IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-009-000417
[2019] NZHC 2016

BETWEEN	KARL GREGORY DODDS AND ALISON ROMA JACQUELINE DODDS AND ST MARTINS TRUSTEE SERVICES LIMITED AS TRUSTEES OF THE MATTSON TRUST Plaintiffs
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Defendant

Hearing: 4 – 7 March 2019

Appearances: P J Woods and T D Grimwood for Plaintiffs
D J Friar and NFD Moffat for Defendant

Judgment: 16 August 2019

JUDGMENT OF GENDALL J

This judgment was delivered by me on 16 August 2019 at 11:00 a.m. pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: 16 August 2019

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Introduction

[1] An insurer commissions a report on the cost of rebuilding an earthquake damaged house. That report contains costings the insurer thinks are beyond the entitlement of the insured homeowner. The insured is provided an abridged report which excludes those costings and settles the claim on that basis. Later, the insured discovers the full unredacted report and feels deceived and misled. The insured sues alleging misrepresentation, misleading and deceptive conduct, and breach of the insurer's implied duty of utmost good faith under the policy. The potential liability of that insurer (if any) is at issue in this case.

Factual background

[2] The plaintiffs, ("the Dodds") owned a residential property at 9 Errol Lane, Huntsbury, Christchurch ("the property") as trustees of the Mattson Trust. The house on that property ("the house") was insured from the 1990s through AMI Insurance Ltd (AMI). A claim under the AMI insurance policy (the policy) eventuated when the house and the swimming pool on the property suffered major damage in the 2010/2011 Canterbury earthquake sequence. In February 2011, the Dodds filed a claim with the Earthquake Commission (EQC) and with AMI. On 5 April 2012, the defendant, Southern Response Earthquake Services Ltd (Southern Response) assumed AMI's liability under the policy for all earthquake damage resulting from the Canterbury earthquake sequence which occurred before 5 April 2012.

The policy

[3] The Dodds' house was insured for full replacement cover under a policy described as an "AMI Premier House Cover" policy. The policy provides "top up cover" for earthquake damage over and above the amounts payable by EQC. It states under a section headed "cover for your house" that if the insured house is damaged beyond economic repair, which both parties accept was the case here, the insured can choose between four insurance options. This section goes on to describe what the insurer will do for each such option:

> (i) **to rebuild on the same site**. We will pay the full replacement cost of rebuilding your house.

(ii) **to rebuild on another site**: We will pay the full replacement cost of rebuilding your house on another site you choose. This cost must not be greater than rebuilding your house on its present site.

(iii) **to buy another house**. We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your house on its present site.

(iv) **a cash payment**. We will pay the market value of your house at the time of the loss.

[4] A separate section in the policy provides "cover for additional costs". This outlines further costs the insurer will meet as follows:

1. Professional fees	We will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild your house. These expenses must be approved by us before they are incurred
2. Demolition and debris removal	We will pay the reasonable cost of demolition and debris removal. These expenses must be approved by us before they are incurred.
3. Removal of household contents	We will pay the reasonable cost of removing your household contents from your house when this is necessary to carry out repair or reinstatement of your rental house.
4. Compliance with building legislation and regulations	If additional work is required, we will pay the reasonable costs for compliance with building legislation and rules…

[5] The relationship between the "cover for your house" section in the policy and the "cover for additional costs" section has been considered in a number of cases which I will outline later in this judgment.

Out of policy options

[6] Southern Response, to its credit, at the time also offered policy-holder customers a number of alternative options which were outside the policy.

[7] One of these options was "Flexi-Build", which was called at that time "Build to Budget". Southern Response developed this option, it said, because its standard policy only allowed customers to rebuild their insured house, and many customers wanted to use the payment they would receive under their policy to build something different. Southern Response therefore developed this out of policy option in which the customer could take the rebuild cost cap that applied under the Buy Another House Option (noted at [3](iii) above), and use this as a budget that they could then apply towards building a different house within the Southern Response rebuild programme (with certain restrictions). In some circumstances, the customer could also choose to contribute more to the cost of the new house than their budget. This might happen where the customer wanted to build a bigger house or a house with higher specifications than the original house. The basis on which Southern Response offered this option, it seems, evolved over time.

[8] In Southern Response's communications with customers at the time, it contrasted this "Build to Budget" out of policy option with its obligations under the AMI policy by describing the policy rebuild options (outlined at [3](i) and (ii) above) as "Replicate to Policy".

[9] Two other out of policy options were available if a policy-holder customer decided to buy another house:

(a) Buy and renovate: If a customer was to buy a house at a price less than the cost of rebuilding the original house, the policy did not allow the customer to keep the difference as a cash payment. However, in many cases where the purchase price was less than the estimated rebuild cost, Southern Response allowed the difference to be paid to the policy-holder in cash up to certain limits. Initially, Southern Response required the cash to be used to renovate the new house, but this requirement was later relaxed.

(b) House and land package: Under the policy, a customer was able to use the "buy another house" sum to buy a new house, but not the land on which the house sat. This was recently confirmed in a decision of this Court, *Southern Response Earthquake Services Ltd v Shirley Investments Ltd*.[1] Notwithstanding this, under the house and land package, Southern Response did allow customers to use the buy another house sum towards the purchase of an entire house and the section/land on which it stood.

The DRA

[10] In processing the Dodds' claim under their policy, Southern Response contracted with Arrow International Ltd (Arrow), at the time a large construction and quantity surveying company. Arrow assessed the earthquake damage to the house and provided an initial report. This essentially recorded the features of the house and the damage. Arrow was then to provide an estimate of the cost of repairing or rebuilding the house and to recommend whether it was economic to repair.

[11] Arrow's initial report which was headed as a "Detailed Repair/Rebuild Analysis" report recorded the aspects of the house which had been damaged but without costing replacement. This was sent to the Dodds for comment on 21 October 2011 and then updated.

[12] Arrow then produced to Southern Response a costed Detailed Rebuild/Repair Analysis (the Complete DRA) on 15 November 2011. The Complete DRA recommended a rebuild concluding that "the dwelling is uneconomical viable [sic] to repair". Under the overall heading "Re-build budget" the Complete DRA itemised the cost of materials and labour required to rebuild the house at a figure of $895,937.78. A further section was included at the end of the Complete DRA under the heading "AMI Office Use". In this section Arrow outlined a number of additional costings for internal administration, demolition costs, professional and design fees, project management costs and a project contingency. Specifically, these amounts (excluding GST) were described in this section as "Internal Administration" totalling $23,000,

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1 *Southern Response Earthquake Services Ltd v Shirley Investments Ltd* [2017] NZHC 3190

"Demolition" totalling $64,634.50, "Design Fees" totalling $50,716.30 and a "Project Contingency" totalling $114,678. These additional "AMI Office Use" figures totalled $253,028.80. When GST was added to these amounts, the Complete DRA concluded its report with a comprehensive estimate of the total costs that Southern Response could be expected to incur if it were to rebuild the Dodds' house at a figure of $1,186,920.75. This figure was described in the Complete DRA as "Grand Total House (including GST)".

[13] Southern Response argues this further section, described as the "AMI Office Use Section" (the Office Use Section), was used only to assess the potential liability of Southern Response if the insured chose the first option in the policy, that being to rebuild on the same site. Southern Response maintains that it did not consider in terms of the policy the Dodds were entitled to any more than the $895,937.78 if they chose to buy another house under the third option in the policy – noted above at [3](iii) (the Buy Another House Option).

[14] Because it did not consider the fees and costs in the Office Use Section were payable to the Dodds if they chose the Buy Another House Option, Southern Response explains that it did not provide the Complete DRA to the Dodds. Instead, it says it provided only an abridged version (the Abridged DRA) which made no mention of these additional fees and costs. The Abridged DRA was given to the Dodds in February 2012. That version set out the cost of rebuilding the house at $895,937.78. For all intents and purposes, it appeared that this figure was the final house rebuild cost, including GST. It was described in the document as the "House and outside EQC scope (including GST)". It was followed by what might be regarded as a concluding statement for that DRA "*Reviewed by: T.S. Date 9.11.11*" and signed. By simply ending at that point, the $895,937.78 figure cut off any mention of the additional costs which had been included in the Complete DRA of a project contingency, administration fees, professional and design fees, project management and demolition costs.

[15] At no time did Southern Response inform the Dodds that they had received only what was an Abridged DRA nor that the Complete DRA existed. Southern Response's position is that it did not need to. As a consequence, the Dodds

were unaware throughout that Southern Response possessed a more complete estimate of the full cost of rebuilding, that is the "Grand Total House" figure in the Complete DRA of $1,186,920.75 noted at [12] above.

The election process – the 26 September 2012 letter

[16] On 26 September 2012, Southern Response sent to the Dodds a detailed seven page letter explaining that the DRA received from Arrow had advised the property was "beyond economic repair". It went on to say that the claim was likely to exceed the EQC cap and explained the process if EQC made this determination. The Dodds could choose, among other things, to rebuild their house or to purchase another one. The letter enclosed what was described as a "house claim pack".

[17] The letter gave details and explanation of the four settlement options under the policy I have noted at [3] above. It said that for option (i), the "rebuild on the same site" option:

> "Southern Response will rebuild your house to an 'as new' condition on its present site".

The letter also added,

> As Southern Response will complete the work to rebuild your house, regardless of any inflation in building costs that may occur over time, this option is not costed out in your decision pack.

[18] For option (ii) (the rebuild on another site option), Southern Response said in the letter it would:

> … rebuild your house on another site provided by you … (at a cost not to exceed) what it would have cost to rebuild your house on its present site.

[19] The letter went on to state that if the Dodds chose to purchase another house under option (iii) (the Buy Another House Option):

> Southern Response will pay the cost of buying another house *up to the maximum it would have cost to rebuild your house on its present site*.
>
> (emphasis added)

It said the "maximum amount available if you take this option will be $894,937," and

then went on to clarify this again by repeating that:

> the most Southern Response will pay *is the amount it would have cost us to rebuild your house on its present site*.
>
> (emphasis added).

If the Dodds chose to purchase a more expensive house the letter outlined that they would not be entitled to a payment for any difference in value.

[20] After outlining the four settlement options under the policy, significantly the letter under the heading "Key policy conditions on these anticipated settlement options" went on to state:

> Your Premier House Policy provides for the cost to reinstate your house to an "as new" condition. It also provides that we will use building materials and construction methods in common use at the time of rebuilding. These are not necessarily the materials and methods that were in common use at the time your home was built or modified prior to the current damage.
>
> Arrow International has taken these issues into consideration and also the quality of your house's construction *in its estimation of the replacement cost under option (iii)* above.
>
> (emphasis added)

[21] The letter also contained a further copy of the Abridged DRA with its $895,937.78 rebuild estimate.

[22] In the letter Southern Response also asked the Dodds to contact it if they had any questions and recommended to the Dodds that they obtain their own independent advice about their claim. In particular, the letter went on to state:

> Southern Response cannot offer you financial advice, or discuss the appropriateness of any decisions you may make regarding your insured property. We encourage you to obtain your own independent advice regarding your claim/s.

[23] On these aspects, in their evidence the Dodds confirmed that, after they received this letter, they did in fact obtain their own legal advice from their solicitor in relation to their settlement options.

[24] As to all of this, it is Southern Response's general contention now is that the only amount actually represented to the Dodds here was the amount Southern Response considered the Dodds were entitled to under the Buy Another House Option in their policy.

[25] To the contrary, the Dodds in evidence said they read the letter as confirming that, in the event they chose the Buy Another House Option, first, Southern Response would pay the expense of purchasing that other house, up to the total sum it would have cost Southern Response to rebuild their home on its present site, and secondly and importantly, Southern Response's professional estimate of that sum provided by Arrow was now $894,937.

Information sheets

[26] Further documentation was provided to the Dodds. There is some disagreement as to timing and whether some of these further documents, described as "Information Sheets", were provided with the 26 September 2012 letter, or at a later time only at the beginning of 2013. It is not necessary for me to resolve this issue here as it is clear the Information Sheets were received before the Dodds finally made their election under the policy. But, in any event, those Information Sheets are said by Southern Response to explain the basis on which the rebuild cost had been calculated in the DRA, and for the purposes of the Buy Another House Option.

[27] For option (iii) (the Buy Another House option), the Information Sheets under the heading "Quick Summary" stated:

> Southern Response will pay the purchase price of the house you buy *up to the maximum it would have cost to rebuild your house on the current site*, less any EQC payments and any excesses you are responsible for. We may also deduct any previous payments AMI and/or Southern Response has made to you for damage to your house.
>
> (emphasis added)

[28] The Information Sheets went on to state in two sections:

> How much will I have available to spend on a new house?

The answer to this was:

> The amount stated in the attached letter is the total amount available, including payments EQC have made or committed to make to you, and any excesses you are responsible for and any previous AMI and/or Southern Response settlement payments to you for damage to your house.

[29] Next, under the question:

> What if the purchase price of my new house is less than the total rebuild cost?"

the answer is given as:

> If the purchase price is less than the rebuild cost then the difference will not be paid to you. However, the difference can be used towards approved legal and associated fees incurred.

[30] Then, under the question:

> What if the purchase price of my new house is more than the total rebuild cost?

the answer is:

> You will be responsible for the difference between the cost of purchasing your replacement house and *what it would have cost to rebuild your house on its present site* (ie the maximum amount payable by Southern Response) taking into account EQC payments and any excesses you are responsible for.
>
> (emphasis added)

[31] Later in the Information Sheets is a page which is headed "Detailed Repair/Rebuild Analysis (DRA)".

[32] Perhaps to an extent somewhat confusing, (as I outline at [35] following) there is a Southern Response question on this page which is:

> Why does the amount in my DRA differ to the amount in my letter?

The answer given to this question by Southern Response is:

> In the letter, Southern Response settlement option (iii) – (Buy Another House) – is costed for you. This amount is calculated as follows:
>
> House
>
> Plus consent fees
>
> Plus P & G (see overleaf for details)

Plus out of scope amount

Plus GST

[33] This DRA page in the Information Sheets goes on to ask a further question:

> Why are some of the other fees not included?

The answer given by Southern Response to this question is:

> Fees such as design fees and Arrow fees are not included as they are not incurred if you chose option iii – Buy Another House.

[34] Lastly, on this DRA separate page in the Information Sheets is a concluding question which is:

> What are design fees and consents?

The answer given by Southern Response is:

> These costs may be incurred by Southern Response when we are rebuilding your house on another site.
>
> If you select Southern Response settlement option III – Buy Another House, then there are no design fees incurred and only consent fees are included in the settlement figure.

[35] As I note at para [14] above, the amount specified in the Abridged DRA given to the Dodds in February 2012 as the cost of rebuilding the house was $895,937.78. This contrasted with the grand total house figure in the Complete DRA which was $1,186,920.75. That latter amount also differed from the settlement option (iii) "Buy Another House" figure in the 26 September 2012 letter from Southern Response, which was (slightly adjusted) at $894,937. There was thus no effective difference of any kind between the amount in the DRA provided to the Dodds and the amount in the letter. This was despite the question I note at para [32] above on the DRA page of Southern Response's Information Sheets that there was a difference. Nowhere is the reason for this explained.

January 2013 meeting/s, the MOU and Build Decision documents

[36] In the meantime, in November 2012, EQC agreed that the earthquake damage to the property was overcap. That allowed the parties to move toward settlement. The

Dodds contend that several times during January 2013 they met with Southern Response to discuss the options to settle their claim. At these meetings they say Southern Response emphasised that the disclosed DRA provided their maximum entitlement for the "rebuild on another site" and the "Buy Another House" options. Mr Dodds confirmed this in his evidence and at para 42 of his brief.

[37] At a meeting between the Dodds and Southern Response around 15 January 2013, Southern Response provided to them two further documents. One was a Memorandum of Understanding (the MOU) and the other was a document headed "Making Your Southern Response Build Decision" (the Build Decision document). Both of these documents explained the process that would be followed if Southern Response undertook the building work to replace the Dodds' house for them. In particular, these documents explained the difference between what was described as the replicate to policy options and the build to budget out of policy options which Southern Response was offering.

[38] It is interesting to note that in the MOU Southern Response stated on page 1 under a heading "1. DRA (Detailed Repair/Rebuild Analysis) Preparation" the following:

> Arrow will have completed a DRA on behalf of Southern Response. The DRA records a description of your house and the damage to it. It also identifies the building work required based on the cover under your insurance policy.
>
> The DRA is an important document.

[39] Then, in the MOU at paragraph 3, Southern Response states:

> **3. Choosing to replace your previous house under the terms of the policy or building something different**
>
> If your house is "beyond economic repair" and you have decided that you want Southern Response and Arrow to manage the building work, you have two options regarding build and design decisions:
>
> - Replicate to policy:
>
> Under this option you can choose to have your house rebuilt to its previous characteristics, using building materials and construction methods in common use today based on the terms of the police.

Build to budget:

- Under this option you can take the *cost to rebuild your previous house determined by using information from the DRA to form a budget*. You can then apply that budget to build a new house that may differ from your previous house (for example you may choose to change the layout of your house).

  In some circumstances you can also choose to contribute more to the cost of your new house than the budget.

  …

  (emphasis added)

[40] The importance of the DRA which had been provided to the Dodds at that point (and bearing in mind that it was only the Abridged DRA) is emphasised at para 4 of the MOU. This states:

> **4. Using the DRA to establish the scope of the rebuild**
>
> The DRA is important for both of the rebuild options outlined above.
>
> If you choose to have your house replicated to policy, the DRA and the insurance policy wording will be guiding documents to define the type of house that will be rebuilt…
>
> If you choose the Build to Budget option the DRA and the insurance policy wording will still be used to define your previous house. Additions made by you which push the building cost over that budget will need to be paid for by you…

[41] Evidence before the Court, including a 30 January 2013 email to Southern Response from the Dodds, shows that even as at the end of January 2013 the Dodds were still considering their various options under the policy, including out of policy possibilities such as the build to budget option. In particular, in this email the Dodds asked amongst other things:

> Firstly, some questions:
>
> 1. If we elect to buy elsewhere, does our house have to be demolished?...
>
> 2. If we go for a build to budget, would it be possible to build two smaller houses on the site to the total value of the build to budget agreed figure? (Our property currently consists of two sections.)

As I understand it, Southern Response answered this second question with the specific

response: "Not under a Arrow project managed rebuild."

Settlement Election Form

[42] Then, on 11 February 2013, Southern Response sent the Dodds a further document called a 'Settlement Election Form'. This form, no doubt intended to assist an insured's election deliberations, set out the Dodds' options and the settlement arrangements for each option as follows:

> "Rebuild on another site" option:
>
> > "*The maximum Southern Response will pay is the cost of rebuilding your house on its present site*"; and
> >
> > "*If you choose the rebuild option and Southern Response agrees to settle your claim in cash, we will pay the cost of building your desired house or the cost of rebuilding your existing home, whichever is the lesser*; and
>
> "Buy another house" option:
>
> > "*We will pay the purchase price of another house, including necessary legal and associated fees, up to the cost of rebuilding your house on its present site*"; and
> >
> > "*We will not pay for any difference between the cost of buying your replacement house and the cost of rebuilding your house on its present site.*"
> >
> > (emphasis added.)

[43] The Dodds say, in reliance on the representations made by Southern Response and the information it had provided, on 5 March 2013 they informed Southern Response of their election to proceed with option iii, the "Buy Another House" option.

[44] Six weeks later, on 16 April 2013, the Dodds signed the Settlement Election Form and Southern Response informed them that they could proceed to buy another house. The Dodds contracted to buy that other house and provided Southern Response with the Sale and Purchase Agreement on 18 April 2013. It seems Southern Response did not itself sign the Election Form until sometime later, on 19 September 2013 but nothing appears to turn on this.

The settlement

[45] The Dodds settled their claims under the policy for damage to their property in two stages. Two settlement agreements were entered into, the house settlement in December 2013 and the swimming pool settlement in November 2014.

[46] Around 23 December 2013, the Dodds finally received a cash settlement of their house claim of $894,937. This was after the parties had signed the document entitled "Partial Settlement of Claim Agreement" (the Settlement Agreement). Significantly, paragraph 4 of the Settlement Agreement itself stated:

> 4. A fair and reasonable estimate for the rebuild cost of the insured property, and the sum insured under the policy, is $907,321.

This was based upon the $894,937 figure plus an adjustment for the cost of rebuilding a fence.

[47] The Settlement Agreement was intended to settle the claim under the policy for damage to the house, with the exception of costs to rebuild their swimming pool. These swimming pool costs were agreed in later negotiations and the pool settlement completed on 12 November 2014. This later settlement provided for a payment of $109,250 to the Dodds as the rebuild cost of the pool. This was reflected in a document signed at the time and headed "Settlement and Discharge Agreement" (the Pool Settlement Agreement).

[48] The Settlement Agreement contained a full and final settlement clause in this form:

> 11. Except in regard to payment of the costs to repair the swimming pool at the insured property, the policyholder accepts the settlement payment, with Southern Response arranging demolition and debris removal as described in clause 7, in full and final settlement and discharge of the claims under the policy for damage to the insured property and in respect of any complaint, claim or right of action the policyholder has or may have against Southern Response, whether known or unknown, which arises directly or indirectly out of the events or any subsequent aftershock that has occurred before the date of this Agreement.

An almost identical full and final settlement clause was also included in the later Pool

Settlement Agreement.

[49] Some years later, the Dodds obtained a copy of the Complete DRA through a request made under the Privacy Act 1993. The Complete DRA contained the Office Use Section which provided for the additional costs not included in the Abridged DRA (outlined as I note at [12] above) as being (exclusive of GST):

Internal administration costs	$23,000.00
Demolition costs	$64,634.50
Design fees	$50,716.30
Project contingency	$114,678.00
	$253,028.80

[50] Seeing this, the Dodds took the view they had been seriously misled into settling in December 2013 for a sum that did not reflect the true cost of rebuilding their house which they understood they were entitled to. They issued these proceedings. In their Amended Statement of Claim dated 19 December 2018 the Dodds seek first, an adjusted figure of $217,181.07 which they say should have been paid to them under the policy, secondly, interest on this sum from the date of the Settlement Agreement and thirdly, general damages for each of them of $15,000.00.

The claim

[51] The Dodds sue here seeking the relief outlined at [50] above on three grounds. These contend that:

(a) Southern Response is liable for a misrepresentation that induced the Dodds to enter into the Settlement Agreement. The Dodds say they are entitled to damages under s 35 of the Contract and Commercial Law Act 2017 (CCLA);

(b) Southern Response is liable for misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986 (FTA). The Dodds seek damages under s 43 of the FTA; and

(c) Southern Response is liable for breach of its implied duty of good faith under the policy. Southern Response breached that duty by failing to disclose information (in the Abridged DRA) that was material to settlement of the Dodds' claim, and failing to act reasonably, fairly and transparently in dealing with and settling the Dodds' claim. They submit that this breach entitles them to damages in the normal contractual measure.

[52] The Dodds argue the above claims are not barred by the "full and final settlement" reached by the parties. That is on the basis, the Dodds say, that they seek damages simply for Southern Response's misrepresentation, its FTA breach, and for breach of its duty of good faith. They maintain they are not re-opening or reviewing the Settlement Agreement or the Pool Settlement Agreement.

[53] In opposing the claims against it, Southern Response denies first, that it made any actionable misrepresentations, secondly, that it engaged in misleading and deceptive conduct, and thirdly, that it breached any alleged duty of good faith that it may have owed to the Dodds. Southern Response also contends that for all of the claims, no general damages can be payable and that in any event the full and final settlement clauses in both the Settlement Agreement and the Pool Settlement Agreement settled all claims between the parties including those raised above.

The Dodds' entitlement to the AMI Office Use Section costs

[54] Southern Response's position throughout has been that the amounts omitted in the Abridged DRA were not payable under the Buy Another House Option, which was the option the Dodds selected, and they were properly redacted from the material provided to the Dodds. Ms Elizabeth Fife, a senior legal advisor at Southern Response, gave evidence before me on behalf of Southern Response and confirmed this.

[55] Ms Fife's evidence was to the effect that, at the time Southern Response was dealing with the Dodds' claim, it relied upon a general interpretation of AMI's policy under which certain costs (including contingency and design fees) were not payable to a customer who selected the Buy Another House Option, since they would not

actually be incurred if the existing house was not rebuilt. Because of this interpretation, around May 2011 Southern Response at a senior strategic management level made the new policy decision that Arrow's estimations of those fees would not be given to claimants as it was claimed "they were confusing". Previously, details of these AMI Office Use section costs had been provided at the outset to all AMI/Southern Response policy claimants simply as part of the Complete DRA document prepared by Arrow which was made available in each case. Southern Response says their changed approach from May 2011 was consistent with what it considered to be the law at the time.[2]

The Avonside Holdings decisions

[56] Later, in May 2013, Southern Response's approach to costs such as demolition, professional fees and a contingency allowance was considered by this Court in *Avonside Holdings Limited v Southern Response Earthquake Services Limited*.[3] At issue in that case was the interpretation of a materially identical AMI policy. The customer in *Avonside* elected to buy another house. The issue was whether the calculation of the cost of rebuilding the house under the Buy Another House Option included, among other items, the costs of demolition and professional fees, and a contingency allowance.

[57] In this Court, Southern Response's argument in the *Avonside* case was that the *notional* "full replacement cost" of rebuilding the house on the original site capped the liability to pay the cost of rebuilding the house on the chosen other site. The High Court upheld Southern Response's approach. In doing so, MacKenzie J in his 11 July 2013 decision held:[4]

> I consider that it is not appropriate to include a contingency allowance in calculating the cost of a notional rebuild. … In a notional rebuild, there can, by definition, be no unexpected items. … There is no need to add a contingency sum to reflect possible contingencies which will never be encountered.

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2 *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344.
3 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433.
4 *Avonside Holdings Ltd*, above n 3, at [24].

[58] MacKenzie J also accepted the argument that the cost of rebuilding did not include the cost of demolishing the existing house. He agreed that this cost may be payable as an additional cost under the "cover for additional costs" section of the policy, but that it was not part of the cost of rebuilding under the "cover for your house" section.

[59] With respect to professional fees, Southern Response had again argued that, although professional fees had been calculated in the DRA, these fees were not payable under the Buy Another House Option, as they would not be incurred. MacKenzie J in *Avonside* adopted the estimate of fees associated with applying for a building consent that Arrow had provided in that case and rejected the plaintiff's argument that a full allowance for professional fees should be paid.

[60] The High Court decision in *Avonside* was delivered on 11 July 2013. This was after Southern Response had sent to the Dodds certain documents in the present case, but before final settlement was reached. In that sense, at the time of the 4 December 2013 settlement with the Dodds, Southern Response had High Court authority supporting the general understanding it took of its liability under the Buy Another House Option.

[61] That High Court decision in *Avonside*, however, was appealed to the Court of Appeal in a hearing that took place on 24 July 2014. The Court of Appeal, in its judgment given on 1 October 2014, overturned the decision of the High Court. In doing so, the Court of Appeal summarised:[5]

> [49] The approach contended for by Southern Response means that costs for contingencies and professional fees that would be incurred where the rental house was actually rebuilt on the same site, whether as part of "the full replacement cost" or as part of "additional costs", are excluded from the calculation of the cost of rebuilding under the "to buy another house" option. The rationale for that exclusion is that because the exercise is a notional and not an actual one, contingencies that would as a result not be incurred need not be included. Southern Response argues this is the correct interpretation of the policy.
>
> [50] We do not agree with that approach to interpreting the terms of the policy. Clause (c)(ii) of "What we will pay" does not refer to "the full replacement cost". What it says is that:

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5 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483.

> We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your rental house on its present site.

> [51] The cost of rebuilding the rental house on its present site involves both the full replacement cost and additional costs, encompassing contingencies and professional fees. That is the amount the insurer would be liable for where the insured chose the "to rebuild on the same site" option. We are satisfied, therefore that it is an amount equivalent to the sum of both of replacement and additional costs, and not the lesser amount of solely "the full replacement cost", that is to be paid by the insurer to the insured when the insured elects the "to buy another house" option. In our view, if the policy had intended any limit to "the full replacement cost" to apply in cl (c)(ii), it would have said so.
>
> [52] We agree with Mr Campbell's general submission that it is irrelevant in the present context that rebuilding will not take place: what is required is an assessment of the costs that would be incurred if rebuilding were actually to occur. As Mr Campbell submitted, costs cannot be excluded merely because the rebuild is not going to happen and costs will not be incurred.
>
> ...
>
> [58] the cost that is payable as part of the required notional exercise [under the "buy another house" option] is the cost that would actually be incurred (whether as a component of full replacement cost or in terms of matters covered by additional costs) to rebuild the house on the existing site. Thus items such as contingencies and professional fees cannot be excluded on the basis that they will not, in fact, be incurred because it is a notional cost that is being calculated.

[62] Southern Response then itself appealed the decision of the Court of Appeal to the Supreme Court. Following a hearing in June and July 2015, the Supreme Court unanimously dismissed the appeal and upheld the decision of the Court of Appeal.[6] In doing so, the Supreme Court commented on the issue of contingencies as follows:

> [38] The amount payable under the policy can be no more than the cost of rebuilding the house on its present site. The exercise that is required is to estimate the actual cost of rebuilding the house on the site.
>
> [39] Mr Harrison, in accordance with what is agreed to be standard quantity surveying practice, included a sum of 10 per cent for contingencies. Southern's witnesses both agreed that there were "unknowns" in any building project, including in a rebuild of this type (existing house in an existing location).

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6 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2015] NZSC 110, [2017] 1 NZLR 141.

> [40] We accept Avonside's submission that the fact that this is a notional, rather than actual, rebuild does not affect the inclusion of an allowance for risks generally encountered. Such risks are relevant to estimating the cost of an actual rebuild and, as noted above, it is the actual cost of rebuilding that must be estimated. The Court of Appeal was thus correct to accept the inclusion of an allowance for contingencies.

[63] And, with regard to the issue of professional fees, the Supreme Court held:

> [49] As mentioned earlier, the exercise that is required is to estimate the actual cost of rebuilding on the site. Mr Harrison did this, while Mr Farrell's approach was based on his erroneous assumption that a different approach was required for a notional rebuild. Mr Harrison's allowance for professional fees was based on orthodox quantity surveying practice. Contrary to MacKenzie J's view, the estimate was based on the use of an architectural draftsperson and not an architect and took full account of the fact that the notional build was a rebuild on an existing site with existing plans. The percentage Mr Harrison used was also very similar to the percentage (nine per cent) used by Arrow in its estimate of what it would actually cost to rebuild. We thus accept Avonside's submission that the Court of Appeal's approach to this issue was correct.

Theoretically, what would the applicable costs be now?

a. Contingencies

[64] The law prevailing now is thus an allowance for contingencies should be included in calculating the cost of rebuilding for the purposes of assessing an insured's maximum entitlement under the Buy Another House Option in these AMI policies. Following the *Avonside* appellate decisions, as I understand it, Southern Response began including a 10 per cent contingency allowance in its calculation of the cost of rebuilding cap under the Buy Another House Option.

b. Demolition costs

[65] The Dodds responsibly accept in the present case that demolition is not payable given that Southern Response was incurring those costs itself.

c. Internal administration costs

[66] For internal administration, as I understand it, these costs are broken down into four parts:

(i) Arrow Project Manager (PMO) costs;

(ii) Arrow DRA costs;

(iii) Arrow Contract costs; and

(iv) Arrow Construction Management costs.

[67] Arrow PMO costs are the general costs that Arrow charges as a project manager. Arrow calculated the PMO costs figure by dividing its total overhead costs by the number of Southern Response claims it was managing at that time. For each of these costs, Southern Response took the view that they were internal claim administration costs only and they were not payable to policy-holders in the same way that a claims officer's salary was not payable to policy-holders. I agree with Southern Response's view. This is not a variable cost that would change, it is the same regardless of whether the house was rebuilt or not.

[68] Arrow DRA costs are the estimated costs to Southern Response for Arrow to prepare a DRA for a claim. Similarly, as I see it, these are costs that are incurred irrespective of whether or not a rebuild occurs.

[69] Arrow Contract costs, in my view, are different, however. Potentially they may be claimable here as they represent variable claim management costs incurred by Arrow in working with architects, designers and builders in developing and finalising a build contract for a specific house if the insured in question elects to repair or rebuild. They are directly incurred as a result of the rebuild along with professional fees. Applying the reasoning of the appellate courts in *Avonside Holdings*, the Arrow Contract costs are costs that should be included in the payment to an insured under the Buy Another House option.

[70] Lastly, I turn to the Arrow Construction Management costs. These are the fees that Arrow charges Southern Response for its work in managing construction work for repairs or rebuilds. This includes supervising the builder undertaking the works. For the same reasons as apply to the Arrow Contract costs I outline above, I am satisfied

these are fees that would be directly incurred as a result of a repair or rebuild and would be claimable by insureds in terms of the *Avonside* appellate decisions.

d. Possible additional costs

[71] The possible additional costs are related to the fees that Southern Response might incur in relation to the design of the house. In the main, these are essentially architectural fees. After the Canterbury earthquake sequence, as I understand the position outlined in Ms Fife's evidence, Southern Response began including an allowance for professional fees "set at 10% of the total rebuild cost for architectural homes, and 6% for group home builds".

[72] Given the revised approach Southern Response adopted following the *Avonside* appellate decisions, the Dodds argue here that if this interpretation of the standard AMI policy as explained in those decisions had been applied to their claim, they would have received at least an additional 20%, or approximately $180,000.

[73] Generally, I accept these are fees that an insured would be entitled to now when making a claim. By the time that the Court of Appeal released its decision in *Avonside*, the parties in the present case, however, had already entered into the Settlement Agreement and settled all claims except in respect of the swimming pool. All of the representations that the Dodds rely on in their Amended Statement of Claim they say had been made at this point.

[74] Southern Response appears to acknowledge here that historically, judges were treated as "discovering" and "declaring" the law as it had always been, rather than changing it, so that judicial decisions apply retrospectively to events that had occurred before those decisions. However, while the Court of Appeal and the Supreme Court in their *Avonside* appellate decisions "revealed" the law that contingencies were payable under the Buy Another House Option, Southern Response suggests those decisions cannot falsify history. It contends these later decisions could not subsequently create a misrepresentation when Southern Response says none existed at the time that the Dodds' house claim was settled in December 2013.

[75] On this aspect, Southern Response suggests a close analogous decision is *Brennan v Bolt Burdon*.[7] In that case, the Court considered that, where the parties (as here) had entered into a settlement agreement, that agreement should not be avoided merely because the law on which the parties had relied in entering into the agreement had been changed by a subsequent decision. In Southern Response's submission, the same principle applies in the present case.

[76] I turn now to consider each of the Dodds' pleaded causes of action in this proceeding, outlined at [51] above.

Claim 1: Misrepresentation

[77] The Dodds say they are entitled to damages for misrepresentation against Southern Response here under s 35 of the Contract and Commercial Law Act 2017 (CCLA) (originally s 6 of the Contractual Remedies Act 1979). (There is no appreciable difference between s 35 of the CCLA and s 6 of the Contractual Remedies Act 1979. Counsel advanced their arguments before me on the basis that s 35 applied, and I will proceed in this judgment referring to s 35 throughout.) Section 35 provides:

> **35 Damages for misrepresentation**
>
> (1) If a party to a contract (A) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B) -
>
> (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
>
> (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

[78] The authors of *Law of Contract in New Zealand* simplify the rule under this section as "any misrepresentation inducing entry into a contract is redressable in damages as if it were a term of the contract."[8] In broad terms, I am required here to determine whether:

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7 *Brennan v Bolt Burdon* [2005] QB 303

8 Jeremy Finn, Stephen Todd and Matthew Barber *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 368.

(a) there was a representation of fact made by words or conduct.[9] A statement of opinion can give rise to a misrepresentation, if it falsely implies that the maker honestly held that opinion and/or had a reasonable factual basis for it;[10]

(b) the representation was false or misleading.[11] A misrepresentation can also occur if a person creates a false impression by disclosing part of the truth, while failing to disclose other information that would correct the false impression;[12]

(c) it is no defence to misrepresentation to assert that the Dodds could have discovered the truth with reasonable due diligence,[13] or even that Southern Response gave the Dodds some other document from which the latter could have detected the truth;[14]

(d) the representation would induce a reasonable person in the same circumstances to enter into the contract at issue, here the Settlement Agreement.[15] It need not be the sole factor, but it must be an important factor influencing the Dodds to enter into the contract;[16] and

(e) the Dodds suffered loss as a result of relying on the representation when entering into the Settlement Agreement. If an actionable misrepresentation is established, damages under s 35 CCLA are

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9 R J Hollyman *Falsehood and Breach of Contract in New Zealand: Misrepresentations, Contractual Remedies and the Fair Trading Act* (Thomson Reuters, Wellington, 2017) at [5.2.1]; *Shen v Ossyanin* [2019] NZHC 135 at [16].

10 Hollyman, above n 9, at [5.2.3].

11 *Savill v NZI Finance* [1990] 3 NZLR 135 (CA); *Shen v Ossyanin*, above n 9, at [16]; *Bisset v Wilkinson* [1927] AC 177 (PC) at 183; *Magee v Mason* [2017] NZCA 502, (2017) 18 NZCPR 902 at [26].

12 *Walsh v Kerr* [1987] 2 NZLR 166 (HC) at 172; Hollyman, above n 9, at [5.3.3].

13 *New Zealand Motor Bodies v Emslie* [1985] 2 NZLR 569 (HC) at 595; *Walsh v Kerr* [1987] 2 NZLR 166 (HC) at 171.

14 *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) at 13 – 14 and 22 – 23 Hollyman, above n 9, at [5.9].

15 *Shen v Ossyanin*, above n 9, at [16](c) and [17], citing *Magee v Mason* [2017] NZCA 502 at [48] and [51].

16 *New Zealand Motor Bodies*, above n 13 at 595; *Walsh v Kerr*, above n 12 at 172; Hollyman, above n 9, at [5.8.1].

awarded on the contractual measure, as if the representation were a term of the contract that had been broken

[79] The Dodds allege they were induced to settle their insurance claims and to enter into the two Settlement Agreements by Southern Response's misrepresentation. They say that Southern Response represented their full estimate of the rebuilding cost for the Dodds' house at $895,937.78 (revised a short time after to $894,937.00). Further, they say details of three of the four costs elements listed in the internal Office Use Section should also have been provided to them but were omitted from the Arrow document provided. They seek damages in the amount of $217,181.07. They say this amount represents the value of the three cost elements that should have been provided. I turn now to consider the elements of misrepresentation insofar as they apply to the facts of the present case.

Was a representation made by words or conduct and, if so, was it false?

[80] The Dodds contend that Southern Response represented to them that the sum of $894,937 was its estimate (as assessed by Arrow) of what it would cost to fully rebuild the Dodds' house on its present site. The Dodds say that Southern Response did so by:

(a) representing in the Abridged DRA the estimated total rebuild cost of the house at the figure (now revised) of $894,937;

(b) not providing the Dodds with the Complete DRA, and not telling the Dodds either that the Complete DRA existed or about the additional cost estimates therein under the internal Office Use Section, leading the Dodds to assume that Arrow had not undertaken any other assessment of the house rebuild cost;

(c) sending to the Dodds the letter of 26 September 2012 which referred to the DRA prepared by Arrow. That letter, as I have noted, said that under the Buy Another House Option, "Southern Response will pay the cost of buying another house up to the maximum it would have cost to rebuild your house on its present site". It explained that the maximum

amount available if the Dodds took this option, based upon the total amount to rebuild their house on its current site, was $894,937;

(d) providing the Dodds with Information Sheet/s relating to their options including the Buy Another House Option which repeated the statement that "Southern Response will pay the purchase price of the house you buy up to the maximum it would have cost to rebuild your house on the current site"; and under the heading "how much will I have available to spend on a new house?", stating that "the amount stated in the attached letter [i.e. the 26 September 2012 letter, specifying the amount at $894,937] is the total amount available";

(e) preparing and providing to the Dodds the Settlement Election Form, which, as I note above, stated that under the Buy Another House Option, Southern Response would "pay the purchase price of another house ... up to the cost of rebuilding your house on its present site." This went on to provide that the "*maximum cover*" (emphasis added) available under that option was $894,937;

(f) failing to correct Mr Dodds' misunderstanding when, in email correspondence, he indicated that he understood $894,937 was "the cost of re-building/replacing our home"; and

(g) preparing and providing the Dodds with the Settlement Agreement, which stated, as I note above, that "A fair and reasonable estimate for the rebuild cost of the insured property ... is $907,321", which was based on the $894,937 figure plus an adjustment for the cost of rebuilding a fence.

[81] On all this, I need to say at the outset that I find that Southern Response represented generally that its estimation of the cost of rebuilding the Dodds' house on its present site (obtained from Arrow's professional QS assessment at the time) was the amount set out in the Abridged DRA and that this represented the complete and at least by implication the only report received from Arrow. There was also a collateral

representation that the Dodds' entitlement under the Buy Another House option was to buy a house and land up to this same amount and that amount and the Dodds' settlement represented Southern Response's full estimate of the rebuild cost set out in the Abridged DRA. I have no difficulty here in concluding that these representations were statements of fact and hence were capable of being seen as misrepresentations for the purposes of s 35 of the CCLA.

[82] The Dodds point to the number of times that the $894,937 figure was quoted in all the material and communications provided to them by Southern Response. They say Southern Response referred to that figure in a number of ways, in a range of documents and throughout their negotiations to enable the Dodds to determine which settlement option was appropriate for them. These references included statements that it was "the maximum it would have cost to rebuild your house on the current site", "the amount it would have cost us to rebuild your house on its present site", "the cost of rebuilding your house on its present site", and as "a fair and reasonable estimate for the rebuild cost of the insured property."

[83] Southern Response says here that it did not make any misrepresentation to the Dodds as the alleged representations were its honest opinion as to the operation of the policy. It maintains too that the alleged representations, in any event, were not statements of fact which were false or misleading. It seems to suggest that buried in one or two of the many documents provided to the Dodds were statements that might be seen as linking the $894,937 figure just to the Dodds' entitlement under the Buy Another House option, and not otherwise. I do not accept this here, however. Put simply, the considerable number of occasions on which Southern Response represented in the documents provided, and otherwise, that the $894,937 figure represented the total cost to rebuild the Dodds' house on its present site must have left a lasting and overwhelming impression for the Dodds, or any other policy owner in their shoes in a case such as this, which far outweighed any other contrary statements made here on other minor occasions.

[84] And last, and in any event, there seems little contest advanced on behalf of Southern Response in this case that the representations in question had been made here. There is, I acknowledge, some argument advanced for Southern Response that

the meaning intended by these representations might be open for argument but, in my view, the repeated words made in the representations included in Southern Response's own documents provided to the Dodds leave no room for doubt.

[85] The Dodds maintain too that these representations were false and misleading. In my view, it is hard to reach any other conclusion. Even on its own evidence, Southern Response seemed to accept this. Southern Response's sole witness before me, Ms Fife, acknowledged in her evidence that the $894,937 figure was not Southern Response's estimate of the cost to rebuild the Dodds' house on their existing site. Instead, she maintained the $894,937 was a lower sum reflecting Southern Response's interpretation of what policyholders (in this case the Dodds) were entitled to under the Buy Another House option. Ms Fife confirmed that in circumstances such as those prevailing here, Southern Response "did not provide customers with its estimate of the cost of rebuilding on the same site". Rather, the cost estimate in the DRA was "Southern Response's calculation of the rebuild cap available to the customer under the Buy Another House Option".

[86] Southern Response's position before me seemed to be that, in some of the documents provided to the Dodds, it had stated that it was *not* costing their entitlement under the options to rebuild on the same site or on a different site. Instead, it claimed that it was simply addressing the Buy Another House option.

[87] Southern Response maintains that the representations were not false or misleading because the amounts in the internal Office Use Section were not actually payable under this Buy Another House option under the law at that time. It accepts its interpretation was later found to be incorrect by virtue of the *Avonside* appellate decisions. Nonetheless, it says that the representations were Southern Response's honest opinion at the time as to the operation of the policy, and they were not statements of fact capable of being misrepresentations. Southern Response's view, as Ms Fife confirms, was that the omitted amounts did not form part of the cost of rebuilding cap under this option. It contends this view was correct at the time it made the alleged representations as indeed the first instance decision of MacKenzie J in this Court made clear.

[88] In relation to statements of opinion, the Court of Appeal has explained the reason why such statements are not actionable (in the context of a misleading conduct claim under s 9 of the FTA) in *Premium Real Estate Ltd v Stevens*:[17]

> A person may, in trade, express an opinion that is honestly held and reasonably based at the time it is expressed or relied upon but which subsequent events show to be wrong. … It is difficult to see why an honestly held, reasonably based opinion should be actionable under s 9 simply because it is not borne out by subsequent events.

[89] The Court of Appeal said that a person can be liable for an expression of opinion that subsequently proves to be incorrect "only where he or she does not honestly hold the opinion at the time it is expressed or (possibly) there is no reasonable basis for it."[18]

[90] The Dodds say in response that fundamentally the representation that the $894,937 figure was the Arrow estimate to fully rebuild their house was a statement of fact. But, even if that representation could be characterised as a statement of opinion or a statement based on an opinion of the law at the time, they maintain the representation was nonetheless false in that it implied Southern Response had a reasonable factual basis for that opinion.

[91] Southern Response says that its opinion was that $894,937 was the Dodds' entitlement. That figure was reached by omitting components that Southern Response thought the plaintiffs were not entitled to from the full rebuild cost. It was what Southern Response calls the 'notional building cost'. However, as I see it, Southern Response falsely represented first, that $894,937 was the full amount it would cost to rebuild the Dodds' house itself and, secondly, that the Abridged DRA was the final and only assessment document specifying the full rebuild cost estimate from Arrow. It made no mention of reductions from a true final rebuild cost based on the Dodds' general entitlement.

[92] The Dodds argue too that Southern Response did not honestly believe $894,937 to be an estimate of what it would have cost to rebuild the Dodds' house and

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17 *Premium Real Estate v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148 at [54].
18 At [51].

that, as I have noted above, Ms Fife's evidence confirms this. That total cost amount, a figure well above the $894,937 was in the Complete DRA. The Dodds say that even if Southern Response honestly believed that $894,937 was all the Dodds were legally entitled to receive under the Buy Another House option (and it may even have had legal advice to that effect) that is not what it actually represented to the Dodds.

[93] As I see the position here, $894,937 was the amount specified as the bottom line in the Abridged DRA. This amount would have looked to be Arrow's professional estimate of the cost of rebuilding the house and it was represented as such. In my view, Southern Response created a false impression by providing the Abridged DRA in such a way as to indicate that it was the complete and only estimate document received from Arrow and that it disclosed the full cost for rebuilding the house. Southern Response did not, in any meaningful way, explain that it had excluded costs that it would otherwise have had to pay, costs that Southern Response had unilaterally decided the Dodds would not be entitled to if they did later choose the Buy Another House option. And, in any event, even as late as January 2013, the evidence is that the Dodds were still weighing up their options both under the policy and outside it, including the possibility of embarking on a "build to budget" or a "build elsewhere" solution, which they later rejected.

[94] I do accept that Southern Response's representations here were based on a professional quantity surveyor's estimate. The Court of Appeal has stated that such estimates are approximate and subject to change.[19] Southern Response says they are always open to question and are, by definition, statements of opinion rather than statements of fact. Yet, the issue is not the accuracy of the figures in the DRA. It is that some figures were deliberately omitted in a way that rendered the document and its meaning false.

[95] I accept, too, that statements of entitlement under a policy may be opinion that is contestable. However, the representation to the Dodds here was false because it did not disclose the true house rebuild estimate that had been prepared. It was misleading to omit part of the Complete DRA without explaining this. In some ways, what in

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[19] *East v Medical Assurance Society* [2015] NZCA 250; [2015] 18 ANZ Insurances Cases 62-074 at [24].

name was Arrow's professional quantity surveyor's full report on rebuild costings, was in actuality just the opinion of Southern Response as to what it says would be the Dodds' entitlement depending upon the option they chose. Southern Response has misrepresented the position by disclosing and relying upon a document which was false and misleading.

[96] I conclude that the representations were actually statements of fact or actionable statements of opinion as to the experts' total rebuild estimates and hence were capable of being shown to be misrepresentations. I find too that these representations, repeated on many occasions here, were false and misleading.

Did the misrepresentations induce the Dodds to enter into the Settlement Agreement?

[97] The Dodds claim they were induced to enter into the Settlement Agreement by the misrepresentations that were made. In the settlement negotiations which formed the context of the representations, the Dodds and Southern Response were working towards agreeing on a value that the Dodds could use to assess what option under their policy they would elect. No election under the policy was made for over two years from February 2011 when the Dodds initially lodged their claim. Finally, the Dodds made this election on 5 March 2013. It was one to exercise the Buy Another House option.

[98] Importantly, the policy entitlement of the Dodds under this option was to purchase another house up to the value of the cost of rebuilding their house on its present site. The Dodds say they considered their entitlement was tied to the actual estimated rebuild costs. Mr Dodds' evidence was that he relied on the Abridged DRA in ascertaining those rebuild costs. Accordingly, the Dodds contend the rebuild figure that was provided induced them into settling at that figure.

[99] In cross-examination at trial, Mr Friar for Southern Response asked Mr and Mrs Dodds to speculate as to what they would have done had Southern Response disclosed the complete DRA figures. Mr Dodds conceded in cross examination that, even if Southern Response had provided the Office Use Section to him, he did not know what he and his wife would have done. He suggested the question was simply

academic. Mrs Dodds did not disagree with this evidence, and she said too that she did not know what they would have done.

[100] In my view, it is entirely speculative as to whether the Dodds might have settled for the same or a higher amount under the Buy Another House Option if the internal Office Use Section had been provided to them. By Southern Response misrepresenting the basis for the settlement figure offered, the Dodds lost their ability to negotiate their entitlement to the Office Use Section amounts, or even to approach the Court for a ruling, as occurred in *Avonside*. They also lost any ability to consider other options, such as the possibility no matter how vague, of taking the increased figure to rebuild on the same site or another site, to build on an out of policy build to budget basis, or even to negotiate further.

[101] I accept that when the Dodds entered into the Settlement Agreement to purchase another house they did so on the basis that the $894,937 figure was the total estimated cost of rebuilding. The failure by Southern Response to disclose that this figure omitted certain costs was an important factor influencing them to enter into the Settlement Agreement at the figure they accepted. I am satisfied that Southern Response's misrepresentation produced a misunderstanding in the minds of the Dodds as to the true rebuild cost of their house, they relied on this, and it was one of the reasons which induced them to settle their policy claim at the figure they did and to enter into the settlement contracts.

Intention to rely

[102] The Dodds' position is that Southern Response intended them to rely on the Abridged DRA as estimating the total rebuild cost of the house when deciding which option under the policy to proceed with.

[103] The documents Southern Response provided to the Dodds were given with a view to assisting them in making a settlement decision. The Abridged DRA itself recommended a rebuild. It went on to provide what seemed to be Arrow's rebuild estimate under the heading "Rebuild Budget" of $895,937.78.

[104] Mr Friar was at pains to point out that the Information Sheets did state "fees such as design fees and Arrow fees are not included as they are not incurred if you choose Option iii – buy another house." In response, the Dodds note that the initial uncosted DRA that was sent to them for comment stated that it was a:

> detailed record of your house which is primarily required in the event that your property is not economic to repair and needs to be rebuilt.

The DRA Information Sheets repeated the sentiment that it was an estimate of the true cost to rebuild the Dodds' house.

[105] The Dodds also say that, of the extensive number of documents provided to them by Southern Response before their election and final settlement, the Information Sheets were the only ones which made any mention of excluded costs. The sheets only note briefly that "Fees such as design fees and Arrow fees are not included". They make no mention of the exclusion of the contingency allowance, other professional fees and demolition costs from the DRA.

[106] On all of this, I am satisfied that the Abridged DRA finally provided by Southern Response was essentially the principal point of reference for the Dodds to consider their policy options, a number of which options were based on the stated rebuild cost figure for their house. Accordingly, Southern Response intended that the Dodds rely on the Abridged DRA when making their settlement election and as the basis for the Settlement Agreement. The Dodds made their settlement election on 5 March 2013. They then purchased a house and entered into the Settlement Agreement, in my view relying on the figure in the Abridged DRA as the total rebuild cost estimate.

Reasonableness of reliance

[107] Actionable misrepresentation requires that the representation would induce a reasonable person in the same circumstances to rely on it and enter into the contract at issue. In terms of the reasonableness of their reliance here, the Dodds say it was accepted by Southern Response that they would rely on Southern Response's "Buy Another House" offer when they purchased their new home.

[108] In response, Mr Friar in cross-examination took Mr Dodds to the 26 September 2012 letter. He pointed out that this document said the "Rebuild on the same site" option had "not been costed out in your decision pack". He then put it to Mr Dodds that nothing else in the letter contradicted that fact. Mr Dodds' response, quite reasonably, as I see it, was that the letter specifically stated "Southern Response will pay the cost of buying another house up to the maximum it would have cost to rebuild your house." The letter then went on to say, "The maximum amount available is $894,937." Mr Dodds said in his evidence that he drew the logical inference that $894,937 was the maximum Southern Response considered it would have cost to rebuild the house. Mrs Dodds expressed a similar view.

[109] Mr Friar in his submissions before me put considerable emphasis on the Dodds receiving the "Information Sheets" and in particular the "Detailed Repair/Rebuild Analysis (DRA)" information sheet. It was this document that stated, under the heading "Why are some of the other fees not included?" that "Fees such as design fees and Arrow fees are not included as they are not incurred if you choose option (iii) – buy another house".

[110] On this basis, Mr Friar suggested it was not reasonable here for the Dodds to rely on the Abridged DRA as they did.

[111] In response, the Dodds say, and I accept, that the Information Sheet (which dealt directly with the Buy Another House option) purported to explain what the policyholder was entitled to under that option, and no mention was made of the fact that any costs had been excluded. Instead, it simply repeated the representation made a number of times before that Southern Response would pay the purchase price of a new house "up to the maximum it would have cost to rebuild your house on the current site".

[112] The Dodds contend that for Southern Response to claim now that the DRA Information Sheets somehow cured or corrected this representation, made on multiple occasions and in many documents, that $894,937 represented "the maximum amount it would have cost to rebuild your house on its present site" is wrong and akin to relying on 'fine print'. I agree.

[113] In *Prattley v Vero Insurance New Zealand Limited*[20] and *Kyle Bay Ltd v Underwriters Subscribing Under Policy No. 0190 57/08/01*,[21], the Courts referred to the sophistication of insureds as a factor in misrepresentation cases. That must be particularly relevant when, as the Dodds allege here, Southern Response is endeavouring to rely simply on "fine print". Southern Response does not suggest that the Dodds are highly sophisticated in business and insurance matters, but it does point to what is said to be their high level of education. It maintains that the Dodds were fully capable of coming to their own view as to the correctness of Southern Response's position, including by obtaining their own legal advice and engaging their own costing experts.

[114] Southern Response's detailed 26 September 2012 letter encouraged the Dodds to obtain their own legal advice. The evidence suggests they did obtain advice from their solicitor, Kenneth Marshall. They did not however engage their own costing experts, Mr Dodds says in his evidence this was because:[22]

> "when I saw that Arrow International were doing our costing … I had in mind that Arrow International was some big American conglomerate corporation who had come into Christchurch to help us out with our terrible situation …"
>
> "… and then I superimposed over that (sic) Mr Friar was that Southern Response we realised by various communiques, was a Government agency and not an insurance company. And, we honestly, at that time believed that the New Zealand Government would be there with this company to simply process the claims and get them attended to … we completely and blindly trusted both Arrow and Southern Response."
>
> "… so just to make it clear, we totally trusted the DRA and we saw no need to seek alternative costings."
>
> "… we were under the impression that they (Southern Response) were providing a correct rebuild price."

[115] I accept Mr Dodds' evidence on this. I find, too, that the trusting conclusions he and his wife reached on total rebuild cost in all the circumstances here were not unreasonable. In light of these circumstances, I conclude that it was reasonable for the Dodds to rely on the fact that the represented amount was the complete cost of rebuilding estimated by Arrow and Southern Response. I am satisfied that Southern

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20 *Prattley v Vero Insurance New Zealand Ltd* [2015] NZHC 1444.
21 *Kyle Bay Ltd v Underwriters Subscribing Under Policy No. 0190 57/08/01* [2007] EWCA Civ.57
22 NOE at p 17 lines 5–8, 14-23, 27–28 and 32-33.

Response's conduct was an operating cause of the Dodds entering into the particular Settlement Agreements and was therefore an operating cause of any loss the Dodds suffered by entering into those Agreements to compromise their rights under the policy.

Damages

[116] I find that an actionable misrepresentation has occurred here. Under s 35 of the CCLA, the Dodds therefore are entitled to damages "in the same manner and to the same extent as if the representation were a term of the contract that has been breached."

[117] Southern Response maintains however that, even if there had been a misrepresentation by it as to the cost of rebuild options, the Dodds have not proved that they suffered any loss as a result. For the Dodds to establish they suffered loss, it is said they would first need to show that they would have elected to rebuild their house, either on the same site or a different site rather than, as they ultimately chose, to elect to buy another house, if they had been told of the Office Use Section figures.

[118] In his evidence, Mr Dodds estimated that he and his wife should have been paid an additional $217,181.07. Southern Response contests this. It responds by saying that, under the policy, the rebuild cost would have been used towards rebuilding the Dodds' house, and not paid to them in a cash settlement. According to Southern Response, the Dodds therefore would have to show, not only that they would have rebuilt the house at its original site, but also that the value of their rebuilt house would have been more than the amount they received under the Buy Another House option.

[119] In that regard, Southern Response notes too that not all of the amounts in the Office Use Section would have gone into the house itself. For example, professional fees would have been paid for their services to the relevant professional, such as an architect. Thus, it is claimed they would not have been used in the actual rebuilding of the house. For contingencies, it is said these would only have been paid if an unexpected event occurred requiring a variation. Even then, they would have only been used to the extent needed.

[120] Southern Response concludes that, in the absence of any evidence as to the value of the rebuilt house, the Dodds simply cannot quantify any loss at all here.

[121] In response, the Dodds repeat that the representation in this case was that $894,937 was Southern Response's estimate of "the amount it would have cost us to rebuild your house on its present site". This was to be the figure the Dodds could go to in the final decision they would ultimately make to buy another house. And no doubt it was of some influence in their choosing this option under their policy. Treating this representation as if it were a term of the contract that has been breached on the Dodds' argument requires that Southern Response pay by way of damages, the value of the promised benefit which had not been received.

[122] The Dodds accept that the representation could only ever have referred to an estimated cost. Accordingly, they are not seeking the difference between $894,937 and whatever the actual cost to rebuild their house may have been. In his evidence, Mr Dodds said that actual rebuild cost of their house in 2018 was estimated, albeit by a builder, at over $3 million. All they are seeking, the Dodds say, is what Southern Response should have told them they could use as the true ceiling amount to buy another house as a rebuilding cap, which was Arrow's total rebuild cost estimate. As the learned authors of *Law of Contract in New Zealand* note:[23]

> The calculation of damages in contract…in the present context [means] the measure will normally be the difference between the value of the subject matter as it is, and the value as it would have been had the representation been true."

And, whilst it is true that under the Dodds' policy the promised "Buy Another House" benefit represents the cost of purchasing a replacement house only, and not the land it sits on, the clear out of policy response from Southern Response at the time (as I note at [9](b)) above was to allow this payment to its policy-holders (including the Dodds) to be used to buy a house and section, as indeed occurred here.[24] Clearly, this out of policy response was not only allowed but also encouraged by Southern Response. To the extent that the remedy sought here by the Dodds is an out of policy response, in

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23 Finn, Todd and Barber, *Law of Contract in New Zealand*, above n 8 at [11.2.6]

24 On this aspect, see the decision of Thomas J in *Southern Response Earthquake Service Ltd v Shirley Investments Ltd* [2017] NZHC 3190.

my view it does not matter.

[123] I am satisfied that the Dodds have established that they have suffered a loss in that they have not received the full value of their promised benefit under the contractual settlement. A shortfall on this full entitlement occurred, representing the difference between:

(a) The $894,937 upon which the Settlement Agreement was premised, and

(b) Southern Response's actual estimate of "the amount it would have cost us to rebuild your house on its present site."

A calculation of this amount follows later in this judgment at [204] to [207].

Claim 2: Misleading and Deceptive Conduct under the Fair Trading Act 1986

[124] Under their second cause of action outlined at [51](b) above, the Dodds allege that Southern Response, acting in trade, engaged in misleading and deceptive conduct, in breach of s 9 of the Fair Trading Act 1986 (FTA).[25] The Dodds claim damages under s 43 of the FTA.

[125] Section 9 of the FTA provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[126] In addition, s 2(2) of the FTA goes on to make clear that a failure to disclose relevant information may constitute misleading or deceptive conduct:

> (2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act, and includes,—
>
> (a) omitting to do an act; or

[25] I note that Southern Response has accepted that it is acting in trade here as defined in s 2(1) of the FTA.

(b) making it known that an act will or, as the case may be, will not be done.

It is clear too that any such omission need not be advertent.[26]

[127] Section 43 of the FTA is a remedies provision and it sets out the orders that can be made in response to breaches of the provisions of the FTA including a breach of s 9.

[128] Section 43 relevantly provides:

> **43 Other orders**
>
> (1) This section applies if, in proceedings under this Part or on the application of any person, a court … finds that a person (person A) has suffered, or is likely to suffer, loss or damage by conduct of another person (person B) that does or may constitute any of the following:
>
> (a) a contravention of a provision of Parts 1 to 4A (a relevant provision):
>
> …
>
> (2) The court or the Disputes Tribunal may make 1 or more of the orders described in subsection (3) –
>
> …
>
> (3) The orders are as follows:
>
> …
>
> (f) an order directing person B to pay to person A the amount of the loss or damage:

[129] The leading case on ss 9 and 43 of the FTA is the Supreme Court decision in *Red Eagle v Ellis*.[27] In that case the Court suggested a simple two stage approach which, it said, was particularly applicable in cases where there was no doubt about what was said, and all the loss arose from the same event. This approach involved the following two stages:

(a) First stage: has the claimant proved a breach of s 9 by the defendant?

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[26] *Sullivan v Wellsford Properties Ltd* [2019] NZCA 168.
[27] *Red Eagle Corp v Ellis* [2010] NZSC 20; [2010] 2 NZLR 492 (SC).

(b) Second stage: was the defendant's conduct the effective cause, or an effective cause, of the claimant's loss or damage?

[130] On the application of the first stage, the Court said that establishing a s 9 breach is contextual. A breach will occur only where it was objectively reasonable for the claimant to be misled or deceived in all the circumstances. The wording the Court used was:[28]

> The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established.

[131] The Court must then ask whether the plaintiff was actually misled or deceived by the conduct.[29] But, it is not necessary to show that the defendant intended to mislead or deceive.

[132] If a breach is established attention then switches to s 43, which as I have noted deals with the remedies available for breaches of the FTA. The relevant parts are s 43(2) and (3) which state that this Court may direct the person who engaged in the misleading conduct to pay to the person who suffered a loss or damage the amount of the loss or damage.

[133] The second stage of the *Red Eagle* test is whether the claimants suffered loss or damage "by" the conduct of the defendant. In determining this, the court must of course have answered the first stage question as to whether the claimant was actually misled or deceived by the conduct. If it answers that question affirmatively, then it must consider the second stage question whether the breach of s 9 was an operating cause of the claimant's loss or damage. It need not be the sole cause, "but it must be an effective cause, not merely something that, in the end, was immaterial to the suffering of the loss".[30]

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28 *Red* Eagle at [28].
29 *Red Eagle* at [29].
30 *Red Eagle* at [14].

[134] In *Red Eagle* the Court also explained that the claimants' own conduct may have been an operating cause of the loss. However, even if plaintiffs such as the Dodds here had contributed to the loss through their own carelessness, that will not necessarily disqualify the claim. In a situation such as that, the Court may, at its discretion, reduce the amount of damages ordered to be paid to reflect the plaintiffs' own contribution to the loss.[31]

[135] In contrast to claims for misrepresentation, the appropriate measure of damages under the FTA is the tort measure, rather than the contract measure.[32] Damages should reflect the plaintiff's loss as a result of the misleading and deceptive conduct. As Gault J put it in *Cox & Coxon v Leipst*:[33]

> The task is to identify the loss or damage suffered by (i.e. caused by) the misleading or deceptive conduct. That will involve inquiry as to what the conduct caused the plaintiff to do ... and the consequences flowing from that.

Application

[136] The parties accept that Southern Response was acting in trade in this case. The first issue here, therefore, is whether a reasonable person in the Dodds' situation here would likely have been misled or deceived by Southern Response's conduct.

[137] The Dodds say Southern Response's conduct here was misleading or deceptive or likely to mislead or deceive in a number of ways:

(a) Southern Response prepared and provided the Dodds with the Abridged DRA which set out the rebuild budget for the Dodds' house.

(b) Southern Response did not:

(i) provide the Complete DRA to the Dodds;

(ii) alert the Dodds to the existence of the Complete DRA; or

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31 *Red* Eagle at [30].
32 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 19 – 23, 24, 26.
33 At 22.

(iii) clearly inform the Dodds as to what items were excluded from the Abridged DRA or the cost estimate of those items.

(c) Southern Response did not make clear to the Dodds that the sum in the Abridged DRA simply represented its interpretation of the Dodds' entitlement under the Buy Another House Option, rather than its quantity surveyor's estimate of what it would cost to fully rebuild their house.

(d) All of the following being the 26 September 2012 letter from Southern Response to the Dodds, the Information Sheets, the MOU and decision document, the Settlement Election Form, communications between the parties here and even the Settlement Agreement itself, although in some ways confusing and misleading in significant parts, stated and repeatedly implied that for all purposes the Dodds would receive up to the maximum it would have cost as estimated to rebuild their house on its present site, and that figure was $894,937.

[138] For the reasons I have set out above, in my view, a reasonable person, reading the Abridged DRA along with the various letters, the Information Sheets and the other material provided to the Dodds would have thought that the $894,937 was Southern Response's estimate of the actual cost of rebuilding the Dodds' house.

[139] Again, while one Information Sheet addressing the Buy Another House Option did state that "Fees such as design fees and Arrow fees are not included" (but, in any event, was silent on the question of "a contingency") in my view it did not clarify the position of Southern Response in a satisfactory way. As I see it, a reasonable person in the Dodds' situation would likely have been misled or deceived.

[140] It is clear from the evidence of Mr and Mrs Dodds that they were misled and deceived by Southern Response's conduct. They understood at the time that if they selected the Buy Another House option, they would receive the equivalent of a professional estimate of what it would cost to rebuild their house, and that was $894,937. I am satisfied the Dodds made their election and entered into the Settlement

Agreement based on that understanding. In doing so they exchanged their rights under the policy for the settlement payment they received.

[141] This leads to the second consideration. This is whether Southern Response's conduct here was the effective cause, or an effective cause, of the Dodds' loss or damage. The Dodds have said (and I accept) that they considered the sum in the Abridged DRA to be Arrow's true expert estimation, accepted and adopted by Southern Response, of the total rebuild cost of the house. The Dodds made their election and entered into the Settlement Agreement on that understanding.

[142] The Dodds contend that in entering into the Settlement Agreement, they exchanged their rights under the insurance policy for the specified settlement payment. Their loss is the difference in value between what was surrendered and what was gained.

[143] Mr Friar sought to challenge the existence of any loss here by asking the Dodds what they would have done had Southern Response disclosed to them the Complete DRA with its higher estimate of rebuild cost. Mr Dodds said the question was "academic" because he did not know the answer to it. In his evidence in answer to this question he did go on to say:

> What I know is that our decisions were based upon a disclosed DRA.

Mrs Dodds' response too was that she did not know what they would have done.

[144] As I have concluded under the claim for misrepresentation, it is unclear what would have happened. The Dodds may have elected for a different option, they may have negotiated a different settlement, or they may have sued Southern Response for the costs it incorrectly interpreted as being beyond their entitlement. Perhaps the Dodds would have even delayed matters to the extent that they would have had the benefit of seeing the appellate decisions in *Avonside Holdings*.[34] All of those possibilities, however, remain speculative.

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[34] *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*, above n 5 and n 6.

[145] What seems clear to me though, is that at the very least, the Dodds have lost the chance either to consider other options or to achieve a higher settlement by not having access to the actual estimation of Southern Response's rebuild costs. Southern Response's conduct was an operating cause of the Dodds entering into the particular Settlement Agreement, and was therefore an operating cause of the loss the Dodds suffered by virtue of their doing so.

[146] It is acknowledged by the Dodds that they did not seek their own professional advice on the costs to remedy the damage to or rebuild their house. In my view, that does not disqualify them from a remedy because the misleading conduct was not about the accuracy of the figures in the DRA. Rather, it related to the withholding of the further information in the Office Use Section outlined only in the Complete DRA.

[147] An important purpose of the FTA is to protect consumers like the Dodds. Their evidence is that they trusted that Southern Response, effectively standing in AMI's shoes as an insurer, would be transparent with them. It was reasonable for the Dodds to accept the Abridged DRA as being an actual estimation of the total cost to rebuild their house. As I have noted above, Mr Dodds stated in his evidence that he thought Southern Response was a Government agency and its agent Arrow a large international company. He said he considered the Abridged DRA, completed by Arrow and provided by Southern Response, could be trusted.

[148] It was also reasonable for the Dodds, as lay consumers, to expect that Arrow, as an experienced professional building and quantity surveying firm, would produce an accurate costing. Professionals may reasonably disagree over the exact quantum of a rebuild, but a document purporting to be a complete rebuild estimate must accurately include all costs foreseen by its authors. Editing or redacting parts of such an important assessment document, and then suggesting it is the complete and only assessment of total rebuild cost as occurred here, is misleading and deceptive.

Damages

[149] Pursuant to section 43(3)(f) of the FTA, the Dodds seek damages for the loss they suffered as a result of Southern Response's misleading or deceptive conduct.

[150] Damages under the FTA are calculated in the same manner as damages for misrepresentation under English law. As I have noted, FTA damages employ the tort measure rather than the contractual measure at the CCLA. As I see it, there is little difference in outcome here if the tort measure is used rather than the contractual measure. Under the contract measure, where a misrepresentation induces a party to enter into a contract:[35]

> The normal measure of damages is the value transferred, generally represented by the contract price, less the value received, whether of property or services or money.

[151] This is in line with my comments at [122] above. And, in this case, the value transferred less the value received is represented by the difference between the true value of the Dodds' claim under their insurance policy, less the value they received through the payments under the Settlement Agreements. Precise calculation of this amount will be addressed later in this judgment at [204] to [207] .

Claim 3: Common Law breach of the duty of good faith

[152] Given my findings against Southern Response here on the Dodds' misrepresentation and breach of the FTA causes of action, there is little utility in analysing at length their alternative claim that Southern Response breached its insurer's obligation of good faith under the policy. This alternative claim adds little to the ultimate outcome I have determined. Nevertheless, for completeness, I will now add a few brief comments directed to this issue.

[153] Under this second alternative cause of action, the Dodds claim that Southern Response breached its obligation of good faith as insurer under the policy by not disclosing to the Dodds the actual assessed cost of rebuilding the house and linked to this, by withholding from the Dodds material information. For this the Dodds have also claimed damages for their loss.

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[35] James Edelman *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at [47-027], [47-055].

[154] The Dodds largely base this particular claim on my decision in this Court in *Young v Tower Insurance.*[36] There, I held that a duty of good faith on the part of the insurer must be implied in every insurance contract. That duty requires the insurer, at a minimum to:[37]

> (a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;
>
> (b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and
>
> (c) process the claim in a reasonable time.

[155] In expressing these principles, I had regard to several judicial expressions that the availability of damages for a breach of the duty of utmost good faith remained open.[38]

[156] In the present case, the Dodds' AMI policy itself, under the section headed "Claims", also specifically states:

> 2. Your rights
>
> You (the insured) are entitled to:
>
> *i* have your claim acknowledged and dealt with in a professional and efficient manner, and
>
> *ii* receive a fair settlement of your claim**,** as quickly as circumstances allow …

[157] As well as this, the Fair Insurance Code promulgated by the Insurance Council of New Zealand (of which AMI was a member) states:

> We will act fairly and openly in all our dealings with you.

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36 *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291; *Pegasus Group Ltd v QBE Insurance (International Ltd)* HC Auckland CIV-2006-404-6941, 1 December 2009.

37 At [163].

38 These included comments in *State Insurance Ltd v Cedenco food Ltd* CA 216/97, 6 August 1998, at 2.

[158] In *Colinvaux's Law of Insurance* in New Zealand, the learned authors note certain specific post-contractual duties imposed on an insurer.[39] In discussing the conduct expected when handling an insurance claim, the authors say:

> It is accepted that a liability insurer is under a duty to negotiate in good faith on the part of the assured, a duty which takes effect as an implied term, and it is apparent that avoidance by the assured is entirely inappropriate as a remedy for the duty. Accordingly, the duty takes effect as an implied term and its breach sounds in damages. The scope of the duty is, as yet, undeveloped. It is accepted in New Zealand that an insurer is under a duty to admit liability (where appropriate) promptly and to pay promptly, failing which there is a liability in damages for breach of an implied term in the policy to the extent that the delay is the fault of the insurers. In *Young v Tower Insurance Ltd*,[40] it was also stipulated as a minimum that, during and after the lodgement of a claim, the insurer must disclose all material information it knows or ought to have known and must act reasonably, fairly and transparently. This is the first time damages have been awarded in New Zealand for breach of this duty.
>
> The critical question in the case was whether the circumstances, arising from the Canterbury earthquakes, justified repair or replacement of a dwelling. Gendall J awarded "nominal" damages of $5000 to the insured because the insurer had not promptly disclosed a report his agent had commissioned recommending the dwelling could not be repaired but had to be rebuilt. His Honour held that the delay "… may have prolonged matters to some extent". He also considered further allegations that the insurer had acted "unprofessionally" and in a "high-handed" way. These claims were not made out to a level satisfactory to the Court but the fact they were contemplated suggested additional duties may be in the wind for insurers; duties not imposed on other contracting parties in the cut and thrust of settling a breach and not justified by an imbalance of information necessary to assess a risk or, in the insured's case, to enter the contract. *Young* was cited with approval in *Sadat v Tower Insurance Limited*.[41] Although in that case the claim fell outside the terms of the policy so that the point did not arise".

[159] *Colinvaux* appears elsewhere to raise some questions as to whether insurers do owe a reciprocal duty of utmost good faith to an insured, in particular relating to post-contractual matters. The learned authors go on at para 4.9 of their text to suggest that reform of the law in New Zealand in this area may be required.

[160] Of note relative to these issues is a comment by Hamish McIntosh in an article "Damages for Insurer's Breach of Duty of Utmost Good Faith" in the Insurance Law Section of the 10 August 2012 New Zealand Lawyer publication where he states:[42]

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

40 *Young v Tower Insurance Ltd* [2016] NZHC 2956.

41 *Sadat v Tower Insurance Limited* [2017] NZHC 1550.

42 *NZ Lawyer* (online ed. 10 August 2012) at 16.

> However the question of damages for breach of good faith (in insurance contracts) is likely to require resolution shortly … It is also foreseeable that litigation brought by aggrieved insureds in Canterbury as a result of perceived delays or failures by insurers in paying out for insured earthquake damage and/or its consequences could throw up a wide variety of situations giving rise to claims of insurer's breach of good faith.

[161] In the present case, the Dodds submit that the duty of good faith that is an incident of all insurance contracts is accepted as being a reciprocal one.[43] English law has consistently recognised that the duty is one on the insured that persists beyond the formation of the contract.[44] Logically, as I see it, the duty is one that on the part of the insurer must equally persist beyond contract formation.

[162] In response, Southern Response here notes that the obligation of good faith in the insurance relationship has traditionally been found by the courts, not to be an implied term of the contract, but an obligation which the common law imposes as an incident of the relationship between the parties. Mr Friar cites a decision of the High Court of Australia, where it was held that where the obligation is breached by the insurer, the breach does not sound in contractual damages, but allows the insured to cancel the policy and to obtain a return of the premium.[45]

[163] Southern Response also presents three core arguments here:

(a) First, the notion of a duty of good faith does not fit conceptually as an implied term. The obligation to disclose material facts exists prior to the inception of the contract. It is impossible that a party be bound to disclose facts as an implied term of a contract not yet formed.

(b) The imposition of an implied duty of good faith does not, on its face, meet the usual criteria for implication of a contractual term such as being "so obvious that it goes without saying" or "necessary to give business efficacy to the contract".[46]

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43 *Carter v Boehm* (1766) 97 ER 1162 at 1164; *Banque Keyser v Skandia* [1987] 2 All ER 923 (QB); [1989] 2 All ER 952 (CA); [1990] 2 All ER 947 (HL); *State Insurance General Manager v McHale* [1992] 2 NZLR 399 (CA) at 406.

44 Merkin, above n 39.

45 *Khoury v Government Insurance Office of New South Wales* (1984) 3 ANZ Insurance Cases 60-581 (HCA) at 637.

46 *BP Refinery Pty Ltd v Hastings Shire Council* (1978) 52 ALJR 20.

(c) Nor is there any basis to imply a duty of good faith from the fact that Southern Response, as an associate member of the Insurance Council of New Zealand, has simply agreed to comply with the Fair Insurance Code. The Code provides its own procedure for breaches, namely that the insurer is required to have a Disputes Resolution Scheme under which complaints of a breach of the code can be made.

[164] I do not necessarily accept these arguments of Southern Response. The duty of good faith must extend beyond the disclosure of facts prior to the contract of insurance being formed. While that may be where in the past the duty has been most often recognised, in my view, logically it cannot amount to the full extent of the duty. I accept that the traditional English view is that breach of the duty of good faith does not sound in damages, and that rescission is the appropriate remedy.[47] But rescission would obviously be an inappropriate and unjust remedy for an insured, when it came to a breach of good faith by the insurer at the time of handling and settling the insured's claim.[48]

[165] There is a duty of good faith on an insurer. That duty in the present case is neither the product alone of Southern Response's membership of the ICNZ nor its agreement to comply with the Fair Insurance Code ("Code"). However, as I do note above, the Code states "we will act fairly and openly in all in our dealings with you", which bolsters the view that an insurer such as Southern Response here owes a duty of dealing fairly with insureds.

[166] In *Young* I left open the issue of whether breach of the duty has a remedy in ordinary damages. In that case, I awarded general damages in a nominal sum of $5,000. The insurer at the outset had withheld from the insured a report that recommended that the insured's home was a "rebuild" rather than a "repair" and then for some time had disputed any notion that the home needed to be rebuilt. I found this was "a serious breach of the defendant's obligation of good faith" but, notwithstanding this, I went on to note that it had "made little difference to the overall outcome".[49] The

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47 Merkin, above n 39 at [4.6.8(1)].
48 See Hamish McIntosh "Damages for insurers' breach of duty of utmost good faith?", above n 42.
49 *Young v Tower Insurance Ltd*, above n 36 at [166].

insurance claim had not been settled at that time and the parties were still in negotiation.

[167] The Dodds submit their position is different. Here they say Southern Response's breach of good faith has led them to settle for less than they were entitled to under their policy, meaning that real loss has crystallised. If the duty of good faith is an implied term of an insurance contract, then on ordinary contractual principles, breach of that term will give rise to the usual obligation to pay "monetary compensation to the other party for the loss sustained by him in consequence of the breach", unless the parties have agreed that some other remedy should apply instead.[50] The insurance policy sets out the remedy for the breach of the duty of good faith by the insured but does not set out the remedy in return.

[168] This case provides a useful example of the application of the duty of utmost good faith. This is not a case where Southern Response as AMI's replacement insurer has been fraudulent. Rather, it is a case where it has failed to disclose certain material facts which it possessed in relation to the claim, provided what in effect is a redacted figure, and accordingly misrepresented what was the true position. In acting in this way, Southern Response has not behaved in line with its duty.

[169] The Dodds say they and Southern Response, as parties to the insurance contract here, owed each other duties of good faith. This included an obligation to disclose all material information. As I have noted above, from about May 2011 it is clear from Ms Fife's evidence that Southern Response at a senior management level made a significant decision to change its previous policy responses that had applied up to that time. Whereas previously its policy holder claimants in each case had been sent the equivalent of the Complete DRA relating to their damaged homes, from about May 2011 those senior managers had decided to exclude the Office Use Section from the DRAs given to claimants. This was done, it was said, in order to avoid "confusion". In the present case involving the Dodds' insurance claim, Southern Response was fully aware of the Complete DRA and the Abridged DRA throughout. It chose not to disclose the Complete DRA document, but to proceed on the basis that effectively the

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50 *Photo Production v Securicor Transport* [1980] AC 827 (HL) at 849.

Abridged DRA was the only DRA, and to encourage and promote to the Dodds that they should use it in making their decision.

[170] Having already found an actionable misrepresentation and misleading and deceptive conduct I need make no orders as to the breach of the duty of good faith. I need to say however that, in all the circumstances here, I would also have found for the Dodds under this alternative cause of action.

Does the full and final settlement clause count?

[171] Southern Response says that, even if claims in misrepresentation, misleading and deceptive conduct, or breach of the alleged duty of good faith are made out, any liability here must be limited by the full and final settlement clauses in the Settlement Agreement and the Pool Settlement Agreement. These, Southern Response maintains settle all claims by the Dodds against it arising from the earthquakes.

[172] In interpreting settlement agreements and release clauses, the court's role is to ascertain the parties' presumed intention and to give effect to it.[51] The Court of Appeal in *Prattley Enterprises Limited v Vero Insurance New Zealand Ltd* noted the importance of finality and said that releases are routinely written in a general way, covering all claims known or unknown.[52] As Southern Response properly points out, public policy is served by supporting the finality of settlements.

[173] *Colinvaux's Law of Insurance*, at para 8.7.3(1) states:[53]

> "Where a dispute has arisen between two parties, it is the policy of the law to encourage the parties to reach a voluntary settlement and thereafter to enforce it. Consequently it is not open to a party who has compromised its rights following a genuine dispute as to the existence or quantum of legal liability to seek at a later stage to overturn the settlement if it is subsequently shown that the party would have done better by initiating or contesting legal proceedings. … a settlement is binding where the correct legal position between the parties is unclear, and even where one party genuinely believes that it has a valid claim or defence against the other, even though that belief has no basis in law. Although settlements are not themselves contracts of utmost good faith so that

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51 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, [2016] 2 NZLR 750 (CA) at [62]; *BCCI v Ali* [2002] 1 AC 251 (HL) at [8], [26], [37] and [78].

52 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, above n 51, at [63].

53 *Colinvaux's Law of Insurance*, above n 39 at para [8.7.3](1).

> there is no duty of disclosure as such, a settlement may be avoided if there is a positive misrepresentation, undue influence or other sharp practice.

[174] In *Prattley,* the Court of Appeal cited the comments of Lord Nichols in *Bank of Credit and Commerce International SA (in liq) v Ali (No 1)* [2002] 1 AC 251 at [27]:[54]

> …The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality … The risk that further claims might later emerge was a risk the person giving the release took upon himself.

[175] The Court of Appeal stated that where a release of all claims is the parties' objectively ascertained intention courts "readily give effect to it", recognising that finality facilitates settlements. The Court stated:[55]

> There is no policy reason to resist an agreement that exchanges money for a full and final settlement of any possible claim.

[176] However, insistence on the finality of settlements is premised on the foundation that the parties have freely reached their bargain. If a party wishes to exclude or limit its liability, it "must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party".[56] Even a very widely-drawn clause, such as a clause that purports to be in "full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist", may be construed in a restricted fashion if a claim later arises that would not have been within the contemplation of the parties at the time of the settlement.[57] A clause in those words was considered by the House of Lords in *BCCI v Ali*, in which Lord Bingham said that:[58]

> A party may … in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. […]

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54 At [63].
55 At [64]
56 *Dairy Containers v Tasman Orient CV* [2005] 1 WLR 215 (PC) at [12].
57 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, above n 51, at [65].
58 *BCCI v Ali*, above n 51, at [9] – [10].

> But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.

[177] In a similar vein, settlements induced by misrepresentation can be set aside because the misled party has not freely bargained, but instead has been induced to settle by affirmative misrepresentations by the other party. Even a well drafted settlement clause may be avoided if there is a positive misrepresentation.[59]

[178] In *Hayward v Zurich Insurance Company plc* the Supreme Court of the United Kingdom dealt with such an issue.[60] There, the claimant was injured at work and made a claim against his employers. A full and final settlement agreement was reached. Two years later it emerged that the claimant's conduct and activities were not consistent with his assertion that he had suffered a serious injury. The insurers, after investigation, commenced proceedings to avoid the settlement. The Supreme Court held that Zurich was entitled to set aside the settlement. This was because the fraud was a material cause of Zurich entering into that settlement even though it was not the sole reason, and there was no duty on Zurich to investigate the truth of what it had been told. The settlement would have been binding only if Zurich had been aware of the fraud and had chosen to ignore it, as in such a case the fraud would not have been a material cause of the settlement being entered into. In short, *Zurich* states that where a party has misled the other into a settlement then the agreement can be reopened.

Application

[179] In the present case, clause 11 of the Settlement Agreement, as I note at [42] above, settled all claims, save for any claim in respect of the swimming pool, on specific terms. It is useful to repeat those terms of clause 11 again:

> 11. Except in regard to payment of the costs to repair the swimming pool at the insured property, the policyholder accepts the settlement payment, with Southern Response arranging demolition and debris removal as described in clause 7, in full and final settlement and

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59 *Saunders v Ford Motor Co* [1970] 1 Lloyd's Rep 379; *Baghbadrani v Commercial Union Assurance Co plc* [2000] Lloyd's Rep IR 94 (QB); *UCB Corporate Services Ltd v Thomason* [2004] EWHC 1164 (Ch), [2004] 2 All ER (Comm) 774; *Contrast Kyle Bay Ltd (t/a Astons Nightclub) v Certain Lloyd's Underwriters* [2007] EWCA Civ 57, [2007] Lloyd's Rep IR 460.

60 *Hayward v Zurich Insurance Company plc* [2016] UKSC 48.

> discharge of the claims under the policy for damage to the insured property and in respect of any complaint, claim or right of action the policyholder has or may have against Southern Response, whether known or unknown, which arises directly or indirectly out of the events or any subsequent aftershock that has occurred before the date of Agreement.

[180] Clause 7 of the Pool Settlement Agreement was framed effectively in identical terms, except obviously it did not include the reservation as to the cost of repairing the pool:

> The policyholder accepts the settlement payment, with Southern Response arranging demolition of the swimming pool and debris removal as described in clause 5, in full and final settlement and discharge of the claims under the policy for damage to the insured property and in respect of any complaint, claim or right of action the policyholder has or may have against Southern Response, whether known or unknown, which arises directly or indirectly out of the events or any subsequent aftershock that has occurred before the date of Agreement.

[181] Before me, Southern Response appeared to rely on the High Court decision in *Prattley*, suggesting that this Court should not undermine the finality of the full and final Settlement Agreements here.[61] In response, the Dodds' position is that *Prattley* was an application to set aside a settlement agreement on grounds of mistake so that the Prattleys could reopen their insurance claim. In contrast, the Dodds are not claiming contractual mistake here, nor do they seek to reopen their insurance claim. The present action is one brought purely seeking damages arising out of Southern Response's conduct in settling their insurance claim.

[182] This Court in *Prattley* did consider whether the settlement agreement in that case could be set aside under the Contractual Mistakes Act 1977. The Court concluded (and the Court of Appeal agreed) that it could not, as the full and final settlement clause in the agreement allocated the risk of mistake to the plaintiff/insureds.[62] And, the Supreme Court held there had been no qualifying mistake, so that interpretation of the clause did not arise.

[183] *Prattley* did not deal with the circumstance such as the present in which an insured is induced to enter into a Settlement Agreement by an insurer's

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61 *Prattley Enterprises Limited v Vero Insurance (New Zealand) Ltd* [2015] NZHC 1444.
62 Above, n 61 at [210].

misrepresentations or misleading conduct. Also, the Court did not consider whether the settlement agreement in that case would bar a claim under the FTA. As I see it, therefore, *Prattley* is not determinative of matters in the present case.

[184] That is not the end of this matter, however. Southern Response goes on to note that the language used here in clauses 11 and 7 of the Settlement Agreements is wide. The Dodds settled "any complaint, claim or right of action" that they had against Southern Response whether that claim was "known or unknown". The only reservation to the width of the release was that the claim or right of action had to arise out of the earthquakes or aftershocks occurring before the dates of the agreements. Southern Response contends, therefore, that even an "indirect" relationship between the claim and the earthquakes is sufficient here to bring it within the scope of the clause.

[185] The Dodds, on the other hand, argue that the Settlement Agreements in this case do not bar their claims, for two reasons:

(a) None of the claims made in this proceeding fall within the scope of the full and final settlement clauses, as a matter of contractual interpretation. The clauses therefore do not apply to their claims.

(b) Even if the claims prima facie fall within the scope of the clauses, the clauses do not suffice to exclude liability for misrepresentation, or for breach of the FTA.

[186] I turn to consider first whether the claims fall within the scope of the full and final settlement clauses.

[187] Southern Response says that, in this case, all of the causes of action alleged by the Dodds fall within the scope of these full and final settlement clauses because they all involve claims or rights of action that the Dodds may have against Southern Response whether known or unknown at the respective dates of the settlements. The claims arise, it says, at the very least, indirectly out of the Canterbury earthquake sequence. The dispute between the Dodds and Southern Response in these

proceedings exists because the Dodds made a claim under their AMI policy due to damage their house had suffered in the earthquakes. This alone, says Southern Response, brings the claims within the scope of the clauses.

[188] In considering this issue, it is clear that the specific wording of clause 11 (and clause 7) settles claims of the following types:

(a) Claims "under the policy for damage to the insured property";

(b) And claims "…in respect of any complaint, claim or right of action … known or unknown, which arises directly or indirectly out of the [earthquake] events or any subsequent aftershock…";

[189] In addressing these issues, I need to say at the outset that I do not accept that the Dodds' present claims arise under the policy. They arise by virtue of statute. Clause 11, unlike the clause in *Prattley*, says nothing about settling claims that arise under statute. Moreover, as discussed below, Southern Response could not (or has not effectively) contracted out of the FTA, or the relevant part of the CCLA.

[190] The breach of good faith claim I accept is a claim under the policy, however, but it is not a claim "for damage to the insured property". Instead it is a claim for Southern Response's misrepresentations and misleading conduct, its non-disclosure of material information, and its failure to act fairly and transparently in resolving the Dodds' insurance claim. The claims for misrepresentation and for misleading and deceptive conduct were not directly caused by the earthquake sequence. They are not excluded on that basis.

[191] Southern Response has submitted that the claims arise indirectly out of the earthquakes. They advance this proposition they say because the dispute in this proceeding exists "because the [Dodds] made a claim under its AMI policy due to the damage the house had suffered". That might, as I see it, satisfy an "in connection with" test, but it does not satisfy the present "arising out of" test, which requires actual causation. The earthquakes did not cause Southern Response to make a misrepresentation. The earthquakes similarly did not cause Southern Response to

engage in misleading and deceptive conduct. And the earthquakes did not cause Southern Response to breach its duty of good faith.

[192] The Canterbury earthquake sequence obviously forms part of the context here. The earthquakes explain why the Dodds had an insurance claim in the first place. However, they do not provide any part of the basis for the misrepresentation claim, nor do they supply any element of the cause of action. Nor did the earthquakes in any sense cause the misrepresentation, either directly or by setting in motion a chain of events that led, indirectly but inexorably, to Southern Response making false representations to the Dodds as policy-holders. Southern Response's conduct was entirely of its own volition.

[193] If there is any doubt as to whether the "arising indirectly" language is wide enough to encompass the present misrepresentation claim, that doubt must be resolved contra proferentem against Southern Response. A proper interpretation of the full and final settlement clauses in the Settlement Agreements were that the agreements intended to settle the Dodds' claims for damage under the policy, not claims for misrepresentation or misleading and deceptive conduct. I do not find the clauses broad enough to exclude liability here.

[194] But, even if the clauses in question were broad enough to do that, I consider they do not exclude liability under the CCLA and FTA.

[195] The common law approach that a party could not contract out of liability for fraudulent misrepresentation is reflected in s 34 of the CCLA, which allows parties to substitute their own remedies in a contract, but only if they do so expressly:

> **34 Remedy provided in contract**
>
> If a contract expressly provides for a remedy for misrepresentation, repudiation, or breach of contract, or makes express provision for any of the other matters to which sections 35 to 49 relate, those sections have effect subject to that provision.

[196] Accordingly, for clauses 11 and 7 here to effectively exclude liability for misrepresentation, they would need to do so expressly. On my reading of these clauses they do not do so. This is not a case where there has been misrepresentation

of quantity surveying amounts. There has been a misrepresentation of what the Abridged DRA actually was.

[197] The position under the FTA, in my view, provides an even clearer answer. The Court of Appeal has said on multiple occasions that "the prohibition on engaging in misleading and deceptive conduct provided for in s 9 cannot be the subject of contracting out…". As Thomas J put it in *Smythe v Bayleys Real Estate*:[63]

> In enacting the legislation, Parliament sought to protect the consumer from unfair trading and it would be inconsistent with that objective to permit a person engaged in trade to exempt him or herself from liability under the Act.

[198] As a matter of law, I am satisfied that clauses 11 and 7 here cannot limit liability for misleading or deceptive conduct. I have found that Southern Response's conduct was misleading and deceptive, and remained so despite the language in the full and final settlement clause.

[199] And, the very agreement Southern Response is attempting to rely upon as barring the Dodds' claim for misrepresentation (and the other claims) was itself induced by the misrepresentation.

[200] Mr Friar for Southern Response urged me to consider the dangerous erosion of finality caused by overturning settlement decisions such as that made here. He argued that if any statement by an insurer as to the insured's entitlement under a claim could be a misrepresentation, then every time an insurer subsequently is found to be wrong in law as to how their policy operates, any and all settlements based on the insurer's interpretation will be able to be re-opened for misrepresentation. This it is said would significantly erode certainty of settlements reached under insurance contracts.

[201] I accept that point entirely. But I note that the misrepresentation in this case was not as to an interpretation of the Dodds' policy entitlement. Rather it was the misrepresentation first, that the Abridged DRA given to them was the complete and only estimate of the cost of rebuilding the house and, secondly, that the total rebuild cost estimate given to the Dodds (on which they could rely to "negotiate" their ultimate

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63 *Smythe v Bayleys Real Estate* (1994) ANZ ConvR 424, (1993) 5 TCLR 454.

policy entitlement and then to make their final election decision) was only $894,937, when in fact it was significantly higher. In such a case, settlements can be challenged.

Damages calculation

[202] The Dodds have succeeded here in their claim against Southern Response under both the misrepresentation, and breach of the FTA causes of action. I have left to one side a definitive decision on the Dodds' claim for what is alleged to be Southern Response's breach of its good faith duty to them under the policy.

[203] Initially, as I note at [116] above, damages here are to be calculated under the misrepresentation claim. Accordingly, the Dodds are entitled to damages in the same manner and to the same extent as if the representation by Southern Response was a term of the contract that has been breached.

[204] I have found that Southern Response wrongly represented the total cost of rebuilding the Dodds' house initially at $895,937.78 (and then revised to $894,937.00) and wrongly represented that it was settling at this total rebuilding estimate figure of $894,937.00.[64] Accordingly, the Dodds are entitled to what was the true reasonable estimate at the time of the amount Southern Response would have paid to rebuild (known by Southern Response as $1,186,920.75 in accordance with the complete DRA it was holding from Arrow), with certain adjustment that I note below.

[205] The figure needs to be adjusted as it would not have included demolition costs of $64,634.50 (already paid by Southern Response) and Arrow PMO costs of $6,000 and Arrow DRA costs of $3,500 for which the Dodds would have suffered no loss as they are items that they would never have received compensation for.

[206] It includes however the contingency amount estimated at $114,678.00, architects' and design fees of $50,716.30, Arrow Contract costs of $6,000 and Arrow construction costs of $7,500. The shortfall difference totals $178,894.30, and represents the Dodds' loss here, being the difference between the true value of the

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[64] The actual payment received by the Dodds, as I understand it, was $772,948 (including GST) which excluded $135,000 for EQC cover and excess, but included $1,150 for EQC emergency works and $11,385 being a claim for a half shared fence.

Dodds' claim under their policy (which would have triggered their rights to negotiate further and to properly reconsider their election decision options) and the $772,948 settlement payment they actually received (taking into account the EQC payment they had already obtained).

[207] An order is to follow that Southern Response pay to the Dodds this $178,894.30.

Interest

[208] The Interest on Money Claims Act 2016 (the IM Act) came into force on 1 January 2018 and under s 5 it applies to every civil proceeding commenced after that date. The Dodds brought this proceeding on 14 February 2018. The IM Act therefore applies here. Section 10 of the IM Act provides:

> **10 Mandatory award of interest**
>
> (1) In every money judgment, a court must award interest under this section as compensation for a delay in the payment of money.
>
> (2) Subsection (1) does not apply if this Act expressly provides otherwise.
>
> …

[209] In terms of s 6(1) of the IM Act, a "money judgment" is defined as:

> **money judgment—**
>
> (a) means a judgment or an order given or made by a court in a civil proceeding that requires the payment of money; and
>
> (b) includes a judgment obtained by default or in accordance with a summary judgment procedure

[210] Addressing this provision, the learned authors of *Law of Contract in New Zealand* state:[65]

> Quite apart from the position of common law, s 10 of the interest on Money Claims Act 2016 now provides that in every money judgment a court must award interest as compensation for a delay in the payment of money, unless the Act expressly provides otherwise. The period during which interest is

[65] Barber, Finn and Todd, *Law of Contract in New Zealand*, above n 8, at 869.

> payable begins on the day on which the cause of action arose and ends on the day on which the judgment debt is paid in full, unless the Court specifies any shorter period in accordance with the Act. The rate of interest is calculated on a daily basis using an internet site calculator established pursuant to the Act. The form of provision in s 87 of the Judicature Act 1908, giving the Court a discretionary power to award interest, gave rise to a number of difficulties which its replacement now avoids.

[211] In the present case, there can be no doubt that Southern Response's conduct has consisted effectively of a failure to pay the proper amount due to the Dodds at the time of settlement under the Settlement Agreement entered into in December 2013. Subsequently, the Dodds signed a Sale and Purchase Agreement for the replacement new build house on 18 April 2013.

[212] The Dodds, therefore, are entitled to interest at the statutory rate on the $178,894.30 specified at para [207] above from the date they became entitled to receive the initial settlement payment from Southern Response (which the Dodds say, and I agree, is 23 December 2013, being the date of the Settlement Agreement) up to the final date for payment.

[213] That interest amount is to be calculated in terms of the IM Act and to be determined by way of discussion between counsel for the Dodds and counsel for Southern Response. But in the event of failure to reach agreement on such calculation, leave is reserved for the parties to revert to this Court for a determination on the interest amount to be paid.

General damages claim

[214] For their causes of action, Mr and Mrs Dodds claim $15,000 each in general damages for what is described generally as "loss and damage including inconvenience, stress and anxiety".

[215] The threshold for claims such as this is a high one. In *Young v Tower Insurance Ltd*[66] I found:

> [163] With all these matters in mind, I therefore find that a duty of good faith on the part of the insurer is implied in every insurance contract. It must,

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66 *Young v Tower Insurance Ltd* [2018] 2 NZLR 291 at [163].

> as I see it, be a necessary incident of these contracts (long said to be contracts of utmost good faith) and an obligation that flows both ways. To suggest otherwise would make no sense. And in my view, this duty extends beyond mere obligation on the insurer and the insured of continued disclosure. While the full scope and limits of the duty can be left for another day, I find, as a bare minimum, that the duty requires the insurer to:
>
> (a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract, and during and after the lodgement of a claim;
>
> (b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and
>
> (c) process the claim in a reasonable time.

[216] In *Young*, I awarded only $5,000 in general damages for breach of an implied contractual duty of good faith where the insurer had withheld from the insured a short report provided to its agent which had indicated the earthquake damage to the house in question was such that it was a rebuild rather than a repair.

[217] The *Young* decision noted, however, that exemplary damages are not available for breach of contract in New Zealand.

[218] This issue of a possible award of general damages in an insurance context was discussed in a recent judgment of Mallon J in this Court in *Bruce v IAG New Zealand Ltd*.[67] At paras [164] – [167] of this judgment Mallon J addresses this general damages issue and states:

> [164] The Bruces say that general damages are available. They say that the general damages they seek are in line with "leaky home" awards. They rely on *Stuart v Guardian Royal Exchange Assurance of NZ Ltd (No 2)* and a paper written by Neil Campbell, "Claims for Damages Against Insurers in New Zealand". Of relevance this paper states:
>
> > Recently there has been a move, in the general law of contract, to award damages for non-pecuniary losses. These losses can usefully be divided into two categories: physical inconvenience, and mental distress. Partly because the former category is more objectively identifiable, both contract law in general, and insurance contract law more specifically, has been fairly ready to award damages for physical inconvenience.

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[67] *Bruce v IAG New Zealand Ltd* [2018] NZHC 3444 at [164] – [167].

> By contrast, New Zealand is still deciding whether, or when, to provide damages for mental distress for breach of contract, with two positions being adopted in the Court of Appeal. The more restrictive view, in *Bloxham v Robinson*, is that mental distress damages are available only where the object of the contract is to provide pleasure, enjoyment, or freedom from distress. The alternative view, in *Mouat v Clark Boyce (No 2)*, is that such damages are recoverable in non-commercial contracts. For insurance contract law it may not matter too much which of these views is adopted, because many insurance contracts fit the "freedom from distress" criterion, though usually only in the non-commercial sphere. Thus it is no surprise that there are many examples of awards of mental distress damages for an insurer's breach of contract. The Court of Appeal, obiter, has given some approval to such awards, observing that the "mental significance [of late payment by an insurer] may well be within the "reasonable contemplation" of the parties."

[165] I have quoted this part of the Neil Campbell paper because I consider it to correctly draw the distinction between the different heads of non-pecuniary loss that may comprise a general damages award. As is explained in *McGregor on Damages* it has long been established that "[s]ubstantial physical inconvenience and discomfort caused by a breach of contract will entitle a claimant to damages". Awards have been made under this head for the physical inconvenience and discomfort of having to live in a house in a defective state.

[166] As also discussed in *McGregor on Damages*, it was once the law that no damages could be recovered in contract for injury to feelings. The law has developed since then, going through a period of expansion when such awards were made, then a downturn, followed be a re-emergence of such awards led by the important and influential decision of *Ruxley Electronics v Forsyth*. The learned authors conclude:

> The above views appearing in cases at the highest level, admittedly of an obiter nature, suggest that the general rule in *Addis* may soon be abandoned and that, in addition, one should not adhere too closely to the somewhat limiting test, for recovery of damages for mental distress, of whether a principal object of the contract is to promote enjoyment or avoid distress but simply to apply the wider, more principled test of whether recovery for the particular loss is within the contemplation of the contracting parties. This is how it was put by Lord Millett: "In such cases [namely, cases of ordinary commercial contracts]", he said in *Unisys*, "non-pecuniary loss such as mental suffering consequent on breach is not within the contemplation of the parties and is accordingly too remote."

[167] An insurance contract pursuant to which an insurer elects to reinstate a damaged home is not a purely commercial one. It is a contract subject to a duty of good faith. It involves a commercial party on the one side and private parties on the other. It provides an indemnity for the private parties' domestic home. When an insurer elects to reinstate, the contract becomes a contract to repair. It is akin to a building contract as to which general damages for physical inconvenience and discomfort are available. It is foreseeable that if the insurer breaches its obligations under the contract, stress and mental anguish is likely to follow. It is no surprise, as Neil Campbell puts it, that there

> are many examples of awards of mental distress damages for an insurer's breach of contract (despite the contrary view in *Pine v DAS Legal Expenses Insurance Co Limited* relied on by IAG).

[219] Here the Dodds bring a claim for general damages with regard to breach of contract, a breach of s 43 of the FTA and, finally, their claim for breach of an implied term relating to the duty of utmost good faith in the insurance contract between the parties. The Dodds say all of these provide a proper avenue here for their claim for general damages.

[220] With regard to the evidence advanced by the Dodds in support of this general damages claim, Mr Dodds stated in his oral evidence that the consequences of discovering the undisclosed DRA were:[68]

> The consequences for us was that it completely undermined what we believed was a trusted resolution to our earthquake claim. It put us in a position of feeling that we had been misled, it caused us considerable upset and grief, it indicated to us that an election option that may have been possible to us, had been denied us, and it was just in our view, an unacceptable position to be thrust into.

[221] In addition, Mrs Dodds, in her evidence, outlined the circumstances in which she and her family were living during the time that they were making their election under the policy and how stressful those circumstances were. She said that during that time she had trusted Southern Response to provide their correct entitlement under the policy and she was shocked when she discovered the undisclosed DRA some time later. She said this exacerbated her suffering from "stress anxiety and related symptoms in dealing with Southern Response". A note from her general practitioner detailing her symptoms was provided.

[222] Overall then, it is the Dodds position that they have each suffered stress, inconvenience and anxiety relating to the misrepresentation by Southern Response and its breach of good faith under their insurance contract.

[223] Whilst I clearly have some sympathy for the position which the Dodds have found themselves in relating to this matter, it is my view that the reasonably high threshold which exists for general damages claims in cases such as the present has not

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[68] NOE at p 6 [31] – p 7 [1] – [4].

been reached here. The Dodds were effectively cash-settled ultimately to enable them to buy a replacement home of their choice. Their policy claim did not involve what is often seen as a long drawn out repair versus rebuild case. There was some evidence before me of reasonable physical inconvenience but I need to say that there was no major evidence that the Court could consider of significant mental distress here. And, as I see the position, the present case differs somewhat from the position that prevailed in *Young v Tower Insurance*[69] where an award of nominal damages was made.

[224] For all these reasons the Dodds' claim for general damages fails.

Orders

[225] The Dodds have largely succeeded in their claim against Southern Response in this proceeding and orders are now made as follows:

(a) Southern Response is to pay to the Dodds damages of $178,894.30 as outlined at para [207] above.

(b) Southern Response is to pay to the Dodds interest at the statutory rate on this $178,894.30 from 23 December 2013 until the final date of payment of this sum.

Costs

[226] Given that the Dodds have largely succeeded in this proceeding, in my view, they are entitled to an award of costs here against Southern Response. Counsel for the parties are to liaise with a view to endeavouring to resolve this issue of costs between them. In the event that agreement cannot be reached, then counsel for the parties may file (sequentially) memoranda on costs which are to be referred to me and, in the

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69 *Young v Tower Insurance Limited*, above n 37.

absence of either party indicating they wish to be heard on the issue, I will decide the question of costs based upon the memoranda filed and the material then before the Court.

.....
Gendall J

Solicitors:
Anthony Harper, Christchurch
Bell Gully, Auckland