IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000222
[2016] NZHC 2956

BETWEEN	GREGORY PETER YOUNG AND MALLEY & CO TRUSTEES LIMITED AS TRUSTEES OF THE MCARA YOUNG TRUST Plaintiffs
AND	TOWER INSURANCE LIMITED Defendant

Hearing: 29 August-2 September, 5-9 September & 14 October 2016

Appearances: P F Whiteside QC and H T Shaw for Plaintiffs
M C Harris and ATB Joseph for Defendant

Judgment: 7 December 2016

JUDGMENT OF GENDALL J

Table of Contents

Para No

Introduction [1]

Factual background [4]

Mr Sinclair instructed [31]

The Policy [41]

Approach to interpreting the policy [43]

The plaintiffs' claims [47]

The defendant's response [48]

Issues [50]

What is the extent of earthquake caused damage? [50]

Is Tower's repair strategy commonly used at the time of loss or damage? [54]

(a) What is the repair method/strategy proposed by the defendant? [55]

(b) Is the repair strategy proposed a construction method commonly used at the time of the earthquakes? [68]

In the alternative, if the repair strategy is one commonly used, is the damage economically repairable? [82]

(a) Will the proposed repair strategy work and return the house to an as new condition? [83]

(b) The economic viability of the repair strategy? [100]

Has Tower made an election to cash settle the plaintiffs' claim? [122]

Rebuild cost? [129]

General and exemplary damages claim [145]

Exemplary damages [147]

General damages [151]

Relief sought [178]

Result [186]

Costs [190]

Introduction

[1] This is a claim brought by the plaintiffs who have a residential property on the Christchurch hills insured through Tower Insurance Limited, the defendant company, which was significantly damaged as a result of the Canterbury earthquake sequence in 2010 and 2011. Initial claims were made under the insurance policy, in particular after the 22 February 2011 event. A significant issue in the present case is whether the defendant has established that the plaintiffs' property can be repaired to the standard required under the insurance policy by adopting a repair strategy put forward by an engineer instructed by the defendants which the plaintiffs contend is a method untried for hill homes in Christchurch or anywhere else in New Zealand.

[2] The defendant maintains the plaintiffs' home is economically repairable in terms of this repair strategy. The plaintiffs' position is that this is not the case, the house is damaged to such an extent that it is a rebuild, and in addition the defendants have elected here to make a cash settlement under the policy. The plaintiffs' claim here also seeks exemplary and general damages from the defendant.

[3] Sadly, I need to say at the outset that, since the time the plaintiffs' initial insurance claim was made in 2011, the relationship between the parties has deteriorated to such an extent that many allegations and counter allegations have flowed between them. A core thesis of the plaintiffs it seems is that the defendant has sought to foist upon them a repair knowing that it fell short of their policy entitlement and further, that the defendant deliberately engaged and promoted experts first, to reject the view that a rebuild was necessary and appropriate here and secondly, to prove that the house had not moved to any significant extent. As I have noted, as a result, exemplary and general damages are sought by the plaintiffs. All these allegations are strongly disputed by the defendant which, in turn, raises issues of what it alleges is the entirely unacceptable and unprofessional behaviour of the first-named plaintiff in particular unjustifiably attacking the position and reputation of the defendant and a number of its appointed experts.

Factual background

[4] The plaintiffs are the trustees of the McAra Young Trust. The Trust owns the residential home in question which is situated at 6 Craigieburn Lane, Mt Pleasant, Christchurch (the property). The property is occupied by beneficiaries of the Trust, the Young family. The house at the property was designed by the first named plaintiff, Mr Gregory Peter Young (Mr Young), who is a registered architect. The house was constructed over four levels on a steep section facing east, and was completed in March 2007. Mr Young moved into the house at the time with his wife and their young family. The property was insured with the defendant, under a policy described as Tower's "Provider House (Maxi Protection) Policy".

[5] The policy it appears was issued in the names of Mr Young and his wife, although the property itself, as I have noted, is actually owned by the trustees of the McAra Young Trust. Before me, no issue was taken as to this however. Matters proceeded on the basis, and it was accepted, first, that the property was properly insured through the defendant and, secondly, in terms of process, the claims brought under the policy were appropriately made.

[6] The February 2011 Canterbury earthquake in particular caused substantial damage to the plaintiff's home. This second major earthquake in the Canterbury sequence of earthquakes was centred only 3.8km away from the property. Mr Young was at home at the property working in his architectural studio attached to the garage at the time of the quake. According to him, the earthquake threw his Combi Van motor vehicle, parked in the driveway, eastward about half a metre into a concrete block wall next to the house. An art glass on the lowest level fell off the south wall of the living room with enough force to go through the back of a leather couch situated two metres away. The plaintiffs say the house moved to such a degree that a small gap resulted at the front door of the house between the driveway concrete block retaining wall and the house.

[7] A small landslip occurred underneath part of the house with the earth moving downhill and in part dropping over half a metre at the eastern end of the house. Some earth movement, it is said, has continued until the present time.

[8] As a result of the February 2011 earthquake, it seems the south-eastern corner of the house has settled by up to 116mm and the upper floor levels have moved laterally to the east by 20mm.

[9] Mr Young first made a claim with the defendant on 21 March 2011, about a month after the February 2011 earthquake. He told Tower that the house had moved, stretched and sunk, and had cracks in the walls and driveway. Tower appointed Stream Group ("Stream") (now known as Symetri) in about May 2011 as project managers to investigate.

[10] As I have mentioned above, at a general level the plaintiffs blame the defendant for a number of things. These include allegations of, first, unnecessarily prolonging the Youngs' insurance claim process, secondly, alleged expert consultant shopping, thirdly, not acting in good faith, fourthly, concealing material evidence and fifthly, consistently changing positions to the significant emotional detriment of Mr Young and his family. The defendant strongly denies these allegations and in response it contends that Mr Young in particular has engaged in unprofessional conduct towards Tower and its experts, making scandalous allegations and unreasonable requests in the claim process. The defendant also alleges that Mr Young has himself changed tack throughout on whether a repair or rebuild of the house is necessary.

[11] It does need to be acknowledged that there can be no doubt the 2010/11 Christchurch earthquakes have caused considerable physical, emotional, and financial trauma to many victims, and I include the Young family in this group. However, the defendant also quite properly notes that the plaintiffs' claim was one of over 25,000 earthquake claims made to Tower, since these events. The magnitude of the catastrophe without question created unprecedented challenges for insurers, their customers and a range of experts in the area. The reality the defendant notes is that the engineering expertise required to assess accurately the damage from these earthquakes and to scope reinstatement work was stretched to the point where months-long delays were common.

[12] In light of the nature of the plaintiffs' various claims here, it is useful at this point to turn to consider a number of individual events which occurred in this case after the plaintiffs' initial insurance claim was made. I now do this.

[13] In mid 2011 Stream, as the defendant's project managers, arranged for two floor-levelling contractors to inspect the foundation damage at the house. The first of these was Mr Aaron Birch of Sub Floor Construction who came to the property in June 2011. Mr Young claims that from the time of discussions he had with Mr Birch when he was at the property, he has believed that the house had to be rebuilt. Mr Birch issued a one line assessment in a brief report he issued to Stream on 21 June 2011 following his inspection, stating:

> Recommendations would be to dismantle the building and rebuild reusing as much material as possible and rebuild again from the foundations up.

[14] Controversially, and relevant to issues as to whether Tower may have breached a duty of good faith here, this assessment was not provided to Mr Young or the plaintiffs for over three years, this occurring only on 7 January 2015. Mr Young suggests the defendant deliberated withheld this report from him. The assessment was forwarded to Mr Young by a Ms Susan Summers, an employee of the defendant, he says only "by accident", in the absence of most staff members over a holiday period. On this aspect, the defendant says that Stream had in fact withheld the report from Tower until then as well.

[15] Soon after June 2011, the second floor-levelling contractors' report was provided to Stream. This was from Russell Grace Consulting and was dated 12 July 2011. Mr Grace was engaged by Stream and also visited the property. His report was considerably more extensive than Mr Birch's and produced more detailed advice. It indicated that in Mr Grace's view, the foundations of the house could be repaired. It provided a detailed description of the foundation damage and outlined a repair methodology. Mr Grace also suggested at the time that he understood Mr Young did not regard the house then as being damaged beyond repair.

[16] Then, in August 2011, the defendant engaged Engineering Design Consultants (EDC), structural engineers, to visit the property. EDC reported that the

house had generally retained structural integrity, that it remained suitable for habitation, and that the damage was repairable. EDC advised that: access to the subfloor to re-level the foundation could be gained, once the foundation was re-levelled, the framing and joinery would be checked and re-plumbed or replaced as necessary, with damaged linings replaced, and that a geotech report was required to finalise the design for re-piling and to confirm the suitability of existing piles.

[17] On 14 December 2011, the defendant sent to the plaintiffs a series of documents which included the EDC report and a letter indicating that the defendant would be requesting an onsite repair. As I understand it, the settlement proposal report failed to mention or record the views of Mr Birch of Sub Floor Construction or to provide its report. In response, and not knowing about Mr Birch's written assessment, Mr Young said:

> Hi Darren,
>
> Awesome- thanks for this.
>
> Lots to think about, and a lot to go through, so at least I can start the process from my end.
>
> 1 quick question– what depreciation do you put on the cash settle option? With being the vice president of the Architectural Designer New Zealand Canterbury branch, local suppliers look after me regarding supply of materials, so it is a viable option for me to consider.
>
> …

[18] The defendant suggests that Mr Young's response accepted that the repair strategy was a viable option and that, at that point, he did not protest that the house was not in fact damaged beyond economic repair. However, I do not read Mr Young's response as acceptance of the defendant's repair strategy. Mr Young was acknowledging receipt of the defendant's proposal and conveying a degree of relief as to progress of his claim. I do not accept the defendant's allegation that at this point Mr Young agreed with their proposal. Indeed, Mr Young expressly said, "lots to think about, and a lot to go through, so at least I can start the process from my end."

[19] But, I do note that from this point at least, both parties seemed to have started "singing from different songsheets". On the advice of EDC and Mr Grace, the

defendant was of the opinion that a repair strategy would work. However, after Mr Young maintains that, after his engagement with Mr Birch, he believed that the house was not economically repairable and therefore a rebuild was required. The difference in view point and misunderstanding at the outset it seems was the start of some animosity and distrust between the parties.

[20] On 29 December 2011, Mr Young provided detailed comments on the defendant's 14 December 2011 settlement proposal report recommendation. He did so by outlining a four page "Quake damaged notes" addition to Stream's assessment. In these comments, Mr Young said the first floor leveller (Mr Birch) had stated to him the floor "couldn't be fixed". The defendant's contention however is that, otherwise in Mr Young's comments at this point, there were no signs of a belief that the house was damaged beyond repair. In fact a suggestion is made that Mr Young had even expressed a wish to stay at the property while the work progressed.

[21] Moving on to the first half of 2012, what happened then is not entirely clear. According to Mr Young, an employee of Tower, Ms Philippa Andrews, took over dealing with the plaintiffs' claim. Mr Young in his evidence says Ms Andrews acknowledged that the current repair strategy proposed was inappropriate and that a rebuild would be adopted instead. Furthermore, Mr Young insisted that Ms Andrews had agreed that Stream would no longer be part of the project and Mr Young's architectural firm would be contracted instead. Indeed, Ms Andrews even confirmed in an email that Mr Young's firm was appointed generally by Tower to act as a lead consultant on some major repairs and rebuilds both in the hill suburbs of Christchurch and for architectural homes.

[22] It seems that, according to Mr Young, things proceeded smoothly in the first months of 2013. Ms Andrews, he said, authorised him to obtain costings for a rebuild because she had accepted that was what was required. The plaintiffs engaged Miles Construction Limited to act as quantity surveyors to give an accurate costing to rebuild the house and garage. It came up with a figure at that point of $1,512,531.69.

[23] Responding to all this, however, the defendant argues it would have been highly unlikely that Ms Andrews would have accepted "on the spot" that the house was damaged beyond repair. Nor, according to the defendant, is there any persuasive evidence before the Court to suggest that the defendant itself had accepted a rebuild was appropriate in the circumstances prevailing then. Ms Andrews, however, was not called to give evidence before me in this trial.

[24] For present purposes, I am prepared to accept Mr Young's account of events relating to his discussions with Ms Andrews. Ultimately, however, the issue of what Ms Andrews may have said to Mr Young in my view does not matter to any great extent here. The question, as I will address later, is whether any repair or rebuild strategy proposed is in accordance with the express terms in the insurance policy.

[25] What seems to be the position, Mr Young says, is that matters were then turned on their head in mid 2013 when Mr David Ashe (Mr Ashe), the Tower Manager of Earthquake Recovery, "reversed Tower's position". In an email to Mr Young dated 7 June 2013, Mr Ashe said:

> Hi Greg,
>
> Your claim appears to missed some of the normal steps in our process with multiple people at TOWER (such as myself and Pip [Ms Andrews]) getting involved and leaving the claim handlers unsure about what has been agreed.
>
> I have talked to both Karen and Pip today and I think we need to consolidate who deals with you to stop this confusion and also to speed up the overall process. Going forward Stephanie and Karen will be the points of contact for your claim– given the previous involvement of Pip and I, they can easily escalate to either of us as required.
>
> *The biggest step has been missed here is whether TOWER has determined your house to be economic to repair or not.* Normally we get this information from Stream (in the form of a repair scope and costs vs. rebuild specification and costs) However in this instance TOWER has worked on your house solely being repairable (and we agreed for you to prepare your own design work) with no inclination at the time it would ever be a rebuild/ total loss.
>
> …
>
> I appreciate you want this resolved quickly, however when we originally discussed your claim it was a c.$300,000 repair and we were comfortable to engage you to undertake your own design/ management; now that your house has turned into a potential $1.5m rebuild we need to undertake the correct level of due diligence and probity.

…

(my emphasis)

[26] Some time earlier, Mr Young had received a report on the property from a Mr Zervos of Budget Set-Outs, a surveying firm he had instructed. This survey report suggested that the house had rotated counter-clockwise 361mm and "slid down the hill" 431mm as a result of the earthquakes. It was this "information" that Mr Young had relied on for some time and indeed which he passed on to Ms Andrews in 2013, prompting her to authorise Mr Young to obtain the rebuild costing.

[27] By late September 2013, Mr Young was still maintaining that the house had "slipped down the site 431mm" and rotated counter-clockwise, and he informed the defendant that he was about to seek legal advice from Anthony Harper.

[28] Anthony Harper started writing to the defendant soon after. It was put to the defendant that its concerns about the extent to which the house had moved were "not well founded". Mr Zervos of Budget Set Outs it was said had "clearly proved" that the house had moved downhill up to 431mm and rotated downhill and sideways up to 554mm. Mr Sillitoe (a geotechnical engineer) had reviewed the Budget Set Outs survey and had "confirmed" that the garage had rotated anti-clockwise up to 344mm and that the house had rotated 572mm about its south-western corner. It was said that the house could not be repaired given this movement, and the "inability to effect the proposed methodology without sufficient access to the bottom of the property".

[29] The defendant responded in some detail. It pointed out that its engineering and surveying reports found no evidence to support the plaintiff's assertions about the movement of the house. While the defendant was prepared to consider Mr Young's request for a cash settlement, a request it seems which had been made several times at that point, the defendant said it was happy to manage a repair of the house.

[30] Mr Young said he then became frustrated and, it seems quite angry, at the defendant's approach and decisions. The defendant then made a cash offer to settle

the plaintiffs' claim on the basis of total repair cost at a figure of $484,688.81. When that offer was rejected, the defendant instructed a new engineer, Mr Marton Sinclair (Mr Sinclair) of Eliot Sinclair to inspect and report on the property. Mr Young in fact requested that it be Mr Sinclair who was instructed if the defendant was engaging Eliot Sinclair. Thus, at first, he was quite content to have Mr Sinclair, as a senior structural and geotechnical engineer and director of Eliot Sinclair, appointed to inspect and report on his property.

Mr Sinclair instructed

[31] Specifically on this aspect, earlier the defendant had advised Mr Young that, while it had "no reason to believe that the information from Envivo [a previous structural engineering firm] is incorrect", it was willing to engage another expert who might be able to clarify the position and narrow differences of opinion between the parties. After Eliot Sinclair was proposed, Anthony Harper replied on behalf of Mr Young that:

> In principle our clients do not oppose the approach you are now proposing. In the circumstances, however, it appears well overdue, and our clients are not prepared to endure further unnecessary delays.
>
> Accordingly, our clients will agree to refrain from issuing proceedings until at least 4pm on 7 February 2014 on the basis that you confirm by 5pm on Monday, 23 December 2013, that:
>
> 1. Martin Sinclair of Elliot Sinclair, is appointed to attend the property and provide you with an opinion on the earthquake damage to the property and the work required to reinstate the property to "the same condition and extent as when new";
>
> 2. Elliot Sinclair is instructed to provide a copy of the opinion to us at the same time it is provided to you; and
>
> 3. You will advise us by no later than 4pm on 7 February 2014 regarding Tower's position on whether the house is economic to repair.

As Anthony Harper explained in a later email, "the request for Marton Sinclair to undertake the work was based on his seniority and experience and our clients' consequent confidence in his ability". It seems the defendant had agreed to Mr Young's conditions.

[32] Mr Sinclair made a brief site visit to the property on 28 January 2014. On 27 February 2014, Mr Sinclair advised the defendant that he could undertake the investigation and report on damage and repair methods as requested. However, two issues were noted. First, additional surveying work at the property was required because he was unable to find evidence in the structure of the house of the significant movement indicated in the Budget Set-Outs survey. Mr Sinclair advised detailed surveying was required to "confirm or refute" that earlier surveying report. Second, while he acknowledged there had definitely been settlement of the northeast foundation of the house supporting the living room, a detailed inspection would be required to determine the full extent of the damage.

[33] Mr Sinclair also was to consider the site access difficulties presented by the current repair and recommended that further geotechnical work be undertaken. He anticipated spending time with Mr Young "explaining our findings as at the moment there seems to be a large difference between his concerns and what I have seen so far on site."

[34] On 15 April 2014, Mr Sinclair advised Stream that surveyors from Eliot Sinclair had completed a survey of the house and related it to site boundaries. The conclusion was that the house had not moved in relation to the boundaries or surrounding land. Discrepancies, he said, were within construction tolerances, but there was no evidence of the alleged counter-clockwise rotation. After significant further work once Mr Sinclair's investigation developed, lateral east-west movement of up to 40mm was detected. As I understand it, this caused the house to lean over as its eastern foundations settled.

[35] Matters moved on. In June 2014 Mr Sinclair advised Mr Young that one repair option for the house Mr Sinclair was considering included the installation of micropiles down to rock to carry the vertical loads from each of the three front foundations and sub-horizontal loads. Mr Young, however, remained critical.

[36] Then, on 15 July 2014 Eliot Sinclair and Mr Sinclair issued their first full report on earthquake damage to the house. It noted floors out of level, significant cracking to wall linings, settlement of the foundations at the eastern end, walls out of

plumb in the east-west direction, and some horizontal movement of subfloor framing. According to this report, the building was found to be still essentially parallel to the original grid lines, indicating that it had not rotated in relation to the site boundaries. The report was of the opinion that there was no sign of the lateral stretching that would be expected if it had stretched through earthquake damage the several hundred millimetres that had been suggested earlier.

[37] In broad terms, Mr Sinclair recommended: removing Gib linings to bracing walls; repairing damaged wall framing and fixings; installing new piles at the eastern end to be socketed into the rock; re-levelling the eastern end; reinstating joint to bearer connections and installing diagonal braces to the subfloor. Micro piles were to be used, given the access constraints. Re-levelling the eastern section of the house was expected to correct off-plumb walls, with residual out of plumb doors to be re-checked and repaired as required.

[38] Mr Young responded by challenging Mr Sinclair's expertise. He even resorted to requesting details of Mr Sinclair's professional indemnity insurance. The plaintiffs' position is also that Mr Sinclair continually modified his original repair proposals in the face of surveying evidence that the house had moved laterally, he was evasive and unprofessional and it was not until June 2016 his final plans were prepared.

[39] The defendant disputes this. It says now that, as matters progressed, and given Mr Sinclair's failure to endorse the rebuild of the house that Mr Young wanted, Mr Sinclair was the subject of a number of scurrilous and unfounded allegations from Mr Young, including accusations of "incompetence", "cheating" and "lying". Before me submissions were advanced on behalf of the plaintiffs contending that in this matter Mr Sinclair was partisan and could not in any sense be considered impartial. Indeed, the plaintiffs' position outlined to me was that Mr Sinclair entirely dictated the repair strategy and went out to find contractors who would go along with it. On these claims I find that there was nothing in the evidence put before me to call into question Mr Sinclair's impartiality or professionalism here.

[40] And, the defendant maintains these allegations against Mr Sinclair were completely uncalled for. Mr Sinclair, it says, is an independent, highly qualified and experienced structural and geotechnical engineer. He is an entirely well qualified expert for the design of foundations and structures on hillside sites like the property here. On the evidence before me these contentions are difficult to dispute, notwithstanding that there were differing expert views on Mr Sinclair's proposed strategy put before the Court.

The Policy

[41] The relevant terms of that part of the Tower insurance policy at issue here I will set out below. (In the policy the pronoun "we" refers to the insurance provider, the defendant Tower Insurance, while "you" refers to the insured, the plaintiffs in this case.) I now set out the "How we will settle your claim" clause in full:

> 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:
>
> - if, as result of changes in government or local body by-laws, you are not able to rebuild or repair the damaged

part of your house to the same specification as before the loss or damage occurred, we will pay any additional costs incurred to rebuild the damaged part;

- if you pay your premium by instalments and your house suffers a total loss you must pay the rest of the annual premium before we settle your claim;

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

- we may make payment to an interested party (mortgagee, etc) if you have one registered on your house. Their receipt will discharge us completely;

- we will not pay more than the sums insured shown in the certificate of insurance unless you have full replacement value then there is no limit to the sum insured;

- we will not pay the costs of rebuilding, replacing or repairing any part of your house which at the time it was built, was otherwise than in accordance with a building permit or other applicable consent issued by the relevant authority;

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

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

- *we will use building materials and construction methods commonly used at the time of loss or damage*;

- you must tell us if any lost or stolen property which was part of the claim is found or recovered and hand it over to us or at our option refund any money paid by us if we request it;

- you must tell us if any person is ordered to make reparation to you for any loss or cost which was part of the claim and reimburse us for that payment as soon as you receive any reparation.

We are not bound to:

- pay for wall, floor or window coverings not located in the room or rooms where the loss or damage occurred;

- 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 cost of demolition and removal of debris including contents;

- pay the cost of replacement or repair beyond what is reasonable, practical, or comparable with the original;
- repair or reinstate your house exactly to its previous condition.

(Emphasis added)

[42] "Full replacement value" in terms of the policy is defined to mean:

> 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.

Approach to interpreting the policy

[43] It is trite to state that the ordinary principles of contractual interpretation apply to insurance contracts. Lord Hoffman in *Investor Compensation Scheme Ltd v West Bromwich Building Society* establishes the five principles of contractual interpretation. In that leading case on modern interpretation Lord Hoffman summarised the key principles of interpretation:[1]

> (1) Interpretation is the ascertainment of meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they are at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to the mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent. They are admissible only in an action for ratification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterance in

[1] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912.

> ordinary life. The boundaries of this exception are in some respect unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words in a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…
>
> (5) The rule that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties and intention which they plainly could not have had.

[44] In our Supreme Court in *Vector Gas*, the majority held that the language the parties have used must be read in the context of the document as a whole and the surrounding circumstances.[2] As summarised in *Trustee Executors Ltd v QBE Insurance (International) Ltd*:[3]

> Under that approach, the wider background and circumstances should always be considered even if there is no ambiguity or other interpretive difficulty with the words used by the parties. Evidence of background circumstance is not, however, relevant if it does no more than tend to prove what individual parties objectively intended or understood their words to mean or to prove what a parties' negotiating stance may have been at a particular time.

[45] Further addressing these issues of contractual interpretation, the Supreme Court in *Firm PI 1 Limited v Zurich Australian Insurance Ltd* again gave guidance as to the interplay between the ordinary meaning and the context of the contract. The Supreme Court held:[4]

> [60] Given the issues in the case, it is not necessary that we discuss the approach of contractual interpretation in any detail. It is sufficient to say that

---

2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
3 *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608 at [32].
4 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd T/A Zurich New Zealand* [2014] NZSC 167.

> the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as 'background', it has to be the background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall *context,* broadly viewed.
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[46] On all of this, what is clear is that the text of the insurance contract remains centrally important to its interpretation.

The plaintiffs' claims

[47] The case for the plaintiffs is that to comply with the terms of the insurance contract it is necessary for the house at the property to be rebuilt. The plaintiffs allege also that the defendant elected to make a cash settlement on 11 December 2013 rather than reinstating. As well as the relief sought in relation to a cash settlement for the rebuilding of the house, the plaintiffs seek exemplary damages and general damages in respect of what they say is the failure by the defendant to act in good faith towards them.

The defendant's response

[48] The defendant submits that, contrary to the plaintiffs' contention, the house is repairable. The defendant maintains that the floors can be re-levelled and re-aligned using a range of building techniques. The upper level floors will be drawn horizontally to the west concurrent with re-levelling at the east end of the house by replacing the foundations.

[49] As to the critical areas of foundations and the sub-floor, the defendant says, those foundations at the east end of the house, which are founded on fill, will be removed and replaced with new, enhanced foundations that will extend down to bedrock. Vertical and sub-horizontal piles will be installed to support the vertical and horizontal loads of the house that may be imposed by future slope movement. Pile caps will be constructed to tie the vertical and sub-horizontal piles together, linked with a tie beam. The tie beam provides additional load-sharing and restraint against ground movement under static loads or in a future earthquake.

Issues

What is the extent of earthquake caused damage?

[50] There is a substantial measure of agreement now between the parties here as to the structural damage and much of the non-structural (or cosmetic) damage to the house. It is agreed that the foundations have settled, most significantly in the south-eastern part of the house, and generally walls are leaning down the slope in a manner consistent with the dis-levelment of the floor levels. There is close agreement between the parties and their surveyors now on the relevant measurements.

[51] The upper floor of the house, it seems, has moved 20mm in an east direction. The living area floor has moved east, relative to the rest of the lower level floor diaphragm, by up to 20mm. This indicates a total movement of up to 40mm from the upper west wall to the lowest east wall. The gap that has opened up to the western retaining walls is up to 10mm at the lower level and 20mm at the upper level. The lower level has moved up to 20mm further to the east in addition to the 10mm of movement to the lower level.

[52] The western foundation to the concrete block wall is understood to be founded on rock. No settlement of the foundation is apparent,

[53] According to the "Acceptable Solutions and Verifications Methods for New Zealand Building Code Clauses" (also known as NZS 3604), issued by the Ministry of Business, Innovation and Employment, the extent of tolerance for deviation from the position shown on a plan for a building is 15 mm. The deviation from line in

plan in any length over 10 m is 10 mm in total. And further, deviation from horizontal in any length over 10 m is 10 mm in total.

Is Tower's repair strategy commonly used at the time of loss or damage?

[54] As expressly stipulated in the insurance contract referred to above at [41], the defendant "will use building materials and construction methods commonly used at the time of loss or damage". A first critical issue I need to address is whether the defendant's repair strategy as proposed by Mr Sinclair is a "construction method" commonly used at the time of loss or damage. What is the meaning of this obligation upon the defendant as insurer here? I approach this question by first discussing the essential elements of the repair strategy itself, secondly, addressing the issue of whether the repair method is one "commonly used" such that it may have been used in New Zealand or elsewhere before and, lastly, if necessary, considering risks associated with Mr Sinclair's proposed repair strategy.

(a) What is the repair method/strategy proposed by the defendant?

[55] As I have noted at [36] above, an earthquake damage report for the property was prepared by Eliot Sinclair on 15 July 2014. The report was prepared by Duncan Kemsley, a structural engineer, and reviewed and approved by Mr Sinclair. Eliot Sinclair's Executive Summary in the Report provides in part:

> 1 Executive Summary
>
> …
>
> We have carried out a detailed investigation including the following:
>
> - precise levelling on the floors
> - accurate survey of the building location
> - visual inspection of the interior, exterior and subfloor area
> - review of the geotechnical report for the site.
>
> From our investigations we summarise the earthquake damage as follows:
>
> - The floors are out of level by up to 75mm; most of which occurs on the eastern side of the lower level

- There is significant cracking to the wall linings including the structural bracing walls.

- Slumping of the ground at the eastern end of the house has led to foundation settlement.

- The internal walls are out of plumb in the east west direction, although in the north south direction, the walls have remained plumb.

- There has been some horizontal movement of the subfloor framing.

Based on our investigations and the observed earthquake damage we have recommended a repair strategy. In proposing the repair strategy we have been mindful of the need to carry out a repair strategy that will provide a robust and durable solution and satisfy the structural and durability requirements of the Building Act. In summary these require the building to comply with the repaired building code at least to the same extent as it did prior to the earthquakes.

Our recommended structural repair strategy is detailed in this report. In summary, the repair strategy is:

- Remove the linings to all bracing walls and any other linings with significant damage.

- Repair the area affected by the ground movement at the eastern end of the house.

- Re-level the floors.

- Repair the damage to the subfloor framing.

- Reinstate the wall linings including any additional bracing required to meet current building code requirements.

- Repair non-structural damage to wall linings.

This report addresses the damage to the house and garage/ studio. It does not include any comments on damage to the site other than where this was a direct effect on the house. This report is not intended to be comprehensive list of the earthquake damage to the house. We have addressed the structural damage to the house but we have not included discussion of non-structural damage or repairs required to reinstate the weather tightness of the building.

Our report is intended to provide sufficient detail to allow for an approximate cost estimate of the proposed repair strategy to be prepared. We understand that Tower Insurance Ltd will compare the cost estimate to repair the house with the estimate for a complete rebuild to assist in deciding how to proceed.

Due to the extent of the repair work, it is likely that a building consent will be required for the work.

[56] A central issue in this case is the proposed strategy to repair the foundation and sub-floor of the house. On these aspects the defendant contends that suggestions the plaintiffs have made from time to time that their house has "slid down the hill", although colourful, are not a useful description of what has actually occurred here. What appears to be accepted, as I have noted above, is that the south-eastern corner of the house has settled by up to 116mm and the upper-level floors have moved laterally to the east by up to 20mm. Relatively minor floor settlement has occurred in the central part of the house.

[57] The defendant says the floors can be re-levelled and re-aligned using a range of what it describes as conventional building techniques. The upper-level floors are to be drawn horizontally to the west, using a system of cables attached firmly to rock or the like and winching with Tirfor winches, concurrent with re-levelling at the east end of the house by replacing the foundations. That foundation replacement for piles which are founded on fill will require their removal and replacement with new enhanced foundations that will extend down to bedrock. Vertical and sub-horizontal piles are planned to be installed to support the vertical and horizontal loads of the house that may be imposed by future slope movement. Pile caps are to be constructed to tie the vertical and subsequent-horizontal piles together linked with a tie beam. That tie beam will provide additional load sharing and restraint against ground movement under static loads or in a future earthquake.

[58] The repair strategy provides for foundations under the central portion of the house to be extended to bedrock to avoid potential differential settlement under seismic conditions in the future. Drilling for new foundations is to take place by the use of an imported mobile PB 250 German foundation drilling unit (rather than a full sized drilling rig otherwise used generally for foundation drilling) because of the constraints of this particular sloping site.

[59] A new barrier pile wall is proposed to be constructed to retain ground beneath the house that is prone to instability. Although both parties agree on the need for such a barrier pile wall, the experts engaged by the plaintiffs here suggest it should extend wider on the site than is proposed by Mr Sinclair.

[60] The defendant contends that effectively the new foundations will be significantly more resilient than the original foundations of the house. The fixing of the floor diaphragms to the existing concrete foundations at the west end of the house are also to be improved to ensure current building code requirements are met. This will reduce too, the likelihood of similar lateral movements to those that occurred in the earthquakes in the event of another seismic event.

[61] On all of this, Mr Sinclair in his evidence suggested that these techniques are well developed and common engineering practice, and they should not be considered as "radical" or "pioneering". The plaintiffs' experts, however, take a different view on this.

[62] Once the house is returned to level and is aligned, Mr Sinclair's proposal is for the framing to be straightened and re-lining to take place. Current sub-floor bracing is to be upgraded to meet the building code requirements and the cedar cladding which was removed for the realignment process is to be replaced.

[63] As part of the strategy, with the exception of the garage, office and bathroom, all of the internal wall linings of the house are to be removed and replaced with new upgraded linings, along with upgraded lateral bracing to meet current building code standards. Cosmetic repairs, such as painting and decorating work, are then to take place. A new concrete driveway is also to be installed.

[64] Returning now to the Eliot Sinclair 15 July 2014 report, insofar as the floor re-levelling and sub-floor repairs are concerned, it goes on to state in particular:

> 7.3 Floor Re-Levelling
>
> Re-levelling of the floor at the eastern end of the house will be carried out using the new piles. This can be done by jacking the timber poles and raking steel posts either directly off the new piles or off the new pike caps.
>
> The floor under the laundry/bathroom area can be re-levelled by jacking and packing under floor joists. This will necessitate removal of either flooring or cladding to access this area. We did not remove flooring or cladding to access this area during our inspection and there may be further damage that will require repair. We expect that the damage can be repaired by similar methods to those described in Section 7.4.
>
> 7.4 Subfloor Repairs

> Due to the movement of the joists on the bearers, the joist to bearer connections to the two rows of short poles and the joist to ribbon board connection along the concrete foundation wall will require upgrading. This can be achieved by driving 14g hex head screws through the side of the bearer and up into the joist.
>
> The joist hangers may also require replacement where distorted. Due to subfloor access constraints, replacement of the joist hangers will require removal and replacement of the flooring in discreet areas.
>
> To reinstate the lateral stiffness of the subfloor poles, two diagonal braces will be required to be installed in the east-west direction. These are to be connected to the face of the bearer and run down to the base of an adjacent pole and will be subject to structural design in conjunction with the bracing panels at the upper levels.

[65] The Report also refers to a Cost Estimate:

> 8. We have not prepared cost estimates for the repair work as this will need to be costed by a quantity surveyor.
>
> Discussions with the micro piling contractor have indicated that the cost of transport and equipment, installation of the micro piles, construction of the piles caps, jacking the floor to level and engineering fee will be in the order of $100,000 to $130,000 plus GST.

[66] The plaintiffs say these repair proposals throughout were subject to regular modification and change. During cross examination, Mr Sinclair mentioned his discussions with and the engagement of Mr Wayne Tobeck from Core Civil Solutions NZ Ltd (CCS) to complete the new piling and sub-floor work. Mr Sinclair said he had contracted with Mr Tobeck on another project, and that Mr Tobeck had also accompanied Mr Sinclair on site prior to completing the 15 July 2014 report.

[67] In a letter dated 13th June 2016, CCS provided an estimated cost of piling and re-levelling the house at a figure of $492,000. However, this estimate was still subject to the engineer's final design and CCS's acceptance of the design. The estimate also does not include removal and reinstatement of flooring holes suitable for obtaining access for the mobile piling plant down through the subfloor structure along with suitable working room. It also does not include unforeseen physical conditions below ground.

(b) Is the repair strategy proposed a construction method commonly used at the time of the earthquakes?

[68] As already noted, while it is the defendant's election to choose to repair a damaged house if satisfied it is not a rebuild, the policy obligation on the defendant is to ensure the repair strategy adopted and the construction methods involved are ones commonly used at the time of the earthquake. *Turvey Trustee Ltd v Southern Response Earthquake Services* addressed this issue in a general way, although relevant in that case mainly to the issue of modern materials being substituted for traditional or rare materials in an older earthquake-damaged Edwardian-style villa. In that case Dobson J held:[5]

> The insurer's obligation under this policy is not an absolute one to pay for replacement of the existing structure. The primary constraint on that obligation is that the insurer is obliged to pay for building materials and construction methods that are in common use at the time of the rebuilding. That constraint, together with the comparative connotation of "as new" conveys the sense of the new structure being the equivalent of the old, rather than a replication of the original. Adopting the approach to equivalents in the Full Court decision in *D'Aloia*, it would be measured by size, functionality, relative quality and reasonably addressing the re-creation of character and appearance.
>
> A component of that equivalent is considered by reference to materials or construction methods that are in "common use" I do not see that as requiring that the materials or methods be used in, for instance, any particular proportion of house building nationally or in the locality of the insured property. The requirement for them to be 'in common use" is likely to have been included so that the insurer would not be liable for rare materials or outdated construction methods that would now be substantially more expensive in relative terms than more recently introduced methods or materials.

[69] I add to Dobson J's observation that the contractual requirement to use construction methods "commonly used at the time of loss or damage" not only saves money for the insurer but must also be designed to minimise the risk of uncertainties in adopting a novel or revolutionary construction method never or rarely tried or tested before.

[70] On this it is useful here to refer to the dictionary definition of the words "commonly used" in the context of a repair strategy involving construction methods

---

[5] *Turvey Trustee Ltd v Southern Response Earthquake Services* [2012] NZHC 3344.

at the time or soon after the earthquakes. In the Chambers Dictionary[6] the word "common" in part is defined as:

> …general, usual, frequent, ordinary, easily got or obtained…

And the word "used" in this context is defined as:

> The act of using…custom…the fact of serving a purpose…to use, employ…

[71] And finally, insofar as the expression "construction methods" is concerned, the Chambers Dictionary[7] defines "method" to include:

> …mode or rule used in carrying out a task or accomplishing an aim, orderly procedure, manner…

[72] Applying the ordinary objective meaning of these words to a reasonable person in the context of this insurance contract with all the surrounding circumstances, I need to say at the outset that, in my view, important aspects of Mr Sinclair's proposed repair strategy could not be considered here to involve construction methods commonly used at the time of the earthquakes or even soon after. I refer in particular to Mr Sinclair's proposal to use cable winching to move the house structure and various floor levels a small distance across and up the site. Although the distance of movement is not great, this is a house on four levels that will require winching and movement on several levels in differing ways. Preparatory to the movement, stripping of the internal and external cladding of much of the house was to be required with bracing installed. I leave on one side for later consideration possible risks and concerns with this strategy which have been expressed on behalf of the plaintiffs.

[73] Suffice to say that nowhere in the evidence before me was it shown that up to now this winching strategy had been used (either successfully or otherwise) on a residential hillside home in Christchurch, or in other parts of New Zealand or even elsewhere.

---

6 Chambers Dictionary (11th ed).
7 Above n 6.

[74] Mr Sinclair in his evidence did state that the proposed winching process was something that had been carried out before on a range of properties both in Christchurch and elsewhere. Indeed Mr Sinclair said he was himself undertaking winching on his own residential home in Christchurch, although this was on a fully flat site. A comment was made too that using Tirfor winches, which are proposed here, had been undertaken in a number of situations, in particular involving structural steel framing, to pull it into correct positions.

[75] Notwithstanding this evidence of Mr Sinclair, and comments from the builder Mr Thomson that he was confident from discussion with the experts that this strategy would work, significantly in my view neither Mr Tobeck nor any other representative from CCS was called to give evidence regarding this aspect of the repair strategy which they would be undertaking. It is true that in his affidavit evidence Mr Tobeck for CCS did express his confidence that this winching strategy would work. As I understand it, he also confirmed that CCS had been involved in something similar but again only on flat site properties in Christchurch.

[76] What is of considerable significance in this case, however, is that the Young family's property is on a steep sloping site. It is constructed over different levels and indeed there is also an issue, involving some degree of fill and minor subsidence under a part of the house as a result of the earthquake sequence.

[77] With these issues in mind, there is nothing before the Court to show that this construction repair method, insofar as it involves winching of various different levels of this sloping site house, was something that has been satisfactorily undertaken before on any sloping residential property in Christchurch, New Zealand or elsewhere.

[78] It must follow, in my view, that this aspect of the defendant's repair strategy can only be considered as novel and largely untried. Is it in common use, is it a "usual, ordinary, easily got or frequently used" strategy on steep hill-side residential sites? The answer must be no. Although since the Canterbury earthquake sequence, many other repair strategies for foundations especially became regularly used, this was not one of them. Certainly at this point on all the evidence before me it appears

it has not been a construction method commonly used on sites of this kind in Christchurch or other parts of New Zealand. Whether or not the strategy might work, as Mr Sinclair, Mr Thomson and CCS envisage, is another matter. The fact remains that, as I see it, the winching proposals for the Young house cannot be considered as part of a construction method or strategy that has been in common use, since around 2010 or 2011 or before. The real purpose of that "commonly used" requirement, in the defendant's standard form insurance policy, must be not only to limit costs to the insurer of being required in a repair to use expensive historic materials (or outdated construction methods) (such as was addressed in the *Turvey* decision) but also to provide a measure of protection for insureds that their residential home, often their most valuable and distinctive asset, is not to be put at risk by an unusual or untried construction repair method which might not work at the time or later, with all that entails.

[79] I conclude therefore that the winching aspect of Mr Sinclair's repair strategy here, a vital part of his overall plan, does involve a construction method which is not commonly used for properties of this type, and thus it does not comply with the defendant's obligations under the policy. And, given that this particular repair strategy is the only one which has been advanced by the defendant to rectify the accepted damage to the plaintiffs' property, the only proper conclusion that can be reached is that the damage is not repairable, and this is a rebuild.

[80] I leave on one side, the many other issues raised before me by the plaintiffs and their experts. These concern questions over re-piling of parts of the dwelling, access to the underfloor area, use of the proposed mobile drilling equipment, cutting away of various parts of the dwelling's flooring for access purposes and the like. On their face, as I see it, there is a reasonable argument, particularly since property repairs following the Christchurch earthquakes have been undertaken, that many of these re-piling and foundation repair strategies have found their way into common use in this area.

[81] Given my conclusion at para [79] above that important aspects of Mr Sinclair's repair strategy could not be said to involve a commonly used construction method at the time of the earthquakes and thus the damage here in

terms of the policy is not repairable but is a rebuild, I need not at this point say anything further as to the risks associated with this repair strategy and whether or not it might work. I will turn to address that aspect further below. Suffice to say at this point that, for the reasons I outline above, I am satisfied that, on the basis of the only repair proposals put in evidence before the Court, the damage to the property is not repairable in terms of the policy and this is a rebuild.

In the alternative, if the repair strategy is one commonly used, is the damage economically repairable?

[82] If I may be wrong in my finding that the only repair strategy adopted and advanced by the defendant here was not one commonly used at the time, then I need to go on to briefly consider two further questions. These are whether in terms of the policy first, the defendant's proposed repair plan would work and return the house to an as new condition and secondly, whether the accepted damage to the house is in fact economically repairable. I now turn to briefly address these aspects.

(a) Will the proposed repair strategy work and return the house to an as new condition?

[83] On this aspect there was a considerable body of expert evidence provided to the Court. The evidential onus here rested on the defendant to show its repair strategy would work in terms of the standard required in the policy.

[84] For the defendant, evidence was principally provided in this area as follows:

Mr Sinclair

[85] Mr Sinclair, as the proponent of the repair strategy and a highly experienced and qualified structural and geotechnical engineer in Christchurch, was consistent in his position throughout that the repair strategy would work and the house would be returned to an as new condition. Despite the many accusations which had been levelled at him and his proposals by and on behalf of the plaintiffs in this matter, Mr Sinclair in his evidence before the Court was professional and firm in his view that his repair proposals would work.

Mr Thomson

[86] Mr Thomson, the builder engaged by the defendant, it seems, has had little experience in the repair strategy proposed by Mr Sinclair. Notwithstanding this, he expressed confidence that it would work and appeared to confirm on behalf of CCS that they too were confident the strategy was viable. As I have noted, it is unfortunate, however, that no representative from CCS gave evidence before me.

Mr Ashe

[87] Mr Ashe from Tower also confirmed that he saw no reason why Mr Sinclair's repair strategy would not work, given the past experience and reliability of Mr Sinclair. Tower, he said, were content in this case to rely upon the expert advice it had received from Mr Sinclair and to run with the view that the repair strategy would work and restore the house to an as new condition in terms of the requirement under the policy.

[88] In opposition to these views, the plaintiffs called a number of expert witnesses who gave evidence here.

Mr Warren Sillitoe

[89] Mr Sillitoe is a geotechnical engineer in Christchurch. In a letter dated 1 October 2014, he and Mr Phil Williams, the Christchurch Manager and Geotechnical Team Leader of Geoconsult identified problems with Mr Sinclair's proposals and, wrote to Mr Young advising that:

> Geoconsult is of the opinion that the solution put forward by Elliot Sinclair will only address part of the issues currently affecting the subject site. We think the solution will do a relatively good job at limiting the effect of horizontal movement affecting the dwelling structure, however, we question how well the micro Piles (the vertical ones that transfer building loads to the stronger material at depth) are going to respond to the subsoils beneath the ground beam sliding downslope. Because the proposed solution does little to restrain the soils at depth, in our opinion, there is a very real possibility that lateral loading over the vertical pile will damage it, thus compromising it's load transference to the underlying soils.

[90] In a further letter sent on the same day, after addressing the movement of the house, Messrs Sillitoe and Williams expressed the opinion that:

> Movement of this magnitude can have a significant effect on the condition of the foundations and can resulting (sic) in cracking and displacement of the foundations even if not obvious to the slab and walls of the structure. Furthermore, retaining walls incorporated within the dwelling that have also experienced movement will likely have suffered damage to the tanking and drainage placed behind the wall. Furthermore, portions of the cut previously supported from the wall and settlement to the subsoils upslope of the wall may occur. This may result in voiding beneath the structure.

And, in his oral evidence before me, Mr Sillitoe voiced the opinion that there were serious doubts over whether Mr Sinclair's repair methodology would even work on this site.

Dr Andrew Buchanan

[91] Dr Andrew Buchanan is an Emeritus Professor of Civil Engineering at the University of Canterbury. It seems he also has some practical experience as a principal of PreStressed Timber Limited. From his evidence it is clear Dr Buchanan was of the opinion that:

> The additional complication is that you've got– we have a house on a sloping site and the house has got floors at different levels and a sloping roof, the elements are not parallel and the difficulty of pushing and pulling on different parts of this to try and get the whole thing to line up exactly as it was, I would say, this is not a trivial exercise, this is an extremely difficult exercise. In fact I would go so far as to say it's impossible without taking the whole thing to bits to get it exactly back the way it was.

Ms Helen Trappitt

[92] Ms Helen Trappitt is a structural engineer with Lewis & Bradford Limited in Christchurch. In a letter to Mr Young dated 4 February 2015, Ms Trappitt recommended that:

> In our opinion that in order to reinstate the house structurally to an 'as new' condition, given the poor site access that now exists (a house has been built on the neighbouring site subsequent to when this house was built), and given the observed earthquake induced ground movement and settlement of foundations that has occurred at the eastern end of the house; it could prove uneconomic to repair to the level required by your insurance policy, necessitating a rebuild.

[93] Ms Trappitt also said there is a need to be very careful in anchoring the winching cable loads to a foundation. She said too it was necessary to assess the

reserve capacity of the retaining wall. Other comments from her noted it is very difficult to anticipate how the wall framing of the house will respond once the floor is re-levelled. The floor bearers need to be propped up while the foundation replacement work is going on. The Christchurch City Council need to know the calculations associated with the drawings so the repairers will have to attempt to calculate the winching forces and design the anchorage points for those winching forces. Ms Trappitt also expressed the opinion that in her view it is unlikely the Sinclair repair methodology would work. There is uncertainty as to when the connections need to be removed. There are forces involved in the repair strategy which have vertical components. That will involve extra structure which needs to be priced.

[94] And lastly, in her oral evidence before me, Ms Trappitt went on to say:

> Since then we've obtained a lot more evidence so in particular to do with the damage to the land, the fact that it's not just a localised small landslide under that eastern-most foundation, rather that the whole area of soil is unstable and there's the presence of the under runners and so on and so forth. So my opinion now is that the proposed repair is technically feasible if you throw enough money at it but there's huge risks associated with it and yeah so it's difficult to say because I'm not quantity surveyor so I haven't looked at the QS figures but I think it's really important to note a lot of the points I've made in my brief have been with regards to elements where there's a high level of risk associated with the cost fluctuation of the work.

[95] Lastly, Mr Whiteside QC, counsel for the plaintiffs, in his final submissions before me listed what he described as 33 contingencies and variables that arose from Mr Sinclair's own evidence, all concerning uncertainties over his repair strategy. Many of these, in my view, are relatively minor and might relate to issues over increased costs in undertaking the repair strategy, rather than questions over whether or not the strategy itself might work.

[96] Nevertheless, a number of these concerns raised in argument advanced by Mr Whiteside QC in my view are worth noting here:

i. No confirmed anchorage details at the western end of the house. Mr Sinclair acknowledged he did not know in relation to the middle cable whether the driveway retaining wall foundation was simply sitting on

clay;

ii. Unknown final adjustments have to be made in relation to floor levels;

iii. It is expected that rock will be found under gridline F on the plan so extra drilling of micropiles may be required;

iv. As to the calculated 6.5 degree angle in the cable point at one point on the plan – it is said the contractor may have to use a nearby timber pile as an anchor point to tie down the cable. But, it seems that the pile is going to be removed and replaced, so some other form of anchorage will be necessary;

v. Extent of removal of parts of the house before winching is a very open book. During evidence in chief, Mr Sinclair's evidence was that the proposal simply required the removal of bracing and installation of temporary bracing. By the time of cross-examination it is said for the first time cladding needed to be removed. This of course was one of Dr Buchanan's concerns as to the lack of clarity regarding which parts of the home were to be removed before winching;

vi. The possibility of moving the house beyond its final position because of the spring-back effect occurring after winching;

vii. Whether the roof needs to be removed in the winching exercise. Mr Brown was of the view that this was necessary. Mr Sinclair's equivocal answer was that there was no proposal to remove the roof rather than saying it was definitely unnecessary;

viii. As to construction of the strong backs using steel or strong timber that is to be left to CCS;

ix. As to what happens at the eastern end of the house;

x. Whether the PB 250 drilling rig for piles will be up on the floor level or

below ground level;

xi. As to the requirement for two metre clearance for the PB 250 machine, that will have to be sorted out on site;

xii. As to whether temporary bracing or cables are required;

xiii. No assessment has been made to the additional load required for the winches to be attached to the foundations of the concrete block retaining wall;

xiv. Modification is required of the existing steel structure at gridline B (the living room) but no details are supplied;

xv. Additional complexity arises in the conflict between the joist and the micropiles. No accurate information was supplied to Mr Thomson in relation to that;

xvi. No detail has been prepared for the proposed subfloor bracing;

xvii. As to whether the load bearing timber framed wall in front of the cellar needs to be demolished;

xviii. Additional support may need to be constructed for the plant to attach or sit on;

xix. Mr Sinclair had not assessed whether there was a risk of shearing off the heads of the screws in the plywood flooring in the winching process;

xx. The number of people required to be engaged in the winching exercise;

xxi. No guidance given to Messrs Thomson and Tobeck (CCS) about getting the walls back plumb;

xxii. No proper assessment has been made as to how the roof is to be moved

back into place;

xxiii. The hole size may have to be increased for the drill and there may need to be a small holes cut in the floor for the winching exercise.

[97] Clearly in this case there is a major divergence in views as to whether Mr Sinclair's repair strategy would work to return the house to its as new condition. This divergence is between Mr Sinclair and other witnesses advanced for the defendant, and the experts put forward on behalf of the plaintiffs. Needless to say, it is somewhat difficult to resolve these differences in this case. I accept that the professionals involved are genuine in the views they have expressed in their evidence before the Court.

[98] But in any event, as I see the position, it is not necessary for the Court to make a precise determination on the viability of Mr Sinclair's repair strategy. Suffice to say that, if the views expressed by the experts called by the plaintiffs prove correct, the proposed repair strategy may well confront difficulties if it was to be implemented. That is as far as I need go at this point, given my other conclusions in this judgment. As Ms Trappitt notes in her evidence before the Court, many repair strategies can work but only on the basis that they involve substantial and often unforeseen costs.

[99] That leads me to the next issue to be considered here. This relates to the question whether, even if Mr Sinclair's repair strategy would work to return the house to an as new condition, is this repair economically viable?

(b) The economic viability of the repair strategy

[100] In terms of the policy, to trigger the ability of Tower to allow the plaintiffs to rebuild their home on the property or another site, or to buy an equivalent house elsewhere, the present house must be "damaged beyond economic repair". As I have noted above, it is an essential part of the plaintiffs' claim here that the house must be rebuilt because it is damaged beyond economic repair. I turn now to consider the economic viability of Mr Sinclair's repair strategy on the assumption that, in any event, the strategy itself would work.

[101] As an aside, before me Mr Harris, counsel for the defendant, suggested that the present case is not like the early "Red Zone" cases which involved claims that could only be cash settled. In cases such as *O'Loughlin v Tower Insurance Ltd* [8] and *Rout v Southern Response Earthquake Services Ltd*,[9] where proposed repair costings from insurers were not accepted as a basis for settlement of the respective plaintiffs' claims, particular weight was placed by the Court on the fact that, in any event, the work in question would never be carried out. Mr Harris noted, however, that the recent line of insurance claim cases outside the Christchurch Red Zone, *Jarden v Lumley General Insurance (NZ) Ltd*[10], *Kelly v EQC*[11] and *Parkin v Vero Insurance*[12] have all accepted that the damage in those cases was repairable and that concerns expressed by the plaintiffs about the scope and costings were not sufficient to justify overturning a repair-based settlement.

[102] At the hearing of this matter before me it also seemed to be accepted by all parties that certain insurers of earthquake damaged properties in Christchurch, and in particular Southern Response and IAG, have a policy of settling on a rebuild basis once a formula assessment, whereby the estimated repair costs for a property exceed 80 per cent of the estimated rebuild costs, is met.

[103] In the present case, however, Mr Ashe in his evidence for the defendant confirmed that the defendant has never had such a policy. He testified that Tower looks at the overall economics in each case rather than setting a formula percentage, although Mr Ashe did acknowledge that, once repair costs reached about 90 per cent of a rebuild estimate, it was likely the claim would be classified as a rebuild. In saying this, however, Mr Ashe explained the reason why the policy adopted by companies other than Tower as to the 80 per cent figure was not one used by Tower. He said this was because 20 per cent of a large claim could well be significant. Overall, Mr Ashe confirmed that before deciding a property is uneconomic to repair, Tower makes a general assessment of the estimated costs, and the risks associated

---

8 *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670.
9 *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262.
10 *Jarden v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1427.
11 *C & S Kelly Properties Limited v Earthquake Commission* [2015] NZHC 1690.
12 *Parkin v Vero Insurance Ltd* [2015] NZHC 1675.

with a proposed repair strategy, rather than adopting a set percentage of repair to rebuild cost.

[104] The costs to complete the repair which are before the Court in the present case total $1,286,755. This is made up of the quote from the builder the defendant says would undertake the work, Mr Thomson of $1,113,533 (which includes the foundation and sub-floor quote from CCS of $565,800). These are the only repair figures which are before the Court. They have been provided by the defendants.

[105] So far as rebuild or replacement costs are concerned, the defendant has put forward an estimate for these from its expert, the quantity surveyor, Mr Eggleton, at a figure of $1,620,887.

[106] Adopting these particular figures which the defendant has done, the difference is some $334,132. By my calculations, the total repair cost figures constitute about 79.4 per cent of Mr Eggleton's replacement cost figures.

[107] The defendant's position, as confirmed by Mr Ashe in his evidence, is that this difference is sufficiently great to justify settling the Youngs' claim on the basis of a repair rather than a rebuild. Mr Ashe goes further in his evidence and claims that, if the defendant was permitted to complete the repair, it would do so. The defendant says that its choice to settle this claim on the basis of a repair is a reasonable one and within the terms of the policy.

[108] It is clear that the powers in the policy reserved to the defendant are subject not only to the terms of the policy itself, but also to common law constraints on the exercise of discretionary contractual powers. The basic common law rule requires that the Court is not to substitute its own decision for a decision properly made by the holder of a contractual power. This was expressed in *Ludgate Insurance Company Ltd v Citibank NA*[13] as follows:

> It is very well established that the circumstances in which a Court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited…These cases show that provided that the discretion is exercised honestly and in good faith for the

---

13 *Ludgate Insurance Company Ltd v Citibank NA* [1998] Lloyd's Rep IR 221 (CA) at 35-36.

> purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse, the Courts will not intervene.

[109] It is true, too, that the possessor of a contractual power is not obliged to prefer the interests of the other contracting party to the detriment of its own interests, even if there is a contractual obligation of good faith – *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*[14] and *Topline International Ltd v Cellular Improvements Ltd*.[15]

[110] And, as Mander J noted in *C & S Kelly Properties Ltd v EQC and Southern Response*[16] where he considers the plaintiff's challenge to EQC's exercise of its statutory powers, a mere risk of the cost of a repair strategy ultimately exceeding the EQC statutory cap could not of itself provide a basis for successfully challenging a decision otherwise properly made by EQC. He held it would be necessary to show the decision to repair, in light of the costs of the chosen remediation strategy, was unreasonable in the sense that no insurer in EQC's position could have reasonably made such a choice.

[111] In the present case, the defendant contends that the difference noted at para [109] above of over $330,000 between the repair and rebuild costs here is substantial. The most challenging parts of the rebuild it is claimed have been costed on a fixed price basis and the defendant suggests there was little evidence advanced by the plaintiffs to attempt to quantify the risks they raised with the repair strategy. The defendant says, too, that the builder, Mr Thomson, was firm in his evidence that the proposed repairs were reasonable, that the CCS costing was appropriate, and that he was willing and able to carry out the repairs for the tendered price. As such, the defendant suggests there is simply no basis on these repair and rebuild costings for the Court to interfere in the defendant's decision to settle this claim on a repair basis.

---

[14] *Thiess Contractors Pty Limited v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102.

[15] *Topline International Ltd v Cellular Improvements Ltd* (HC) Auckland CP144-SW02, 17 March 2003.

[16] *C & S Kelly Properties Ltd v EQC and Southern Response* [2015] NZHC 1690.

[112] As matters stand, the only evidence as to quantum for repair of the property in terms of Mr Sinclair's repair strategy is from the defendant to the effect that it would cost $1,286.755 to complete repairs.

[113] However, there is no doubt in my view that this evidence must be subject to a number of vagaries which I now set out.

[114] There is an issue insofar as Mr Sinclair has acknowledged he has been unable to carry out a full inspection under the house and in particular under the western end. He maintains in his evidence that this, however, does not increase any uncertainty about the feasibility of his proposed repair strategy. It goes without saying, however, that this may well involve increased pricing in the event that unknown issues arise.

[115] The CCS quote, it seems, was completed by Mr Tobeck, a senior officer of that company. He did not give evidence before me, nor did any other party from CCS. Instead, it was Mr Thomson the builder who said he was happy with the CCS quote. Notwithstanding this, that CCS quote is tagged, being subject to "final PS1 engineer design and CCS acceptance of this design." These might well be seen as significant factors. In addition, the quote is subject to unforeseen physical conditions below ground being encountered plus an hourly standby rate of $950 plus GST for delays. The CCS quote was stated to be valid only for 28 days from 13 June 2006 and if not accepted by that time it was subject to exchange rate and other cost changes which might be applicable. Additional piles required were also to be charged at the rate of $1500 plus GST per metre and, if it proved that hand drilling of piles was required, rates were to be increased.

[116] Next, significant doubts were raised by Mr Whiteside QC for the plaintiff about the competence of those involved in this repair work and, in particular, Mr Tobeck of CCS. These, however, comprise mere allegations at this point. I take them no further.

[117] The quote from the builder Mr Thomson, as I understand it, was also necessarily subject to certain conditions.

[118] The realities of conducting, in particular, the foundation and sub-floor work on this steep sloping site with a degree of limited access and what I have accepted as a rather novel and untried foundation repair strategy, also in my view may well raise some concerns over pricing of the work.

[119] There is also some suggestion from the plaintiffs that a builder, Mr Steven Brown (for whom Mr Thomson worked earlier) had been consulted earlier to provide a quote for and undertake the repair work, such that he was a party to a previous inspection of the site. Notwithstanding that, it seems Mr Brown disengaged from the project. The plaintiffs contend the reasonable inference is that, as an experienced builder, Mr Brown declined to be involved because he was of the view that the repair strategy devised by Mr Sinclair was not feasible or, alternatively, costing of this on some fixed basis was impossible. Mr Young even suggested that Mr Brown had intimated this to him at the time. Mr Brown was not called to give evidence however. I take these allegations on the part of the plaintiffs no further, and attribute little weight to them here.

[120] Notwithstanding all these matters, and without in any way suggesting that the exercise by the defendant of its discretion to determine that this is a repair of the Young house was undertaken other than honestly and in good faith, some question marks must remain over the repair costings provided in this case. Nevertheless, I do not reach any definitive conclusion that for cost reasons alone this repair is uneconomic. Instead, I find that uncertainty as to the true economics, costs and outcome of carrying out this repair strategy is such that, notwithstanding the defendant's assertions and the evidence before me of Mr Ashe to the contrary, some concerns must arise over whether a well-advised insurer in the position of the defendant would ultimately prefer the certainty of a rebuild over the repair proposed here.

[121] These matters, combined with the other conclusions I have reached at paras [79] and [98] above, lead me to the conclusion that, in the context of this case, with all the factors and circumstances relating to this property, the proposed repair would not meet the relevant policy obligations such that the defendant here cannot insist on a repair over a rebuild.

Has Tower made an election to cash settle the plaintiffs' claim?

[122] The pleaded election at para [12] of the plaintiffs' amended statement of claim is that the defendant elected to make cash settlement offers to the plaintiffs from December 2011 and specifically one on 11 December 2013 of $362,084.08, in accordance with the election clause under the insurance policy, and the defendant is now bound by these.

[123] On 11 December 2013, Ms Karen Paterson of the defendant sent the following email to Mr Young:

> Dear Mr Young,
>
> …
>
> The following documentation sets out the basis upon which TOWER would be prepared to propose an offer to cash settle your earthquake related insurance claims with us.
>
> TOWER's offer to settle your earthquake related claim would be at its estimated of the full replacement value (not at indemnity value) of the costs of repairing your house. The offer would include additional costs (such as geotechnical and enhanced foundation costs where applicable) that TOWER believes are fair and reasonable.
>
> The amount which TOWER would be prepared to propose as a cash settlement has been calculated as $368 667.61 as follows:
>
> | | |
> |---|---|
> | $366,999.59 | House |
> | $44,062.25 | Contingency Sum |
> | $35,914.12 | Landscaping |
> | $589.95 | shared landscaping |
> | $484,688.81 | TOTAL REPAIR COST |
> | $ 6582.77 | less cost already incurred |
> | $116 021.20 | less EQC liability as advised by EQC |
>
> **$362084.84 TOTAL SETTLEMENT AMOUNT**
>
> This proposal from TOWER remains open for acceptance for six weeks from the date of this letter. If you require more time to consider this offer please contact TOWER to discuss extending this deadline. If you do not want to have your claim cash settled, or you do not believe this amount is correct, TOWER are happy to manage the repair of your house and to take on any of the risks of additional costs that may be required.
>
> …

[124] In that 11 December 2013 letter, Ms Paterson expressly recorded that the defendant had not made any formal election under the policy but that it was open to proposing a cash settlement as outlined, or to provide a fully managed repair of the house.

[125] In *Domenico Trustee Ltd v Tower Insurance Ltd v Tower Insurance Ltd*[17] I endeavoured to elucidate from the authorities some general principles applicable to the concept of election. I now set these out as follows:

> (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;
>
> (d) The electing party must be appraised 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 enquiries 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.

[126] These general principles were referred to and applied by Mander J in *C & S Kelly Properties Ltd v Earthquake Commission and Southern Response*.[18]

---

17 *Domenico Trustee Ltd v Tower Insurance Ltd v Tower Insurance Limited* [2015] NZHC 981.

18 *C & S Kelly Properties Ltd v Earthquake Commission and Southern Response* [2015] NZHC 1690 at [104].

[127] And, turning to the other authorities in this area and in particular *Rout*[19] and *Skyward Aviation 2008 Ltd v Tower Insurance Limited*,[20] they generally confirm that upfront cash offers made informally by an insurer are not elections to cash settle in terms of an insurance policy of the type addressed here, unless it is clear from the express terms of the offer that it is indeed the making of an unequivocal election. In the present case in my view, the reservation of the defendant's rights in the email from Ms Paterson would seem to negate any inference that a formal election had been made with that offer. Earlier and back to December 2011, as I see it, there is no definitive evidence before me that in any of the many negotiations and discussions between the parties, an unequivocal cash offer election was made by the defendant. And, in any event, where (as here) the defendant as insurer had made a cash offer which was rejected by the plaintiffs as the insured, the right to elect to repair or reinstate has been held to remain open to the insurer – see *Colinvaux's Law of Insurance in New Zealand* at 8.5.2(2).[21]

[128] For these reasons I find that the defendant did not make an election under the policy from December 2011 or in the 11 December 2013 email, and that it is yet to make its formal election on the plaintiff's claim.

Rebuild Cost

[129] Having reached the conclusion I have that this is a rebuild, I find in terms of the policy that the maximum amount payable by the defendant here under each of the alternatives of a rebuild (either on the site or elsewhere) or for purchase of another property, is the cost that the plaintiffs would notionally incur in rebuilding their existing house at the property to the same condition and extent as and when new.

[130] As to evidence of quantum before me, two quotes for the cost of a rebuild were provided. The first was an estimate prepared in May 2013 by a building firm, Miles Construction, instructed by the plaintiffs. Mr Miles, a director of that firm gave evidence before me. Miles Construction's original rebuild estimate was

---

19 Above n 9.

20 *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2014] 2 NZLR 713 (CA).

21 Robert Merkin and Chris Nicoll, *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at 8.5.2(2).

$1.362 million. This quote was revised up to $1.512 million in June 2013, $1.620 million in March 2015 and finally up to $2.097 million in August 2015. One additional material source of this increase was the additional cost of a pile wall, but the defendant submits that much of the rest is attributable to high fee allowances and the additional 10 per cent contingency allowance.

[131] The second report was prepared by an experienced quantity surveyor, Mr Eggleton, instructed by the defendant. He also gave evidence before me. Mr Eggleton initially estimated the cost of replacement of the house to be $1,609,559.50 based on a site visit and drawings emailed to him by Mr Young. He later added a further $10,811 (incl GST) in response to a comment by Mr Young that the joists were engineered timber and a further $506 + GST for an external power socket omitted. His new total for present replacement cost of the house is $1,620,887.

[132] I turn first to consider the quantum claim advanced by the plaintiffs which depends upon Mr Miles' estimate of costs noted above.

[133] But first, I note generally that as the policy here states, the defendant is not bound to "pay the cost of replacement or repair beyond what is reasonable, practical or comparable with the original." I bear this in mind along with the fundamental principle of insurance law that an insured is not entitled to an unjust windfall for loss and damage incurred by events such as the earthquakes here.

(a) Design fees

[134] Turning now to the Miles Construction estimate, first I note that this includes a design fee allowance which was sourced from Mr Young. The original costing including a "working drawing" fee of $126,500. The defendant pointed out, however, that this was ten times the fee that Mr Young had earlier quoted for a repair that he himself described as a "very complex fix" of an "intensively architecturally detailed property". By August 2015, the design fees had increased to $210,000 + GST, including a new "contract observation" fee that Mr Young also envisaged being paid to him or his firm.

[135] By way of contrast, in Mr Eggleton's calculations, a design fee of $80,100 + GST was included. He explained that most of the difference was in reproducing the architect's drawing (a fee Mr Young was to receive himself or for his benefit) and that Mr Eggleton's allowance was similar to Mr Young's initial fee proposal. Mr Miles initially suggested that new drawings would be required to rebuild the house. However, it seems he later conceded in his evidence that even with the changes in the Building Code, this probably did not require major changes to the initial 2006 plans. Having considered all the evidence before me, I find that Mr Eggleton's assessment of the designer's fee aligns better with the terms of the policy and all the circumstances here. This would result in a reduction from Mr Miles' figures of approximately $130,000 plus GST.

(b) Consent fees

[136] The Miles Construction consent fee allowance was $8,900 + GST in the June 2013 costing but increased to $28,000 + GST by August 2015. Miles Construction claimed that the Council charging regime was opaque and largely time-based. Mr Miles pointed to inspections, document reviews, and hourly rate of $130-$200. However, the defendant submits that none of this could justify the significant increase of almost 300 per cent. Mr Miles later conceded in his evidence that the estimate was "potentially high".

[137] Mr Eggleton's consent fee allowance was $6,900. He explained how he had made up this figure and noted that it compared favourably with his recent experience on other comparable jobs. I accept that the quote provided by Mr Eggleton for consent fees is a better reflection of the actual cost required. The result is a further reduction in Mr Miles' figures of $21,100 + GST.

(c) Curtains and carpets

[138] Miles Construction in its estimate allowed $15,000 + GST and $12,330 + GST for curtains and carpets respectively. However, as I understand it, the defendant argued that this falls under contents insurance and is not insured under the house policy. No real dispute was raised as to this. The result is a further reduction in Mr Miles' figures of $27,330 + GST.

(d) *Music system*

[139] Miles Construction also allowed $8000 + GST for a music system. However, this would also seem to come under contents insurance and not the house insurance and therefore is not covered in the current proceeding. A further reduction in Mr Miles figures of $8000 + GST is required.

(e) *Contingency and margin*

[140] In his evidence before me, Mr Eggleton strongly disputed Mr Miles' 15 per cent contingency margin added in his estimate. Mr Eggleton said a 10 per cent contingency allowance was the proper market rate. The 10 per cent contingency allowance, as I understand it, has also been agreed by other quantity surveyors as a generally accepted rate. I agree with Mr Eggleton that a contingency margin of 10 per cent is more appropriate in this case. This 5 per cent excess contingency reduction is likely to amount to a figure of about $90,000 + GST here.

(f) *Inflation*

[141] The plaintiffs at the commencement of this trial claimed rebuild costs based upon a 5 per cent inflation rate since August 2015. However, both "quantum experts" here considered that a reasonable allowance of 1-3 per cent was more appropriate. I agree. I find that inflation of up to 3 per cent is appropriate in this case. The reduction in the inflation rate from 5 per cent to 3 per cent for the one year four months since August 2015 is likely to amount to a figure of about $50,000 + GST here.

[142] Totalling all the reductions from Mr Miles' estimated rebuild costs noted above on my calculations comes to $326,430. This amount deducted from Mr Miles' original estimate of $2,097,612 leaves a new estimated rebuild figure, which he appeared to accept in his evidence, before me of $1,771,182. Other attacks were made upon some of Mr Miles' additional costings in his original estimate such that in my view, although Miles Construction and Mr Miles are very experienced builders, used often in earthquake rebuild and repair matters by Tower, here the deficiencies

and errors, both acknowledged and otherwise, in his estimate must mean that the only proper response is to put it to one side.

[143] This brings me to the rebuild estimate provided by the quantity surveyor instructed by the defendant, Mr Eggleton. Mr Eggleton is a very experienced quantity surveyor employed often by both insurers and insureds for earthquake repair and rebuild assessments. The estimate provided in his evidence for the rebuild is $1,620,887. This estimate was not effectively challenged or questioned in any real way by the plaintiffs. The only real objection raised was a suggestion made by the plaintiffs that Mr Eggleton was not impartial in giving his rebuild estimate here. There was no evidence of any kind to support this contention put before me however. I reject it.

Conclusion as to rebuild cost

[144] Given my conclusions concerning the Miles Construction rebuild estimate noted above, and the fact that Mr Eggleton's estimate was largely unchallenged, the only proper response on this quantum question, as I see it, is to adopt Mr Eggleton's figure. The plaintiff is therefore entitled up to a figure of $1,620,887.00 for the cost of a rebuild.

General and exemplary damages claims

[145] The plaintiffs seek general and exemplary damages from Tower "for its unjustified refusal to pay the full replacement value to which the plaintiffs are entitled under the insurance contract". The plaintiffs provide a list of complaints which, in their opinion, justifies an award of general and exemplary damages in this case:

(a) withholding the information of Subfloor Construction Limited in their recommendation to rebuild the house;

(b) the reversal of Ms Andrews' stance that the house required a rebuild;

(c) the attempt to make the Sinclair report of July 2014 binding on the plaintiffs;

(d) the deliberate ploy by Mr Ashe to muddy the waters by suggesting that Tower had been advised that EQC assessed the house as being under cap;

(e) the redaction of the CNTL interactions

(f) the health and wellbeing of Archie McAra Young

(g) the arrogance of Tower

(h) delay

[146] At the outset however, I note that the plaintiffs have conflated certain issues. These are whether general damages should be awarded as loss incurred through breach of express clauses in the insurance policy contract, or whether the plaintiffs are alleging that the defendant has breached an implied contractual term of good faith. Before coming to this issue, however, I will first address the plaintiffs' claim for exemplary damages for what are essentially contractual breaches.

Exemplary Damages

[147] The law is relatively settled on this point. Put simply, exemplary damages for breach of contract are not permitted in New Zealand since the Court of Appeal decision in *Paperclaim Ltd v Aotearoa International Ltd*. In that case, the Court held:[22]

> [181] It is easy for a court to hedge and say that exemplary damages should not be possible save "in very rare cases" or "in exceptional circumstances". But the downside of "leaving an out" is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the "exceptional" category. The defendant will never be successful in having the claim struck out, as the court will not be able to assess at a strike-out stage whether the case factually comes within the exceptional category where exemplary damages might lie. A claim may go to trial

---

22 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 at [181].

> unnecessarily, the plaintiff hoping that he or she may win the $1 million jackpot… The fact that the odds may be slim may not deter a plaintiff with stars in his eyes. Alternatively, defendants may feel compelled to offer something in order to get rid of the possibility that this case is found to be within the exceptional category. It is quite wrong to give plaintiffs a powerful weapon with which they can harass defendants and, perhaps, extract large settlements because the costs of defending even an unmeritorious claim may be huge… Mr Beck is right that the time has come for this "bull… to be grasped by the horns and slaughtered" and that exemplary damages have "no place in a principled system to contractual damages.

[148] It follows that exemplary damages awarded in the context of a contractual breach are not available in New Zealand. And before me counsel for the plaintiffs has failed to advance any reasons why the Court of Appeal's decision should not be followed in the circumstances of the present case. This is sufficient to dispose of the plaintiffs' claim for exemplary damages here, which is dismissed.

[149] But, in any event, even if exemplary damages were able to be awarded in a case such as this involving an insurance contract breach, such damages in any event are an exceptional remedy as the Court of Appeal noted in *Taylor v Beere*.[23] It is a remedy which must be reserved for extreme cases of flagrant wrongdoing. Exemplary damages in tort are awarded to punish a defendant who is guilty of outrageous wrong, to deter that person and others from similar misconduct in the future, and to register the Court's condemnation of that behaviour – *Couch v AG (No 2).*[24]

[150] In any event in the present case, it could not be said on the evidence before me that the behaviour of the defendant has approached the standard required for an award of exemplary damages in tort or otherwise to be made.

General Damages

[151] I now turn to the issue of whether the plaintiffs are entitled to general damages. As noted above, the two bases on which general damages may be awarded in a case such as the present are either, that the loss incurred by the insured is a foreseeable loss as a consequence of the insurer's breach of contract, or that the loss

---

[23] *Taylor v Beere* [1982] 1 NZLR 81 (CA).
[24] *Couch v AG (No 2)* [2010] NZSC 27.

is incurred as a result of a breach of an implied term of good faith such that damages of this kind should be awarded.

Whether the general damages sought by the plaintiff are a reasonably foreseeable consequence of the breach of the insurance contract?

[152] Mr Whiteside QC for the plaintiffs has referred me to two authorities in New Zealand where general damages have been awarded for an insurer's breach of the insurance contract. In *Bloor v IAG New Zealand Ltd,*[25] the plaintiff's buildings were destroyed by fire. His insurance claim was declined on the grounds of material non-disclosure. Proceedings were brought and the High Court held that IAG failed to establish its affirmative defences. Noting that the award should be modest, Stevens J awarded $10,000 of general damages for distress, humiliation and health problems experienced as a result of non-payment under the policy.

[153] In *Edwards v AA Mutual Insurance Co*,[26] the plaintiffs claimed general damages of $10,000 for worry, anxiety and the disruption to their lives resulting from the breach of contract by the insurer unjustifiably declining the plaintiffs' claim for indemnity cover for their home destroyed by fire.

[154] In that case, Tompkins J did not consider damages are generally recoverable for injured feelings, upset and annoyance. However, his Honour went on to say that there can be damages flowing from substantial inconvenience where:

(a) The inconvenience is suffered as a direct result of the breach;

(b) The damage is not too remote; and

(c) The inconvenience should have been reasonably contemplated by the defendant as a probable result of its failure to indemnify the plaintiffs.

---

[25] *Bloor v IAG New Zealand Ltd* [2010] 16 ANZ Insurance Cases 61-845.
[26] *Edwards v AA Mutual Insurance Co* [1985] 3 ANZ Insurance Cases 60-668.

[155] The approach taken in *Bloor v IAG New Zealand* and *Edwards v AA Mutual Insurance Co* applies the rule in *Hadley v Baxendale* where the classic test of remoteness was stated by Baron Alderson:

> [We] think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it.

[156] In circumstances where the insurer unjustifiably rejects the insured's claim, which is what happened in *Bloor v IAG New Zealand* and *Edwards v AA Mutual Insurance Co*, it is reasonable, and within the contemplation of both parties at the time of the execution of the contract, that such conduct will lead to injured feelings, upset and annoyance of the insured. However, that is different to the circumstances prevailing here. At no point did Tower reject the plaintiffs' claim in the present case. The alleged breach under the insurance policy contract happened when Tower chose a repair strategy said to be against the express terms of the policy. I therefore find that the non-pecuniary loss claimed by the plaintiffs here cannot be fairly and reasonably considered as arising naturally from the breach, or that it is such as may have been contemplated by both parties during the formation of the insurance contract.

Whether there is an implied duty of good faith and, if so, whether it has been breached here?

[157] As I understand it, the question over whether an insurer owes a duty of utmost good faith beyond its initial duty of disclosure has never been settled in New Zealand. There are a number of authorities that alert to the possibility of a general duty of good faith by an insurer. One of these is *State Insurance Ltd v Cedenco Foods Ltd*, where the Court of Appeal noted:[27]

> As this case turns on other issues it is unnecessary for us to decide whether damages can be awarded for a breach of the duty of utmost good faith. For present purposes we will assume they can, but without deciding as much.

[27] *State Insurance Ltd v Cedenco food Ltd* CA 216/97, 6 August 1998, at 2.

> The point remains open and can await a case in which a decision is necessary.

[158] Later, in *Pegasus Group Ltd v QBE Insurance (International) Ltd,* Winklemann J also considered a claim for alleged breaches of good faith arising from an insurer's handling of claims.[28] Her Honour stated that it remained unclear in New Zealand whether the duty of good faith owed by an insurer is contractual or equitable and what the precise content of the duty is. She declined to rule on that point, however, on the basis that the case before her did not require it.

[159] On these aspects, there does seem to me, however, to be a persuasive argument as to why a duty of good faith on the part of the insurer in processing claims should be implied in insurance contracts. First, as noted by Hardie Boys J in *State Insurance v McHale*, "[it is a] fundamental principle that the contract of insurance is one of the utmost good faith on both sides".[29] While the duty to disclose all material facts is often enforced against the insured, I have no doubt that a corresponding duty, especially at the stage of lodging and processing a claim, applies to the insurer. It seems to me fundamental that an insurer should be required to disclose all relevant information material to a claim that the insurer knows or ought to have known.

[160] In the recent round of Canterbury earthquake insurance litigation, Courts have acknowledged that a potential duty of good faith on the part of both parties is likely to exist. Notwithstanding this, none of these decisions have found any circumstances in which such duty on the part of the insurer has been breached. By way of example, in *Rout v Southern Response,* the plaintiff claimed general damages for the length of time taken by the insurer to process the insured's claim, the alleged failure by the insurer to fulfil its obligations under the policy, the late change in position by the insurer from a rebuild to a repair, as well as additional stress alleged to have been caused to the insured given their ongoing difficulties.[30] While in *Rout*, I did have considerable sympathy for the claimants and expressed this, I found that the delay in payment was due to ongoing negotiations by both parties and therefore

---

28 *Pegasus Group Ltd v QBE Insurance (International Ltd)* HC Auckland CIV-2006-404-6941. 1 December 2009.

29 *State Insurance General Manager v McHale* [1992] 2 NZLR 399 at 406.

30 *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262.

general damages were not appropriate. On this general damages question, in *Rout* I noted at [202]:

> The obligation of Southern Response throughout was to act fairly and in good faith as insurer in terms of the policy requirements. General damages claims against insurers in the past have involved situations, for example, where claims have been unjustifiably declined on grounds of fraud or gross delay. In addition, s 30 Consumer Guarantees Act 1993 requires services such as those provided here by Southern Response to be provided "in a reasonable time". This section might well apply in this case.

[161] In *Colinvaux's Law of Insurance in New Zealand,* the learned authors note specific post-contractual duties imposed on the insurer.[31] In discussing the conduct expected when handling an insurance claim, the authors say:

> It is accepted that a liability insurer is under a duty to negotiate in good faith on the part of the assured, a duty which takes effect as an implied term, and it is apparent that avoidance by the assured is entirely inappropriate as a remedy for the duty. Accordingly, the duty takes effect as an implied term and its breach sounds in damages. The question is whether this is a general principle. It is accepted in New Zealand that an insurer is under a duty to admit liability and to pay promptly, failing which there is a liability in damages for breach of an implied term in the policy to the extent that the delay is the fault of the insurer. However, the English authorities support this proposition only to the extent that the insurer is in breach of contract by wrongfully repudiating the policy and that such repudiation can be disregarded as it is a thing writ upon water. In *Insurance Corp of the Channel Island v McHugh (No 1)*, Mance J held, even if there was a continuing duty of utmost good faith owed by the insurer, it did not give rise to an implied term obliging the insurer to negotiate, settle and pay a claim in good faith and with reasonable speed.

[162] On these aspects, I note too that Tower has agreed to be bound by the "Fair Insurance Code 2016" issued by the Insurance Council of New Zealand (ICNZ). In part, the Code states:

> **Our Responsibilities**
>
> 26. *We will manage your claim quickly, fairly and transparently.*
>
> 27. When you make a claim, we will:
>
> - explain how to report your claim
> - explain what information you must give us to process your claim

---

31 Robert Merkin and Chris Nicoll, above, Colinvaux's Law of Insurance in New Zealand, 2014, Thomson Reuters at [4.8(4)].

- explain the steps we will take while handling your claim
- tell you that the information you give us must be honest, complete, up-to-date and relevant
- keep you informed of the process of your claim
- *settle all valid claims quickly and fairly*
- clearly explain how we reached our decision
- clearly explain the reason or reasons, if we decline your claim.

…

31. You have a right to:

- access the information that we have relied on in evaluating your claim; and
- ask us to correct any mistakes in that information

[163] With all these matters in mind, I therefore find that a duty of good faith on the part of the insurer is implied in every insurance contract. It must, as I see it, be a necessary incident of these contracts (long said to be contracts of utmost good faith) and an obligation that flows both ways. To suggest otherwise would make no sense. And in my view, this duty extends beyond a mere obligation on the insurer and the insured of continued disclosure. While the full scope and limits of the duty can be left for another day, I find, as a bare minimum, that the duty requires the insurer to:

(a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;

(b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and

(c) process the claim in a reasonable time.

[164] As to the requirement that the insurer process a claim within a "reasonable time", this, however, must take into account the time required to properly investigate

and assess all aspects of the claim. What is "reasonable" will depend on all the relevant circumstances. Factors that may need to be taken into account include the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer's control. Further, if the insurer shows that reasonable grounds exist for disputing the claim (whether as to the amount of any sum payable or as to whether anything at all is payable), the insurer does not breach the implied term merely by failing to pay the claim (or the affected part of it) while the dispute is continuing. But the conduct of the insurer in handling a claim may be a relevant factor in deciding whether that good faith duty was breached and, if so, when.

[165] I now turn to the specific allegations made by the plaintiffs here and consider whether any of them breaches what I have found to be the insurer's duty of good faith.

(a) Withholding Subfloor Construction's opinion to rebuild

[166] The plaintiff alleges that withholding the June 2011 report from Mr Birch of Subfloor Construction which, although only a brief report, did recommend a rebuild of the house, is a serious breach of the defendant's obligation of good faith. I agree. The report was effectively commissioned by the defendant, albeit during the early stages of the plaintiffs' claim, through their agent Stream. Although the evidence seems to indicate that it was Stream who intentionally withheld the report, and that the defendant provided it to Mr Young as soon as they were aware of it, this does not assist the defendant in this case. Stream were the defendant's appointed agents to carry out the claims process under the policy and the defendant is bound by Stream's actions here. And Mr Young in this case had mentioned to representatives of both the defendant and Stream on a number of occasions the comments he said Mr Birch had made to him at the time of his inspection of the property, comments which would appear to be consistent with this withheld report. For all these reasons, I am of the view that the full and continuing disclosure obligation of the insurer has been breached and the major delay in providing the report to Mr Young may have prolonged matters to some extent. I find that nominal damages of $5000 should be awarded for the defendant's failure to disclose this document to the plaintiff. The

failure to disclose was not a major matter, given the report was extremely short and was contradicted by the other floor-leveller's report obtained at the time, and it has made little difference to the overall outcome here.

(b) Reversal of Philippa Andrews' position from a rebuild to repair

[167] As I note above at [21], I accept for present purposes that there was a positive collaboration between Ms Andrews and Mr Young. However, I do not find that Ms Andrews went to the extent of indicating a firm view to bind the defendant that the house was accepted as a rebuild. And I note too that from the evidence it seems Ms Andrews' comments were based very much on the information (which was incorrect) given to her at the time by Mr Young that there had been a major movement and twisting of the house. Therefore it cannot be fairly said here that this constituted a reversal of the defendant's position from a rebuild to a repair.

(c) Attempt to make the Sinclair report binding on the plaintiffs

[168] The plaintiff alleges that the defendant attempted to make the Sinclair report of July 2014 binding on the plaintiffs. As I understand it, this allegation is linked to an email sent on 15 August 2014, from Mr Gordon Fraser of Tower to Mr Young where he said:

> Hi Greg,
>
> I think it's important to note that all parties agreed to abide by the decisions that came out of Marton Sinclair's review and report. James has assured me that Marton's report addresses the repair of earthquake damage to your home.
>
> I am very confident that the repairs meet our obligations from a policy point of view. Please feel free to call me if you would like to discuss this.
>
> Regards
>
> Gordon

[169] In my judgment there is little in this claim advanced by the plaintiffs. I do not find that the defendant exerted unfair pressure on Mr Young to be bound by the Sinclair report. The comments Mr Fraser makes in this email are perhaps somewhat unfortunate, and his claim that all parties agreed to abide by Mr Sinclair's decision

would appear to be wrong. But, given the intense history in this matter which preceded this email, and the many and often hostile exchanges between the parties, this perhaps misguided attempt to reach some resolution of disputed matters (quickly rebuffed) was little more than that. And, of interest too is the fact that when the defendant proposed to engage Eliot Sinclair to try to break the parties' deadlock, Anthony Harper, on behalf of Mr Young, specifically requested that the work be carried out by Mr Sinclair personally. That occurred.

(d) Deliberate ploy by Mr Ashe to muddy the waters by suggesting that Tower had been advised that EQC assessed the house as being under cap

[170] There is nothing of substance in this allegation. Mr Ashe may well have been mistaken in comments he made. But innocent mistakes do occur from time to time. And, I do not find that Mr Ashe was unprofessional here in dealing with this aspect of the plaintiffs' claim.

(e) The redaction of the CNTL interactions

[171] Again, I am satisfied there is no substance in this allegation. I do not find that there is any wrongdoing on the part of the defendant or their lawyers, Gilbert Walker, in redacting certain parts of the evidence due to privilege claims.

(f) The health and wellbeing of Archie McAra Young (Archie)

[172] This area, in my view, is a sad and all too often difficult by-product of many insurance cases that have arisen following the Christchurch earthquake sequence. On this aspect, I express my deepest sympathies for Archie, the son of Mr and Mrs Young. As the evidence advanced for the plaintiffs suggests, the harm caused to the Young family overall by the Christchurch earthquakes was compounded for Archie (aged about 10 at the time of the February 2011 earthquake) by his having to live in an unrepaired house for what is now nearly six years. During that time, Archie was undergoing counselling and treatment for worry, anxiety and stress due to the earthquakes. He was and is nervous and frightened of being alone in the house and being in the dark, particularly given that at the time the earthquakes occurred, there were few working lights. Despite the fact that Stream and Tower were put on notice of Archie's condition and the need therefore to resolve matters without delay, the

plaintiffs say this was simply ignored by the defendant and no prompt outcome was achieved.

[173] However, while some criticism may possibly be levelled at the defendant for not addressing or responding in a sympathetic and real manner when it was put on notice about Archie's condition, I do not accept that it was either reasonably foreseeable in the policy for Tower to compensate the health and well-being of its occupants, or insofar as such terms are implied, I do not accept that Tower here intentionally or by omission breached this term, such that an award of general damages should flow.

(g) The arrogance of Tower

[174] The plaintiffs allege that there have been many high-handed actions by Tower in this case. However, overall on all the evidence which is before the Court, I do not find generally that Tower acted unprofessionally in its correspondence or dealings with Mr Young. To the contrary, some comments made by Mr Young, especially to and about Mr Sinclair, seem ill-intentioned. That is unfortunate because Mr Young has been seen throughout as speaking on behalf of the plaintiffs and his family, including his wife and children, all of whom have been substantially affected by the earthquake damage caused to their home.

(h) Delay

[175] The plaintiffs allege that the defendant was solely at fault for what they say is the major delay that has occurred here since they lodged their claim. In the 2015 text *Insurance Claims in New Zealand*[32] the following comments are made regarding delay in settling claims:

> 8.5 Delay in settling claims
>
> The time taken to assess and pay claims is a common source of complaint. At the time of writing, a large number of insured's claims for damage sustained in the Canterbury earthquake sequence remain unresolved – over four years after the event.

[32] *Insurance Claims in New Zealand*, Michalik & Boyes, Lexis Nexis 2015 at 8.5.

> There is no question that insurers are obliged to assess and pay claims within a reasonable time, but what is "reasonable" is specific to the context of the particular claim. As a result, the extent and nature of the insurer's obligation is poorly defined. The earthquakes of 2010 and 2011 have strained the capacity of the New Zealand insurance industry, not only financially, but also, more importantly, in terms of the availability of skilled staff to deal with the unprecedented number of claims and the complexities of the issues faced. This problem was, and is, compounded by the peculiarities of the EQC dual insurance system, which has led to further complications and delay.
>
> Under these circumstances, there has been a difficult balance to strike, between acting in good faith to deal with the needs of distressed insureds whose homes have been badly damaged, while not over- or under-indemnifying. There have been instances reported of settlements being offered with the implied threat that if the offer is not accepted, the claim will go to "the bottom of the pile". If such threats are proved, there is no doubt that this is bad faith on the part of the insurer. The question is: if delays have occurred because of bad faith or intransigence on the part of the insurer, should the insured be compensated, and, if so, why and how?

In this broad area of delay, by way of example, the plaintiffs refer to the period in the second half of 2014 when they allege that "Tower and Stream deliberately delayed in providing a scope of works based on the first Sinclair report".

[176] There is no doubt in my mind that there have been real delays in this claim since it was promptly made by Mr Young in 2011. While I can understand the frustration of the entire negotiation process and the effects it has had on the entire Young family here, I do not find that the defendant was entirely at fault for the delay in this insurance claim, such that there has been unreasonable delay in concluding the plaintiffs' claim causing losses or costs that can be recoverable as damages. The claim must be viewed in the context of 25,000 other earthquake claims the defendant has processed since the Christchurch earthquake sequence began and the strained capacity of the available experts pool to provide assistance and reports. No suggestion has been made in this case of the Young's claim "going to the bottom of the pile" if offers were not accepted. Undoubtedly though, this whole matter has seen a large range of experts engaged over different periods of time to consider, negotiate, and report on what must be seen as a novel repair strategy on a difficult site. Some of this, however, related to the need for additional surveying evidence following Mr Young's continued reliance on the early Budget Set Out figures which were clearly in error. As I understand the defendant's allegations, even when Mr Young instructed Mr Cowie to complete a new survey and this showed the true

position, there is a suggestion that Mr Young continued to rely on his original position for a time. I am satisfied too that, in the main, there was a degree of real engagement between the defendant and Mr Young throughout, even though that relationship clearly became fraught at times. It is difficult therefore to escape the conclusion here that on occasions Mr Young is himself at least partly responsible for some aspects of what has been a prolonged claim process. Overall I accept the defendant's submission I have noted above that, due to the position taken initially by Mr Young and his insistence as to how far the house had moved, this caused delay and required the defendant to engage a range of extra experts to ensure that the house was not in the position or condition which Mr Young claimed it to be.

[177] I conclude therefore that the plaintiffs have been unable to show on the balance of probabilities that the defendant has caused unreasonable delay in this matter to such an extent that it should be liable here for an award of general damages based on delay.

Relief sought

[178] In the plaintiffs' first amended statement of claim they seek the following:

> (a) Judgment in the sum of (now) $2,097,612.18 being the amount assessed by Miles Construction Limited as the full replacement value of the house and repair of the garage, or such higher amount as may be assessed at the time of the trial;
>
> (b) An order directing Tower to pay all reasonable architects', engineers' and surveyors' fees in respect of a rebuild;
>
> (c) An order directing Tower to pay the plaintiffs' reasonable temporary accommodation costs, not exceeding the contractual limit of $25,000;
>
> (d) Exemplary damages in the sum of $100,000;
>
> (e) General damages as the Court sees fit;
>
> (f) Interest on the judgment sum and any damages award; and
>
> (g) Costs.

[179] Although the plaintiffs have effectively, to a significant measure, succeeded in their claim in this proceeding, a number of the items of relief sought are not appropriate here.

[180] In the Court of Appeal judgment in *Skyward Aviation 2008 Ltd v Tower Insurance Ltd*[33] the Court noted, under the identical policy conditions to those prevailing here, that once the damage to the property at issue was regarded as a rebuild, election of the alternatives available (a rebuild on the site, rebuild elsewhere or purchase of another property) rested with the insured. That decision went on to state that under this election, if the insured elected, for example, to rebuild or to purchase another house, the insurer was bound to pay the cost of that rebuild or new house up to the cost that the insured would notionally incur in rebuilding their existing house on its present site. The amount payable by the insurer on rebuild or purchase to replace was not subject to any other limitations.

[181] Accordingly, the relief to be granted here is to take the form of a declaration as to either rebuild or replacement by the purchase of another house up to the maximum figure noted at para [144] above.

[182] So far as the relief sought by way of temporary accommodation costs up to the contractual limit of $25,000 is concerned, as I understand it, this is not disputed by Tower and an order to this effect is to follow. Experts' fees however, as I understand it, are in dispute, but, no submissions on this aspect were made before me.

[183] No award of exemplary damages is appropriate or to be made here. So far as the general damages claim is concerned, as noted at para [166] above, a nominal award of $5000 general damages is made.

[184] No submissions were advanced before me regarding the claim to interest on any judgment sum or damages award. No award of interest is to follow.

[185] Costs are to be reserved as outlined below.

---

[33] Above n 19.

Result

[186] A declaration is made that the plaintiffs' house is beyond economic repair in terms of the policy and therefore it is regarded as a rebuild.

[187] The maximum amount payable by Tower under each of the alternatives of rebuilding the house on its existing site, or rebuilding the house elsewhere or, alternatively, purchasing another house (which election is to be made in terms of the policy) is to be $1,620,887.

[188] The defendant is to pay the plaintiffs' reasonable temporary accommodation costs, not exceeding the contractual limit of $25,000.

[189] The defendant is to pay to the plaintiffs general damages of $5000.

Costs

[190] As to costs, disbursements and experts' fees here, they are reserved.

[191] I direct that, in the absence of the parties being able to agree these issues between them, they are to file submissions on the question on a sequential basis. These are to be referred to me and, in the absence of either party indicating they wish to be heard on the issue, I will decide those questions on the basis of the submissions filed and the material before the Court.

…………………………………………

Gendall J

Solicitors:
Wynn Williams, Christchurch
Gilbert Walker, Auckland

Copy to Mr Whiteside QC