IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2015-409-000230
[2019] NZHC 528

BETWEEN	PAUL GEOFFREY MYALL Plaintiff
AND	TOWER INSURANCE LIMITED Defendant

Hearing: 6 December 2018

Appearances: K P Sullivan for Plaintiff
M C Harris for Defendant

Judgment: 21 March 2019

JUDGMENT OF DUNNINGHAM J

---

[1] Mr Myall, the plaintiff, owned a fully restored historic mansion, known as Riverlaw, in the suburb of Opawa in Christchurch. It was so badly damaged in the Canterbury earthquakes of 2010-2011 that it had to be demolished. Mr Myall initially hoped to rebuild Riverlaw. However, disputes arose with his insurers over what sum comprised full replacement value and no steps were taken while these were being resolved. The reasons for the disputes included that Mr Myall had not insured the house for its true floor area and the parties disagreed on how the policy determined the specifications for the rebuild.

[2] On 23 February 2017, I gave a judgment on the disputes which affected the calculation of full replacement value.[1] That judgment was appealed and cross-appealed on various grounds. With those issues resolved, the parties have

[1] *Myall v Tower Insurance Ltd* [2017] NZHC 251.

recently agreed that the amount which represents full replacement value is $5,273,021.71, and on the costs payable in the High Court.

[3] The parties had hoped that would be the end of the matter. However, it was not. Two issues were identified as outstanding. The first is whether Mr Myall must account for use of money interest on the interim payments that were made to him in 2012 and 2013. Tower Insurance Ltd (Tower) says it raised this point in argument before the High Court but that point was not determined. It says it is a significant point of principle and one that is worth a substantial sum here as the interim payments totalled nearly $3,000,000. Mr Myall resists this claim.

[4] The second issue is whether Mr Myall is still required, in accordance with the policy, to rebuild or replace his home before the balance is paid, or whether Tower has waived this requirement when it elected to cash settle, and cannot now insist on it.

[5] These issues were initially raised in memoranda filed in the Court late last year. Given the importance of them to the parties, and the amounts at stake, I agreed to hear counsel on these issues. In the course of exchanging submissions, a third issue was identified by the plaintiff which was whether he was entitled to interest as provided for in r 11.27 of the High Court Rules 2016 on what was described as the "judgment sum" from the date of the High Court judgment to the date of payment.

The insurance policy

[6] Before dealing with the three issues arising, it is necessary to briefly recap the relevant provisions of the insurance policy. The defendant, Tower, agreed to pay the "full replacement value" of the house when it suffered "sudden and unforeseen accidental loss or damage". "Full replacement value" was defined in the policy as "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". However, Tower was not bound to "pay more than the present day value until the cost of replacement or repair is actually incurred". "Present day value" was defined to mean:

> …the cost at the time of the loss or damage of rebuilding, replacing or repairing your house … to a condition no better than new less an appropriate allowance for depreciation and deferred maintenance.

[7] Importantly, the policy gave Tower options for how it settled a claim. It said "we will arrange for the repair, replacement or payment for the loss, once your claim has been accepted". In other words, Tower could either rebuild the property itself or it could choose to meet its obligations through payment of a monetary sum sufficient to do this.

[8] In summary, where Tower did not undertake the repair or rebuild itself, its obligation was to pay the insured the indemnity value of the house until the insured had incurred the cost of replacement or repair, at which point it would meet those additional costs.

The relevant background events

[9] The claim for total loss of Riverlaw was accepted by Tower in July 2011. In a letter sent to Mr Myall at the time, Tower explained how it proposed to meet its policy obligations, saying:

> Although we are obtaining a costing to rebuild your house, we understand that you may not wish to rebuild. Without making a decision yet on what option Tower wishes to take to resolve your claims, we will, in the meantime, also obtain valuations for market value and present day value as at 21 February 2011.

[10] On 23 January 2012, Tower forwarded three valuations to Mr Myall along with advice that it would make payment of what it described as an "interim discharge" totalling $1,359,000.

[11] Mr Myall's lawyers replied to Tower's lawyers on 27 January 2012, rejecting the valuations relied on by Tower to calculate present day value and advising that he would be replacing the existing house.

[12] Based on a report by its quantity surveyor, Tower then calculated that a further $1,612,644.12 would constitute full replacement value and proposed paying that amount to settle Mr Myall's claim. Mr Myall's lawyers advised that Tower could make

payment of that amount to their trust account on a "without prejudice" basis and it would be accepted as a partial payment.

[13] By 31 August 2012, Tower had not heard anything further from Mr Myall. It forwarded a settlement and discharge form and said that:

> …any shortfall identified over and above the amount as detailed in the settlement and discharge form will need to be documented, costed and fully justified before Tower would entertain any increase in its liability in respect of these two claims.

[14] The response from Mr Myall's lawyers was that any payment made would not be accepted as full and final settlement of the claim, but rather as a "progress payment".

[15] In April 2013, having made little further progress, Tower made what it describes as a "final payment" totalling $1,612,644.12 in respect of Mr Myall's claim. This figure relied on the cost of rebuild which had been calculated by its quantity surveyor, Mr Eggleton. Mr Myall did not accept Mr Eggleton's calculation of replacement value and matters remained unresolved.

[16] On 16 June 2014, Tower's lawyers wrote to Mr Myall's lawyers noting that Tower had made the two interim payments in January 2012 and 9 April 2013, and the payments were expressly made and received on the basis they were not in full and final settlement of Mr Myall's claim. They then stated:

> Tower's position was – and is – that further payments would be considered and made as and when additional costs were actually and reasonably incurred in rebuilding the insured property … Tower remains ready, willing and able to meet its obligations under the policy to your client. It is prepared to pay further sums actually and reasonably incurred in rebuilding the insured property.

[17] Mr Myall's solicitors replied on 2 July 2014. They agreed that the insurance policy "is a typical replacement value policy" under which Tower had an immediate obligation to pay the "present day value" which they described as the "depreciated replacement cost". The letter went on to discuss some of the issues which should be taken into account in reaching a depreciated replacement cost, including the extensive

recent restoration of the property, and concluded by saying "we are instructed that it is our client's present intention to rebuild the property".

[18] Tower responded promptly and reminded Mr Myall's lawyers that it was not:

> …obliged to pay [Mr Myall] more than the market value of the property, less the value of land, until the costs of rebuilding the insured house are actually incurred.

[19] On 8 April 2015, after further correspondence regarding how full replacement value should be calculated, Mr Myall's lawyers stated:

> Our client is intending to replace the house. So, in the meantime and in accordance with your previous acknowledgment, he is entitled to be paid the replacement value less an allowance for depreciation and deferred maintenance… Given our client's house had only recently been fully and completely renovated prior to the damage, then the assessment would be close to the full replacement value (and certainly well in excess of what your client has paid already). If you disagree please let us know your reasons.

[20] By October 2015, Mr Myall had cooled on the idea of rebuilding. Instead, through his lawyers, he broached the option of using the insurance money to replace the house, with Mr Myall's lawyers noting that:

> …the policy is quite clear on this issue and indeed was sold on the basis that if the house was demolished then Tower would pay the full replacement value on another site of Mr Myall's choice.

[21] His lawyers asked Tower to confirm that "Mr Myall may sell the section without it affecting his insurance entitlement".

[22] In an email on 27 October 2015, Tower noted that it remained willing to "manage a rebuild on the current site", which would avoid "the need to litigate rebuild costs". However, it said:

> [W]e take it from your enquiry of 16 October that Mr Myall does not wish to pursue that option, but we are nevertheless instructed to confirm that it is from Tower's perspective a serious route to resolution that is still available.
>
> The "off-site" settlement options – buying or building elsewhere – can be chosen by the customer where, as here, the house is damaged beyond repair and Tower has elected to settle in cash. *Skyward* governs. We agree that Tower cannot in these circumstances insist upon an onsite rebuild. While a sale of the current site would reduce Mr Myall's options, it would not

> disqualify him from accessing full replacement value by another option that is otherwise available to him under the policy.

[23] Mr Myall's lawyers sought clarification of that email in an email sent two days later. They asked Tower to "please confirm that Tower will elect to settle in cash, if requested by Mr Myall". Tower responded that it had "already elected to settle in cash, by paying the cash already paid". In response to a query about the meaning of the phrase "Skyward governs", Tower said:

> *Skyward* governs who has the choices under the policy. Because Tower has elected to pay cash, it can no longer unilaterally elect to reinstate (despite the fact that it remains willing to do so). Mr Myall can therefore sell if he wants to, but he has to take responsibility for the fact that it will no longer be possible to rebuild on the same site. We can't anticipate whether there will be a dispute over nature and extent of the other settlement options available under the policy.

[24] By this stage, however, proceedings had been filed. One of the declarations sought was a declaration:

> …that the plaintiff will be entitled to be paid the Full Replacement Value when he either incurs or contracts to incur the costs of rebuilding or replacing the house and, in addition, architects', engineers' and surveyors' fees.

[25] As the quantity surveyors who had been engaged by the respective parties prepared reports to quantify full replacement value, points of difference arose. In a letter to Tower dated 6 April 2016, Mr Myall's lawyers said:

> As I presently see it, the only issue that we will need to put in front of the Court is the determination of the replacement cost and, essentially, that is simply a resolution of the disagreements between the experts.

[26] In a joint list of issues prepared by the parties in April 2016, the parties stated at the outset that "[t]he key issue in this case is the full replacement cost", although amongst the list of subsidiary issues were the following questions:

(a) Does Mr Myall intend to replace or rebuild his house?"

(b) Is Mr Myall obliged to account to Tower for interest if and when he satisfies the conditions for accessing full replacement value?

[27] By August 2016, an amended statement of claim was filed which identified the areas of dispute in calculating full replacement value. The relief sought by the plaintiff included a declaration that he was entitled to be paid $6,921,094 less payments made to date, and a declaration that Tower had elected to discharge the indemnity by payment. In its statement of defence to the amended statement of claim, Tower expressly admitted it had elected to discharge its indemnity by payment and noted:

> …having repeatedly advised it of his intention to rebuild the house on site, the plaintiff advised on 4 June 2015 for the first time that he intended to buy a replacement home instead.

[28] In a statement of agreed facts prepared for the hearing the parties recorded the following:[2]

> [7] The defendant is not bound to pay more than this present day value until the cost of repair or replacement is incurred. Once this cost is incurred, the plaintiff will be entitled to "full replacement value" defined as 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…with no limit to the sum insured.
>
> [8] The plaintiff has at all relevant times intended to replace the demolished building. The parties have agreed that the plaintiff is entitled to effect his replacement entitlement on another site of his choosing.

The judgment

[29] In my judgment of 23 February 2017, I set out the primary focus of the hearing as being that "the parties are not agreed on the amount which constitutes full replacement value under the policy and are still around $2,000,000 apart".[3]

This focus was consistent with the submissions of the plaintiff at hearing, where his lawyer said in opening:

> The parties' experts have conferred and, in a report to the Court, have identified the areas of difference and so the purpose of this proceeding is now focused on resolving those differences. The plaintiff then seeks consequential declaratory relief confirming the replacement value.

---

2 It is not clear whether this was ever filed in Court.

3 *Myall v Tower Insurance Ltd*, above n 1, at [3].

[30] Because the key issue was the resolution of disputes hindering the calculation of full replacement value, the judgment focused on those. Although I ruled on those disputes, I was not able, on the information before me, to precisely quantify the effect my findings had on the cost of rebuilding, and so was not able to make a declaration as to the monetary sum which represented full replacement value under the policy. However, I reserved leave to both parties to seek any further relief required as a consequence of my judgment.

[31] As already mentioned, some of my findings were appealed and, as a consequence of the outcomes on appeal, the parties have been able to quantify the amount which represents full replacement value.

[32] In light of this background, I turn now to the issues raised in this hearing.

The claim for use of money interest

The defendant's submissions

[33] The claim for use of money interest relates to the interim payments made to Mr Myall of $1,359,000 on 31 January 2012 and $1,612.644.12 on 9 April 2013. The parties agree that these payments were made and received expressly on the basis they were not in full and final settlement of the plaintiff's claim.

[34] Tower argues that a credit for use of money interest is appropriate because the sums paid on account of the full replacement value are to be used only for the purposes of replacing the house that was lost. It proposes that Mr Myall be required to pay use of money interest at "on call interest rate" which totals the sum of $431,138.71 between the date of receipt and judgment date.

[35] While Tower accepts it did not specifically refer to use of money interest in its statement of defence to the amended statement of claim, it says it was an issue raised in opening submissions where Tower submitted that an insured who is going to repair, replace or rebuild his property must credit "any profit generated on funds received prior to costs being incurred … to the replacement costs". The rationale for this is that the insured is not entitled to gain "windfall profits from holding any advance payments

of replacement costs". To do so would incentivise an insured to hold funds while claiming increasing costs over time from the insurer.

[36] The issue was revisited in closing where Tower asked for a credit, not just for the principal sum received, but for the benefit that Mr Myall had enjoyed by holding funds received in part satisfaction of his claim to full replacement value. Tower said it is clear that my judgment did not address that issue.

The plaintiff's submissions

[37] Mr Myall argues that the interest issues were before the Court, and the judgment should be taken as a finding that Tower's claim that a credit for use of money interest should be applied did not succeed. He says that the finding of the Court at [108] clearly records that a precise monetary sum, being the balance of the full replacement value once calculated, would be payable by Tower to Mr Myall. That finding was not appealed and it is not open to Tower to now argue that the amount payable should be reduced by a proposed use of money interest on the interim payments.

Discussion

[38] The first issue to address is whether the judgment made a finding on this issue. It did not. While the question of use of money interest was addressed briefly in the defendant's submissions, the primary issue at the trial was quantifying full replacement value. I gave judgment on the disputes over calculation of full replacement value, but expressly reserved leave to revert to the Court on other issues once the impact of my decision on the quantification of full replacement value was considered by the parties. In short, the defendant is correct that the point was not resolved in favour of either party and it falls within the reservation of leave at the end of the judgment.

[39] As Tower points out, Mr Myall's policy provides two basic settlement pathways: present day value (an indemnity value), or full replacement value. Present day value limits the insured's recovery to the amount required to restore his or her

pre-loss position. The insured can choose not to reinstate and take an indemnity sum which they are free to spend as they see fit.

[40] Full replacement value is only payable when the insured has actually incurred the costs of repair or replacement and, to avoid moral hazard, the insurer will normally require the insured to actually have incurred the costs of reinstating or replacing the property before being eligible for payment over and above indemnity value.

[41] Tower bases its argument for use of money interest on the fact that it has paid the sums to date towards full replacement value and therefore Mr Myall must account for any profit or other benefit he has enjoyed if he applies the policy proceeds for other purposes between receiving a payment and actually reinstating or replacing the property. If there was not an obligation to account, the insured could undermine the scheme of the policy and enjoy windfall profits, by applying proceeds intended for reinstatement for other purposes. That would increase the moral hazard that these provisions are intended to reduce.

[42] In the present case, Mr Myall claimed full replacement value and told Tower that he was committed to replacing his house. Taking Mr Myall at his word, Tower made, first, a present day value payment and then a substantial interim payment towards full replacement value in order to progress matters. It was only after those payments had been made that Mr Myall advised that he intended to buy a replacement house rather than rebuild, but he still confirmed his intention to meet the policy requirements to be eligible for payment of the balance of full replacement value. Even at the hearing Mr Myall reiterated his intention to buy or build elsewhere using the funds, although he acknowledged that by then he had used the funds to date to pay off a mortgage and to purchase another property, which it subsequently transpired was in Queensland, Australia.

[43] It is only now that Mr Myall resists the suggestion that he must comply with the policy terms to buy a replacement house or to rebuild, before he is entitled to be paid the calculated balance of full replacement value.

[44] Resolution of this issue requires consideration of the context in which the two payments were made by Tower.

[45] The first payment was clearly a payment of present day value, as estimated by Tower. When it was made, it was accompanied by three valuations which Tower said supported the recommended interim payment under Mr Myall's policy. While Mr Myall challenged the accuracy of the valuations (and therefore whether Tower had fulfilled its policy obligation in that regard), that dispute was not resolved because at that stage he intended to rebuild and so focused on his challenge to Tower's estimate of rebuild costs.

[46] The requirement to make a payment of present day value is an express term of the insurance policy, regardless of whether or not the insured subsequently incurs further cost in reinstating or replacing the building. Had the insured been expected to account for interest earned on payment of present day value if the insured subsequently became entitled to a further payment for full replacement value, that too should have been an express term of the policy. It was not. Furthermore, it is not a term that could reasonably be implied into the insurance policy. An insured may or may not benefit from receiving an interim payment, depending on how it was used. To imply a term that the insured must account for assumed profit on the receipt interim payment could cause an injustice in individual cases. Such a term would fail several of the accepted conditions for implying such a term, but it is sufficient to say it is not a term which is so obvious it "goes without saying", particularly when the rate of interest to be assumed is unspecified at the time of payment.[4]

[47] My view on this is reinforced by the views expressed in *Vintix Pty Ltd v Lumley General Insurance Ltd*.[5] In that case, the insured owned a commercial building which was severely damaged in two natural events. The sum insured was $4,950,000 and the insurer accepted liability under the policy and made a partial payment of $2,500,000 to the insured, without prejudice to either party's rights under the policy. The insurer did not pay any further sum and the insured commenced proceedings

---

4 Referring to the classic tests for implying a term in a contract set out in *BP Refinery Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC).

5 *Vintix Pty Ltd v Lumley General Insurance Ltd* (1991) 6 ANZ Insurance Cases 61-050.

claiming the balance of the sum insured. The Court gave judgment for the insured for payment of a further $1,954,900 plus interest, to meet the insurer's obligations under the policy.

[48] The insurer then submitted that interest should be deducted from the amount otherwise payable to the plaintiff, at rates prescribed in a Practice Note, on the $2,500,000 paid prior to the litigation. The Court noted the defendant's acknowledgement that its submission was "rather unusual", saying:[6]

> Other adjectives might better describe it, none of them complimentary. The defendant had admitted liability under the policy and had paid the $2,500,000 on terms including those which I have earlier set out. That amount was undoubtedly payable to the plaintiff, and there was nothing to indicate that its payment was otherwise than a recognition that the plaintiff's entitlement under the policy was at least to that amount. Why the plaintiff should be effectively penalised for receiving payment of an amount undoubtedly due to it I am unable to see.

[49] Applying the same reasoning, I cannot see that the insurer could reasonably require the insured to account for interest earned on any payment which constitutes present day value, and which the insured is entitled to as of right, when a claim for full loss is accepted.

[50] That leaves the position of the further payment of $1,612,644.12 made in April 2013, or at least any part of it which does not represent a proper calculation of present day value. In that regard I note that the sum which constitutes present day value is not settled in this case, and the defendant says the total value of payments received to date does not exceed a fair assessment of present day value. I am not in a position to determine that issue. However, I accept that present day value may well exceed the amount which was paid in early 2012.

[51] To the extent the second interim payment represents a sum exceeding present day value, there was no obligation on Tower to pay it. However, Tower was clearly willing to make a payment outside the terms of its policy in order to settle the claim. It placed no conditions on that payment and noted that it was expressly made and received on the basis that it was not in full and final settlement of Mr Myall's claim.

---

6 At 77,090.

Had Tower wished to make the payment on the condition that Mr Myall was obliged to account for interest on it should he subsequently establish that full replacement value was a higher figure, then Tower could have done so. It did not. Again, in the absence of any contractual obligation from Mr Myall to account for interest at any specified rate, I do not think it reasonable to imply such a term into the receipt of payment.

[52] Furthermore, there is no proof that he has in fact profited, although that is obviously possible. However, even if he has, that is balanced by the fact that if he does become entitled to payment of the balance now, Tower will have the benefit of paying in 2017 dollars, a payment which is made in 2019 or later.

[53] Accordingly, this aspect of the claim is declined. Tower is not entitled to deduct use of money interest earned on the interim payments when it pays the balance of the sum which represents full replacement value.

Is Tower obliged to pay the funds regardless of whether Mr Myall rebuilds or replaces the house?

[54] This issue is an intensely factual one. It turns on whether Tower has agreed to vary the terms of its policy so that it is now legally obliged to pay Mr Mayell full replacement value regardless of whether he has incurred those costs as required by the policy.

[55] Mr Myall's position is that because Tower has elected to cash settle the claim (which Tower admits) and it did not condition its April 2013 payment on the need for Mr Myall to replace or rebuild the property, it cannot now revoke that "election".

[56] Clearly the first payment of $1,359,000 was made in accordance with the policy, and it was Tower's assessment (albeit rejected by Mr Myall) that the sum paid constituted present day value. The real issue is whether by making a further payment, without "conditioning it on Mr Myall replacing or rebuilding", Tower has irrevocably waived or varied that requirement and cannot now insist on those costs being incurred before it is obligated to pay the balance.

[57] I do not accept that is the case. As can be seen from the communications between the parties set out at [9] to [26] above, Tower repeatedly reminded Mr Myall of his obligation to rebuild or replace before full replacement value would be paid, and Mr Myall repeatedly accepted that he was bound by that, both before and after the second interim payment was made. For instance, when the claim was first accepted, Mr Myall said he was committed to rebuilding, which is why the parties dedicated so much time to calculating full replacement value. When, in late 2015, he first considered buying a replacement property instead and selling the section, he was careful to check that he was not jeopardising his entitlement to full replacement value by taking that course of action. That was after both interim payments had been made.

[58] At the hearing in December 2016, Mr Myall reiterated his intention to use the funds to buy a replacement property (although he insisted he could still rebuild if that was necessary). There was never any suggestion that he had any alternate intention. In evidence he said that the only reason he had not incurred those costs to that point was because "no prudent owner would commence a rebuild or spend money until a specification and budget had been agreed with his or her insurer".

[59] There is nothing in the evidence to suggest Mr Myall operated under any other understanding than that he must rebuild or replace the property before he was entitled to receive any further payment under the policy.

[60] It is only since the hearing that Mr Myall now suggests that this policy requirement was waived or varied by Tower, in particular by its acknowledged election to "cash settle" the claim, and it now cannot resile from that position.[7] However, this submission confuses the concept of an election to cash settle within the terms of the policy and the situation where the parties agree to settle outside the terms of the policy. Here, it is clear from the correspondence that the election to cash settle was an election made by Tower within the terms of the policy. It chose to meet its policy obligations by making a payment as opposed to undertaking the repair or rebuild itself.

[61] The policy option to cash settle is explained under the heading "how we will settle your claim". The policy provides that "[w]e will arrange for the repair,

---

7 Mr Myall does not use these words but this seems to be the gist of his argument.

replacement or payment for the loss, once your claim has been accepted". It also specifies that if Tower elects to make a cash payment then it is not bound to "pay more than the present day value until the costs of replacement or repair is actually incurred". Electing to cash settle a claim does not negate the requirement on the insured to replace or rebuild the house before entitlement to payment of those costs arises.

[62] This was reiterated in *Skyward Aviation 2008 Ltd*, where the Court explained that:[8]

> Where Tower elects to make a cash settlement payment, clearly it is not obliged to pay anything more than the "present day value" unless and until the costs of repairing, rebuilding or replacing, are actually incurred.

[63] The position is not changed if, as here, Tower voluntarily waives a condition that is for its benefit. There is no suggestion here that by proposing a cash settlement, there was agreement between Mr Myall and Tower that Tower would not insist upon subsequent compliance with the policy of insurance. Indeed, to the contrary, Tower consistently reiterated that "further payments would be considered and made as and when additional costs were actually and reasonably occurred in rebuilding the insured property".[9] Furthermore, the policy itself gives Tower the flexibility to pay more than the present day value in advance of the cost of repair or replacement actually being occurred. The use of the introductory words "we are not bound to" before the statement "pay more than the present day value until the costs of replacement or repair are actually incurred" suggest that Tower, in its discretion, could make a payment outside those terms, but could not be compelled to do so by the insured.

[64] In this case, I am satisfied that Tower, in its discretion, chose to make a payment in advance of the costs of rebuild or repair being incurred, with the hope that that would settle the claim. It did not bind itself to make any further payment on this basis.

[65] Furthermore, no question of estoppel arises which would make it unconscionable for Tower to now rely on the terms of the policy despite making an interim payment in advance of costs being incurred. It did so in the context of

---

8 *Skyward Aviation 2008 Ltd v Tower Insurance Ltd* [2013] NZHC 1856 at [73].
9 See Tower's letter of 16 June 2014.

Mr Myall's repeated assurances both before and after the payment was made that he would rebuild or replace the property and that he accepted that policy requirement. His repeated acceptance of that meant it was simply not an issue that the parties addressed, until now.

[66] Mr Myall sought a declaration as to the sum which represents full replacement value. The sum which has been calculated by the parties in accordance with my judgment and the outcome in the Court of Appeal can be the subject of such a declaration. It quantifies the maximum amount payable by Tower to meet its obligation to pay full replacement value. As Tower noted, a similar approach was taken in *Kilduff v Tower Insurance* where the Court made a declaration as to the amount payable under the policy.[10] Such a declaration does not override or alter Tower's right to insist that Mr Myall complies with the terms of the policy before that payment is made.

[67] Accordingly, I find that Tower does not need to pay the balance of the calculated amount of full replacement value until and unless the policy requirement to incur the cost of rebuild or replacement is met.

[68] In that regard, I note that Tower says that purchase of a house, or houses, overseas (as Mr Myall has done) does not constitute purchase of a replacement property. It says a replacement property must be a single property in New Zealand towards which Tower will pay up to the calculated amount of full replacement value. I did not hear argument on this issue and I expressly record that leave is reserved to address this issue should it be required.

Judicature Act interest

[69] The last issue raised by Mr Myall is a claim that interest should be added to the judgment sum at the applicable rate (as provided in r 11.27 of the High Court Rules) from at least the date of the High Court judgment down to the date of payment. Rule 11.27 provides that a judgment debt carries interest from the time judgment is given until it is satisfied, and that interest is at the rate prescribed by or under s 87 of

---

10 *Kilduff v Tower Insurance Ltd* [2018] NZHC 704.

the Judicature Act 1908 at the relevant time (noting these proceedings pre-date the commencement of the Interest on Monies Claims Act 2016).

[70] However, that is to misunderstand the effect of the judgment. As I have discussed above, the parties presented the case on the basis that, with the sum which represented full replacement value fixed, Mr Myall would shortly have an entitlement to be paid it as he could then proceed with confidence to rebuild or to buy a replacement property. I then made findings which could be used to calculate the amount Tower would have to pay to meet its obligation to pay full replacement value. That was not a determination that Tower was obliged to pay that amount immediately regardless of whether the policy requirements had been met or not. This is because no party, at the time of hearing, expressly disputed that Mr Myall was obliged to rebuild or replace the house and would do so.

[71] For these reasons, the declaration I make as to the sum which represents full replacement value cannot be treated as constituting a judgment debt to which r 11.27 applies. It is simply the Court's finding as to what sum represents full replacement value which Mr Myall is entitled to when he has satisfied the policy criteria for payment. Accordingly, interest under the Judicature Act is only payable from the point when Mr Myall has incurred the cost of rebuilding or replacing the house and is entitled to additional payment under the policy.

Summary of conclusions

[72] On the matters which have been raised before the Court for determination, I find as follows:

(a) the defendant is not entitled to deduct use of money interest earned on the interim payments when it pays the balance of the sum which represents full replacement value;

(b) the defendant does not need to pay the balance of the calculated amount of full replacement value until and unless the policy requirement to incur the cost of rebuild or replacement is met;

(c) leave is reserved to the parties to seek further directions or decision from the Court on what constitutes "replacing … your house" in terms of the policy; and

(d) Interest does not run from the date of judgment on the amount the parties have agreed represents full replacement value. Such interest can only run from when the plaintiff has incurred the cost of rebuilding or replacing the house and becomes entitled to further payment under the policy.

[73] As requested by the parties, but modified in light of my determinations above, I make the following orders:

(a) the full replacement value for the plaintiff's house at 81 Ainsley Terrace, Christchurch, including exterior works, and after making a pro-rata adjustment for the size of the house from 799 square metres to reflect the insured floor area of 650 square metres, is $5,273,021.71 including GST; and

(b) the plaintiff is to pay the defendant costs in the sum of $32,000.

Costs

[74] That leaves the issue of costs on the present application. Given the parties have had mixed success, my tentative view is that costs should lie where they fall.

[75] If costs cannot be agreed, the party seeking costs must file a memorandum on that issue within 20 working days. The party opposing costs must file its memorandum in response within a further 10 working days.

[76] Costs will be determined on the papers unless I need to hear from counsel.

Solicitors:
Succeed Legal, Wellington
Gilbert/Walker, Auckland