IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA659/2020
[2022] NZCA 208

BETWEEN	IAG NEW ZEALAND LIMITED Appellant
AND	QBE INSURANCE (AUSTRALIA) LIMITED Respondent

CA156/2021

BETWEEN	IAG NEW ZEALAND LIMITED Appellant
AND	JOAN MARGARET FRASER SLEIGHT AND ALAN LEITHFIELD SLEIGHT First Respondents
	QBE INSURANCE (AUSTRALIA) LIMITED Second Respondent

Hearing:	14 and 15 September 2021
Court:	Kós P, French and Collins JJ
Counsel:	N S Gedye QC, O V Collette-Moxon and M K Booth for Appellant in CA659/2020 and CA156/2021 D H McLellan QC, S D Galloway and B K McLay for Respondent in CA659/2020 and Second Respondent in CA156/2021 D J Cooper and M J Borcoski for First Respondents in CA156/2021
Judgment:	25 May 2022 at 11.30 am

JUDGMENT OF THE COURT

A The appeal in CA659/2020 is allowed.

B The respondent's cross-appeal in CA659/2020 is allowed.

C Leave is reserved to the parties in CA659/2020 to seek further orders in respect of quantum and the form of final judgment orders in light of this judgment in the event the parties are unable to agree on quantum.

D Leave is reserved to the parties in CA659/2020 to seek orders as to costs in the event costs are unable to be agreed.

E The appeal in CA156/2021 is allowed and the decision of the High Court awarding interest to the first respondents is quashed.

F There is no award of costs in CA156/2021.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] This case concerns defective repairs to an earthquake damaged home. The homeowners sued their insurance company IAG New Zealand Ltd (IAG), the repairer, the project manager monitoring the repairs and the project manager's insurance company.

[2] In the High Court, Gendall J upheld most of the homeowners' claims against each of the four defendants and awarded damages representing the cost of the necessary further remedial work. He also upheld but only in part a cross-claim made by IAG against the project manager under an indemnity clause in the contract between those parties.[1]

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[1] *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851 [Substantive judgment].

[3] IAG now brings two appeals. The first CA659/2020 relates to the Judge's refusal to allow all of its indemnity claim against the project manager. The second appeal CA156/2021 relates to the Judge's decision to award the homeowners interest dating back to 2015 on the damages.[2]

[4] For its part, the project manager cross-appeals one aspect of the Judge's findings regarding the extent of its liability to indemnify IAG.

Background

[5] Mr and Mrs Sleight owned a house in Christchurch. It was damaged in the Christchurch earthquakes of 2010 and 2011. They made a claim on their insurance policy with IAG and elected to repair the house. IAG accepted the claim.

[6] It had become apparent to IAG that its usual administrative resources were insufficient to manage the large volume of claims it received as a result of the Christchurch earthquakes. It took a number of steps including the establishment of a Management Repair Programme with a project management company called Hawkins Management Ltd (Hawkins) and a number of selected builders. One of those builders was Farrell Residential Ltd (Farrells).

[7] In 2010 following the first earthquake, IAG entered into a contract with Hawkins called a Rebuild Solution Master Agreement (RSMA). Amongst other things, the RSMA detailed the services Hawkins undertook to provide. A second replacement RSMA was signed in August 2012. It is the 2012 RSMA that is the operative document in these proceedings and accordingly we refer to it throughout the remainder of this judgment as the RSMA, with the earlier RSMA being cited as the 2010 RSMA.

[8] Some of the key features of the RSMA were as follows.

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2 *Sleight v Beckia Holdings Ltd* [2021] NZHC 456 [Costs and interest judgment].

[9] Throughout the document, references were made to the "Rebuild Solution". That term was defined as "the works required to make good the damage to the property…".

[10] Clause 3.1 required Hawkins to perform the services listed in sch 2. The list runs for two and a half pages. The services are grouped under five headings "Pre-qualification" (which relates to checking the builder's credentials), "Scoping" (the work to be done), "Costing", "Customer/Builder Alignment" and "Construction Coordination".

[11] Of the services, it is those under cl 5 of sch 2 "Construction Co-ordination" that are of significance in this case and in particular cl 5.6.

[12] The full text of cl 5 reads as follows:

> 5. **CONSTRUCTION COORDINATION:** Hawkins will monitor the delivery of each Rebuild Solution, which shall include the following:
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> 5.1 Monitor all Builders in accordance with the processes and procedures agreed between the parties and promptly notify IAG NZ where it believes that any Builder no longer meets the Pre-Qualification Standards (as may be updated and amended by parties).
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> 5.2 Use reasonable endeavours to assist IAG NZ's Loss Adjusters to ensure that the Rebuild Solution, when completed, complies with the scope of works for that Rebuild Solution (as may be updated to account for any variations).
>
> 5.3 Ensuring the implementation and completion of and monitoring the delivery of each Rebuild Solution in accordance with its Rebuild Priority and within its Solution Budget (as updated in accordance with clauses 4.5 and 4.6(b) of the Agreement).
>
> 5.4 Provide evidence to IAG NZ and its Loss Adjusters that the Builder has obtained all permits and consents in respect of the Rebuild Solution (including a Code Compliance Certificate).
>
> 5.5 Immediately notify IAG NZ and its Loss Adjusters upon becoming aware that a Code Compliance Certificate may not be able to be obtained for any Rebuild Solution.
>
> 5.6 Inspect the progress of each Rebuild Solution in order to certify completion of each Solution Milestone.
>
> 5.7 Agree with IAG NZ standard inspection and sign-off processes and procedures to be carried out at the completion of each Rebuild Solution (including in relation to any defects).

> 5.8 Carry out a final inspection and sign-off of the Rebuild Solution with the Customer in accordance with the processes and procedures agreed with IAG NZ under paragraph 5.6 above.
>
> 5.9 Maintain minimum levels of contact with each Customer (including site visits to the Customer's property) in accordance with the processes and procedures agreed between the parties from time to time.

[13] The term "Solution Milestone" which appears in cl 5.6 was defined in the RSMA as "the milestones in respect of the relevant Rebuild Solution triggering payment of Rebuild Solution Payment Claims". Essentially, the milestones were the specified stages of the repair work at which a progress payment to the builder would become due. For each individual repair job, a "Milestone Payment Schedule" was prepared identifying the operative milestones.

[14] The regime relating to milestone payments was detailed in cl 9. Clause 9.1 obliged Hawkins to ensure that the builder's form and content of Rebuild Solution Payment Claims complied with certain requirements. As regards certification, cl 9.2 relevantly stated:

> 9.2 **Certification as to Payment claims**: Hawkins will:
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> …
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> (b) certify completion of the relevant Solution Milestone and/or Rebuild Solution (as applicable) under the relevant Customer Building Contract; and
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> …

[15] Under cl 9.3, Hawkins warranted that each Rebuild Solution Payment Claim submitted to IAG for payment was "properly due and payable by IAG NZ in accordance with [Hawkins'] provision of the Services as set out in Schedule 2".

[16] The RSMA also provided a procedure for the approval of changes to pricing and variations to the Solution Budget. Once works pursuant to an approved variation order were complete, Hawkins was to inspect and certify the works for payment.

[17] IAG encouraged its policy claimants including Mr and Mrs Sleight to arrange for their houses to be repaired under its Management Repair Programme. It arranged

for Farrells as one of its designated builders to be assigned to the Sleight job and it advised the Sleights that Hawkins would act as project manager to monitor the repairs.

[18] On 14 October 2013, the Sleights signed a standard building contract with Farrells. Schedule 2 of the building contract listed ten milestones attracting corresponding payments. The number of milestones was amended during the course of the work.

[19] Farrells carried out repair work on the Sleights' house in 2014 and 2015. Between February 2014 and 23 June 2016, Hawkins made approximately 30 site visits. Some of these visits were for the purpose of approving variations and provisional sums. Others were for the purpose of undertaking milestone inspections. After each milestone inspection, Hawkins certified to IAG that a progress payment was payable. In total Hawkins certified 15 solution milestones.

[20] Unfortunately, the repair work undertaken by Farrells was defective. And on 1 May 2015, the Sleights terminated the building contract. They asked IAG to undertake or fund the further work which was required to remedy the defective work and complete the repairs.

[21] IAG commissioned a company called Axis Building Consultants Ltd to investigate the Sleights' concerns. The subsequent report from Axis confirmed the existence of significant defects in the repair work.

[22] IAG received the report on 19 June 2015. On 29 June 2015, it wrote to Mr and Mrs Sleight denying any obligation regarding the defective work and pointing out that it was not a party to the building contract.

[23] IAG maintained that position and finally in 2017 Mr and Mrs Sleight issued court proceedings. By that time, both Farrells and Hawkins were in liquidation operating under different names.[3] However, Hawkins had been insured with QBE

[3] Beckia Holdings Ltd and Orange H Management Ltd respectively.

Insurance (Australia) Ltd (QBE) and accordingly the Sleights joined QBE as a fourth defendant under the provisions of the Law Reform Act 1936.[4]

[24] IAG filed a cross-claim against Hawkins/QBE relying on an indemnity clause in the RSMA and seeking a total indemnity for any liability it might be held to have to the Sleights. The clause in question provided that if building owners bring a claim against IAG and IAG incurs any liability to those owners as a result of any breach by Hawkins under the RSMA then Hawkins must indemnify IAG. The clause read:

> 17.2 **Hawkins indemnity**: Hawkins indemnifies IAG NZ to the maximum extent permitted by law for all claims (including third party claims), liability, costs (including reasonably incurred legal costs on a solicitor-client basis), losses and damages incurred by IAG NZ as a result of any breach by Hawkins of its obligations under this Agreement or any reckless, fraudulent or wilful act or omission by Hawkins or any of its personnel.

[25] During its site visits, Hawkins had not noted any of the defects alleged by the Sleights and in certifying that milestone payments were due to Farrells had not reported any of the defects to IAG. IAG contended that its failure to do so amounted to a breach of its monitoring and certifying obligations under the RSMA. IAG's position in the High Court was that Hawkins was responsible under the RSMA for ensuring the work was carried out in accordance with the agreed scope of work to a reasonable, proper and lawful standard of workmanship (except for latent defects not reasonably discoverable) and was not certified for payment unless it met that standard.

[26] In addition to its cross-claim, IAG also filed a contribution claim against Hawkins/QBE. As the Judge put it, the contribution claim was a backup claim in the event IAG failed or was only partially successful in its cross-claim.[5]

[27] The hearing in the High Court took place in June and July of 2020. As at that date, the house was still unrepaired.

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4 Law Reform Act 1936, s 9(1) and (4): the effect of these provisions is that because Hawkins was in liquidation, the Sleights are entitled to a charge on all insurance monies payable to Hawkins under its indemnity policies with QBE as a result of the Sleights claim against Hawkins.

5 Substantive judgment, above n 1, at [17].

The High Court decision

[28] Because the two appeals have a limited focus, it is only necessary to provide a relatively brief summary of the High Court findings.

[29] As the Judge noted, all parties accepted there were numerous defects in the repair work. He identified the defects as being generally of three types:[6]

(a) Scoping defects — that is, work that should have been included in the original scope of works but was not.[7]

(b) Key defects — exterior cladding and windows, structural defects relating mainly to the foundations and sub-floor and first-floor balcony.[8]

(c) Remaining defects — miscellany of matters which the Judge described as minor.[9]

[30] He found that the total cost of remedying these defects to enable the Sleights to obtain a code compliance certificate for their house amounted to $389,848.00.[10]

[31] As regards the liability of the various parties, the Judge held that Farrells was liable to the Sleights in contract and in negligence as well as under the Consumer Guarantees Act 1993 for its defective and inadequate repair work.[11] Judgment was duly entered against Farrells for the full cost of the remedial work.[12]

[32] The Sleights were also successful in their claim against Hawkins (and hence QBE) under the Consumer Guarantees Act.[13] Hawkins was found to have held itself

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6 At [581].
7 At [582]–[595]. On appeal, IAG does not contend that Hawkins is liable to it in relation to scoping defects.
8 At [596]–[608].
9 At [609]–[625].
10 At [709].
11 At [709(b)].
12 At [716(a)].
13 At [360] and [709(c)]. The Judge held that a claim in negligence (which the Sleights had also advanced) was subject to a clause limiting liability to $10,000: at [388]–[389].

out to the Sleights as providing the services of a project manager including monitoring the delivery of the repair works, ensuring that Farrells would undertake properly scoped repairs in a tradesman like manner and ensuring that Farrells would only receive properly certified milestone payments. The Judge accepted on the evidence that Hawkins had failed to carry out those services with reasonable care and skill.[14] He therefore awarded judgment against Hawkins for the full cost of the repairs and entered judgment against QBE for the same sum less its excess of $50,000.[15]

[33] As regards IAG's liability to the Sleights, the Judge held that the insurance policy was a policy to pay rather than a reinstatement policy. Under the policy, the election to repair rested with the Sleights. IAG's policy obligation was simply to meet the cost of the policy standard once that election was made.[16] The relevant standard was expressed to be "when new", the policy containing a statement "we'll pay … the cost of repairing or rebuilding the home to a condition as similar as possible to when it was new".[17] IAG had failed to discharge that obligation and had therefore breached its contract.[18]

[34] The Judge further held that IAG was liable to the Sleights under the Consumer Guarantees Act for failing to appoint a suitable builder, ensuring the scope of works was appropriate, ensuring that Hawkins had adequately monitored the work and properly certified for instalment payments and that Hawkins used reasonable care and skill.[19]

[35] In respect of both causes of action (breach of contract and breach of the Consumer Guarantees Act), the Judge held that like the other three defendants IAG was liable to pay the cost of carrying out the necessary work to remediate the defects and repair the house to a condition such that a final code compliance certificate could be issued.[20]

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14 At [380].
15 At [710].
16 At [153].
17 Emphasis removed.
18 At [195].
19 At [291]–[295].
20 At [194]–[195], [295].

[36] In addition to the damages award, the Judge issued a declaration that IAG, Farrells, Hawkins and QBE were jointly and severally liable to pay the costs of alternative housing for the Sleights at a rate of $685 per week while the remedial work was being undertaken.[21]

[37] Having found that IAG was liable to the Sleights, the Judge then turned to IAG's cross-claim against Hawkins. It will be recalled this was based on an indemnity clause under which Hawkins indemnified IAG in respect of any liability IAG might incur as a result of any breach by Hawkins of its obligations under the RSMA.

[38] That of course raised the issue of what exactly was the scope of Hawkins obligations under the RSMA, in particular its monitoring and certifying obligations.

[39] The Judge held that on a proper construction of the RSMA, IAG and Hawkins had agreed that Hawkins was not to be responsible for the quality of the repair works nor was it to be responsible for monitoring the quality of Farrells' workmanship. It was accordingly not a project manager in the usual sense.[22]

[40] However, it did have an obligation to ascertain whether the work justifying the progress payment had been completed. That meant, the Judge said, that Hawkins had to provide a suitably qualified person to undertake a reasonable naked eye observation of the work and be satisfied the work in question was in place and generally carried out properly although workmanship and quality issues might still need to be addressed by Farrells later through the snag list or otherwise if they arose.[23]

[41] Purporting to apply this interpretation of the RSMA to the facts, the Judge said he was satisfied there were three instances in respect of which Hawkins had clearly breached its certifying payment obligations to IAG under the RSMA.[24]

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21 At [677]. The Judge dismissed claims of negligence and estoppel also made against IAG because of an exclusion clause in the building contract: see at [244]. The estoppel claim was also time-barred: see at [325].

22 At [473].

23 At [474]–[475] and [496].

24 At [496].

[42] The first two instances related to its certifications in June 2014 and September 2014 of two milestone payments relating to the foundations and sub-floor. The work in those areas was the Judge found on the evidence "entirely deficient work which would be obvious on any cursory examination [by a rebuild solution manager]". Hawkins' failure to properly identify this "obviously defective and incomplete area of work" led to IAG making an overpayment to Farrells. The cost of fixing the defective and sub-floor work was $60,000 and that, the Judge held, was a loss which IAG had suffered as a result of Hawkins' failure to comply with its payment certification obligation and was therefore covered by the indemnity clause.[25]

[43] The Judge further found that Hawkins had breached its obligations to IAG under the RSMA in December 2015 by certifying the final payments totalling $70,468.96 in circumstances where Hawkins was aware of the existence of reports identifying deficiencies in the repairs.[26]

[44] However, with the exception of these three instances, the Judge held there had been no breach by Hawkins of any other obligation under the RSMA. The upshot was that Hawkins' liability under the cross claim was limited in total to the sum of $130,468.96 ($60,000 plus $70,468.96).[27]

[45] As regards IAG's claim against Hawkins/QBE for contribution, the Judge held contribution under s 17 of the Law Reform Act was not available to IAG because of a finding that neither IAG nor Hawkins was liable to the Sleights in tort and therefore were not joint tortfeasors. Nor was contribution available in equity in light of his finding that Hawkins was not responsible for ensuring the quality of Farrells' workmanship. That finding meant IAG and Hawkins did not have shared liability for the same damage and it also meant the substantial justice of the case did not favour contribution being awarded against Hawkins over and above that achieved through the cross-claim.[28]

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25 At [498]–[508].
26 At [509]–[511].
27 At [520]–[521].
28 At [547]–[555].

[46] On IAG's view of it, the Judge's finding about the limited and narrow scope of Hawkins' responsibilities to IAG under the RSMA is inconsistent with his findings about the extensive quality obligations Hawkins owed to the Sleights. We address that argument in more depth later. At this juncture it is sufficient to note that the Judge acknowledged the inconsistency but justified it primarily on the basis that IAG's marketing material provided to the Sleights represented Hawkins as having a greater role than it actually did under the RSMA. Hawkins was represented to the Sleights as being a project manager with a quality assurance role. Hawkins was aware of the way it had been described in the material and did nothing to correct that impression. It effectively acquiesced in that portrayal of its functions and therefore accepted those obligations. The Sleights had no knowledge of the RSMA.[29]

The appeal and cross-appeal relating to IAG's indemnity claim against Hawkins CA659/2020

The position taken by the parties

[47] The Judge's finding upholding part of IAG's indemnity claim against Hawkins is the subject of both an appeal by IAG and a cross-appeal by Hawkins/QBE. IAG contends it should have been awarded the full amount of the damages it had to pay the Sleights except those relating to the scoping defects. For its part, Hawkins/QBE does not challenge the Judge's finding against it in relation to the foundations and sub-floor but contends he erred in finding it had breached the RSMA in December 2015 by certifying the final payments.

[48] Prior to the appeal hearing, IAG's counsel Mr Gedye QC filed a memorandum advising that IAG would no longer be opposing the cross-appeal. He said that IAG accepted the Judge's decision in relation to the final payments was erroneous and could be set aside.

[49] IAG's concession was appropriate. There were a number of difficulties with the Judge's finding on this point. IAG's claim for indemnity was indemnification for the amount of its liability to the Sleights, not reimbursement of any overpayment to Farrells. The basis of the Judge's finding appears to have been Hawkins' knowledge

[29] At [261]–[266].

of the defective nature of the earlier repair work it had already certified. However, given that IAG itself also knew of the defects at the time of the final payments, that was clearly not a tenable basis of liability and nor in any event was it an argument advanced by IAG at trial. Further, there was evidence that after considering whether payment should be withheld, IAG instructed Hawkins to approve the works for payment.

[50] In short, as submitted by Mr McLellan QC for QBE, even if Hawkins' certification of the final payments was a breach of the RSMA, IAG did not rely on the certification and nor did it cause IAG loss.

[51] The cross-appeal is therefore allowed and the relevant finding of the High Court quashed.

[52] Turning then to IAG's appeal.

[53] At the hearing before us, it became clear that in some ways the parties were not quite so far apart in their respective interpretations of the RSMA as might at first have appeared. Both agreed that the concept of completion is critical and that the scope of Hawkins' responsibility for the defects primarily turns on what was meant by "completion" in cl 5.6 of sch 2 and cl 9.2(b).

[54] The parties also agreed that while the RSMA did not require Hawkins to underwrite or guarantee Farrells' workmanship, or to carry out a painstaking audit of the work, it did nevertheless impose a limited quality obligation. The burning question was how limited — where on the spectrum between a full warranty of quality and zero responsibility did it properly fall?

[55] While there are passages in the High Court decision that suggest the Judge considered Hawkins had no responsibility at all for the quality of the repair work, he did nevertheless find Hawkins was in breach of the RSMA in relation to the foundations and sub-floor under a naked eye test.

[56] Both parties endorse the Judge's naked eye test but differ on what it entails and hence the dispute.

[57] IAG's position is that while there was a limited quality role it was intended to be a meaningful one and that was adequately captured by the Judge's naked eye test. According to IAG, that test means that where visibly defective work existed, the RSMA obliged Hawkins to decline to certify payment. The Judge's error lay in failing to apply the same test to the other defects, all of which were plainly visible.

[58] Developing this central thesis, IAG submitted that it is actually not necessary in this case to determine the precise point where Hawkins' quality obligations sit on the spectrum between zero responsibility and a full warranty as to quality. That is because the evidence shows there are certain minimum standards which the parties intended to apply and those standards are sufficient on the facts of this case to show breaches. The Judge's naked eye test captures those minimum standards even if he did not apply it consistently.

[59] Insofar as some passages of the judgment suggested a narrower test, Mr Gedye submitted they were the result of a series of errors made by the Judge in interpreting the RSMA:

(a) failing to give primacy to the text;

(b) making inappropriate use of inconclusive pre-contract negotiations evidence;

(c) wrongly relying on differences between the RSMA and the 2010 RSMA;

(d) mischaracterising the status, meaning and effect of operational documents which provided for quality obligations by Hawkins;

(e) failing to take into account relevant and cogent subsequent conduct evidence;

(f) failing to take into account industry practice and understanding of relevant terms in the RSMA;

(g) taking into account evidence of circumstances arising after contract formation which did not constitute subsequent conduct probative of contractual intention;

(h) wrongly distinguishing between Hawkins' liability to the Sleights and its liability to IAG; and

(i) adopting an interpretation that did not make commercial sense.

[60] QBE disputes IAG's interpretation of the naked eye test and says IAG's reference to minimum standards is imprecise and vague. In QBE's submission, the foundation and sub-floor defects were in a different category to the other defects and the Judge was justified in distinguishing between them. QBE emphasises that the contractual standard is completion and the Judge's test involves a naked eye assessment of completion, not freedom from visible defects.

Analysis

[61] In our view, the wording of the RSMA and the circumstances in which it came into existence fully support the conclusion that Hawkins was only to have a very limited quality assessment function. Its primary role under the RSMA was one of administration and co-ordination.

[62] The 2010 RSMA had been developed in response to the September 2010 Christchurch earthquake. It placed express obligations on Hawkins to "[monitor] the delivery of each Rebuild Solution to ensure the quality, timeliness and cost efficiency of the work undertaken by the relevant Builder". The RSMA at the centre of this case was however negotiated against the different background of the 2011 earthquakes which were of far greater severity than the one in 2010. The damage caused by the 2011 earthquakes was far greater and more widespread.

[63] The negotiations between IAG and Hawkins for a new RSMA commenced in November 2011 and continued for several months. In our view, the Judge was entitled to have regard to these as illuminating joint intention and thereby the objective meaning of the terms of the RSMA.[30]

[64] Early drafts submitted by IAG imposed obligations on Hawkins that included a warranty it had inspected the rebuild solution and that it had been completed to an acceptable trade standard. During the negotiations, Hawkins expressed strong opposition to this and other provisions that might make it liable for the quality, timeliness or cost efficiency of the builders. Its position throughout the negotiations was that because of the scale of the repair programme, it could no longer carry the risk of ensuring the quality of building work and did not have sufficient resources to be able to supervise the quality of the repair work. Responsibility for the quality of the building work needed to rest with the builder. IAG responded by removing those draft provisions.

[65] Final agreement was reached in August 2012.

[66] Contrary to a submission made by Mr Gedye, we consider it is instructive and legitimate to compare the provisions of the concluded RSMA with the 2010 version. The case he cites in support of a contention that it was wrong in principle for the Judge to do so (*Newfoundworldsite Site 2 (Hotel) Ltd v Air New Zealand Ltd*) is not apposite. The purpose of the comparison in this case was to identify differences, not similarities between the two documents.[31]

[67] In our view, the comparison between the two documents enhances the probative value of the negotiation evidence, thus providing further support for the contention that one of the central purposes of the new RSMA was to limit Hawkins' role in response to the changed circumstances.

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30 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [76]–[79] per Winkelmann CJ and Ellen France J.

31 *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261, [2018] NZCCLR 22 at [53].

[68] That is apparent from a number of key differences between the two contracts. For example, in addition to the clause quoted above which was part of the 2010 definition of management services, the definition of service levels under the 2010 RMSA contained an express reference to "quality of the works and services". There was also a clause that imposed responsibility on Hawkins for ensuring that each customer was "satisfied with the … quality and workmanship … in respect of the relevant Rebuild Solution". Significantly too, the 2010 contract expressly described Hawkins as the project manager.

[69] In stark contrast, the 2012 contract does not contain a single reference to "quality".[32] As mentioned, in sch 2 it lists in over two and a half pages the services Hawkins must provide. The list does not include any obligation to monitor or assess the quality of the repair work. As QBE put it, the word "quality" is conspicuous by its absence. Mr Gedye attempted to overcome this difficulty by pointing out there was no clause expressly excluding quality either. However, in our view, the absence of a provision expressly excluding the obligations IAG contends exists is not a proper basis for finding the obligations existed. The parties effectively excluded them by omission.

[70] In our view it is also significant that unlike the 2010 RSMA, the 2012 contract does not contain any reference to Hawkins being a project manager.[33] Further and very importantly, the price IAG was to pay Hawkins for each rebuild solution was reduced in 2012. Under the 2010 RSMA a rebuild solution fee of 3.5 per cent had been payable together with agreed hourly rates. Under the new contract the amount payable was a service fee of 0.39 per cent, the hourly rates remaining the same as before..

[71] The significant reduction in rate is in our view clearly consistent with greatly reduced obligations. It would not make commercial sense for Hawkins at a time when

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[32] Schedule 3 of the RSMA refers to a role styled "Quality Controller". However the uncontested evidence was this was a desk-based role and related to ensuring the quality of documentation compiled and kept by Quantity Surveyors and Rebuild Solution Managers.

[33] There is a reference to "project management services" in a clause prohibiting Hawkins from providing "project management services (which includes services equivalent to those provided under this Agreement)" to any competitor of IAG. However, the use of that phrase in the context of an exclusivity clause does not take matters any further. The perceived need for the words in brackets also militates against IAG's interpretation of the RSMA.

it had significant bargaining power (given the demands for its services in Christchurch from IAG's competitors) to have accepted the same risk for significantly less remuneration.

[72] Regard must also be had to IAG's standard building contract and in particular the existence of provision for a defects liability period. That clearly suggests the parties contemplated a payment certificate could be given by a rebuild solution manager despite the presence of defects that could be addressed during the defects liability period.

[73] As submitted by QBE, it is also clear that the milestone payments were not intended as quality control checkpoints. This is apparent from the nature of the milestones themselves which include tasks such as "begin foundation repairs" and "begin exterior painting". The structure and content of the milestone system all point to its primary purpose as being to provide positive cashflow for the builder and thereby limit insolvency risk for builders which would have consequences for the wider repair programme and IAG's clients.

[74] In our view all of the above background must inform the meaning to be attributed to "completion" as it appears in the RSMA.

[75] As previously noted, QBE says the test is a naked eye assessment of completion, not freedom from visible defects. But that begs the question of what is meant by completion if it does not mean freedom from visible defects.

[76] The three main clauses on which IAG relies as importing a quality obligation of the scope it contends for are cl 5.6 of sch 2 and cls 9.1(d) and 9.3.

[77] For convenience we set them out:

> 5.6 Inspect the progress of each Rebuild Solution in order to certify completion of each Solution Milestone.
>
> …
>
> 9.1 **Payment claims**: Hawkins shall ensure that each payment claim in respect of any Rebuild Solution ("**Rebuild Solution Payment Claim**") must:

…

> (d) contain sufficient information to enable IAG NZ to establish the accuracy of the Rebuild Solution Payment Claim, including (without limitation) a description of the work undertaken and a detailed breakdown of the trades and materials used and the associated rates;
>
> …
>
> 9.3 **Warranty as to Payment Claims**: Hawkins warrants the accuracy of each Rebuild Solution Payment Claim and any associated information submitted to IAG NZ for payment and that each Rebuild Solution Payment Claim is properly due and payable by IAG NZ in accordance with the provision of the Services as set out in Schedule 2.

[78] IAG submits that work cannot be regarded as completed if it is defective. If defective, it is of necessity not finished (completed) because there is more work to be done. Likewise, how can payment for observably defective work be "properly" due. Or warranted as "accurate". How could work and materials be assessed without considering the quality of the work? A description of the work undertaken inherently includes its quality or whether it has defects and is thus incomplete.

[79] We agree that as a matter of language, the concept of completion carries with it an element of qualitative assessment. That is to say, we agree that it is not solely a quantitative exercise as to whether for example the builder has installed the contracted number of piles. It may encompass, as the Judge found and indeed QBE has accepted, considerations relating to the quality of the method of installation.

[80] However we do not agree that the existence of any defect visible to the naked eye of itself renders the work incomplete and means the payment claim is not accurate or properly due. That in our view is an untenable proposition in light of the text of the RSMA and its context. It would in our view impose an obligation on Hawkins far greater than was intended and effectively reinstate the 2010 position. It would also ignore the fact that it is implicit in the building contract that not all defects are an impediment to certification.

[81] We have considered whether the operational documents relied upon by Mr Gedye detract from this analysis. The documents in question are documents that

were created after the RSMA was signed, in one instance some two years later. They include a manual containing procedures and processes as well as various inspection forms and the building contract specifications. According to Mr Gedye's submission, the RSMA was deliberately high level and general, the parties contemplating that the detail of what would happen on the ground would be provided in these operational documents.

[82] There is no doubt that these documents contain references to quality. However, we are not prepared to attach the weight to them that IAG would have us do.

[83] First, the documents do not have contractual status and cannot be read as part of the RSMA. There is no basis on which they could be incorporated into the contract by reference. Secondly, insofar as IAG relies upon them as evidence of subsequent conduct shedding light on the parties' intentions, there was no evidence that the personnel who drafted them had any involvement in negotiating the RSMA and knew of its background. How then can it be said, as required by the Supreme Court in *Bathurst*, that they represent the views of the relevant corporate party at the time the contract was formed?[34]

[84] Thirdly, and in any event, while there are references to quality in the operational documents, the references are not necessarily inconsistent with a limited role regarding quality and therefore do not take matters too much further. As for provisions in the building contract that refer to the quality and standard of building work, they are essentially directed at the builder.

[85] In our view, properly construed "completion" turns not only on the visibility of the defect but also the nature of the defect, its seriousness in terms of the integrity of the building as a whole and the extent of the repairs necessary to fix it. Finishing details and minor defects would clearly not be an impediment to certification. Unfortunately in applying the naked eye test, the Judge did not articulate the basis of the distinction between the foundations and the other defects including in particular the cladding and the windows. That is so even though the cladding and the windows

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[34] *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 30, at [90] per Winkelmann CJ and Ellen France J.

were both classified as key defects and cost more to remedy than the defective foundations.

[86] In rejecting IAG's broader formulation of the naked eye test, we have not overlooked the other criticisms made of the Judge's reasoning. However for reasons we now explain we are satisfied they lack substance whether viewed individually or collectively.

[87] First the issue of industry practice. There was evidence about understandings in the building and insurance sector as to the meaning of terms used in the RSMA such as "monitor" and "deliver", evidence which supported IAG's interpretation. We acknowledge that evidence of industry practice and understandings of commonly used expressions can be a useful aid to interpretation.[35] However in the circumstances of this case we are not persuaded it is particularly cogent. That is because we agree with the Judge that the RSMA was a bespoke contract responding to an unprecedented situation.

[88] Mr Gedye also relied on evidence from Mr Geraghty a former Hawkins employee and the builder Mr Farrell that some Hawkins rebuild solution managers did take steps to promote building work quality on the ground. However there was no evidence they did this in response to an instruction from those at a senior level in Hawkins let alone anyone responsible for the negotiation and conclusion of the RSMA. We therefore agree with the Judge that little or no weight can be attributed to this subsequent conduct evidence.

[89] Another criticism made of the Judge's reasoning was inconsistency between his treatment of the liability of Hawkins to the Sleights vis-à-vis its liability to IAG. IAG says his findings in relation to the services provided by Hawkins to the Sleights should have informed his interpretation of the RSMA obligations owed to IAG because these were based on the same facts in respect of Hawkins' role and what it did or did not do. The effect of the decision, Mr Gedye says, is that while carrying out the same task Hawkins owed different duties to the insurer and the insured. And that cannot be right.

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[35] At [157] per Winkelmann CJ and Ellen France J.

[90] The different findings were of course based on different legal pathways and it is well-established that liability arising out of the same act to different people may be concurrent but not necessarily co-extensive. The liability of Hawkins to the Sleights was founded in the tort of negligence and the Consumer Guarantees Act (ie imposed as a matter of law), whereas as between IAG and Hawkins it was exclusively a contract issue. Of itself the fact of different duties is not heretical.

[91] The existence of the promotional material and Hawkins' apparent acquiescence could however, we accept, be capable of being evidence of subsequent conduct bearing on the interpretation of the RSMA. It is reasonable to ask why would Hawkins have not objected to being represented as a project manager with a quality assurance role if that were not in fact its role. Why too would IAG have intended Hawkins to owe owners wide project management duties but only narrow duties to IAG the very entity that was making the payments on behalf of the owners?

[92] There are however answers to these questions in the evidence. The evidence showed that the contracting parties, IAG and Hawkins, had in fact addressed this very issue in the course of pre-contractual negotiations relating to the scope of the indemnity IAG would give to Hawkins.

[93] In a letter dated 23 May 2012, Hawkins' lawyer expressly recorded that representations to homeowners that Hawkins would ensure quality were contractually not the position vis-à-vis IAG. Significantly the letter also stated:

> There is a distinction between contractual duties arising between Hawkins and IAG on the one hand, and tortious duties which might arise between Hawkins and the homeowner on the other. The homeowner is not a party to the IAG/Hawkins agreement. It is however not only possible, but likely, that a homeowner faced with a defective workmanship issue would include Hawkins in any proceedings against the builder (for example) particularly if the builder is not of any substance. Whether or not a duty is owed to the homeowner by Hawkins will be a matter for the Court and will depend on the particular facts that arise. …
>
> Given Hawkins limited role under Schedule 2, it is simply unacceptable that an indemnity for third party claims arising from negligence is not given — as drafted there is simply no indemnity as at best, all the current version would cover is [sic] irrecoverable costs on an unsuccessful third party claim.

[94] The terms of the indemnity provision were modified accordingly as per cl 17.1 of the concluded RSMA:

> 17.1 **IAG NZ indemnity**: IAG NZ indemnifies Hawkins to the maximum extent permitted by law for all claims (including third party claims), liability, costs (including reasonably incurred legal costs on a solicitor-client basis), losses, penalties and damages (including arising in tort, including negligence) incurred by Hawkins arising from or in connection with this Agreement, except to the extent caused by a breach of this Agreement or by any reckless, fraudulent or wilful act or omission by Hawkins or any of its Personnel or Hawkins or its Personnel acting outside the scope of their responsibilities under this Agreement.

[95] In those circumstances, we are firmly of the view that any significance that might be attributed to the legal relationship between Hawkins and the Sleights for the purposes of interpreting the RSMA is negligible.

[96] Finally we address IAG's argument that the High Court's findings offend commercial common sense. Mr Gedye submitted in effect that if the Judge was correct, what was the point of IAG engaging Hawkins if its role was one that conferred only marginally greater benefits beyond those which certification by the builder itself would have conferred. Under the Judge's interpretation, the builder was the party solely responsible for quality and yet the whole RSMA system was substantially based on distrust of builders and the need to check their output. Mr Gedye further submitted IAG could not have intended that it would be required to pay for defective work, the scale of the earthquake repair programme making such an intention less likely, not more as the Judge assumed.

[97] These submissions were essentially premised on the basis that the Judge found Hawkins was to have no responsibility at all for the quality of a builder's work. But that was not the case and nor is it the case under the expanded test we have formulated. What in our view would not make commercial sense would be for Hawkins to have agreed to obligations that mirrored the obligations it had under the previous contract for significantly less money. It would also not make sense for two commercially sophisticated legally represented parties to have failed to spell out in express terms what would be one of if not the most important of Hawkins' obligations

in the contract and instead chosen to leave it to "inherent" reasoning. That would be a very oblique approach to contract drafting.

[98] Drawing all these threads together, we have reached the following conclusions:

(a) It was a breach of Hawkins' monitoring and certification obligations under the RSMA to certify completion of work if that work contained defects that were both visible to the naked eye and of a significant nature in terms of the integrity of the building as a whole and the extent of the repairs necessary to rectify them.

(b) Applying that construction of the RSMA to the facts of this case, viewed globally, the defects as found by the Judge relating to the cladding and the windows including the structural defects of the first-floor balcony were an impediment to certification.

(c) Those defects were in the same category as the foundations and sub-floor defects.

(d) All other defects found by the Judge were not an impediment to certification.

Outcome of IAG's appeal against Hawkins/QBE in CA659/2020

[99] Both the appeal and cross-appeal are allowed.

[100] As to the monetary consequences of our decision, the parties sought an opportunity following determination of the appeal issues to reach agreement on the sums owing by each to the other in light of our determinations.

[101] We agree that is appropriate. In the event agreement cannot be reached on the calculations, we reserve leave to the parties to seek further orders in respect of quantum and the form of final judgment orders.

[102] We also reserve the question of costs with leave being granted for the parties to come back to the Court in the event costs are unable to be agreed.

Appeal against the decision to award interest CA156/2021

[103] This appeal is a dispute between IAG and the Sleights.

[104] As mentioned, the Judge awarded damages against IAG in the sum of $389,848.00 representing the cost of remedying the defective repairs. In a separate judgment, he awarded interest on that figure from 19 June 2015 to the date of the substantive judgment, 30 October 2020.[36] The significance of 19 June 2015 is that this was the date on which IAG received the Axis report identifying significant defects in the repair work and the Sleights requested funds to undertake the necessary remedial work.

[105] The award of interest was made under s 87 of the Judicature Act 1908.[37] Section 87(1) states:

> (1) In any proceedings in the High Court, the Court of Appeal, or the Supreme Court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such a rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: provided that nothing in this subsection shall—
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> (a) authorise the giving of interest upon interest; or
>
> (b) apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement enactment, or rule of law, or otherwise; or
>
> (c) affect the damages recoverable for the dishonour of a bill of exchange.

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36 Costs and interest judgment, above n 2, at [28].

37 The interest regime under s 87 of the Judicature Act 1908 has been replaced by the Interest on Money Claims Act 2016. However, the latter only applies to proceedings filed after 1 January 2018. Under the relevant transitional provision, in pt of sch 1 of the Interest of Money Claims Act, proceedings filed before that date continue to be governed by s 87. The Sleights filed this proceeding on 6 October 2017.

[106] The damages awarded to the Sleights were calculated on the basis of current repair costs, not the rates prevailing in 2015. The Judge acknowledged the existence of authority cited by IAG which has held that in such a situation interest should not be awarded. However, in his view, justice in the circumstances of this case required that interest should be paid in order to fairly compensate the Sleights.[38] The Judge said that there were various factors that supported this conclusion.

[107] The first was that the cases cited by IAG were distinguishable because they involved tort claims whereas the claim against IAG was for breach of contract.[39]

[108] The second factor was that delay in making payment had caused the Sleights real and further losses for which they should be compensated. If IAG had honoured its contractual obligations, the Sleights would have been able to complete the repairs and would then have had the benefit of a house that was properly repaired and which they could have rented or sold for its true value. As it was, they had to wait. They were deprived of money to which they were entitled in 2015.[40]

[109] Thirdly the Judge questioned whether in any event the damages had been assessed at repair rates that were current at the time of trial.[41]

Grounds of appeal

[110] It was common ground that the decision whether to award interest under s 87 involves the exercise of a discretion. That is to say, it was common ground that before appellate intervention was warranted, we needed to be satisfied that the Judge had made an error of principle or had taken into account an irrelevant factor or failed to consider a relevant factor or had been plainly wrong.

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38 Costs and interest judgment, above n 2, at [25]–[26] citing *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA); and *Tocker & Bayliss v Goodwill Holdings Ltd* HC Tauranga CP 39/87, 5 March 1993.

39 At [27(a)–(b)].

40 At [27(c)].

41 At [27(d)].

[111] Mr Gedye for IAG acknowledged there was jurisdiction under s 87 to make an award of interest in this case because it involved a proceeding for the recovery of damages. However, he submitted the Judge had erred in three key respects:

(a) the Judge failed to properly characterise IAG's underlying obligation;

(b) the Judge should have applied the well-established approach that where present day costs are awarded, interest should not run from an earlier period; and

(c) the Judge wrongly awarded interest to compensate for stress and inconvenience.

For reasons we now go on to explain, we uphold the second ground of appeal and have decided to reverse the interest award.

Analysis

Did the Judge fail to properly characterise the underlying obligation?

[112] In advancing this ground, Mr Gedye submitted that it is the underlying obligation that should control interest. IAG's underlying obligation was not to produce a repaired house but rather simply to pay whatever the cost of repairs were if and when they were incurred. It was in the nature of a reimbursing obligation. It followed that as at June 2015 the right to be paid anything under the policy had not yet come into existence. No money was payable under the policy in June 2015 because the Sleights had not elected to carry out remedial works or hired a builder. Any liability IAG had in June 2015 to pay was at best contingent liability only and cases such as *Doig* v *Tower Insurance*[42] and *Myall v Tower Insurance*[43] show that contingent liability is not sufficient for the purposes of a pre-judgment interest award.

[113] We do not accept this argument which has an air of sophistry about it. We agree with Mr Cooper, counsel for the Sleights, that the underlying obligation must be as

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42 *Doig v Tower Insurance Ltd* [2019] NZCA 107, [2021] 2 NZLR 127.
43 *Myall v Tower Insurance* [2019] NZHC 528.

determined by the pleadings and the Judge's substantive findings. IAG's contentions on this issue are not consistent with the way the claim was pleaded and run at trial. They are also not consistent with the relevant findings of the Judge about the nature of IAG's breach. Those findings have not been appealed and cannot now properly be revisited through the vehicle of an argument about interest.

[114] The claim against IAG was never pleaded as a claim for an insurable loss arising from defective repair. That is to say, it was never pleaded as a fresh insurance claim arising from the defective work and requiring a new election to repair. Defective workmanship was expressly excluded from the policy. There was only one insurable event, namely the damage to the house caused by earthquakes.

[115] The claim that was argued at trial and upheld by the Judge was that under the insurance policy IAG had an obligation to fund earthquake repair work to the extent necessary to produce a certain result. As at June 2015 it refused to provide any further funding despite the fact the promised result had not been achieved. It was therefore in breach of the policy.[44]

[116] We conclude this first ground of appeal is not sustainable.

It was an error to award interest from June 2015 when the damages represented present day costs of repair

[117] The first issue under this head is whether the damages did in fact represent present day costs of repairs — the Judge appears to suggest the damages he awarded did not or may not have done. However, as Mr Gedye points out, that suggestion is not supported by the evidence. All parties adduced evidence of current repair costs and no party advanced a case based on 2015 rates. There was disagreement as to current rates but the Judge must be taken to have resolved that disagreement by making the damages award in the sum he did. For completeness we would add that no party adduced evidence of future cost increases.

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[44] See Substantive judgment above n 1, at [109], [194]–[195] and [709].

[118] It follows that insofar as the Judge appears to have relied on the quality of the evidence about costs to justify his decision to award interest, that was plainly an error.

[119] Turning then to the key issue raised by the second ground of appeal.

[120] The general principle is that interest is awarded from the date of loss — in this case the date of entitlement to payment. That is because the defendant has had the use of the money pending judgment and the plaintiff has been out of pocket.[45] Where however repair damages are calculated on the basis of present day costs, the accepted practice as evidenced in *Bowen* and *Tocker* is not to award interest.[46] That is because an award of interest would duplicate an allowance already built into the damages calculation. The gain to the defendant is removed because it now has to pay a higher sum than it would have paid at the time of breach and the loss to the plaintiff is removed because it will recover more than the loss as at the time the cause of action arose, that is as at the time it was entitled to payment.

[121] In declining to follow the approach taken in *Bowen* and *Tucker*, the Judge was influenced by two factors.

[122] The first was that *Bowen* and *Tucker* were negligence cases in tort and in the view of the Judge, that meant the payment obligation arose only upon entry of judgment. In contrast, IAG had been in breach of a direct payment obligation under its contract with the Sleights since 2015.

[123] No authority was cited in support of that proposition and the reasoning appears contrary to general principle. It has never been the law that where the plaintiff suing in tort has not actually incurred the repair costs, they are not to be regarded as having suffered any loss until that loss is quantified at judgment. The correct position is that they have an entitlement to damages once all the elements of the tort have come into

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45 *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [57] and [74]; and *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1(CA). See generally *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 845–846.

46 *Bowen v Paramount Builders (Hamilton) Ltd*, above n38, at 411; and *Tocker & Bayliss v Goodwill Holdings Ltd*, above n 38, at 98–99.

existence or are reasonably discoverable and that will of course always occur before trial and judgment.

[124] We agree the fact that *Bowen* and *Tocker* were tort cases was not a proper basis for distinguishing them from the present case and therefore the Judge took an irrelevant factor into account and made an error of principle.

[125] Mr Cooper wisely did not seek to justify the award of interest on the grounds of a distinction between contract and tort. Rather he sought to endorse the Judge's second reason for not following *Bowen* and *Tucker* which was that the s 87 discretion was a means by which the Sleights could be fairly compensated for losses arising from the delay in receiving payment. Mr Cooper emphasised the breadth of the discretion conferred by s 87 and submitted there is no mandated approach. All depends on the interests of justice in the particular circumstances.[47]

[126] In support of that proposition, he referred us to a decision of the English Court of Appeal in *Woodlands Oaks Ltd v Conwell*.[48] In that case despite the fact that remedial rates had been calculated at contemporary rates, the Court nevertheless upheld an award of interest on the grounds that to deny interest would produce an unjust result.

[127] *Woodlands Oak* was however a radically different case to the present one. It involved both a claim and a counter-claim. The claim was by a builder for monies owing under the building contract with the homeowner, and the homeowner's counterclaim was for remedial work caused by defective workmanship. Both the claim and the counter claim succeeded and awards of interest were granted in respect of each. However the trial Judge awarded the builder interest on the full amount of its claim rather than (as should have been done) on the balance remaining after setting-off the counterclaim. In circumstances where the appeal court was being asked to quash the award of interest on the counterclaim only, it is hardly surprising it would decline

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47 Citing *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd*, above n 45, at [25]–[26], [32], [36] and [57]. Mr Cooper also pointed out that in *Bowen* interest was not a contested issue.

48 *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254.

to do so. That would have been patently unjust because it would have resulted in the claimant builder receiving interest which they were not entitled to receive.

[128] *Woodlands Oak* is certainly not authority for the proposition that interest can be used as a back door method for compensating losses that are more properly within the realm of heads of damages and which need to be formally claimed and supported by evidence. Yet in our view that is exactly what the Judge has done in this case. The sorts of losses identified by the Judge as the basis of his interest award in this case — namely an inability to tenant the house or sell it — were opportunity or expectation losses. Those sorts of losses were never claimed or advanced as the basis for compensation.

[129] Those being the circumstances, we consider there was no justification for departing from the standard practice of not awarding interest when damages are assessed as at the date of quantification rather than the date of entitlement. The Judge's exercise of his discretion under s 87 was wrong in principle and cannot stand.

[130] Although that conclusion is dispositive of the appeal, it is strictly speaking unnecessary for us to consider the third ground of appeal which was that the Judge had wrongly relied on stress and inconvenience as a basis for awarding interest. The Sleights had made a claim for general damages but the Judge had declined to award them. The Sleights have not appealed that decision.

[131] Against that background, we agree that if the Judge had awarded interest on the basis of a claim which he had already rejected that would be an error. However, the interest judgment makes no reference to stress or inconvenience and we decline to interpret it in the way IAG suggests.

[132] Finally for completeness, we note that the interest judgment makes no reference to the Sleights' successful claim against IAG under the Consumer Guarantees Act. However for the purposes of interest, exactly the same principles apply.

Outcome of IAG's appeal against the Sleights CA156/2021

[133] The appeal is allowed and the decision of the High Court awarding interest to the first respondents is quashed.

[134] As regards costs, counsel advised us that neither party to this appeal sought costs. We agree that is appropriate and therefore make no award of costs.

Solicitors:
DLA Piper, Wellington for Appellant in CA659/2020 and CA156/2021
Hazelton Law, Wellington for Respondent in CA659/2020 and Second Respondent in CA156/2021
Saunders Robinson Brown, Christchurch for Respondent in CA156/2021