IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-000839
[2015] NZHC 981

BETWEEN	DOMENICO TRUSTEE LIMITED Plaintiff
AND	TOWER INSURANCE LIMITED Defendant

Hearing: 2 - 3 March 2015

Appearances: AME Parlane and N Hamid for Plaintiff
M C Harris and MHA Ho for Defendant

Judgment: 8 May 2015

JUDGMENT OF GENDALL J

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The claim

[1] Domenico Trustees Ltd (Domenico) owned a house which was substantially damaged in the Christchurch earthquakes. The 100 m^2 house was insured for replacement value by Tower Insurance Limited (Tower) under a "Provider House Policy Maxi Protection" policy. Following the damage inflicted by the earthquakes, Tower admitted liability for the damage. The house is a total loss. Domenico has received payment of $132,783.41 from the Earthquake Commission (EQC), by way of settlement.

[2] Tower suggests that it stands, and has always stood, ready and willing to meet its obligations under the policy by rebuilding the house. Tower says it has also offered to pay Domenico the present-day costs of rebuilding, plus further amounts that Domenico actually and reasonably incurs in rebuilding.

[3] Domenico, however, desires a cash settlement. In particular, it wants to be paid in cash the value of a rebuild, without actually incurring rebuild costs. During the course of discussions with Tower, Domenico claimed that Tower had agreed to this proposal. In other words, Domenico's present claim is that Tower has made an irrevocable election and it now seeks to hold Tower to the alleged election. This led Domenico to issue these proceedings alleging breach of contract.

[4] Domenico's position is that Tower has failed to settle in accordance with that election. It therefore seeks judgment against Tower for those rebuild costs, along with interest and costs. Net of the payments received by the Earthquake Commission, that sum, it says, would be $271,260.79.

[5] The quantum of the rebuild costs has been the subject of considerable movement as this claim has progressed. In Domenico's first statement of claim, rebuild costs were said to total $842,392.45. Since that date, Domenico has slowly retreated on its position as to quantum. The first movement was to a figure of $655,401, then to $581,787.42 (amended statement of claim), then to $445,882, before finally reaching a figure of $370,000 for the purposes of trial. Tower accepts the final figure, which it states to be "for the sake of compromise", as at March 2015.

[6] By way of observation I note that without proper explanation, it must be seen as remarkable, in a rising building market, that final rebuild costs amount to only around 44 per cent of the quantum initially claimed. This too is the position taken by Tower which describes the first estimates as "outrageous" and "extravagantly inflated".

The issue(s)

[7] The nub of this proceeding is captured in the allegation Domenico makes in its first amended statement of claim:

> 10 The defendant has chosen to settle the claim under the policy by paying to the plaintiff in cash the costs to rebuild the house without the need for the plaintiff to first rebuild/buy a house.

[8] From this, Tower has identified two substantive issues that fall for determination:

(a) First, does Tower have the right to reinstate instead of paying cash?

(b) Second, did Tower by its email of 18 April 2013 (and other correspondence) make a binding election to pay the rebuild costs in cash without requiring the plaintiff actually to incur replacement costs.

[9] Tower's position is that these two questions can be answered "yes" and "no" respectively. Domenico's position is simple in its approach. Counsel for Domenico, submits:

> The plaintiff's primary case is that TOWER elected to settle in cash and cannot resile from that position. Its secondary argument is that it is too late given the passage of time since acceptance of the claim and proceedings issuing for the insurer to change its position.

Background facts

[10] Domenico owns a modest 100 m^2 residential property in the suburb of Aranui, Christchurch. In the past Domenico has rented this house out to third party tenants. The house was damaged beyond economic repair in the Canterbury

earthquakes. Stream Group carried out a preliminary assessment of the damage caused by the first earthquake in late September 2010. After the February 2011 earthquake, Stream Group carried out a further initial assessment of damage in March 2011. A report was sent to Domenico on 23 June 2011, advising that the claim had been accepted and that Stream would revisit the property in due course to undertake a detailed assessment and prepare a scope of works.

[11] In November 2012, Domenico's director and shareholder, Mr Robert Da Col, engaged Claims Resolution Services Limited (Claims Resolution) to assist him in pursuing his claims against both EQC and Tower. Mr Da Col agreed to pay to Claims Resolution a fee of 10 per cent of the entirety of the settlement sum they achieved, if it exceeded the amount Tower had previously offered. According to Tower, the effect of this was that, in order to achieve anything greater than what was on offer by Tower, Domenico would need to receive a substantial increase over and above previous settlement offers made by Tower.

[12] In December 2012, a Mr Victor Cattermole of Claims Resolution contacted Tower to advise that Domenico had instructed him to assist it in settling the claim. On 4 December 2012 Mr Cattermole, Mr Da Col and Tower representatives attended a site meeting. On 19 December 2012, in an email exchange between Mr Da Col and Mr Cattermole, Mr Da Col made the following comments on his settlement expectations for Domenico:

> I'm hoping for around $240,000 excluding demolition and excluding driveways, fences, paths in order to cover all costs.

[13] Mr Cattermole responded to Mr Da Col's position as follows:

> We will try, Stream were talking around $1800m2 so that's $180k, generally with properties like this we have been coming close to between $2400 and $2900 but including driveways.

[14] In February 2013 Tower accepted that the house was damaged beyond economic repair. Tower's assessors estimated that the cost of rebuilding the house, as at April 2013, would be in the region of $236,413. Accordingly Tower offered to pay Domenico this sum, less payments received from EQC, and other payments.

This offer was made on the basis that Tower would also pay any additional costs actually incurred when the rebuild was undertaken.

[15] In the first offer of settlement communicated to Domenico by email, it was noted:

> As advised in our correspondence 24/11/2011, the policy provides the following settlement options:
>
> 1. Rebuild on current site.
>
> 2. Rebuild on another site of your choice – the cost to do so must not exceed the cost to build on the current site.
>
> 3. Purchase – you may purchase another property. If you choose to purchase a property, Tower-s [sic] liability is for the purchase price or the rebuild price, whichever is less.
>
> 4. Cash settlement – based on the market value of the property.
>
> Under option (4) TOWER, are now offering the ability for clients to take a cash settlement on the basis of the "full rebuild cost" opposed to the market value. This is not an option under the current policy, but has become and [sic] option to allow people to move on outside the claim process.

[16] As I have noted above, a total replacement figure, "gross of EQC payments", of $236,413 was put to Domenico. A "Frequently Asked Questions" document prepared by Tower (FAQ Document) was also sent to Domenico at this time. I replicate below the pertinent aspects of that document:

> **Q: Why are you offering cash settlements now?**
>
> A: Many customers have told us that they want to be able to move on with their lives – they want to control their own destiny and put the decision making into their own hands. A cash settlement of your claim would enable you to forward plan your life at your own pace.
>
> We now have a much better understanding of how we can rebuild on different categories of land and the costs associated with doing this. This information has only recently become available.
>
> …
>
> **Q: Isn't this just the insurance company looking to save themselves money?**
>
> A: Any cash settlement of your claim would be at the full replacement value (and not a depreciated or present day value). This is intended to include the full costs of replacing your house and we are more

than happy to discuss with you whether you believe some of the costs are missing.

Policy response questions

Q: I want my house rebuilt by you – isn't this what my policy gives me?

A: Your policy gives us the option to determine how your claim is settled (whether this is by repairing or rebuilding your house or settling your claim in cash). TOWER has not yet made any final decision as to which of these options it will take in relation to your claim.

If you have any exceptional circumstances that you believe apply to your situation, TOWER is happy to discuss these with you and to consider rebuilding your house rather than paying you cash. We do not want to disadvantage any customers.

Q: What happens if the costs are higher than what you have allowed in your settlement with me when I rebuild my house?

A: Cash settlements are intended to be full and final settlements of your claims on your TOWER policy, which allows both you and us to move forward. However, TOWER is committed to providing you with the full replacement cost for rebuilding your house under the terms of the policy. If it turns out that you incur greater costs in rebuilding your house than are provided for under a cash settlement, we will reimburse you for the additional costs provided you meet the following criteria:

- the additional costs would have been covered under your TOWER policy for your existing house but for the cash settlement;
- you have spent the full cash settlement on rebuilding your house;
- your replacement house is the same size (m2) as the existing house;
- your replacement house is located at the same address as your existing house and in a similar location at that address;
- your replacement house utilises similar modern equivalent materials and construction techniques to your existing house;
- your replacement house is a similar layout and build complexity to your existing house; and
- your replacement house is completed within 2 years of the date of settlement.

[17] On 10 April 2013, Mr Da Col replied by email referring to the options. In this reply Mr Da Col stated:

> Thanks for sending the 2 emails on Monday with your first offer based on cash settlement on basis of full rebuild.
>
> I do understand that this option is necessary given the circumstances since the land assessment is not completed, nor even started for my property. It is unlikely that any rebuild can start this year and it's not practical for Tower to settle by other means within a reasonable time frame as required by the policy. Anyway, I've had a quick first read through …

[18] Mr Da Col then makes several observations about the first email sent by Tower. Relevantly, he questions the total settlement costing and also some methodology suggested by Tower.

[19] Tower responded to Mr Da Col's email on 18 April 2013. The response addresses the various issues raised by Mr Da Col, and then notes:

> REVISED SETTLEMENT OFFER (INCLUDING INFLATION ALLOWANCE)
>
> The revised offer is as follows:
>
House 100.56 ms @ $1,933.40 /m2	$194,423.00
Additional Foundation Costs	$1,979.20
Garage	$29,700.00
Inflationary allowance	$18,088.18
Geotech fees	$9,361.00
Engineering Fees (Enhanced Foundations)	$950.00
>
> TOTAL REBUILD GROSS OF EQC PAYMENT $254,501.38
>
> EQC'S SETTEMENTS are proposed as follows:
>
> 04/09/2010 $114,627.00 ($115,000.00 – $373.00EW) ** Emergency works
>
> 22/02/2011 $18,156.41

[20] This second offer was also made on the basis that any further costs actually incurred in rebuilding the house would be met in accordance with the terms of the policy. The cash offer it seems was made in order to advance the claim in a more expeditious manner than otherwise might prevail.

[21] I pause at this point to note that to some, it might appear somewhat strange now that as noted at [12]–[13] above, in December 2012, Domenico would have

been satisfied with a settlement offer of around $240,000, excluding demolition and driveways, fences, paths etc. The offer Tower made in April 2013 was for $254,501.38 with Tower *additionally* managing the demolition of the house. These aspects are perhaps all the more curious given that in August 2012, Tower made a payment to Domenico of $31,199.79 for driveways, fences, paths etc. Thus, from the evidence presented, the offer Tower made in April 2013 would have exceeded Mr Da Col's expectations.

[22] Domenico's response to this second offer was a simple one. Shortly after receiving the offer, on 30 April 2013 Domenico issued proceedings seeking rebuild costs in the sum of $842,392 ($8,423 per m^2). This figure it appears was based upon a costing provided by a quantity surveyor engaged often by Claims Resolution at the time, Mr Malcom Gibson. Tower it seems then took the position that it was likely to carry out a rebuild itself, if Domenico did not accept, as appeared to be quite apparent, that its claim was "seriously overstated".

[23] On 29 November 2013, counsel for Domenico provided a new reduced rebuild costing, which totalled $655,401. The new costing, said to be based on Tower's geotechnical report, was prepared by, Mr Stephen Betts, a quantity surveyor then engaged by Domenico. Later, on 14 August 2014, Tower was informed that Mr Betts had "revised his costing" downward to a new estimate of $578,787. In this period between Domenico providing the two costings referred to above, it also raised with Tower the possibility of building a new house on land in Wellington. Tower advised Domenico that this was an option which it was happy to consider.

[24] Domenico then provided an amended statement of claim, dated 25 August 2014, which claimed $581,787.42, obviously in reliance on the downwardly revised estimate of Mr Betts. However, in briefs filed on 29 August 2014, in addition to the evidence of Mr Betts, briefs of another Domenico witness, a different quantity surveyor, Mr Stewart Harrison, were provided and these estimated total rebuild costs at yet another reduced figure, this being $445,882. And, as I have discussed above, there has since been a further retreat to a final accepted figure of $370,000 (expressed by Tower to be for the purposes of this proceeding).

[25] Tower's position throughout this proceeding it says is a simple one. Faced with what it maintained was a grossly inflated claim, it says it intimated a decision to reinstate the property, and it said:

> By reinstating, Tower takes on the costs risk (because it simply pays what it actually costs) and protects itself from exaggerated cash claims. The authorities have long recognised the right to reinstate as an important protection for insurers …

[26] Tower steadfastly maintains that it has made no "take it or leave it" offer, and that its offer of payment was expressly subject to it agreeing to pay further amounts actually and reasonably incurred in the rebuild. Tower also made it clear that it stood ready and willing to undertake the rebuild of the property itself. On 10 September 2013, Tower advised that the rebuild process could begin promptly upon Mr Da Col advising that Domenico wished the house to be rebuilt.

[27] On 18 December 2013, in an email Tower again communicated its position to Domenico:

> TOWER's position remains that it will commission a rebuild itself if Mr Da Col wants the house to be rebuilt. If he does not, TOWER will arrange for payment of present day value. We assume from the fact that the a[s] new rebuild cost has been presented that a rebuild is what Mr Da Col wants but TOWER would like him to confirm this so that it can begin commissioning a rebuild. We have [been] seeking your client's confirmation for some time and ask that it is provided no later than mid-January.

[28] Given the impasse that had come to bear, Tower commissioned a further report from an independent quantity surveyor, Mr Peter Eggleton. On 29 June 2014, Mr Eggleton reported with revised rebuild costings in the sum of $347,990 (including GST).

[29] In August 2014, an employee of Tower, a Mr Venemann, contacted Mr Da Col to offer him an "off the record" discussion so as to progress potential settlement options. Despite the status of those discussions, both Domenico and Tower waived privilege in respect of them for the purposes of this proceeding. It is useful here to set out in some detail significant parts of the transcript of that conversation. These relevantly record the following exchange between Mr Venemann and Mr Da Col:[1]

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[1] Mr Venemann of Tower was asking the questions and Mr Da Col was answering.

Q I understand that and I thought I would give you a call to see if we can move … [the claim] along. We both know that your lawyer has a lot of these claims on foot in the High Court, and we don't necessarily think that they are moving as quickly as they could and, I mean, if the cash settlement offer which, as I see it is $302,000 for the total rebuild costs, and that would be less EQC and Tower excess.

A $302,000 did you say?

Q That is my understanding. Have I got that wrong? I'm just taking that directly from Mr Eggleton's costing.

A I thought I saw $368,000, what have I missed there? Something like that, it was $360 something thousand in the email I saw, in what was filed with the High Court.

Q Right, let me check that. Mr Eggleton's costing may not in fact include foundation elements, I'll just check it. I should have …

A That offer, I haven't actually even seen details of that. I've seen the figure, it was early July. I think it was. I've seen the figure and going back to the original court decision last year, I thought all that had to happen was both parties sit down, go through the figures, see where you disagree and come to a conclusion. This was supposed to take 6–8 weeks.

Q yeah, it is taking a lot longer than that. I mean that High Court process doesn't … it has been flooded effectively and these matters don't move as quickly as we would like, or as you would like. But the number, you are correct, is higher than what I quoted to you. It is $363,940 and that would be less any EQC payments and Tower excess. But that is the offer as it currently stands. Basically, I don't want, and I'm sure you don't want, for this to sit around for another 6–8 months only to come to the conclusion that you are happy with an offer that we put forward in early July. So look, I understand as you say, you may have given instructions to your legal counsel. We don't know what those are, we haven't seen anything yet.

A Yip, yip, no I just gave my views. Without …

Q I'm not committing you to anything in this discussion, I'm just trying to give it a bit of a …

A I want to finish this off and there seems some reason in the offer that was made, so I basically said … I can't remember what I said to him, but … I thought that we had enough to work on and sit down and just make an agreement and get on with it. And that seems not far off. But I just wanted, you know, perhaps what has made it difficult is that I haven't had a lot of information on my side either. I'm not sure what has happened. I've sent a note yesterday saying we have responded to the High Court, because it was due by the end of July, or I think Tower were asking to have it done by the end of July. The only other thing is the form of the settlement, and there seems to be some confusion there too because the Tower side seem to be keen on either rebuilding on site or not at all. I'm not sure.

Q We've been quite flexible. We understand that you had … you had potentially intended to rebuild in Wellington.

A Yes

Q And we suggested to your counsel that that was something we would be happy to consider. We didn't say no to it, we gave a tentative yes, but I think from our perspective, I'm not sure what your intentions are now, but from our perspective we feel that it would be best to provide you with a cash settlement so that you can do whatever you like, in terms of rebuilding in Christchurch or rebuilding in Wellington or buying an existing house. All of these options have been on the table.

A Yes, I agree. And the thing about rebuilding in Wellington, up until only in the early July correspondence did I see that Tower had like a little condition that it would be on reasonably flat land, which I hadn't seen before. And it is not, by the way, it is not.

Q Wellington, yeah, you don't find a lot of flat land in Wellington.

A No, there is not and this isn't flat land and there will be more work involved. But I pointed out that as far as the policy goes it doesn't actually state that it has to be flat land on the policy.

Q No, what it does state though is it can be no more than the cost to rebuild on the current site, which is a flat site.

A Correct

Q So that … I mean, as I say, probably the cash settlement is going to be the best option for both parties.

A Yes

Q And then you can do whatever you like.

A yes, I think so. I am reasonably keen. I think there is a bit of a balance there. The only thing now, I'm on the phone with you and am I allowed to make a decision, am I allowed to talk about this on the phone?

Q I think that needs to be done through the proper channels, but look, in terms of the discussion that we're having now, I can have our legal counsel draft a formal settlement agreement on that basis and send it to your counsel and it will facilitate a quicker settlement if you and I can have a discussion around what should be in the agreement, then you can simply state that you are happy with it and sign it, or you can give us whatever minor amendments you might think of. It will just make it happen quicker.

A Yeah, yeah. But am I going to be offside with a process here, because … I know …

Q I understand your concern in that regard, but the process that the Court puts all of these matters through is basically one of banging people's heads together until they come to a resolution themselves. So this is why we've had all the joint expert meetings and joint reports and having both sides get their own QS reports. That is what the process is intended to do, to resolve the claims outside of Court.

A To me it feels like Tower has just come up with the QS report in the last couple of months, but why was that not done last year?

Q We've had a QS report last year. This one obviously takes into account some further foundation costs. The initial settlement offered

to you included Geotech fees and allowed for you to not only undertake whatever further investigations needed to happen, but also to potentially come back to us if the foundation costs were more than what we had allowed for. That is generally what we do with our discharges. But our interest is getting this liability off our books, I mean, we're not trying to short change anybody. It is not in our interest to have these matters move this slowly.

A And we want to get this done quickly, but what say I say something now and then my lawyer says, hey wait a minute, you've given some instructions to Tower but you have forgotten this fact or there is something else here.

Q You are not giving instructions to me. Nothing is going to be set in stone, this is just an offline discussion. If you and I agree something in principle now, that is that you are happy with the $363,000 cash settlement, less EQC and Tower excesses

A And I've already worked that out too, because I've put it on a spreadsheet so I know … I think it is roughly about 200 isn't it?

Q That sounds about right. But yeah, if we are agreed in principle that that is a fair settlement, then you can, as I say I can have our lawyers draft the formal settlement agreement and send it to your lawyer. You can … I would encourage you to chase up your lawyer and say, look Tower has called me and they said they're going to send a settlement agreement through, can you send it to me as soon as you get it. If your lawyer brings anything up, there may be suggestion that you could negotiate the settlement further. We'll be happy to consider that. I can tell you now that this settlement, Tower is not likely to increase this number, what it may do or what it will likely do in the formal settlement agreement is insert a clause that will allow you to come back if the costs to rebuild that house are more than what we have allowed for.

A OK

Q I mean in terms of the strict terms and conditions of your policy, this cash settlement is outside of those terms.

A Yes, yes, but the way … I'll tell you what I was thinking of doing actually, because it is not outside the square. Given the length of time and given everything that has happened, what I did say on my side is that it is probably better for me to buy an existing house. And the reason is very, very simple. Because it is quick, it is easy and there is no more issues to discuss or questions. Because if you rebuild a house anywhere, there or here, it is just going to carry on, isn't it. We don't have final settlement until it's finished and then we've got …

Q Well in terms of as far as Tower is concerned, we would see it as final settlement unless you were actually intending to rebuild that house. Potentially that house on another site, but it would have to be that house.

A What you are saying, I mean yeah it is final settlement because you are doing the cash. So once you've done the cash then there is no question about the rebuild process or whatever.

Q Yeah, correct. You can do whatever you like with that.

A So going back to the policy, the policy says you could do all that as long as there was no more, well you know, you won't pay any more than that …

Q Well the strict terms of the policy only allow for a cash settlement at market value.

A Correct

Q So present day value. So we wouldn't be cash settling you under the strict terms and conditions of the policy at the full cost of rebuilding that house.

A And I do understand that. But I know that at the end of the day though, it works both ways by …

Q Absolutely, as I say. And it is in our best interest to get rid of them. So trying to do it cheaply is not going to be good business practice. It is not something that we generally do.

A OK. Look, look, subject to OK with my side and, you know, I think the whole thing seems quite reasonable, what you are saying and it is doable. But as long as there are no questions on my side, I mean they'll probably advise me and they'll probably say yes take it, or whatever. But I will let them know on our discussion.

Q Yip

A And that may work, you know, and as I say this is … slightly off the record if you like, at my end, because you know, I wasn't expecting the call and I haven't …

Q No, that is fine. I admit that also. It is an offline discussion and the intention from our perspective is to actually get it moving, because this has been stagnating for a long time and I don't think we've ever really been that far away from a reasonable settlement. Certainly not so far away that it should have taken this many months.

A No, no. That figure has only just come through on the second of July, I think that sort of figure …

Q Yeah, and as I say we have been working, not necessarily in terms of a precise number. We had a QS report which has now taken inflation into account and some slightly higher foundation costs, but I mean we could have had a discussion around the number quite some time ago, if that was your intention. But we've been trying to figure out exactly what your intention is through your lawyer. We've offered to build the house in Wellington, we've offered to build it in Christchurch, we've offered cash and the opportunity for you to come back if the costs to rebuild were more. I mean, we've put a number of offers on the table that would have or should have been able to facilitate a settlement a long time ago.

A Yes, yes, and I thought I've given enough information for that to happen. So I'm really a bit puzzled as to why there has been any hold up at all, because even …

Q As are we

A Even the rebuilding, I mean I mentioned I think last year, and I talked about that earlier this year on my side. I just don't know why .. I don't understand. Well I don't have much in front of me to say

why it has taken so long. I'm wondering. But anyway, you know that, that's fine. So that is the figure that matches the 2nd of July is it, $362,940 is it?

Q Yeah, correct

A Yeah, yeah, OK

Q So you have a talk to your legal counsel, I will have our legal counsel draft a settlement agreement and have them forward that to your legal counsel and hopefully, I mean we're happy to discuss that settlement agreement with you, but hopefully this discussion will at least facilitate a quicker settlement.

…

Q Yeah, I mean I have no visibility of what kind of costs you are incurring while this is taking months and months to get over the line, but I think it is in everyone's best interests to get this settled as quickly as possible. As I say, the offer, we don't feel, or the number of offers that we've made for different scenarios, we don't feel have been unreasonable.

[30] Both parties here rely on this discussion in support of their position. Domenico claims it supports its position that there has been an irrevocable election. Tower claims that the transcript speaks for itself and evidences that no binding election or promise had been made.

[31] Also relevant here is to note the outcome of the witness caucusing, or "hot-tubbing", which occurred prior to trial. The relevant witnesses were Messrs Eggleton and Glennie for Tower, and Mr Harrison for Domenico. The outcome of this caucusing in February 2015 was that the respective rebuild cost sums for the witnesses were $367,498 (Eggleton), $363,508 (Glennie), and $377,854 (Harrison). For the sake of compromise, Tower and Domenico agreed that the rebuild cost value would be $370,000.

[32] On the topic of experts, I note also that on 23 February 2015, less than a week before trial, counsel for Domenico advised Tower that the quantity surveyor, Mr Betts, who was originally to be called by Domenico to give evidence for it, would no longer be giving evidence. The consequence of this was that the only witness called at trial for Domenico was Mr Da Col, and none of Tower's experts who were available to give evidence were called to testify.

The terms of the policy

[33] It is important here to set out the relevant terms of the Tower insurance policy document which I now do:

> **WHAT YOUR HOUSE IS INSURED FOR**
>
> Sudden and unforeseen accidental physical loss or damage unless excluded by this policy.
>
> **WHAT SPECIAL BENEFITS YOU ARE INSURED FOR**
>
> …
>
> **NATURAL DISASTER DAMAGE**
>
> If **your house** suffers **natural disaster damage**, **we** will pay the difference between the amount paid under EQCover and the sum insured shown in the **certificate of insurance**.
>
> …
>
> **HOW WE WILL SETTLE YOUR CLAIM**
>
> **We** will arrange for the repair, replacement or payment for the loss, once **your** claim has been accepted.
>
> **We will pay**:
>
> - the **full replacement value** of **your house** at the **situation**; or
> - the **full replacement value** of **your house** on another site **you** choose. This cost must not be greater than rebuilding **your house** at the **situation**; or
> - 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; or
> - the **present day value**;
>
> As shown in the **certificate of insurance**.
>
> **We** will only allow **you** to rebuild on another site or buy a house if **your house** is damaged beyond economic repair.
>
> **We** will also pay for all costs and expenses incurred by **you** with **our** approval in defending claims under liability protection plus any costs awarded against **you**.
>
> **In all cases:**
>
> …

- **we** have the option whether to make payment, rebuild, replace or repair **your house**;

…

- **we** will pay architects', engineers' and surveyors' fees in respect of the rebuilding or repairs where authorised by **us**;

- **we** will pay the costs of demolition and removal of debris including the contents;

…

We are not bound to:

…

- pay more than the **present day value** if **you** have **full replacement value** until the cost of replacement or repair is actually incurred. If **you** choose not to rebuild or repair **your house** or buy another house **we** will only pay the **present day value** and the reasonable costs of demolition and removal of debris including contents;

…

MEANINGS OF WORDS

…

- ***Full replacement* value** means the costs actually incurred to rebuild, replace or repair **your house** to the same condition and extent as when new and up to the same area as shown in the **certificate of insurance**, plus any decks, undeveloped basements, carports and detached domestic outbuildings, with no limit to the sum insured.

…

- ***Present day value*** means the cost at the time of the loss or damage of rebuilding, replacing or repairing **your house** to a condition no better than new and up to the same area as shown in the **certificate of insurance**, plus any decks, undeveloped basements, carports and detached domestic outbuildings, less an appropriate allowance for depreciation and deferred maintenance, but limited to the market value of the property less the value of the land as an unoccupied site.

Issue one - Does Tower have the right to reinstate instead of paying cash?

[34] I say at the outset that this question requires little discussion now – it clearly can be answered in the affirmative. And, it is a matter which as I see it can hardly be queried. The express terms of the policy provide for reinstatement as an option, and

vest that option in Tower's discretion. In addition, beyond the policy terms, I was referred to multiple authorities which support Tower's position.[2]

[35] And, in the recent Supreme Court decision in *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* the Court began its discussion there of Tower's rights under its Tower insurance policy by referring to the "heightened moral hazard" created by replacement value insurance and said: [3]

> The associated risks can be mitigated by insurers in various ways, including by policies (a) providing insurers with the option of reinstating the property, and (b) limiting replacement value recovery to reimbursement of expenditure incurred by the insured. In the latter case, it is open to an insurer to require actual reinstatement or replacement by the insured, on a new for old but otherwise like for like basis, as a precondition for paying out anything above indemnity value. It will be noted that options (a) and (b) in cl 2 of the policy proceed on this basis. A review of the cases and literature shows that conditions of this sort are commonplace in replacement value insurance policies.
>
> …
>
> [28] In writing replacement value policies, *Tower has been content to manage the associated moral hazard using the mechanisms which we have discussed. These come down to its entitlement to reinstate the house or, where it is not prepared to do so, to pay no more than indemnity value except by way of reimbursement for expenditure actually incurred*. Once Tower has opted to make payment, its obligations are solely monetary in character and, providing the insured actually incurs the expenditure for which it is entitled to reimbursement, Tower should be indifferent to the mechanism by which Skyward triggers its right to replacement value recovery.

[36] I therefore accept as beyond contention that, under the policy, Tower has, amongst other things, the right to reinstate or make a cash payment, and the choice between those options rests in its hands.

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2 *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2013] NZHC 1856 at [40]; *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2014] NZCA 76, [2014] 2 NZLR 713 at [37]; Robert Merkin (ed) *Colinvaux's Law of Insurance* (9th ed, Sweet & Maxwell, London, 2010) at [10-040]–[10-041]. See too *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262 at [180].

3 *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [26] and [28] (emphasis added).

Issue two - Has Tower made an election to settle by payment of the claim by cash, at replacement value?

(a) What is an election?

[37] The concept of election arises in many contexts.[4] Its fundamental premise is that where a party has an option as between two or more inconsistent rights, when he or she selects one of them, that decision is irrevocable and there can be no resiling, as the other options irretrievably disappear from the moment the election is made.[5] In this situation he or she has elected a preference. Before the Court will infer the existence of an election however, there must be clear evidence, which permits of little equivocation on behalf of the party in whose favour the power is vested.

[38] In the insurance context, there is a considerable body of commentary and law dealing with the concept of election. In *Colinvaux's Law of Insurance in New Zealand*, a summary of the position is set out:[6]

> A reinstatement clause may confer upon the insurer the right to pay an indemnity or to reinstate. In that situation the choice of which route to follow is entirely that of the insurer, although the mere fact that the insurer has that choice and exercises it in favour of payment does not mean that it has the further right to choose the measure of indemnity from a range of options under the policy: in the absence of clear language which specifies the measure of indemnity if there is no reinstatement, such an option is for the assured.
>
> …
>
> Once an insurer has determined either to reinstate or to pay, the election is binding on both parties and the insurer cannot change its mind simply because the election has proved to be an unwise one. The selection of one alternative remedy necessarily constitutes an abandonment of the other.

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4 One immediately obvious context is in the law of remedies, as between certain equitable and common law remedies. On this, see Peter Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013) at [2.4].

5 This derives from the maxim *quod semel pacuit in electione, amplius displicere non potest*, which translates to "that which in making his election a man has once decided, he cannot afterwards disavow": Brian Garner (ed-in-Chief) *Black's Law Dictionary* (10th ed, Thomson Reuters, St Paul, Minnesota, 2014) at 1954.

6 Robert Merkin and Chris Nicoll (Gen eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, New Zealand, 2014) at [8.5.2(1)]–[8.5.2(2)] (citations omitted). See too the New Zealand text which pre-dated the New Zealand version of Colinvaux's, AA Tarr and JR Kennedy *Insurance Law in New Zealand* (2nd ed,The Law Book Co Ltd, Sydney, 1992) at 231–233.

> An election between competing rights must be unequivocal. Thus where the insurer made a cash offer which was rejected by the assured, the right to elect to reinstate was held to remain open to the insurer.

[39] And, in the online CCH commentary on insurance law it is noted:[7]

> The words or conduct ordinarily required to constitute such an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other. The choice is between inconsistent rights and involves not merely the affirmation of the chosen course but the abandonment of the others. However, less equivocal conduct, only providing some evidence of an election, may suffice if coupled with actual knowledge of the right of election.

[40] Similarly, in *Kelly & Ball Principles of Insurance Law*, the authors remark:[8]

> The insurer's election must be unequivocal. A notice of election is clearly sufficient. However, problems may arise if there is no notice, but the insurer negotiates with the insured to settle a claim. In *Lake v Hartford Fire Insurance Co Ltd* [1966] WAR 161, a comprehensive motor vehicle policy gave the insurer an option to repair the insured vehicle. The vehicle was severely damaged in an accident, and the insurer offered to settle the claim for £400 less an excess of £10. The insured rejected the offer. Subsequently, the finance company which provided finance in respect of the vehicle repossessed it. The insurer, unaware that the vehicle had been repossessed, authorised its repair for £305. The insured then sued for the full amount due under the contract.
>
> A majority of the Full Court (Neville and Jackson JJ) took the view that the insurer's conduct amounted to an election to pay the claim rather than to reinstate the vehicle. Jackson J drew a distinction between an attempt to reach an amicable settlement of the claim, on the one hand, and negotiations that clearly proceeded on the basis that a money amount would be paid, on the other. In the latter case, there was an election which bound the insurer. Wolff CJ dissented. All the insurer had done was to indicate the basis on which it was prepared to settle the claim. That could not amount to an election. An election would only occur if the insurer took some step which was inconsistent with a right to reinstate, such as disposing of the salvage or submitting the question of quantum to arbitration. The approach taken by Wolff CJ seems to be preferable.

[41] The topic is also given brief consideration in *Insurance Law: Doctrines and Principles*, where the authors state:[9]

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7 *Australia & New Zealand Insurance Commentary* (online looseleaf ed, CCH) at [19-300].

8 David St L Kelly and Michael Ball *Kelly & Ball Principles of Insurance Law* (online looseleaf ed, Butterworths) at [12.0140.1].

9 John Lowry, Philip Rawlings and Robert Merkin *Insurance Law: Doctrines and Principles* (3rd ed, Hart Publishing, Oxford, 2011) at 345 (citations omitted).

> If the policy provides that the insurer has the option to either pay insurance moneys to the insured or require him to reinstate or repair, the insurer must make an election. The election must be made within the period fixed by the policy, or if none is stipulated, within a reasonable time of the claim. The insurer must communicate its election to the insured in unequivocal terms; and once an election is made, it is irrevocable. Merely making an offer to settle by way of payment may be viewed as a mere negotiation step and will not necessarily pre-empt the insurer from subsequently making an election should the offer be rejected by the insured. In practice the election is communicated by the insurer informing the insured of its intention to reinstate or, conversely, of its intention to pay insurance money.

[42] More comprehensive treatment is detailed in *MacGillivray on Insurance Law: Centenary Edition*:[10]

> **Reinstatement clause.** The usual form of reinstatement clause gives the insurers an option to pay a money indemnity or to restore to the assured in specie the property damaged or destroyed. …
>
> …
>
> **Notice of election.** If the insurer wishes to reinstate he must give the assured unequivocal notice that he intends to exercise his option. If the policy does not stipulate a period within which the notice must be given, it must be given within a reasonable time to the assured or his agent having authority to receive such notice on his behalf. …
>
> **Election to pay or reinstate.** Once the insurer has made his election he is bound by it and cannot thereafter change his mind. But it may often be difficult to say whether conduct of any kind by the insurer constitutes an election. …
>
> ... [I]t is not easy to lay down any general principles as to what conduct constitutes an election, since in each case it is a question of fact. However, a court would be reluctant to hold that an insurer had exercised an election by conduct unless it was satisfied that the insurer had all the available information before him on which to decide which of the two courses was more advantageous to him. In particular, a mere offer to settle by payment of a certain sum of money will probably not of itself be an election to pay if that offer is refused. Insurers would, however, be wise to state that any such offer was made without prejudice to their right to reinstate.

[43] *Colinvaux's Law of Insurance* essays the position in these terms:[11]

> **Exercise of right of election.** An election between competing rights must be unequivocal. If there is any ambiguity in the insurer's intentions, the

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[10] John Birds, Ben Lynch and Simon Milnes *MacGillivray on Insurance Law: Centenary Edition* (12th ed, Sweet & Maxwell, London, 2012) at [22-002]–[22-004] (citations omitted).

[11] Robert Merkin *Colinvaux's Law of Insurance* (10th ed, Sweet & Maxwell, London, 2014) at [10-074] and [10-077] (citations omitted).

> option may be treated as not having been validly exercised and the insurer is free to change its mind. …
>
> **Time for exercise of election.** The policy may stipulate a time within which the insurers are to determine whether to pay or to reinstate; in the absence of any such provision the insurers doubtless have only a reasonable time in which to make up their mind, an obligation classified in Australia as one flowing from the obligation of the insurers to act with the utmost good faith but in England probably as an implied term. …

[44] Counsel for Tower also referred me to *The Law of Insurance Contracts*, which provides:[12]

> **29-2A The Act of Election**
>
> Election, to reinstate or not, must be made within a reasonable time. Whether by word or by act, election must be unequivocal and it must be communicated to the person affected. The election must be made with knowledge not only of the right to elect but also of the facts affecting choice. A court will be slow to see a move to investigate the nature and extent of the loss claimed as an act of election. Election usually occurs when the insurer indicates to the claimant that he intends to reinstate rather than to pay insurance money or vice versa. However, an initial offer of money by the insurer may be seen as a first move in negotiations and does not rule out a later election to reinstate, if the initial offer is refused.
>
> …
>
> **29-2B The Effect of Election**
>
> The effect of election is that the insurer "is in the same position as if he had originally contracted to do the act which he has elected to do". Election "does not constitute a fresh contract between the insured and the insurer, but the policy relates back and will be read as if it had originally been one simply for reinstatement". An election once made is said to be irrevocable.

[45] This position solely as it relates to insurance does not, however, adequately address the nature of election simpliciter. I do not think that the position need be taken much beyond the plain meaning of the words. An election is a choice – as between inconsistent rights only one can prevail. Reduced to its essence, it is the legal manifestation of the idiom "you can't have your cake and eat it". However, there is authority that seeks to guide. In *Scarf v Jardine*, Lord Blackburn stated:[13]

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose

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12 Malcolm Clarke (ed) *The Law of Insurance Contracts* (6th ed, Informa, London, 2009) (citations omitted).

13 *Scarf v Jardine* (1882) 7 App Cas 345 (HL) at 361–362.

> one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act - I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way - the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

[46] In *Victoria v Sutton*, the High Court of Australia stated the position shortly:[14]

> The true nature of "election" is the confrontation of the person electing with two mutually exclusive courses of action between which a choice must be made, for example, to terminate or keep a contract on foot.

[47] The High Court of Australia addressed this concept in *Agricultural & Rural Finance Pty Ltd v Gardiner*, where it was said:[15]

> [58] The doctrine of election is long established at common law. As Jordan CJ pointed out in *O'Connor*, "[s]ince the days of the Year Books it has been recognised that you cannot have the egg and the halfpenny too". If, then, something happens which gives rise to the existence of two alternative rights, and one of those rights is satisfied, the other is no longer available. A breach of contract by one party always gives the other party a right to recover damages for the breach. If serious, the breach will give the innocent party the right to treat the contract as at an end. But the innocent party need not accept the repudiatory breach and avoid the contract; the innocent party may choose to insist upon further performance. And as *Craine* shows, the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot.

[48] An Australian text also deals with the topic of election, Handley's *Estoppel by Conduct and Election*.[16] For convenience, I replicate the relevant excerpts of that text:[17]

> There are four distinct doctrines of election in English law, election between rights, election between estates, election between remedies and election in procedure. Decisions on one of the doctrines should not be relied on for another. An election between rights occurs where the elector has alternative and inconsistent rights against the same person, or different persons. …
>
> **Election between inconsistent rights**

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14 *Victoria v Sutton* [1998] HCA 56, (1998) 156 ALR 579 at [40].
15 *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 (citations omitted).
16 KR Handley *Estoppel by Conduct and Election* (Sweet & Maxwell, London, 2006).
17 At 229 (citations omitted).

> Although a legal right normally subsists until discharged by performance, release or lapse of time one of two sets of alternative and inconsistent rights can be extinguished by the unilateral election of their holder. A person entitled to alternative and inconsistent rights will have to make a choice at some stage or the law will make it for him. The need to choose does not arise until he has sufficient knowledge of the facts, but he is not then bound to elect at once. He may keep the choice alive until he makes it or loses it by estoppel or delay. The best general statement of the doctrine is that of Stephen J of the High Court of Australia. There is no comparable statement by an English Judge although a mosaic to this effect could be made from English cases. [In *Sargent v ASL Developments* Ltd (1974) 131 CLR 634 at 641–642] [h]e said:
>
> > The doctrine of election as between two inconsistent legal rights is well established, but certain features are not without their obscurities. The doctrine only applies if the rights are inconsistent … and it is this … which explains the doctrine; because they are inconsistent neither … may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence …
> >
> > In many instances what may pass for an application of the doctrine is, in truth, but the inevitable consequence of the party's conduct, a consequence that would follow even if no such doctrine existed. Thus in the common sense of avoidance of a contract for breach it is not any doctrine of election that prevents the avoiding party … from enforcing the contract but … the fact that the contract has, by his act of avoidance, ceased to exist. … On the other hand, if he chooses … to keep the contract on foot and sue for damages … recourse must be had by the other party either to election or, if the facts will support it, to an estoppel if that breach should later be … relied upon … to avoid the contract. …
> >
> > For the doctrine to operate there must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election. …
> >
> > An elector must at least know of the facts which give rise to those legal rights, as between which an election must be made; without that knowledge the doctrine of election will not be available to make irrevocable his choice of one particular right, although in appropriate circumstances an estoppel may still arise which produces that very consequence.

[49] Ultimately, the issue of whether an election has been made is an inherently factual inquiry. While each case stands or falls depending on the features unique to the dispute, it is nonetheless useful to consider how the principles outlined above have been applied in various contexts. I will start with the position in the United Kingdom.

[50] In *Sutherland v Sun Fire Office*, an Edinburgh-based stationer effected a policy of fire insurance over his stock in trade.[18] The terms of the policy granted the insurer the option of settling any claim by payment or reinstatement. A fire occurred on the night of 12 April 1851, with the insured giving notice to the insurer on 13 April 1851. A detailed claim followed on 24 April, alleging the insured's total loss at about £1,300. On 10 May, the insurers offered to settle the claim by cash for £500, which was rejected by the insured.

[51] On 19 May, agents of the insurer wrote to the insured stating that his claim was so extravagant as to preclude amicable settlement, and were prepared to settle by arbitration provided by the policy. The insured declined to arbitrate, which was met by a response from the insurers stating that they would reinstate. The assured commenced the action, seeking £1,200, alleging that the insurer's right to reinstate had been lost through election.

[52] Lord Probationer Anderson delivered the first judgment of the Court of Sessions:[19]

> It appears to me that the case turns very much on the 10th clause of the memorandum on the back of the policy. That clause is quite unqualified and absolute; there is no limitation as to time; it does not say that the Insurance Company will forthwith declare their option, but generally reserves the right of reinstatement in preference to payment.

[53] The Lord President next pronounced on the matter:[20]

> It is contended, on the part of the pursuer, that the Company are not now entitled to reinstate; that they have lost their right through delay, and by having entered into a transaction with a view to settlement in another way. All that the Lord Ordinary has found is, that the Company have not lost the right to reinstate. That is the amount to which he has sustained the defences.
>
> It does not appear to me that the facts set forth on the part of the pursuer are such as, assuming them to be as he states them, exclude the right of the Company to reinstate. It does not appear to me that the valuation founded on by the pursuer imported any waiver of the right to reinstate. It was gone into before the pursuer had made his claim, which he was called on to do in terms of the policy. It was necessary, both to enable the pursuer to make his claim, and to enable the Insurance Company to judge whether they would proceed to reinstate or to settle by payment. Till they received the claim and the

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18 *Sutherland v Sun Fire Office* (1852) 14 D (2d) 775 (IH (1 Div)).
19 At 777.
20 At 778.

> valuation, it was impossible for them intelligently to exercise their right of election.

[54] Lord Cuninghame added:[21]

> The only question now raised is, whether the Insurance Company, by what took place immediately after the fire, lost their option of restoring the premises, and became bound to pay the loss in money, as it might be ascertained. I see nothing in the case to sanction such a conclusion. The parties first appointed mutual valuators for the purpose, as admitted by the pursuer himself, of ascertaining the condition of the stock and the apparent amount of the loss. That was necessary and expedient in whatever way the loss was afterwards to be compensated, and it was just as necessary if the premises were to be restored, as if the loss were to be paid in money. Till that preliminary inquiry took place, both parties were in the dark.
>
> Hence, the mere act of the defenders consenting to the appointment of neutral men to report on the loss, was not equivalent to a discharge of the option, or anything like it.

[55] *Scottish Amicable Heritable Securities Association v Northern Assurance Co* involved the proprietors of mills and machinery.[22] In fulfilment of obligations undertaken pursuant to a loan agreement, the proprietors insured the property over which the loan was given against fire, for £9,000, under four different insurance policies. A fire subsequently occurred, causing loss alleged to be around £6,500. Each of the policies contained a clause stating (or substantially similar to):[23]

> The company may, if it think fit, reinstate or replace property damaged or destroyed instead of paying the amount of the loss or damage, and may join with any other company or insurer in doing so in cases where the property is also insured elsewhere.

[56] Substantial correspondence passed between the interested parties, represented by the manager of the Heritable Securities Association and the secretary of the Northern Assurance Company (who, as largest insurer (with £3,165 of liability), was permitted to represent the interests of all four insurance companies). The correspondence culminated with Heritable Securities Association asking the insurance companies to make payment of £5,388, "or to reinstate the buildings and machinery".[24] The alternate demand was repeated on multiple occasions, without

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21 At 779.

22 *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287 (IH (2 Div)).

23 At 288.

24 At 288.

any notice being taken on behalf of the insurance companies to suggest reinstatement.

[57] Eventually an action was raised against the insurance company, seeking judgment in the sum of about £6,500. The Heritable Securities Association pleaded, inter alia:

> The defenders not having timeously exercised their option to reinstate the premises, and, *separatism*, having waived the same, and elected to make good the loss in money, are barred from now offering reinstatement.

[58] In determining the case at first instance the Lord Ordinary said:[25]

> … the defenders, by negotiating with the pursuers for a reference of the question of damages to arbitration under the arbitration clause of the policy, have elected to make compensation in money, and are not now entitled to exercise the power of reinstating …

[59] Lord Craighill first addressed the question of whether the insurers retained the right to reinstate:[26]

> My opinion is, that this point has been well decided by the Lord Ordinary. The correspondence between the parties satisfies me that the defenders elected to settle in money for the loss covered by the policies, and the result necessarily is, as the Lord Ordinary has determined, that they are bound by this election, and consequently cannot, despite the pursuers' opposition, betake themselves to the alternative, which they by the terms of the policies might originally have adopted, of rebuilding and refitting the portion of the premises which the fire destroyed.

[60] Turning to the position in Australia, the first of the leading cases is *Lake v Hartford Fire Insurance Co*.[27] In that case the appellant had insured a motor vehicle for £500, which he held under hire purchase agreement. When the motor vehicle was extensively damaged, Hartford Fire Insurance wrote to the appellant stating that it was not economical to repair the vehicle, but that it was prepared to pay the sum of £390, being the average of several pre-damage estimates of the vehicle's value. That offer was rejected by the appellant, who sought the full amount under the policy less a £10 franchise fee. This resulted in the insurer repossessing the vehicle and having

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25 At 291.
26 At 292.
27 *Lake v Hartford Fire Insurance Co* [1966] WAR 161 (WASC).

it repaired for £295 10s. 1d. The appellant brought proceedings claiming that the respondent had made an election to pay.

[61] Wolff CJ first delivered judgment and said relevantly:[28]

> While the fact that the appellant did not agree is not conclusive in favour of the respondent on the question of election, it is nevertheless important in considering whether in the circumstances the respondent had in fact made an election. Election does not necessarily depend upon agreement of the parties. It is a unilateral act. The insurer is entitled to make its own decision, which once made cannot be revoked. Mere abortive negotiations for an amicable arrangement on a basis of total loss or of reinstatement are not conclusive. … I think one should look for some unequivocal act on the part of the insurer which commits him to his choice under the policy. Such an act, for example, would be the insurers disposing of the salvage, or in case of a claim for reinstatement submitting the question of the amount payable in respect of the loss to arbitration. Here all that the insurer did was to indicate a willingness to settle on the basis of total loss if the appellant agreed.

[62] Jackson J also made insightful remarks on the topic:[29]

> The doctrine of election between two modes of performance of an insurer's obligation under a policy of insurance in respect of loss of or damage to property, where the policy gives the insurers the option, on the one hand, to pay the loss or, on the other hand, to reinstate the property or repair the damage, is well recognised in insurance law and is acknowledged by all the textbooks. … It is thus really an instance of the broad common law doctrine of election … As applied to an insurer's option to pay the loss or to reinstate or repair, the doctrine is that the insurer is free to decide what he will do, and, unless a time is fixed by the policy, he has a reasonable time within which to come to his decision. He may make a decision expressly or it may be implied from his conduct. … Once the insurer has exercised his discretion one way or the other, he is bound by it and cannot later change his mind if he finds his decision to be an unwise one.

[63] There the Court held that the insurer decided to settle the claim by a money payment on the basis that the vehicle was a constructive total loss and that it was not an economical proposition to repair.[30]

[64] The next material case is *General Accident Insurance Asia Ltd v Sakr*, where the New South Wales Court of Appeal grappled with the concept.[31] The respondents

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28 At 163.
29 At 166.
30 At 167.
31 *General Accident Insurance Asia Ltd v Sakr* [2001] NSWCA 402, (2001) 11 ANZ Insurance Cases 61-508.

had taken out insurance with the appellant (then known as NZ Insurance Australia Ltd) in 1994 for building cover, loss of rent cover, and public liability cover in respect of two properties situated in Dubbo, Australia. There were several renewals, all of which stated that the use of the premises was one hairdresser and one sandwich shop. In fact, the sandwich shop had fallen vacant in December 1994 and the hairdresser's premises suffered the same fate in July 1995, from which time the properties had been unoccupied.

[65] On 27 September 1997, the property was damaged by fire. The respondents claimed under the insurance policy. The insurer responded to the claim by declining to pay on the basis that the premises had been unoccupied since "December of 1995". Subsequent correspondence did little to ease the deadlock between the parties. Eventually the respondents issued proceedings, and obtained judgment for $104,000 plus interest of $28,080.

[66] A tangential issue arose as to election. This was dealt with expeditiously on the facts:[32]

> In the present case the option to reinstate, replace or repair can be put aside. In the letter of 24 December 1997 the loss assessor said that the basis of settlement would be "based on the cheapest quotation which has been submitted by Mr Neil O'Connor". This excluded the option of reinstatement, replacement or repair. As I have said, the appellant in opening accepted payment of the value of repairs as the better method of assessment, and the appellant did not submit to Delaney DCJ, or on appeal, that the amount it had been obliged to pay was or turned on the cost to it of reinstatement, replacement or repair if it had chosen to reinstate, replace or repair.

[67] Australian decisions on this election issue include a decision of the Queensland Court of Appeal in *QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd*.[33] This case concerned a claim made by the respondent in relation to a Cessna 208 aircraft which ditched at sea on 8 February 2004 and was recovered 42 hours later. It was insured for AUD $1,800,000. At first instance, the trial judge

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32 At [56].

33 *QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd* [2011] QCA 60, [2012] Qd R 158. In this case several relevant decisions were referred to: *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26; *Ballas v Theophilos* [1958] VR 576.

rejected the insurer's stance that it had validly elected to repair the aircraft, in reliance on three letters that it sent to the insured. Clause 1(a) of the policy provided:[34]

> The [appellant] will at its option pay for, repair, or pay for the repair of, accidental loss or damage to the Aircraft described in the Schedule.

[68] After traversing the relevant letters, and the law germane to election, the Court of Appeal concluded that there had been no valid election to repair under the policy. This decision reversed the decision of the Queensland Supreme Court.[35] However, the comments of that Court remain apposite:

> [120] But it is also clear that a party purporting to make an election can only make a choice between the suite of options available under the relevant contract. In a case such as the present, where a suite of choices is available, the electing party is plainly limited in its range of choices. A purported election by it of an option which is not within the available range is no election at all.

[69] Next, I turn to consider the position here in New Zealand. The principal decision I will consider for present purposes is *Skyward Aviation 2008 Ltd v Tower Insurance Ltd*.[36] That case concerned a house which Skyward had purchased in 2009 in Christchurch and insured with Tower. The house was destroyed during the Canterbury earthquakes in September 2010 and February 2011. The parties disagreed about whether, inter alia, Tower had made an election as to how it would settle Skyward's claim under the policy. It was Skyward's position that Tower elected to make a cash settlement based on the full replacement value.

[70] Skyward sought to rely upon a series of emails to support its contention that Tower had made an election. However, the settlement offer, as in the present case, was not one of the options strictly available under the policy. In that case I concluded:

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34 At [3].

35 *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313.

36 *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2013] NZHC 1856, affirmed on the point of election [2014] NZCA 76, [2014] 2 NZLR 713 at [50]–[52]. Other New Zealand decisions dealing with the concept of election in the New Zealand context include *Bowes v National Dire and Marine Insurance Co of New Zealand* (1888) 7 NZLR 27 (SC); *Robson v New Zealand Insurance Co Ltd* [1931] NZLR 35.

> [117] As the decision in *Cape York* notes, a party purporting to make an election under a policy can only make a choice between the suite of options available to it under that contract. The offer made by Tower here, as I see it, was not the choice of a direct option under the policy and, as such, simply could not have constituted an election. Looked at in this way, the offer from Tower might be seen here simply as part of settlement manoeuvring, which could not amount to an election to pay or reinstate under the policy.

[71] From the foregoing, an attempt to elucidate some general principles applicable to the concept of election as I see it might be formulated in these terms:

(a) election is an irrevocable act between two or more inconsistent rights that must be unequivocal, unqualified and communicated to the other party;

(b) the assessment as to whether there has been an election is evaluative in nature, drawing upon the entire factual matrix of the particular case;

(c) an election can be made either by words or conduct. The test is whether the reasonable bystander would consider the totality of the actions of the party entitled to elect meet the threshold of election;[37]

(d) the electing party must be apprised of all relevant facts and information such that it is in a position to make an informed election;

(e) the act is unilateral and needs no agreement from the insured – the responsibility for making an election therefore rests solely upon the party entitled to do so, including the requirement to do so in a timely manner;

(f) a mere offer to settle a claim without more will not ordinarily amount to an election;

(g) the making of inquiries by the insurer, even where it creates expectations upon the insured, will not ordinarily amount to an election; and

(h) the party entitled to elect has only a reasonable time in which to make their election before the law will make it for that party.

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[37] *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 782.

[72] Finally, I observe it is often said that where the doctrine of election has application, there must be a choice between one of the options, and not some option not provided for in the relevant instrument. This is strictly true under the operation of the doctrine of election alone – one cannot elect that which does not exist. There seems to be, however, nothing objectionable in principle for the doctrine of waiver to run alongside election to achieve, in combination, what each alone cannot. For example, there could be an election to reinstate, coupled with a waiver of the requirement that actual rebuild or repair costs are incurred. This method would permit of full recovery of the rebuild sum in a money payment.[38] But, in the present case, waiver is not pleaded by Domenico.

[73] It has been noted that there is a certain ambiguity with the concept of waiver and the extent to which it and election are one and the same.[39] However, I use the term waiver in this sense to be an unequivocal disavowal of a strict right under the policy. Further, for my part, I consider the two concepts, that of election and waiver, to be masters of their own dominion. As I have said, an election is a choice between two or more inconsistent rights. While an election does, in the ordinary sense of the term, require the electing party to waive the other options, it is distinct from a waiver in relation to a condition attaching to an extant right.[40] Alternatively, the two concepts have been categorised as "waiver by election" and "waiver by estoppel" respectively.[41]

[74] As I need take this concept no further in the present case, due to the way it has been pleaded and presented, I end this discussion with the observations of Robert Walker LJ in *Oliver Ashworth Ltd v Ballard Ltd*:[42]

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38 I note that this is effectively what Domenico seeks in this case, though pleaded incorrectly. It is, however, strictly incorrect for counsel for Domenico to assert "All the plaintiff has ever wanted is what he is entitled to under the policy." Domenico in fact wants what it says is its entitlements absent having to fulfil the requirements to obtain them.

39 See *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [50]-[57].

40 As to the concept of waiver see *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 (HL); *Alan (WJ) & Co Ltd v El Nasr Export and import Co* [1972] 2 QB 189 (CA); *Banning v Wright* [1972] 1 WLR 972 (HL). The relevant Australian authorities were collected in *Mowie Fisheries Pty Ltd v Switzerland Insurance Australia Ltd* (1996) 140 ALR 57 (FCA) at 79–80.

41 Piers Feltham, Daniel Hochberg and Tom Leech *Spencer Bower The Law Relating to Estoppel by Representation* (4th ed, LexisNexis Butterworths, London, 2004) at 355, fn 1.

42 *Oliver Ashworth Ltd v Ballard Ltd* [2000] Ch 12 (CA) at 27D–E. For a more detailed review of the concept of waiver refer Sean Wilken and Karim Ghaly *The Law of Waiver, Variation, and*

> [B]efore any detailed consideration of those cases it is necessary to make some general observations about estoppel, election and waiver. All share a common foundation in a simple instinct of fairness and in particular the perception that as between two parties to a transaction or legal relationship it is or may be unfair for one party, A, to adopt inconsistent position in his dealings with the other, B. As Lord Wilberforce said in *Johnson v Agnew* [1980] AC 367, 398: "Election though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity".

[75] For completeness, I record here also that I reject the assertion advanced before me by counsel for Domenico that the FAQ document sent to Domenico has "become part of the suite of choices that Tower can … elect under the policy". This is simply incorrect. The FAQ document is clearly an explanatory document to provide information and to assist insured parties to understand certain processes. Tower was providing this information to many of its Christchurch earthquake claimants, with a view to potential settlement outside the terms of its policies. I repeat that the options mentioned in that FAQ document were plainly outside of the policy. The option in question which Domenico seeks here could only be achieved by Tower waiving its policy right to insist upon actual reinstatement or incurring of the total expense before it would pay increased sums over and above an indemnity amount.

(b) Did Tower make an election?

[76] Having set out the legal position in some detail, I now turn to deal with the question of whether Tower has, as a matter of fact, made an election. For the first time in this proceeding in its amended statement of claim dated 25 August 2014 Domenico raised this allegation and said that Tower made the election particularly in its April 2013 correspondence and then in the August 2014 telephone conversation between Mr Venneman and Mr Da Col. In this respect I need to say at the outset that I am of the firm view that Tower did not, by words or conduct here, unequivocally make an election to make payment or to reinstate. The evidence before the Court simply does not suggest otherwise. At every juncture the discussions between the parties were caveated and interspersed with intimations from Tower that it had not

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Estoppel (3rd ed, Oxford University Press, Oxford, 2012) and Daniel Hochberg and Tom Leech *Spencer Bower The Law Relating to Estoppel by Representation* (4th ed, LexisNexis Butterworths, London, 2004).

made a decision and stood ready and willing to settle by other means under the policy.

[77] The highest the position can be put is that Tower had a desire, and apparently a general interest, in settling this dispute by a payment in cash in order that this claim, like so many others it was facing as a result of the Canterbury earthquakes, could be completed and come off its liability sheet. That said, throughout the entirety of the correspondence between the parties, I am satisfied that Tower made it clear that it stood willing to settle by reinstatement of the house. While this was not something that Domenico desired, Tower never shied away from its willingness to do so. Indeed, when Tower was faced with the claim which it submits was grossly exaggerated by Domenico, its inclination was towards the rebuild option, while at the same time holding out hope that the parties could reach a sensible cash settlement outside the strict terms of the policy.

[78] So, the starting point under this head is that I do not consider on any objective consideration of this matter that it could be concluded that Tower had made an unequivocal election under the policy to settle by the payment of money. Further, as counsel for Domenico has not pleaded waiver, I do not consider the formulation of the claim competent to consider whether there has been here an election to reinstate coupled with a waiver of the requirement that the house actually be rebuilt, or the works undertaken, before Tower becomes liable to pay reinstatement value.

(c) Election through delay?

[79] What I now move to consider is whether Tower's complacency in making an election is such that it can be said nevertheless to have made an election through delay. The concept of delay in the context of election is discussed by Handley:[43]

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[43] KR Handley *Estoppel by Conduct and Election* (Sweet & Maxwell, London, 2006) at 252–25, referring relevantly to *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtgesellschaft mbH & Co* [2002] EWCA Civ 1878, [2003] 1 WLR 1015 (CA) at 1037; *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 35; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL) at 398. See too Sean Wilken and Karim Ghaly *The Law of Waiver, Variation, and Estoppel* (3rd ed, Oxford University Press, Oxford, 2012) at 68–80; Daniel Hochberg and Tom Leech *Spencer Bower The Law Relating to Estoppel by Representation* (4th ed, LexisNexis Butterworths, London, 2004) at 437–440.

> A party entitled to exercise a power of election need not do so at once, and can keep it alive for a time provided he does nothing which exercises it, but the facts may require him to act promptly. An owner with the power to withdraw his vessel for non-payment of hire by a time charterer must exercise it promptly and a hirer with the power to terminate is in the same position. In *The Northern Pioneer* Lord Phillips MR said:
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> > If circumstances arise giving rise to a right to terminate the charter, business efficacy requires that the right be exercised promptly. If the shipowner continues to provide the services of his ship, or the charterer continues to make use of those services beyond such time as would reasonably be needed to react … the inference will normally be that he has decided not to exercise the right…
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> … The general principles applicable in other cases have not changed since *Clough* where the Exchequer Chamber said, dealing with recission for fraud:
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> > … so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating … the position of the wrong-doer is affected, it will preclude him from exercising his right to rescind … lapse of time without rescinding will furnish evidence that he has determined to affirm … and when the lapse of time is great, it probably would in practice be treated as conclusive evidence that he has so determined.
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> As Lord Goff said in *The Kanchenjunga*:
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> > … he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands.

[80] The time for election is also addressed in *Colinvaux's Law of Insurance*, where the authors observe:[44]

> The policy may stipulate a time within which the insurer is to determine whether to pay or to reinstate; in the absence of any such provision the insurer doubtless has only a reasonable time in which to make up its mind. That flows from the obligation of the insurer to act with the utmost good faith. The rights of the assured on the insurer's failure to reach a decision within the relevant time will depend upon the wording of the policy. … [W]hen – as is usually the case – the reinstatement clause confers upon the insurer an option to pay or to reinstate, for here the assured does not have a fall-back entitlement under the policy … [different considerations may arise]. …

[81] Overlaid on top of the notion of delay, of course, is the requirement to settle claims under contracts of insurance with reasonable speed. In New Zealand, the Fair

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[44] Robert Merkin and Chris Nicoll (Gen eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, New Zealand, 2014) at [8.5.2(4)], referring to *K & M Prodanovski Pty Ltd v Calliden Insurance Ltd* [2011] NSWSC 738, affirmed [2012] NSWCA 117, (2012) 17 ANZ Insurance Cases 61-934.

Insurance Code states that insurers will "settle all valid claims quickly and fairly".[45] While that does not, of course, have any strict legal effect, there is authority which supports the same ideal. This issue was recently discussed in *Rout v Southern Response Earthquake Services Ltd*.[46] To me it is trite that insurers should proceed with all due expedition to effect settlement or ultimate resolution upon acceptance of a claim. It is also obvious that settlement cannot occur in a case such as the present until the insurer elects the method of settlement.

[82] It must be remembered that the ultimate decision as to settlement method here, for example, be it by reinstatement or cash payment, is a matter for Tower, and for Tower alone. This is something which Tower itself has sought to highlight. While it is certainly open for Tower to seek input from Domenico regarding its settlement option, Tower cannot let the position remain in limbo indefinitely. It is a most unsatisfactory state of affairs for claims to have been made in September 2010 and February 2011, albeit claims which at one point Tower described as "grossly overstated", with no settlement occurring over three and a half years from the date of the latter claim, and also no election being made.

[83] But in any event, for my part I do not consider it competent for Tower to make no final decision under the policy for such a substantial period of time while simultaneously pleading it has made no election – a ball it not only recognises, but actively asserts, is solely in its court. I therefore consider, by a reasonably fine margin that, as a result of effluxion of time, Tower has made an election to settle this claim by cash payment of indemnity value (present day value under the policy) as a base position. This finding in a way touches on aspects of submissions I received from counsel for Domenico when it was suggested:

> … an election made outside a reasonable time is not an election – the result is the same – that the plaintiff is entitled to cash.

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45 Insurance Council of New Zealand *Fair Insurance Code* (Insurance Council of New Zealand, 2011).

46 *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262. See too *Dome v State Insurance General Manager* (1987) 5 ANZ Insurance Cases 60-835 (HC); *Kerr v State Insurance General Manager* (1987) 4 ANZ Insurance Cases 60-781 (HC); *Stuart v Guardian Royal Exchange Assurance Co of New Zealand Ltd (No 2)* (1988) 5 ANZ Insurance Cases 60-844 (HC); *Fussell v Broadbase Christchurch Ltd* (2011) 16 ANZ Insurance Cases 61-913 (HC).

[84] But, as is plain from the foregoing, I find that this suggestion is incorrect. After a sufficient lapse of time, the law will make the election in substitution for the party. But this is not synonymous with a plaintiff necessarily being "entitled to cash", or a late election not being an "election" at all.

[85] From the date of the last claim in February 2011, Tower had reached no final view as to which election it would make. This continued until as late as August 2014 when Mr Vennemann phoned Domenico seeking to settle the claim by cash payment. This is entirely inconsistent with any suggestion that upon being served with the statement of claim in April 2013 it had made an election to reinstate. I consider that when Tower was met with a statement of claim seeking more than treble its settlement offer in April 2013, it should have taken notice that amicable settlement was unlikely.

[86] Despite this, and no doubt with good intentions, over the next 18 months, facing the spectre of looming litigation, Tower continued to seek to negotiate and settle by a cash payment outside the strict policy terms. Further, from April 2013, Tower was apprised of all material facts necessary to achieve settlement – the only impediment from that time was the impediment of deadlock between the parties.

[87] Generally, a party can only rely for so long on ongoing negotiations as evidence that no election has been made. There comes a point where the law will deem an election and, on the specific facts of this proceeding, but, as I have noted above, only here by a rather fine margin, I find that this time has passed. In reaching this conclusion, I have been cognisant of the unique circumstances which exist in the wake of a substantial natural disaster such as the Canterbury earthquakes and the difficult position Tower was facing here in light of the shifting and perhaps extreme stance taken by Domenico. That said, from February 2013 both parties knew that there was a total loss under the policy. The parties also knew from the end of April 2013 that they were poles apart in their assertions of quantum. Tower endeavoured subsequently and perhaps commendably to bridge that gap but this was unsuccessful and at some point needed to end.

[88] As election is referable to an option under the policy, I consider the election here can only be to pay indemnity value under the policy, unless and until one of the triggers for a higher amount has become operative. The repeated and unsuccessful attempts by Tower to settle the claim by a payment of cash outside the policy terms cannot change that position here. Thus, Tower is liable to make immediate payment to Domenico of indemnity value. If, however, Domenico chooses to rebuild (either on the situation or elsewhere) or to buy another house, Tower's liability will likely increase. This is consistent with the terms of the policy:

> **We are not bound to:**
>
> pay more than the **present day value** if **you** have **full replacement value** until the cost of replacement or repair is actually incurred. If **you** choose not to rebuild or repair **your house** or buy another house **we** will only pay the **present day value** and the reasonable costs of demolition and removal of debris including contents

Quantum

[89] All of the evidence and negotiations in relation to this proceeding was squarely directed at the issue of replacement value. I repeat that I have found, but only by a slim margin here, that through delay, Tower has made an election under the policy terms to settle this claim by payment of cash. However, that election is prima facie one to pay indemnity value (less EQC payments). There is no evidence before the Court as to that value and I am therefore unable to quantify the sum.

[90] The parties are therefore to agree upon quantum of indemnity value (present day value under the policy). Of course, as I have mentioned above, if Domenico seeks to reinstate at the situation, at another situation, or to purchase another house, Tower would still be required to meet its obligations under the policy.

[91] In many ways, therefore, this proceeding has come to nought. Indeed, this is not a claim that ever needed to come before the courts. Between December 2012 and April 2013, it seems to me the parties were in substantial agreement as to the appropriate outcome. In December 2012 Domenico sought "around $240,000 excluding demolition and excluding driveways, fences, paths in order to cover all costs". In April 2013 an offer outside the policy terms of slightly over $254,000 was made. One might wonder why this saga did not end there.

[92] Nonetheless, the matter continued, with what Tower considered, and what it would appear has ultimately transpired to be, grossly exaggerated estimates of loss along the way until trial, when the parties agreed (for the sake of the proceeding) that the replacement value was $370,000. In August 2014, it would seem that Domenico appeared potentially amenable to settlement for slightly less than $364,000. Around this time the parties were virtually in agreement. In the face of all common sense, the matter did not settle and proceeded to trial.

[93] One might also sensibly question the reasons for this matter proceeding to trial in light of the later direct agreement reached on quantum in February 2015. The absurdity is highlighted further by comments in the closing submissions from counsel from Domenico that:

> The parties are agreed to the remediation strategy and the only other outstanding issue was quantum.

[94] Plainly, a week before trial quantum was no longer in issue. The parties agreed, on the strength of the finally agreed expert evidence, that replacement cost would be $370,000.

[95] This proceeding has reached a point with my decision in this judgment which I suspect no party strictly sought or, it seems, truly wanted. In the end it is only a starting point. If Domenico incurs actual and reasonable rebuild costs, this judgment does not preclude Tower's liability for such increased costs. Equally, this result means that Tower's liability to Domenico is only partially resolved. Despite the strict outcome of this judgment, it therefore remains open to the parties to come together and reach a pragmatic settlement, which would more closely approximate each of their desired outcomes. This is entirely possible given how close the parties are on the issue of quantum, but I leave that in their hands.

Outcome

[96] This claim as finally advanced by Domenico strictly speaking has not succeeded. But, through delay, I have found here that Tower has made an election to settle by way of a cash payment in terms of the policy. That payment initially, is fixed at this point at indemnity value. That is the only option prescribed under the

policy for a cash payment. But I am unable to fix quantum on that finding due to a dearth of evidence on this aspect before the Court.

[97] If Domenico chooses to reinstate at the situation, to reinstate at another situation, or to purchase another house, Tower's liability may increase in terms of the provisions in the policy. As at the date of judgment, Tower's maximum possible liability under the policy would seem to be $370,000.

Costs

[98] There has been no true victor in this proceeding. Tower has resisted the claim as advanced on the strict terms finally put forward by Domenico. However, on the principle of election as pleaded, but upon a wholly different basis, I have found there to be an election by Tower.

[99] Costs here are reserved. If the parties cannot agree on this question of costs, they may file memoranda in accordance with the following timetable:

(a) Domenico within 20 working days of this proceeding (such memorandum not to exceed 7 pages); and

(b) Tower within 20 working days following receipt of Domenico's memorandum (such memorandum not to exceed 7 pages).

[100] I will then deal with the issue of costs on the papers, unless either party indicates they wish to be heard on the matter.

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Gendall J

Solicitors:
Grant Shand, Auckland
Gilbert Walker, Auckland