion of the wall was to be demolished and reconstructed with a timber framing and GIB Fyreline. The 22 February 2011 earthquake caused some further damage. Cunningham Lindsey in April 2011 provided a further report into fresh damage. They summarised what had happened and to the inter-tenancy wall to date:

> The original firewall was concrete block. The insured had an engineer inspect and was advised that the damaged and weakened area of the concrete block fire wall should be removed and replaced with timber framing and double layered gib on each side of the fire wall. This work was completed prior to our inspection. The property manager advised that the removal of the wall was approximately $7,000.00 and we have included the removal in our estimate. We also included the replacement of the wall as recommended by the engineer and has been completed. The property manager advised that he has not received an invoice for the replacement of the firewall; therefore, we have used standard pricing for replacement. The fallen area of concrete firewall fell through the suspended ceiling in the storeroom, the gib ceiling in the kitchen and also caused damage to the bathroom ceiling. We also noted minor cracking in the mortar of the concrete block walls in the storeroom, bathroom and bike repair area.

[89] Moorhouse's engineer, referred to in that summary, was Wilton Joubert Ltd. The repair they had recommended involved removing the blocks from the mezzanine level upwards.

[90] Cunningham Lindsey estimated the total cost to be around $42,530.32 (excluding GST). In their report, they explained the relationship of the further damage to the earlier damage:

> We have reviewed the prior estimate for [damage] from 4 September 2010 which includes much of the same damage. However, the amount included for the replacement of the firewall was much less than has been done and the total amount of suspended ceiling was less than what is now damaged. Our enclosed estimate includes only new damages based on our inspection with the property manager and our review of the prior estimate. The insured has now hired Hawkins, whom we met with during our inspection, to [effect] repairs.

[91] The repairs effected by Hawkins totalled $57,804.74 (including GST), which includes the costs incurred with Wilton Joubert and Powell Fenwick. Vero paid those costs in 2011.

[92] Mr Allott explained Vero's understanding thus:

> 50. I understand that Moorhouse now includes in its claim in the proceeding costs to replace this section of firewall again, this time with concrete block. Vero does not consider it is obliged to pay to replace this section of wall again. Vero was not advised at the time that it paid for the Hawkins work that the replacement wall was intended as a temporary rather than a permanent reinstatement, nor is there any record of Vero being asked whether it would agree to fund both a temporary replacement of the wall and then a permanent replacement. Vero is not aware of any reason why the 2011 replaced wall is unsatisfactory as a permanent fire wall. The information available to Vero demonstrates that the wall replacement was arranged by Moorhouse to the specification of its engineer, and the work was paid for by Vero on the understanding that the cost incurred was for the repair of earthquake damage. Vero considers that it has already met its obligations in respect of the earthquake damage to the firewall.

[93] Mr Allott was not cross-examined in relation to this evidence.

[94] Mr Dennis was cross-examined in relation to the repair. He described Wilton Joubert's recommendation as a "make safe".

[95] Mr Dennis was also cross-examined in relation to Mr Allott's evidence, through this exchange:

> Q. You know that Vero says it wasn't told that this replacement was intended to be a temporary replacement and so wasn't asked and so just pausing there, do you accept that?
>
> A. If that's a statement I must accept it, but I remember –
>
> Q. Do you accept that Vero was not told?
>
> A. Sorry?
>
> Q. Do you accept that Vero was not told to your knowledge that this replacement was intended to be temporary?
>
> A. From the information I have on hand I believe that Vero had the information, they didn't digest it. So what did stick in my head is the property manager was absolutely chastised, how did the conversation go: "We don't have an association with Hawkins, we don't know what they're doing there, you need to be dealing with" and I think that's when it was swung away from Hawkins through to being supported by MWH Mainzeal at the time. As I said I'd need to go through the information I have to support this statement but that's my understanding. The reports, I think an email from Knight Frank directed me to that.

[96] Neither Mr Dennis nor counsel for Moorhouse pointed to any information which recorded the repair was intended to be temporary. Accordingly, Mr Allott's assertion that Vero was not told the repair was intended to be temporary has not been contradicted in the evidence.

[97] The reports commissioned by Moorhouse were initially written in the context of ensuring safe entry to the properties. The evidence at trial identified the relevant parts of the buildings were untenanted at the time of the earthquakes. The repair reports contained a specific recommendation that the walls be removed from mezzanine level upwards and replaced with the timber-frame. Wilton Joubert recorded they could assist in construction specifications. Other evidence indicates Wilton Joubert then had that role. There is nothing in the Wilton Joubert reports to indicate, as Mr Dennis apparently understood, that Wilton Joubert were simply recommending a "make safe" repair. There was no evidence to indicate Moorhouse has, since 2011, effected any material alteration to the walls as repaired in accordance with Wilton Joubert's design.

[98] The repair to the inter-tenancy walls between 33 and 35 Moorhouse Avenue was not the subject of a discussion about permanent replacement, as had occurred in relation to 41 Moorhouse Avenue.

[99] At trial, Moorhouse asserted it was entitled, in relation to the inter-tenancy wall (as well as the northern wall of 41 Moorhouse Avenue), to a further replacement, as that would achieve a like for like repair. Moorhouse's evidence costed the proposed replacement of the wall in block masonry at $40,800 (exclusive of GST).

[100] The Judge found Moorhouse was not entitled to the further repair of the wall in block masonry. She recorded:[45]

> [149] As with any contract, an insured party is able to agree with an insurer to have repairs effected and paid for in a manner other than a "like for like" fashion. In this case, the repair which Moorhouse implemented is a properly finished repair that repairs the wall to an "as new standard", albeit in different materials from the original. While the materials differ from the lower half of the wall, this is not unusual in this building which was developed in stages using a range of construction materials.
>
> [150] In my view, Vero was entitled to conclude that by paying for the reinstatement undertaken by Moorhouse, it had discharged its obligation to repair this section of the building. Mr Dennis accepted in cross-examination that Vero wasn't told that this replacement was intended to be a temporary replacement, although he says he subsequently "chastised" the property manager for authorising Hawkins to do this. However, whatever was occurring internally within Moorhouse does not change the fact that, from Vero's perspective, Moorhouse asked for the wall to be repaired in this way and Vero agreed, and made payment. That is reflected in Vero's pleadings. Clearly, had Vero known Moorhouse was reserving its position to have the wall reinstated in block, it would have resisted paying for works which were obviously more sophisticated than a temporary repair.
>
> [151] For these reasons, I do not consider Moorhouse has substantiated its claim that these were simply temporary works to make it safe or suitable for continued use and, therefore it cannot claim an almost equivalent cost ($40,800 plus GST) to subsequently reinstate it in block. It agreed to a repair that restored the building to a when new condition, albeit in different materials from the original. This aspect of Moorhouse's claim is rejected.

[101] Accordingly, the Judge did not consider the competing claims about the scope of works appropriate to reinstate the wall.

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[45] Judgment under appeal, above n 1.

[102] For Moorhouse, Mr Bayley submitted the Judge incorrectly concluded the inter-tenancy wall repairs did not constitute temporary repair (for which Moorhouse had cover under the policy). Mr Bayley noted Moorhouse was not under an obligation to clarify for Vero the policy entitlement. He submitted it was incumbent on Vero to secure from Moorhouse an unequivocal release of Moorhouse's entitlements to a like for like repair. As Vero did not do so, he submitted, Moorhouse was entitled to the approval of the repair scope which provided for the wall to be "permanently rebuilt".

[103] The central premise of Moorhouse's case in relation to this repair is that the 2011 repair was not a like for like replacement. But that is not the Policy standard. What Moorhouse had designed through Powell Fenwick and Wilton Joubert, and then had constructed by Hawkins, was a repaired wall to an "as new" standard. The cost of that repair, representing the greater part of the $57,804.66 (exclusive of GST) met by Vero in 2011, can be compared with the $40,800 (exclusive of GST) put forward by Moorhouse at the time of the 2022 trial as the cost of what it proposed as a "permanent" repair (some 11 years later).

[104] This was not a situation where the insurer was, in 2011, being asked for prior approval to undertake modest repair works. In 2011, the insurer was asked, after the event of design and construction carried out by the insured, to cover the cost of an expensive repair to an "as new" condition.

[105] We consider that the Judge was correct to conclude that this repair work met the Policy standard. This is not a situation where there has been accord and satisfaction, or an estoppel. To the extent that the Judge concluded that it was we do not agree. But the engagements between Vero and Moorhouse over precisely what repair work was to be undertaken are relevant to assessing whether the substantially the same as new standard has been met. The repair has been undertaken using modern materials. They are not exactly the same materials as the initial construction. But that does not mean that the wall has not been restored to substantially the same condition as new. Aesthetically and functionally it is effectively the same. Any argument that could be mounted about this now was not advanced at the time, and may just amount to a matter of perspective. We do not accept that Moorhouse has established that the Policy standard has not been met by the work the parties earlier agreed upon.

[106] For these reasons Moorhouse's allegations in relation to this inter-tenancy wall are dismissed.

The east wall at 43 Moorhouse Avenue

[107] The remaining issues in dispute about particular repairs do not raise any issue about temporary repairs. Rather, they turn on whether Vero's repair meets the Policy standard.

[108] The Judge upheld Vero's argument concerning the east wall of 43 Moorhouse Avenue.[46] The east wall of 43 Moorhouse Avenue is approximately 100 mm from the neighbouring building. It is approximately 32 metres long, constructed of second-hand pre-cast concrete panels. As a result, most of the external wall cannot be observed and access for any repairs is practically impossible.

[109] There was earthquake cracking to this wall observed on the interior. It is not possible to inspect the exterior for cracking apart from a limited inspection by a camera. Given the cracking to the interior wall, cracking to the exterior wall is likely. It was not disputed that the cracking could be properly repaired by epoxy injection — lost stiffness was not an issue with this wall. But Moorhouse contends that Vero's epoxy repair solution does not meet the Policy standard as the likely cracking to the external wall will not be fully repaired. First, because there may have been external cracking that did not make its way through to the internal wall and therefore will not be filled with epoxy. Secondly, because the repair to the cracks will not be properly finished on the external wall. Moorhouse says that the entire wall needs to be replaced. This will have implications for the rest of the building given the structural role of the wall.

[110] Mr Walker's evidence was the cracking on the inside would not necessarily match the cracking on the outside, and Ms Stanway said that in her experience with 150 mm thick panels the cracks do not match from front to back, and they have different crack patterns. Moorhouse criticises the Judge's reliance on the evidence of Mr Peter Higgins, a Regional Manager at a company that carries out specialist concrete

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[46] At [189].

crack injection repair work, that the relative thinness of the walls would mean the cracks would likely travel right through, and as long as there is a visible crack of at least 0.2 mm on the interior face, the crack would be appropriately filled. Moorhouse also argues that cracking ought to be sealed on both sides of the wall to be a proper repair to the Policy standard.

[111] We accept Moorhouse's argument that, notwithstanding Mr Higgins' evidence relied upon by the Judge, it established that there will likely be cracking damage to the exterior of the wall that will not be fully repaired by the epoxy repair solution. We accept that, on the balance of probabilities, there will likely be cracks on the exterior wall that do not fully correspond to the cracks on the interior wall. That will never be known for sure as inspecting the exterior wall is not feasible. We also accept that the repairs will not be able to be properly finished on the outside.

[112] However, we consider, on balance, that Vero's repair strategy nevertheless meets the Policy standard. The appropriate repair can be done to the cracking to the wall as the cracks appear from the inside, and there is no complaint about the repair to the damage visible to the internal wall. Some external cracks that do not appear on the inside will not be repaired, and we also accept the cracking repair will not be properly finished on the outside in the sense that they will not meet normal trade standards. But this does not mean that they do not meet the Policy standards. It does not mean that the wall will not have fully restored functionality to an as new standard.

[113] As indicated, it was not suggested that there was any damage to the structural integrity of this wall through loss of stiffness arising from the cracking. The fact that the repair is not properly finished on the outside has aesthetic implications. But those implications are not material precisely because that side of the wall will not be seen. What remains is the potential that the unfinished repair, or external cracking that has not been repaired, will have implications over time that adversely affects the functionality of the wall in some way, for example by leaks developing through fine cracks. But Moorhouse's evidence did not establish this simply because of the likely existence of unfinished or untreated cracks. Finishing might normally be required to do what might be called a "proper job", but there is no evidence that this has implications for the integrity of the repair. These implications will again only likely

be aesthetic. Neither do we accept that the lack of an applicator's warranty means that the Policy standard will not be met.

[114] In the absence of Moorhouse having evidence that these limitations of the repair have actual effects on the functionality of the wall, including over time, we do not accept that Moorhouse proved that Vero's epoxy repair solution does not meet the Policy standard.

Suspended first floor slab

[115] The first floor of 43 Moorhouse Avenue is concrete and suspended. After the earthquakes, cracks were identified. There was a dispute at trial about whether those cracks were caused by the earthquakes or were pre-existing arising from shrinkage after construction. But in cross-examination, Dr Brooke accepted that some of the cracks to the floor were probably caused by the earthquakes. There was also some dispute as to what reinforcing had been used in the floor slab.

[116] Ms Stanway gave evidence that the crack widths were highly indicative of reinforcement damage, and that as soon as there had been yield in the reinforcing there was likely loss of strength capacity. Ms Stanway considered that the floor needed to be replaced. Again, that would have implications for other parts of the building, and in terms of the requirement for a building consent. When she gave evidence, however, Ms Stanway said she had reached her conclusions "on the balance of the probabilities" and elaborated on this by saying "I have come to it on the balance of probabilities that you're unable to rule out damage to the reinforcements". Given that, we do not consider that the Judge can be criticised in making the following findings:[47]

> [194] Regardless of what type of reinforcing there was, Moorhouse needed to prove, on the balance of probabilities, that there was damage to the reinforcement which was caused by earthquake shaking and which warranted the floor being scoped for replacement. This was not established by Moorhouse's experts simply asserting that they could not rule out the possibility of damage to reinforcing. On the contrary, it was for Moorhouse to satisfy me that there had been damage to the reinforcing that affected the performance or structural integrity of the floor.

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47 Judgment under appeal, above n 1.

[117] We also agree with the Judge's further finding that significance could not be placed on hearsay statements that this floor was "lively" after the earthquakes.[48] This could not be properly taken into account in the absence of any evidence from witnesses who made such observations.

[118] We do not accept Moorhouse's submissions that there had been a level of agreement between the experts that there had been damage because Ms Stanway's evidence was consistent with an earlier report from an expert who was not called. Dr Brooke's evidence was that there had been no damage to the reinforcing steel, and any movement of the steel did not cause damage.

[119] Neither do we accept the criticism that Dr Brooke provided no adequate foundation for this view. The finding of the Judge was based on the conclusion that Moorhouse had not proved this damage had occurred. It was not for Vero to disprove damage through some robust test or other technique conducted by Dr Brooke. It was for Moorhouse to prove it by such techniques. Such damage was not established by Ms Stanway's opinions alone. Having reviewed the evidence on appeal, we are not satisfied that the Judge's conclusions were wrong.

[120] We accordingly do not accept this aspect of Moorhouse's appeal.

Building consent

[121] The Building Act 2004 requires building work to be carried out in accordance with a building consent, unless the work falls within the provisions in sch 1 of that Act.[49] The requirement for a building consent triggers certain requirements, including that the building be seismically strengthened to 34 per cent of the New Building Standard, as well as other requirements, such as fire standards.[50]

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48 At [195].

49 Building Act 2004, ss 40 and 41(1)(b). Section 41 also provides for other circumstances in which a building consent is not required.

50 Sections 112 and 133AT.

[122] The Judge accepted Vero's arguments that its repair strategy did not require a building consent as the work fell within the exemptions in sch 1. This relevantly provides:

Part 1

Exempted building work

General

1 General repair, maintenance, and replacement

(1) The repair and maintenance of a building product or an assembly incorporated in or associated with a building, provided that a comparable building product or assembly is used.

(2) Replacement of a building product or an assembly incorporated in or associated with a building, provided that—

(a) a comparable building product or assembly is used; and

(b) the replacement is in the same position.

(3) However, subclauses (1) and (2) do not include the following building work:

(a) complete or substantial replacement of a specified system; or

(b) complete or substantial replacement of a building product or an assembly contributing to the building's structural behaviour or fire-safety properties; or

…

[123] Moorhouse criticises the Judge's findings. First, it is argued that such a determination by the Judge was inappropriate in the absence of Vero seeking a declaration that no such consent was required, and without the consenting authority, the Council, being heard.

[124] We do not accept this argument. Vero could have sought a declaration, but it was not obliged to. It was able to put in issue the need to obtain a building consent in other ways, and it did so by contending that its proposed repair scope did not require a building consent. The Judge appropriately addressed that issue as part of the claim. Moorhouse knew that was in issue, and called evidence itself on the question. So, there was no procedural unfairness in the Court addressing the issue.

[125] In oral submissions, Mr Bayley also challenged the findings of the Judge in relation to each of the building repairs under Vero's scope of repairs that were said to give rise to a need for a building consent.[51] We address those elements in turn.

[126] In relation to new roof cladding, Mr Walker gave evidence that this would affect the weathertightness of the building and therefore the work would require a consent. Mr Tolley, an experienced building surveyor, gave evidence that the work fell within cl 1(2) as it was a replacement with a comparable material or component. We agree with the conclusion of the Judge that the exemption applies, and that there will be no change to the weathertightness as a result of the work.[52] The fact that a replacement could theoretically affect weathertightness does not mean that the exemption does not apply. If it did, any repair to the external roofing or cladding of a building would require a consent. The material questions are whether a comparable building product is being used, whether it is in the same position, and whether it was a complete replacement of a system. We are satisfied that the relevant requirements to exclude the requirement for building consent were met.

[127] In relation to the epoxy crack injection repairs, Mr Walker gave evidence that they would require consent because the repair did not use comparable material, although the Council may be prepared to grant an exemption under its power to do so. Both Dr Brooke and Mr Tolley gave evidence that a consent would not be required as it qualified under cl 1(1) as a repair with comparable material. We agree with the High Court's conclusion that the exemption applied.[53] As the Judge found, the extent of the epoxy injection was not great given the size of the building, and it simply repairs and rebonds cracking within the existing building material.[54] In that sense, no new building material is used at all. It simply restores the existing concrete construction to its pre-earthquake state by a repair.

[128] In relation to the block infill panels at 41 Moorhouse Avenue, Mr Walker's evidence was that they would not be exempt because the wall contributed substantially to the structural behaviour of the building. We agree with the Judge that they fall

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51 Judgment under appeal, above n 1, at [208].
52 At [210].
53 At [211]–[212].
54 At [212].

within the exemption as the repairs involve comparable materials, do not involve a complete or substantial replacement under cl 1(3)(a) because the repair comprises less than 50 per cent of the wall, and they do not contribute to the building's structural behaviour given Dr Brooke's evidence that the wall could be removed and replaced without any appreciable impact on the building.[55]

[129] In reaching these conclusions, we do not place particular weight on a 2012 email from the Council concerning epoxy repairs, or the MBIE determinations referred to in argument, notwithstanding that the MBIE determinations in particular have relevance. In the end, the questions involve the application of the provisions in the schedule to the Building Act in light of the facts, and we consider it preferable to have directly addressed the relevant questions.

[130] Neither do we place significance on the evidence of Mr Walker concerning his meeting with the Council on 13 May 2019. This suggested that the Council would not grant an exemption for epoxy crack injection at 33 to 43 Moorhouse Avenue because of its earthquake prone status. But there would only be a need for such an exemption if there is a requirement for a building consent in the first place. We do not consider such a consent is required given the factual position. In that context, we have agreed with the findings of the High Court that there is no underlying damage to the structural integrity of the building that this repair is addressing, including from a lack of a reduction in stiffness. We also do not read the notes of the meeting with the Council as being definitive.

[131] For these reasons, we uphold the findings of the High Court in relation to building consent.

Other issues

[132] There are other issues to address to resolve the appeal and cross-appeal.

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55 At [213].

Indemnity value: Vero's cross-appeal

[133] In its cross-appeal, Vero challenges the High Court determination that the indemnity value entitlement of Moorhouse could exceed the calculations of the depreciated replacement costs calculated by its expert property valuer, Mr Stanley. The Judge concluded that Moorhouse's entitlement was specifically defined under the Policy by reference to the reinstatement cost of the property less due allowance for depreciation and deferred maintenance, and that this definition would prevail whether or not it exceeded Mr Stanley's calculations.[56]

[134] In advancing the cross-appeal, Vero accepted that the cross-appeal would have no practical effect and would not require determination if the Court upheld the High Court's determination concerning Vero's scope of repairs. Moorhouse contended that the cross-appeal lacked a jurisdictional basis because Vero did not seek any declaration concerning the measure of indemnity in the High Court.

[135] Given the stance of the parties, and our findings above, we accordingly do not address the cross-appeal.

Indemnity value: Moorhouse's appeal

[136] The position is different with respect to Moorhouse's appeal. Moorhouse criticises aspects of the Judge's analysis in relation to indemnity value. In particular, Moorhouse criticises her finding that the parties had not sought a declaration in the pleadings on what should be considered as part of depreciation, in determining the indemnity value. As Mr Rennie submitted, Moorhouse did seek such a declaration through its claim for "modified relief" in the closing address. A further reformulation of the declarations sought was provided to us.

[137] We agree with Moorhouse's submission, accepted by the Judge, that the position here is distinguishable from that addressed in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*.[57] In *Prattley*, there was no clause that prescribed how to

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56 At [231].

57 At [225]–[226], citing *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352.

assess the indemnity value, so the insured's entitlement was assessed in accordance with the underlying principle of insurance law that the insured be indemnified, but not more than fully indemnified for their loss, where economic considerations were relevant. But here there was a clause, and it is the meaning and effect of that clause that determines Moorhouse's entitlement.

[138] We also agree with the Judge that that entitlement is based on the cost of reinstating the damaged property, less an allowance for depreciation and deferred maintenance.[58] In that context, depreciation is referring to the physical life of the property, or part of a property that is in issue. The clause is not based on the market value of the property. Moorhouse was not insured for the market value of the property, or the leasehold income. This was a material damage policy insuring the physical buildings themselves from damage to those buildings. The indemnity clause made it clear it was the physical life of the asset, not its economic life that is relevant in this case.

[139] We also agree that, given the physical attributes of a building will likely age at different rates, with some components needing to be replaced earlier than other components, an "elemental" approach where different depreciation rates are applied to particular elements of the building may be appropriate. These concepts were explained in *SR International Business Insurance Co Ltd v World Trade Centre Properties LLC* by the United States District Court for the Southern District of New York.[59] They are also referred to in the guidance issued by the New Zealand Institute of Valuers.[60]

[140] But we nevertheless agree with Vero's submission that it is not appropriate to make declarations in this case. It is not always necessary to have a genuine dispute or lis before declarations are made by a court.[61] But here there is a lis, and the declaration should correspond to what is in dispute. There are factual matters that will be relevant to the appropriateness of the declaration. For the reasons addressed above in relation

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58 Judgment under appeal, above n 1, at [226].

59 *SR International Business Insurance Co Ltd v World Trade Centre Properties LLC* 44 F Supp 2d 320 (SD NY 2006) at 347–348.

60 Australian Property Institute and others *Valuations for Insurance Purposes* (ANZVGP 104, June 2021) at [5.1].

61 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9].

to Vero's cross-appeal, it may be that any dispute about the application of indemnity value principles is now irrelevant given we have upheld the Judge's view that Vero's scope of repairs applies. To the extent that that is not so, what we have said above can guide the parties.

Interest

[141] Moorhouse criticised the High Court's conclusions in relation to interest. The Court found that there were significant delays in this proceeding and that they were attributable to Moorhouse and did not award interest for some of the period.[62]

[142] Moorhouse's submissions were advanced on the basis that this was only relevant if its arguments on the cost of repair were accepted. We accordingly do not address the issue.

[143] However, we observe that delay is relevant to the discretion to award interest under s 87 of the Judicature Act 1908, and there is no reason to question the Judge's conclusions in relation to delay. But we also think that it may be generally preferable in cases involving an insurance entitlement for the consequences of delay to be reflected in the interest rate being applied rather than depriving a successful party of interest for periods of time altogether. In the present case, if Moorhouse had shown that Vero was obliged to pay it under the Policy, Vero would have been benefited from deferring its obligation. An interest rate that compensated for the time value of money, but no more, may still be appropriate.[63]

Costs

[144] Given our conclusions as to the appeal and cross-appeal, we consider it is appropriate for Vero to be awarded costs on the appeal as they have been successful. Vero seeks costs for a standard appeal on a band B basis. We agree that this is appropriate.

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62 Judgment under appeal, above n 1, at [245]–[246].

63 See *Worldwide NZ LLC v NZ Venue and Event Management* [2014] NZSC 108, [2015] 1 NZLR 1 at [76].

[145] There is no award for costs on the cross-appeal given that it only needed to be determined if Vero did not succeed on the appeal.

Result

[146] The appeal and cross-appeal are dismissed.

[147] The appellant must pay the respondent costs for a standard appeal on a band B basis together with usual disbursements. We certify for second counsel. There is no award of costs on the cross-appeal.

Solicitors:
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