

BETWEEN

TOWER INSURANCE LIMITED

Appellant

AND

SKYWARD AVIATION 2008 LIMITED

Respondent

Hearing: 5 November 2014

Coram: McGrath J
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: R B Stewart QC and M C Smith for the Appellant
N R Campbell QC and K P Sullivan for the Respondent

CIVIL APPEAL

MR STEWART QC:

Yes, Your Honours, I appear with Mr Smith for the appellant.

McGRATH J:

Mr Stewart, Mr Smith.

MR CAMPBELL QC:

May it please the Court, I appear for the respondent with my learned friend, Mr Sullivan.

McGRATH J:

Mr Campbell, Mr Sullivan.

MR STEWART QC:

I feel a bit dishevelled, Your Honour, myself and my junior got caught in the shower, he left a little bit late to get here.

Your Honours, this appeal concerns the determination of two questions under Tower's Provider House Maxi Protection, which is a full replacement policy. Now the terms of the policy wording apply equally to Tower's full replacement policies and also to its present day value policies, and there is indications in the wording of the policy that we're concerned with that makes it clear that those terms also apply to the present day policies.

WILLIAM YOUNG J:

But we haven't got a present day policy, have we?

MR STEWART QC:

No, you don't. I have a – the only difference is, Your Honour, if we go to the case book at page 132, and that is the certificate that's referred to and defined in the policy that we're considering, and at the bottom of the left-hand column you've got, "Policy schedule", and it makes it clear that this is a sum insured full replacement policy.

WILLIAM YOUNG J:

I see.

MR STEWART QC:

If I could just take you to one clause which indicates the dual purpose of these terms that we're considering, at page 143, and at the top of the left-hand column it says what Tower is not bound to do. It says, "We're not bound to," and the second paragraph says, "pay more than the present day value if you have a full replacement value until the cost of replacement," so that's within its policy, making it clear that this

applies to a full replacement policy, that provision, and not a present day value policy.

Both policies are defined at page 144, where full replacement value policy at the bottom of the left-hand column and the present day value policy at the –

WILLIAM YOUNG J:

But it's not the policies that are defined, it's the expressions that are defined, isn't it?

MR STEWART QC:

Well, the term, but they're referred to, they're interchangeable. So sometimes you're going to get a reference in this policy to a present day value option to pay, if you like.

WILLIAM YOUNG J:

Yes. But it's clear that a whole lot of replacement value option don't apply if you've got a present, if you haven't got a replacement value policy.

MR STEWART QC:

Exactly. And –

WILLIAM YOUNG J:

But I mean the whole problem, I mean, just looking at the replacement value, it means the costs actually incurred to rebuild.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

But in our context it means "estimated costs", doesn't it?

MR STEWART QC:

I don't think so. What happens, let's assume that there's a claim. Then the first thing that Tower does is to pay the present day value of that property if it's damaged beyond economic repair, it will pay the present day value, immediately, up front, as it did in this case –

McGRATH J:

Because that's the minimum it's going to be liable for?

MR STEWART QC:

Yes. And then, because of the – if I take you to, easier if I just take you to the clause that deals with it, page 143, left-hand column, top of the page, “We are not bound to,” second paragraph, “pay more than the present day value, if you have full replacement value, until the cost of replacement or repair is actually incurred.” So if the insurer does not incur the costs of rebuilding or buying another house or repairs – well, there won't be any repairs because it would be a complete, uneconomic to repair – then the –

McGRATH J:

But if it's, if the phrase is “replacement or repair”, if it doesn't incur that?

MR STEWART QC:

If it doesn't incur, yes. Now “replacement”, we say, and I'll develop this further, can mean rebuild or buy another house, or rebuild on another site. So you've got three then: rebuild on the existing site, you can rebuild on another site, or you can buy another comparable house.

McGRATH J:

You say “replacement” means all those three?

MR STEWART QC:

It does.

McGRATH J:

I understand that's your argument?

MR STEWART QC:

Yes.

GLAZEBROOK J:

Not always though, does it?

MR STEWART QC:

No.

GLAZEBROOK J:

Because it can't in the actual part of the policy that says you can't have more than the replacement value, wherever it is.

O'REGAN J:

It says when you, if you buy another house you can't get more than the replacement value, they must be different things, mustn't they?

MR STEWART QC:

Yes, you can't get more than a cost of rebuilding on the original site.

GLAZEBROOK J:

Oh, it doesn't actually use the word "replacement", actually does use "rebuilding", right.

WILLIAM YOUNG J:

There's no, you've got no, you say that you're entitled to buy someone another house?

MR STEWART QC:

Indeed.

WILLIAM YOUNG J:

Even if they don't want it?

MR STEWART QC:

Well, that is the effect of it. Let's take a situation like this. I mean, you've got to take one extreme example, which is what the Court of Appeal focused on. If a person's living in Epsom and they've lived there for 10 years, 15 years, and the children go to St Cuthbert's and they have friends in the street and the house is destroyed, that would be an upheaval to relocate them into another house rather than rebuilding on that site, assuming you could rebuild. Remember, in the red zone we can't rebuild on these sites. Now the, Tower does have the choice of saying, "We're going to buy you another comparable house," and in my submission that means more than just comparable, it means in the same locality.

McGRATH J:

I think all you need do as this stage is perhaps just answer the Judge's questions, Mr Stewart, because you'll develop your argument on this –

MR STEWART QC:

I will.

McGRATH J:

– won't you?

O'REGAN J:

So you're saying Tower can make the insured move to another house, even if the insured wants to rebuild on the same site, and can do so?

MR STEWART QC:

They could do, yes.

O'REGAN J:

Where does it say that in the policy?

MR STEWART QC:

It gives, it's a choice, and...

WILLIAM YOUNG J:

About the choice, it says, because the thing that seems to me, if you look at the policy, "We will settle your claim. We will either repair, replace or pay for the loss."

MR STEWART QC:

Where are you reading from, Sir?

WILLIAM YOUNG J:

Under, "How we will settle your claim."

GLAZEBROOK J:

"Settle your claim."

MR STEWART QC:

Sorry?

WILLIAM YOUNG J:

Under, on page 142 –

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

– “How we will settle your claim.”

MR STEWART QC:

142, yes.

WILLIAM YOUNG J:

“We will arrange for the repair, replacement or payment for your loss.”

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

For the loss, right. Then under the, the payment options are then set out under that.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

So that only applies if, those payment options only apply where Tower isn't repairing or replacing the house.

MR STEWART QC:

Itself, correct.

WILLIAM YOUNG J:

Yes. Now, so once you've opted, “We're going to pay,” you've spent your option, over on the other side we have the option whether to make payment, rebuild, replace or repair. You've elected to make a payment.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

And so you've got to make a payment for, in reality, one of the first three options.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

All right. Now, where does it give you a choice as to what payment you're going to make?

MR STEWART QC:

You go to the – we're dealing with a section headed up, "How we will settle your claim," this is basis of a payment, and you have, unhelpfully, unnumbered paragraphs, going over to the next column, and we get a heading towards the top of the second column, on page 142, in all cases –

WILLIAM YOUNG J:

Yes, I know, but I've said that. We've assumed that you've decided, "We're not going to rebuild the house, we're not going to repair it, so we're going to make a payment."

MR STEWART QC:

Right.

WILLIAM YOUNG J:

Okay. So you've exercised the option under the "in all cases" clause.

MR STEWART QC:

Can I just read that? "We have the option, in all case, whether to make payment, rebuild, replace or repair." Now under "replace" is, includes the option to buy another house.

WILLIAM YOUNG J:

It's a funny way –

O'REGAN J:

Yes, but that's gone.

WILLIAM YOUNG J:

– to go about it, isn't it? I mean, isn't the logical thing that you're at risk for the full replacement value of the house, subject to the constraint that it's got to be a reasonable and comparable replacement, and once you're at risk for that they're entitled to whatever, to (inaudible 10:14:06) they like, if you choose not to repair the house.

MR STEWART QC:

Okay. The reason that the choice is conferred on Tower – sometimes policies confer the choice on the insured, and we've got a case in the bundle, *Turvey Trustee Limited v Southern Response Earthquake Services Limited* [2012] NZHC 3344 is one, where the policy specifically said, "In each case those four choice are with the insured, they can choose." And the textbook says that, that common place for a policy is nevertheless to say that the insurance has the choice in all cases. Now the reason they have the choice – because there is not, there is a difference between whether you rebuild the house on the site or at another site, or whether you buy another house. Now, that's demonstrated starkly in this case. Here we have an insured who's in the rental business of renting residential houses, the house has been damaged beyond repair and it can't be rebuilt on that site, it's in the red zone. So this tenant, who doesn't have attachments to the –

WILLIAM YOUNG J:

This landlord.

MR STEWART QC:

– landlord, sorry, doesn't have attachment to the location, well, not that we've heard of, it's one of its many houses, it's an investment, it has to relocate, it needs another property, presumably, to replace the rental stream that it's lost through this house being damaged. Now, it's very difficult to see where the objection could be to this tenant in having, in buying another house of its choice, it chooses the location, and –

WILLIAM YOUNG J:

But subject to your veto, subject to being mucked around.

MR STEWART QC:

Well, I'm not quite sure what relevance that has to –

O'REGAN J:

But you're saying that –

MR STEWART QC:

– what we're talking about, but it hasn't been mucked around. We had this in the High Court and that's how Justice Gendall started off too. We've actually, the tenant in this case has been paid \$600,000-odd, without prejudice to its right to get more –

WILLIAM YOUNG J:

Yes, now, but I mean, mucked – I'm not saying you're mucking him around, I'm saying that if you've got a right to control their decision as to where they live and what house they occupy –

MR STEWART QC:

Okay –

WILLIAM YOUNG J:

– and the details, then there's huge potential to muck them around.

MR STEWART QC:

We're not, we're not seeking to control it. We have said, "You identify a house that you'd like to have as a replacement property, and we will buy it."

O'REGAN J:

Yes, but that, you're saying that you're doing that voluntarily, you're not saying you're contractually bound to do that.

MR STEWART QC:

It doesn't say –

O'REGAN J:

So you're just saying Tower's a very nice insurer –

MR STEWART QC:

No, no, I'm not –

O'REGAN J:

– but every other insurer could, if they wanted to, muck their customers around, if they have the same policy.

MR STEWART QC:

I would say that about Tower, Sir, because they're my clients, especially in public, but it's not part of my argument. You see, it doesn't say in this case here that you will take "the" house that Tower stipulates. Now, we've got a little bit of a difference here between the parties. My learned friend says, one supported by the Court of Appeal, that they can buy any other house anywhere up to the cost of rebuilding on the original site. Now –

WILLIAM YOUNG J:

No, they can buy any house –

MR STEWART QC:

They can ask –

WILLIAM YOUNG J:

– anywhere and get reimbursed up to the cost of rebuilding on the present site.

MR STEWART QC:

That's right – well...

WILLIAM YOUNG J:

Okay, so in your argument the rebuilding cost \$350,000, they can buy a house up to \$350,000, even though you can only really buy a house with a section normally, but if they want to buy a house for \$360,000 you're entitled to say, "No way"?

MR STEWART QC:

Well...

WILLIAM YOUNG J:

Why would you? But you're entitled to say that.

MR STEWART QC:

\$10,000, there wouldn't be that sort of issue.

WILLIAM YOUNG J:

But you're entitled to.

MR STEWART QC:

We're –

WILLIAM YOUNG J:

Well, \$50,000 even. You're entitled to say, "We're going to tell you how you spend the money."

MR STEWART QC:

Well, we're not – because if they buy, if they identify a comparable property.

WILLIAM YOUNG J:

But it can't cost a penny more than the rebuild cost of the house, even though they're buying something that's land and a house.

MR STEWART QC:

That is the restriction on the policy, yes. So if they identify a comparable property –

WILLIAM YOUNG J:

But it's not – here's the property, say it's worth \$500,000, 300,000 house, 200 land. You say they can only buy another property for \$300,000, because that's the cost of rebuilding the house.

MR STEWART QC:

No, they have the –

WILLIAM YOUNG J:

No, but they do here, but they mightn't always, that's just an accident of land insurance –

MR STEWART QC:

Well...

WILLIAM YOUNG J:

– and the Government offer.

MR STEWART QC:

Well, then, they could sell their land.

WILLIAM YOUNG J:

No, but you'd say they –

O'REGAN J:

Might be valueless.

WILLIAM YOUNG J:

– but you'll still say, "Ah ha, they can only buy the house for \$300,000," because if they spend a penny more they're outside your construction, whereas they'd have to pay \$500,000 to get another house.

MR STEWART QC:

End up buy the land as well, you mean?

WILLIAM YOUNG J:

Yes.

MR STEWART QC:

Yes, but that, I mean that's –

WILLIAM YOUNG J:

How do you get the land into the language?

MR STEWART QC:

– that's outside – well, you can't list an earthquake, or if you've insured the land against –

WILLIAM YOUNG J:

But say you haven't, but say, or say you just sold the land to someone else.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

You're saying, in this case, they could only buy a house for \$300,000.

MR STEWART QC:

Just a moment, Sir. I thought you understood, Sir. I started to make the point and I said, "Do you see, do you understand that?"

WILLIAM YOUNG J:

No, but just, just go back to my problem here. Property, pre-insurance value of the house and land \$500,000 –

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

– 300,000 house, 200,000 land.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

The cost of rebuilding the house, \$300,000, it's assumed, present value and replacement value the same, right? You say, they say, "We want to go and buy another house" and you say, "That's great but you are only allowed to spend \$300,000."

MR STEWART QC:

Yes, and what are the other alternatives, to let them rebuild on-site?

WILLIAM YOUNG J:

No, well they may say, "Well we have got a \$500,000 property, we want to replace it, we want to spend, we will put in \$200,000 ourselves so that we can buy a house that corresponds to what we had, but it is going to cost 500,000."

MR STEWART QC:

I thought you said they didn't own the land.

WILLIAM YOUNG J:

Well they may or may not, it doesn't matter.

MR STEWART QC:

Then they won't have 500,000 will they?

WILLIAM YOUNG J:

Sorry?

GLAZEBROOK J:

When you say the cost of replacing the house. Are you saying that you take the land value out of the new property. So that say for instance, you have got a 500,000 house with a \$300,000 building, \$200,000 land that you can replace it with a \$500,000 property as long as the house is not worth more than \$300,000. So you can still buy a \$300,000 but you take the land value.

O'REGAN J:

But where does the policy say that?

WILLIAM YOUNG J:

Say there is a dispute about how you will apportion the value between the house and the land?

MR STEWART QC:

Well you see it does say that the policy only insures the house.

WILLIAM YOUNG J:

Yes.

O'REGAN J:

But you are saying, "We can force you to buy a house and you must buy a house that is only \$300,000." So are you predicating that it is okay for them to buy a \$500,000

property so long as the land value is \$200,000 and if so, where does it say that in the policy.

MR STEWART QC:

Well, we were given 300,000.

O'REGAN J:

Where does it say it? Just point it out to us.

WILLIAM YOUNG J:

You are not giving them \$300,000, in this case they want the \$300,000. You are saying, no we are going to buy you a house.

MR STEWART QC:

Well no, that's the house – if the build price of the house on the original home was \$300,000 and they have got a house they want to buy for \$500,000 and they say "We want \$300,000 towards this acquisition, the other 200,000 from somewhere else," Tower would say yes.

WILLIAM YOUNG J:

But you say, I thought your interpretation of this third option was the cost of buying another house, can't exceed the rebuild cost.

MR STEWART QC:

That's right.

WILLIAM YOUNG J:

I mean you can make it work if you really employ the value and profession and say you are going to apportion between house and land but that is just an academic exercise. Because you are only buying, leaving aside, you know, silly examples where you buy a relocatable house, you only buy a house on land.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

So how can you buy a house that replicates the earlier house if you are only allowed to spend the rebuild fit cost?

MR STEWART QC:

You could build the house, you could lease the land.

WILLIAM YOUNG J:

Yes I know but you want to buy another house. It is going to cost \$500,000 because you have got to buy the land and you're saying you can only spend 300,000 because that's the rebuild cost.

MR STEWART QC:

Well you know, there's nothing governing that precisely either way in the policy.

WILLIAM YOUNG J:

Well it is so silly, it is such a silly proposition that it makes you think the policy should be construed to avoid it doesn't it?

MR STEWART QC:

Well it must mean, having the choice to buy another house, is in there and it is given to Tower.

ARNOLD J:

Well I suppose what the underlying assumption is that the value of the sections is going to be neutral in the sense that if a new house is bought then a vacant section be insured, will be reimbursed in some way. Either in this case through the government offer or by selling it on the open market so it seems to me your argument is assuming that you put the land out of the equation because there is another mechanism to deal with that.

MR STEWART QC:

Well, Justice William Young's assumes that, I don't see how you can leave it out.

WILLIAM YOUNG J:

Well I don't actually understand how it works.

ARNOLD J:

Well if you can't leave it out, you've got a real problem.

O'REGAN J:

Because in the red zone the land was actually worth nothing, the only reason it had value was because the government made them a buyer. But these people, if that hadn't happened, would have had to buy another house somewhere else, they would have had zero value in their land, they would have had to buy a house on valuable land.

MR STEWART QC:

In the market at the moment it costs more to rebuild the house than to buy another house. Now we see in this case, the cost to rebuild this 1900 villa is \$770,000. That same house can be bought on the market for \$365,000.

McGRATH J:

Albeit in a depreciated condition.

MR STEWART QC:

Well the obligation is to buy a comparable house, as new.

WILLIAM YOUNG J:

This is sort of chasing it around because that assumes that the comparable provision applies to the buying of another house. Whereas it is possible to construe it as a constraint on the replacement obligation, that if the original house has got some extraordinary feature that is completely impossible to duplicate at anything like a reasonable cost, then you don't have to do it, you can do something else.

MR STEWART QC:

Well you can put down, if it is matai flooring it's gone through the roof for a price and the flooring was covered by carpet or lino, you don't have to replace that. But by and large you do though have to replicate it.

WILLIAM YOUNG J:

But how can you replicate an Edwardian brand new house.

MR STEWART QC:

Well you can't do it exactly and there are guidance in both the judgment of Justice Asher and Justice Gendall as to how you achieve the comparability that is required under the policy.

WILLIAM YOUNG J:

Isn't that easier to do it if it is in the context of an actual rebuild so if you look, this is the clause at page 143.

MR STEWART QC:

This is a different issue, you can buy another house.

WILLIAM YOUNG J:

Well no but you have brought it into it, that's why I was saying, we were chasing Mercury around because you said, buy another house and you are bringing in that it has got to be a reasonable, practical and comparable option. So you are bringing the other issue back into what we were talking about.

O'REGAN J:

But also, the questions that were asked, that the Court was asked to answer are all predicated on the basis that Tower is settling by making payment. It is not predicated on the basis of Tower settling by buying another house. I mean question 1 is, "How do you calculate the amount Tower has to pay?" It doesn't say how Tower has to settle, it says, "Tower has to pay." So it is already a done deal that Tower has chosen to make payment. That's the whole basis on which the case has been put before the Court.

MR STEWART QC:

But how you settle, the payment options, are under the basis for settlement.

O'REGAN J:

But they are payment options, they are making payments, it is not a question of Tower buying a house, it can't do that anymore because it has agreed to pay.

MR STEWART QC:

Can I put it to you this way? We start off with all cases Tower has the choice.

O'REGAN J:

Well that is the choice as to whether to pay or to settle by some other means but it has made that choice already.

MR STEWART QC:

Well is it.

O'REGAN J:

Well that is the –

GLAZEBROOK J:

Well you say there is a choice for the second as well?

MR STEWART QC:

Yes it is.

O'REGAN J:

But that is the question that is being put to the Court, if that is not so, the question is completely academic.

MR STEWART QC:

Well that is what we are talking about today isn't it?

O'REGAN J:

No, we are answering the questions that were put to the Court which are predicated on the basis that Tower is making a payment.

McGRATH J:

Do you want to reply to Justice O'Regan, we will try and get this one at a time.

MR STEWART QC:

I will take all comers, I don't mind.

McGRATH J:

You don't want to say anything in response to that?

MR STEWART QC:

Well I do but I have lost the thread. I am just going to look up the question.

O'REGAN J:

Well, the first question says, "Under the terms of the policy, on what basis is the amount payable by Tower to be calculated if an insured party's claim is to be settled by Tower paying the cost of buying another house."

GLAZEBROOK J:

Well, as I understand it, your argument is you elect to pay and then you have a choice between the payment options – that Tower has a choice between those payment options. So not only is there a choice to pay, repair or replace, but there is also, once you have chosen payment, there is a choice between those four methods of payment, except obviously you can't choose present day value in circumstances where the policy doesn't allow Tower to do so.

MR STEWART QC:

Correct, because the two options do line up.

WILLIAM YOUNG J:

Can I just ask you, because I really want to get this straight because I don't fully understand it.

MR STEWART QC:

Can I just finish what Justice O'Regan asked me? It says in all cases they have got the choice. Now if you elect the payment option, so you give them the PDV on day one, they have got that upfront. And so we will pay the rest when you incur the cost. Now if, at that point, the choice as to which payment option is taken is with the insured, then Tower doesn't have, in all cases, as its choice if the choice extends to not only the option whether to pay or do the work itself, but also to whether it rebuilds on the same site or builds on another site or buys another house. So that's the basis which I put it forward.

GLAZEBROOK J:

I am sorry, I think I missed the last part of that, so I didn't quite understand it. So if the choice extends to whether to pay or do the work itself and, sorry, I missed...

MR STEWART QC:

If the option is limited to paying, or doing the work itself, that's one scenario but if the option is –

GLAZEBROOK J:

Well what is the consequence of that?

MR STEWART QC:

- well it can also say that it will pay for the costs incurred in rebuilding the house on the site or rebuilding the house on another site or buying another house, whichever one it stipulates.

O'REGAN J:

Well where does it say that?

MR STEWART QC:

Well that is part of, "in all cases". It doesn't say in some cases or part.

O'REGAN J:

No it has made that choice, it has made that choice. "In all cases it can choose whether to pay" or to settle some other way, it has already done that.

GLAZEBROOK J:

Where is the "in all cases?"

WILLIAM YOUNG J:

On the top right-hand column towards the top on page 142.

MR STEWART QC:

"In all cases."

WILLIAM YOUNG J:

Now, can I just put an alternative hypothesis to you, Mr Stewart.

GLAZEBROOK J:

No, that is just an "in all cases", there is a whole lot of, that is not, "In all cases we get to do that." That's just "In all cases, if you pay your premium, you do something or rather and there's a whole lot of..."

MR STEWART QC:

Yes I accept that.

GLAZEBROOK J:

It is not in all cases we can choose.

MR STEWART QC:

But this clause where it says, "We have the option whether to do A, B, C, D..."

O'REGAN J:

But the whole case is predicated on the basis that Tower has already exercised the option to make payment, that is what it is going to do. So it is not doing any of the other things, so that is done now, that is yesterday's news.

MR STEWART QC:

We've gone past that. The other argument is, that in also having made payment as for the balance to achieve full replacement value it has the choice.

O'REGAN J:

Where does it say that?

MR STEWART QC:

Under that clause, "We should have the option."

WILLIAM YOUNG J:

Yes but you are really saying there are two choices. A, we want a choice whether to make a payment or alternatively do other things and, B, if we make a payment, if we choose to make a payment, we have got a choice as to the basis of payment.

MR STEWART QC:

That is correct.

WILLIAM YOUNG J:

All right, it doesn't sit very easily with the words "you choose" in the second of the options.

MR STEWART QC:

No, well, it says, "You choose the site."

WILLIAM YOUNG J:

All right, over the page "If you choose not to rebuild or repair your house or buy another house, we will only pay," suggesting the choice to buy another house is that of the insured?

MR STEWART QC:

Well no whether it wants to get the further entitlement under the policy, full replacement policy it has to incur the cost.

WILLIAM YOUNG J:

What would be wrong with saying the choice is payment, in between payment or other options, once payment is made the words "choice" in the various payment options indicates that the decision as to which option is chosen, is that of the insured?

MR STEWART QC:

Because there is nothing in the policy that says it is the insured's choice whereas there is, of course, in the policy saying that it is the choice.

WILLIAM YOUNG J:

That assumes that the choice is doubled.

MR STEWART QC:

Yes, that's right. Now if you are against me on that then I think that is the end of the case.

WILLIAM YOUNG J:

That is the end of the case, I guess.

GLAZEBROOK J:

But where is the clause that says it is the choice. I mean I can understand the choice is to repair, replacement or payment but if it is – I mean even going back do you say that if you, that Tower has a choice what sort of replacement it does, as well, even if it decides to do the replacement itself?

MR STEWART QC:

Well, yes, that is the critical matter.

GLAZEBROOK J:

But isn't the critical matter for Tower, it is a money policy, the critical matter for Tower isn't it, that it never is liable for anything other than the present day value if you don't have a replacement or repair, or alternatively the replacement on the site. So in money terms, Tower knows exactly where it is because it never pays any more than the replacement value on-site, whatever the insured does.

MR STEWART QC:

That's right. If Tower elects not to make the payment, but is going to do the work itself.

O'REGAN J:

But once it has made a provisional payment, that option is gone isn't it. It is not going to do the work itself and pay the present day value.

MR STEWART QC:

In this case the payment was made without prejudice to all.

O'REGAN J:

Yes but even so, the die is cast now isn't it and in fact the whole case is predicated on that basis. That is what we are being asked to decide.

MR STEWART QC:

Can I come back on 170. The die is cast in this case in terms that we are proceeding on the basis that the insurer has made the payment, the PDV payment I accept that, that is the way the questions are framed. I am not giving up on this point but it is not the end of the whole case. There is another part we have to consider.

McGRATH J:

Yes can I just ask you one thing, Mr Stewart. When we look at that provision at page 142, we have the option whether to make payment, rebuild, replace or repair. You, I take it, don't accept the Court of Appeal's approach which is, although I am not sure of this because you put it this way just a minute ago. That the two alternatives are

between payment on the one hand and rebuild, replace or repair on the other. In other words, there should, if you want to, you can read in an “or” after the word “payment”.

MR STEWART QC:

I don't accept that, and it is not what Justice Gendall decided either.

McGRATH J:

Sorry?

MR STEWART QC:

It is not what Justice Gendall decided. I mean when he was having a general discussion he did put an extra disjunctive in the sentence but when he came to give his decision and he didn't intend to [inaudible] that way.

McGRATH J:

Just, the way you put your argument a moment ago, I wondered whether in fact you were accepting that.

MR STEWART QC:

No I accept there are two choices here. The initial choice is, “Are we going to do the work ourselves or are we going to make payment for that.” And the next one is, if that doesn't extinguish the choice or if that is not the extent of its choice, it can then in doing that, be able to say at the same time, “Here is the PDV, when you incur further costs in rebuilding the house on the site, we will pay them.” Because that is, the real differentials arise under the, “How we will settle your claim.” The payment, the question about who does the work or not is not so critical as to the outcome except Tower can control it if it does the work itself.

McGRATH J:

Is it fair to say your approach to this clause is that you can mix and match these terms? You can have a payment in part and you can have a rebuild, replace or repairing in the function part?

MR STEWART QC:

No they pay the cheque out for the PDV and then say, “We want you, Mr Skyward, to buy another house,” and this is what they did. “Please let us know, find a house, and

we will buy it for you if it meets the terms of the policy,” or they are happy to go and source the houses themselves, but we never got that far because Skyward disputes that they can be required to buy another house.

McGRATH J:

Just one other, or a general point. You were talking about, you put some emphasis on the fact that this was a, rental properties that were being insured under this policy but the policy doesn't appear to have that as a particular characteristic. I mean, I take it this policy is used for residential owned houses, single units is it not?

MR STEWART QC:

Yes.

McGRATH J:

So we shouldn't really, we don't really, to what extent is the rental character of the property, it doesn't really have any relevance to the interpretation, does it?

MR STEWART QC:

Well, just to respond to the extreme example of a person living in Epsom and going to St Cuthbert's and all these personal considerations. Now Tower would accept that comparable also applies to the locality, buy another house in the same locality, and also it has an obligation to act in good faith and to be reasonable.

McGRATH J:

You can bring that out to the extent you like but at least I know that we are dealing with a standard owner's, house owner's single-unit policy here which also is used for rental, multi-unit properties.

MR STEWART QC:

There is some other drivers here, of course, is that the insurance industry is a competitive market, and if an insurer was unreasonable it would be on *Fair Go*, it would be in the news and it would quickly go down.

McGRATH J:

Not exactly the sort of key principle for interpretation of contract though is it?

MR STEWART QC:

No but then it is not a key principle that because you can do that, somehow we are going to construe this policy differently. If it says it can do it, then it can do it. I mean let's say the policy was then re-written and it was spelt out to make it abundantly clear, "We can in all circumstances and for whatever reason require you to buy another house." Now I think that is what the Court of Appeal suggested actually, that they just didn't achieve it in this case. Now you know, there would be no way round that. So it is not something that is that absurd or that objectionable. It may be some that say well that is not really an ideal situation, that could work hardship and in those cases, of course, although it is not an ideal answer, it is in the discretion of the insurer to act reasonably and with good faith.

O'REGAN J:

But then it is not a full replacement policy is it?

MR STEWART QC:

It is, because it's defined in the definition section that that would be a replacement if you get a, buy another house.

O'REGAN J:

That's not full replacement of the property that was destroyed.

GLAZEBROOK J:

Where do you say it's defined? Because full replacement value doesn't say anything about buying. I suppose "replace" do you say?

MR STEWART QC:

Yes, "replace".

O'REGAN J:

Well, but "replace" is used as, in, as an alternative to buying in other places.

MR STEWART QC:

Well, if you look at the –

O'REGAN J:

"Replace" means building a new one, doesn't it, not buying another one?

MR STEWART QC:

If we have a look at that. You have the option whether to rebuild –

O'REGAN J:

Sorry, where are you looking at now?

GLAZEBROOK J:

This is a definition – oh, sorry, I was –

McGRATH J:

Page 144.

GLAZEBROOK J:

I was looking at the definition which says, “rebuild, replace or repair.”

MR STEWART QC:

Yes, your house, yes.

GLAZEBROOK J:

Do you say “replace” includes buy another one?

MR STEWART QC:

Yes. I mean, you'd – if you rebuild it you're replacing it with a rebuilt house.

WILLIAM YOUNG J:

Well, it's got to be the same area, as shown in the certificate of insurance –

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

– plus any deck, so, I wonder whether “rebuild and replace” are repair or really a single concept of reinstate, essentially one of reinstating the house on the site?

GLAZEBROOK J:

Well, “replace” might be doing it on another site because –

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

– but with exactly the same dimensions.

MR STEWART QC:

Relocate, yes.

McGRATH J:

That wouldn't, you say –

MR STEWART QC:

You could pick the house up. Let's say only the land was damaged. You could take the land off the site and relocate it on another site.

McGRATH J:

Does the word “replace” take some of its meaning from the “we will pay” clause which, where it refers to full replacement value of the house and full replacement value of the house on another site? Because that would indicate “replace” as a narrower meaning than the one you're contending for. Because when we get down to the third “we will pay” option, the cost of buying another house, we don't see “replacement” in that concept at all.

GLAZEBROOK J:

And actually in all cases it's limited in any event to the cost of rebuilding on the site, isn't it.

McGRATH J:

So just, if you just try my question first and then come back to that. What I'm suggesting to you is that “replace” is – we're trying to find a meaning for “replace”, and I'm suggesting the way the word “replacement” is used is an indicator of that meaning.

MR STEWART QC:

In the “option” clause you're looking at, Sir?

McGRATH J:

I'm looking at the...

MR STEWART QC:

"Option to pay", "we will pay"?

McGRATH J:

I'm looking at the "we will pay," and that's where you get the word "replacement" there.

MR STEWART QC:

Yes.

McGRATH J:

And I'm suggesting that, if you come down to the definition of "full replacement value", if you go to that, and you see the words, "The cost incurred to rebuild, replace or repair" –

MR STEWART QC:

Oh, is this in the last page?

McGRATH J:

– I'm suggesting that, as Justice Young suggested, that's a composite phrase, "rebuild, replace or repair", and I'm suggesting that the way the word "replace" is used in the "we will pay" clause is consistent with that.

MR STEWART QC:

Well, then you'd have a unnecessary duplication, wouldn't you? I mean –

McGRATH J:

An issue of...?

MR STEWART QC:

An unnecessary duplication in the pay, I mean...

WILLIAM YOUNG J:

So, but the draft of the policy is pretty lousy.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

Because the same, what should, what you assume are the same concepts are repeated but with variations in wording in a way where the variations presumably aren't meant to have much significance, or any significance.

MR STEWART QC:

Well, what would be the difference between a rebuild and a replace?

WILLIAM YOUNG J:

I – well...

MR STEWART QC:

I mean, if –

GLAZEBROOK J:

Same situation and different site, so options 1 and 2 under the “we will pay,” is what's being suggested to you.

MR STEWART QC:

Well, the first one is –

GLAZEBROOK J:

So, rebuild is option one under “we will pay,” it replaces option two under “we will pay –

O'REGAN J:

“Rebuild” is duplicating what was there before and “replace” is doing something different, but as a substitute, isn't it?

MR STEWART QC:

Yes, but what's different? I say that it must capture the buying another house.

O'REGAN J:

Well, it doesn't need to, because the "we will pay" clause, when you go down those options, it talks about the full replacement value, second one's full replacement value, the third one's the cost of buying another house, which seems to indicate that's something different from replacement value.

MR STEWART QC:

Well, no, that – well...

GLAZEBROOK J:

But restricted.

MR STEWART QC:

Then it wouldn't be replacement, would it? This –

O'REGAN J:

Well, that's what I'm –

McGRATH J:

Yes, that's the point.

O'REGAN J:

It seems to me that that's the better way of construing the policy though. Buying another house is something different from replacement, and you can do that, but it mustn't cost more than replacement value.

MR STEWART QC:

Well, except it's not, is it? But they're allowing you to do it up to the cost of building another house on the same site.

O'REGAN J:

But it's a replacement policy. The premium's been accepted on the basis that Tower has agreed that if the house is completely destroyed it's liable for the replacement value, ie, rebuilding the house on the same site, up to whatever the agreed maximum is if there is one. So that's what Tower bargained for. The fact that in the end the way the person decides to deal with their loss is to buy another house, instead of rebuilding on the same site should be neither here or there to Tower, because it

accepted that if there was a destruction it had to pay replacement value, that's why it called it a full replacement value policy.

MR STEWART QC:

Yes, well, the reality is that there is difference, a monetary difference, between –

GLAZEBROOK J:

But the premium's been calculated.

O'REGAN J:

Well, there might be in some cases and might not be in others, I mean, that's – in other cases it could be the other way round. But the fact is what Tower bargained for is, "We'll pay the replacement value, we don't care how you – we're not going to pay you anything more than the present day value unless you actually do something to create a new home for yourself, but we don't care whether you do that by rebuilding on the same site, rebuilding on another site or buying another house."

MR STEWART QC:

Well, the only answer to that is that, if I'm right in the argument, that Tower has the choice as to what option, what payment option is applied in order to deliver the replacement value.

O'REGAN J:

Well, you can just as easily –

McGRATH J:

Mr Stewart –

O'REGAN J:

– you can just as easily construe it thought as saying, Tower, "As long as you, you the insured, incur costs in creating a new home for yourself, we will pay you, and we will pay you the amount up to either the amount of costs you did in fact incur or the full replacement value as calculated under the policy, whichever is the lesser."

MR STEWART QC:

In this case there's another rider, the second part of the inquiry is how do you calculate the amount? I mean, we say on the second leg that the payment, it is up to the cost to build a comparable house, but that cost has a cap on it.

O'REGAN J:

Well, it doesn't say that, it just says, "Build another house."

MR STEWART QC:

Well...

O'REGAN J:

It says, "Buy, the cost of buying another house," is what it says –

MR STEWART QC:

"This cost must not be greater than rebuilding."

O'REGAN J:

– at the bottom of page 142, left.

MR STEWART QC:

"This cost must not be greater than rebuilding your house on its present site."

O'REGAN J:

Yes, but that's just a limitation on the amount of money.

MR STEWART QC:

That's the cap.

O'REGAN J:

But the house isn't described as anything other than "a house." It could be anything.

MR STEWART QC:

Yes, but that's the cap, isn't it.

O'REGAN J:

The cap is a cap relating to the amount of money you have to pay. It's got nothing to do with what type of house the insured decided to build.

MR STEWART QC:

No, but that's governed elsewhere, we say.

McGRATH J:

Yes, but perhaps, Mr Stewart, we should now, seeing we've moved on to this question, which you to just short of develop your argument. Because I think what your argument is is that this, "And we will pay the cost of buying another house," clause, while it has a cap in relation to no more than FRV, there's also another cap which comes, now you say that comes from elsewhere in the policy, do you –

MR STEWART QC:

Yes.

McGRATH J:

– from the "we are not bound to," clause?

MR STEWART QC:

Yes.

McGRATH J:

Perhaps you could just develop your argument on interpretation in that way?

MR STEWART QC:

I'll just refer with my junior on topic.

McGRATH J:

Sure.

MR STEWART QC:

143, what Tower's not bound to do. It is the third paragraph at the 143, the left-hand column, "We are not bound to pay the cost of replacement –

McGRATH J:

Yes.

MR STEWART QC:

– or repair beyond what is reasonable, practical or comparable with the original.”

McGRATH J:

So you say that applies to buying another house?

MR STEWART QC:

Yes.

McGRATH J:

Well, just – how is that from those words?

MR STEWART QC:

Well, that depends on the word “replacement”, you know, “Pay the cost of replacement as to either rebuild or buy another house,” it captures both. And I say that because if you go back to 142, under the “in all cases” clause that we’ve been looking at –

McGRATH J:

Yes.

MR STEWART QC:

– we have the option whether to make payment, rebuild, replace. So, my submission is that “rebuild” and “replace” are different, and that the “replace” captures the third payment option under, “How we will settle your claim.”

GLAZEBROOK J:

But Tower can’t buy another house, can it? I mean, the person has to buy the other house. Tower can rebuild and it can build a new house, because you don’t, that’s not related to ownership. But Tower can’t buy another house because it can’t own the house, so the person has to buy the house –

MR STEWART QC:

Yes, and it –

GLAZEBROOK J:

– and the only thing that Tower can do is pay for that. So “replacement” can’t mean Tower can decide to buy another house.

MR STEWART QC:

No, but it can offer to and say, "We will –

GLAZEBROOK J:

Well, it can offer to pay for another house.

MR STEWART QC:

– offer to pay for another house, and if the insured says, "I don't want it," then Tower says, "Well, there it is. If you want to get the full replacement value," now, let's say that the insured doesn't particularly like the house, but the insured can take the house and sell it and then get the uplift above the PDV from selling the property.

WILLIAM YOUNG J:

And it all should be as broad as it's long, isn't it? I mean, leaving aside the particular situation here of the red zone, by and large it would be open to the insured to require a house to be built that replaces or reinstates what was there but to new standards, sell it, and then do what they like with the money. Now, what you're saying is they've got to do that and we can't, as it were, cut the triangle by just paying the cost of the rebuilding exercise, they can't, that Tower can't be made to do that, and so therefore the insured has to incur the transaction costs of reinstating and then selling to someone else and then buying something else.

GLAZEBROOK J:

But doesn't the argument go further than that? Don't you say that if it's cheaper to buy another house you can make them buy another house, as long as it's in the same area and comparable and –

MR STEWART QC:

As new, as new, so it will be better.

GLAZEBROOK J:

Well, doesn't – no, it won't be better, it'll be exactly the same. So what your argument is is that despite it being possible to build, rebuild on the same site, if it's cheaper for Tower they can say, "You're to move two houses down."

MR STEWART QC:

Yes.

GLAZEBROOK J:

And that's what your argument is, is that –

MR STEWART QC:

Well, that's –

GLAZEBROOK J:

– it's Tower's choice to say, "Don't care whether it's possible to rebuild, don't care whether you want to rebuild, it's cheaper for us to buy you a comparable house to streets over, in the same area," because you accept there's some constraints on it –

MR STEWART QC:

Yes.

GLAZEBROOK J:

– and therefore up sticks.

O'REGAN J:

But it wouldn't be cheaper unless Tower then took over the bare piece of land and that had some value. I mean, there's nothing in the policy that suggests that will happen.

MR STEWART QC:

No –

O'REGAN J:

So, I mean, it's, all of this is just academic, it would never be cheaper to buy another house when you had to pay for land as well. And you wouldn't want to give the insured, allow them to keep a valuable piece of land with nothing on it –

MR STEWART QC:

Yes.

O'REGAN J:

– and also get a new house with the land under it.

MR STEWART QC:

I struggle with this idea of separating the land from the house, because if Tower said, "We'll buy this house for you," they have to buy the land with the money they've got from EQC or whatever, or from their previous property –

WILLIAM YOUNG J:

Say there's, but this means you've somehow or other got –say you get a situation here where the land wasn't insured, wasn't damaged, my 500 and 300, 500 token value, 300 and 200. So there's a 300,000 rebuild cost, this guy was left with a 200,000 block of land. Now how does the rebuild, how does the "buy another house" option work on your interpretation?

MR STEWART QC:

Well, you know, logically say how it might work, but I mean, it would never happen, but I do, don't shrink from the fact –

WILLIAM YOUNG J:

Well, it might happen, might it, because I think that has happened quite a lot, a lot of people have, in Christchurch, have settled with the insurers, sold the land and bought another house?

MR STEWART QC:

I'm not aware of that. Maybe. Is that right? Yes.

WILLIAM YOUNG J:

But so how would you apply the cost of buying out of the house in my example? Skyward's got, has got a \$200,000 section, it wants to go buy another house, there's a \$300,000 rebuild estimate, how, what's the cost of the house they can buy?

MR STEWART QC:

Well, the cost to rebuild the, their previous house –

WILLIAM YOUNG J:

300,000.

MR STEWART QC:

Probably 300,000 I get towards buying another house.

WILLIAM YOUNG J:

So that, so you're not saying that the rebuild cost is the cap on the value of the other property, on the purchase price of the other property?

MR STEWART QC:

Well, that'd be the maximum, on the house value, to rebuild the house on the other property.

WILLIAM YOUNG J:

Yes. So they can –

McGRATH J:

It's a cap on the house component –

MR STEWART QC:

Yes.

McGRATH J:

– of the other property, not the land.

MR STEWART QC:

That's right.

McGRATH J:

I think if we clearly understand that, we get rid of an unnecessary diversion in this case.

MR STEWART QC:

Yes, that's right.

WILLIAM YOUNG J:

And that has to be established –

MR STEWART QC:

That is correct, Sir.

WILLIAM YOUNG J:

That has to be established by arbitration or valuation or –

MR STEWART QC:

Or agreement.

WILLIAM YOUNG J:

– if necessary, the Court.

MR STEWART QC:

Or agreement between the parties, or, ultimately, if they can't agree, yes, some process to resolve the difference.

GLAZEBROOK J:

So if there's 300 rebuild on one side and the house component of a comparable house is 200,000, they can be forced to move to the new house by Tower, as long as it's comparable in area, including those sort of sentimental and school attachments?

MR STEWART QC:

That's the logical –

GLAZEBROOK J:

That's the argument.

MR STEWART QC:

That –

O'REGAN J:

Absolutely none of that was in the policy.

MR STEWART QC:

Well, it all –

O'REGAN J:

I mean, we're just making that up as we go.

MR STEWART QC:

No, no.

O'REGAN J:

That would make sense if that's what Tower's rights were, but the fact it's not there suggests that isn't Tower's right, doesn't it.

McGRATH J:

Well, there is in fact something in the policy, Mr Stewart, if we look at page 142, left-hand column at the foot of the page. Now that speak of, "We, Tower, will only allow you to rebuild in another site, or buy a house." Now, doesn't that indicate that the base line is that the insured will make the choice as to whether or not to buy another house, but that is subject to a proviso that the house must be damaged beyond economic repair?

MR STEWART QC:

Well, we'll deal with that in the submissions. There's another way of looking at it, that in fact if you're correct and say that the insured has the choice and Tower doesn't, on all of these matters, then that clause doesn't work, does it, because it doesn't matter – why would you say Tower wouldn't have the ability to stop them anyway, or to allow them anyway, if the choice was with the insured? And really what that clause is doing – and it's not happily phrased, the word "allow" doesn't really belong there – but what it's saying is, "We're not bound by it, but we're letting you know that we may not or are unlikely to or have to, to allow you to build a house on another site unless the house is damaged beyond economic repair.

McGRATH J:

Well, I'm looking at buying a house on another site just at the moment, I think is this, there's no difference. But isn't – it seems to me that that provision is really saying is, "Well, while you have the choice as to whether or not to buy a house, you only have that choice if in fact your house has been damaged beyond economic repair," in which case you do have that choice.

MR STEWART QC:

Well, that's not an easy clause for me to deal with. But I can see both sides of the argument there.

WILLIAM YOUNG J:

What's the other?

MR STEWART QC:

It's an indication. But I'll deal with this at 39 if you want to, of my submissions.

McGRATH J:

Right.

MR STEWART QC:

We'll start at 37 –

GLAZEBROOK J:

Well, what it really means, isn't it, is, "We're not going to pay you the full replacement cost if you rush off and buy another house, if yours is able to be repaired"?

MR STEWART QC:

Yes.

GLAZEBROOK J:

So you've got to – if your house can be repaired you've got to repair, you can't toddle off and buy another one and say, "Hey, please pay me the replacement value," isn't that –

MR STEWART QC:

That's right.

GLAZEBROOK J:

– all it says?

MR STEWART QC:

Yes. All of these issues, these questions, are on the basis that the house can't be repaired, uneconomic to repair, it doesn't cover a repair. If the house is going to be repaired, none of these situations come into play. If it's uneconomic to repair, this is the only instance that these questions have any relevance.

WILLIAM YOUNG J:

But it does rather suggest though, as Justice McGrath put it, that once the uneconomic to repair criterion's satisfied, then it's the insured who decides whether it's replacement value on the site, replacement on another site, or a purchase somewhere else.

MR STEWART QC:

We're there. The second part of the inquiry is whether there are any qualitative constraints or restrictions on the, buying another house, or can I go and buy any house, anywhere up to the – whether it is comparable or not – up to the cost to rebuild the damaged house on the original site.

McGRATH J:

That is bringing us back to – sorry, you are now coming back to the “we are not bound to”.

MR STEWART QC:

That's right.

McGRATH J:

That's good, so that is something I am interested in, in particular.

MR STEWART QC:

And when we got to that last time, Your Honour, you tackled me on the basis, well why does replacement encompass to buy another house and I've given you what I can give you on that, to contemplate something different from a rebuild, and there is provision in this policy to buy another house so why wouldn't you say, well that is what is being referred to at – I can't think why you didn't keep diffusing the word “rebuild”. Replacement must contemplate something different and that's what the Court has accepted, the Judge accepted in the first instance decisions.

WILLIAM YOUNG J:

It could mean replace the house with a very similar house on another site you choose.

GLAZEBROOK J:

Which seems to be what is meant by full replacement value because full replacement value doesn't actually make any sense in terms of buying another house does it. Which is why it is defined as being a cap on that.

MR STEWART QC:

Sorry, Your Honour, why did you say you couldn't?

GLAZEBROOK J:

Well if you look at the definition of full replacement value, replace there doesn't make sense in terms of buying another house. I mean it is possible to read it in but it is not an easy read.

MR STEWART QC:

Would you say buying an alternative, I mean.

GLAZEBROOK J:

I mean it is possible, but it is not the most obvious read.

O'REGAN J:

And the idea that you can get a 100 year old house as new, is a bit odd isn't it?

MR STEWART QC:

That is a feature, you do get something better.

O'REGAN J:

Yes but it is just a contradiction in terms. You can't have an "as new" Edwardian house.

WILLIAM YOUNG J:

Unless it is being repaired by another insurer.

MR STEWART QC:

You might get plaster mouldings rather than kauri.

O'REGAN J:

Well you might get a renovated one but that is not "as new".

MR STEWART QC:

No, but that is all you can do in the current climate because you may not be able to get these items any longer and it does say in this policy, on one of the few things that you can't do, that they have to repair or reinstate your house, "To exactly to its previous condition."

McGRATH J:

Mr Stewart, can I make this point? That I can see why an insurer would wish to include a term along the lines of that we are not bound to pay the cost beyond reasonable, practical or comparable with the original, why that term could be applied to the purchase of a new house. It seems to me that the concept of full replacement value actually gives cover for what I would say was depreciation. A person who is buying, whose house is destroyed and wants to have it replaced on the site, doesn't want to be limited in terms of cost to a depreciated house. I mean that person has to fund the depreciation element in that circumstance.

MR STEWART QC:

This gives a new for old.

McGRATH J:

Yes that is the new for old concept, so I can see that there was something of value if you have got a policy, if you are exercising the choice to have, to rebuild your house, in having new for old because all you are getting is a house of comparable kind to live in. Your balance sheet might indicate that you have got an asset that is worth a bit more but from a practical point of view, you have got a house to live in that is the same as old.

MR STEWART QC:

Yes.

McGRATH J:

But once you come to the option of buying another house, you are inevitably going to be buying a depreciated house, and you don't really need that depreciation element in your cover. So I can understand that an insurer would want to say, "If you are going to buy another house, there is a reasonable, practical or comparable limit on the cost of the house you can buy." Now this actually is a concept that comes out of one of the cases, and I think it is the Canadian case of *Brkich & Brkich Enterprises*

Ltd v American Home Assurance Co Ltd (1995) 127 DLR; in reading that that is from your submissions, got that concept. But, so I can see there is a sort of common sense in that approach. What I am having difficulty with is trying to see exactly how the words of the policy get you to that result, so that's really what I need your assistance on. And of course if an argument has been mounted against that, the policy can be – by your opponents, the policy really is to be interpreted on ordinary contractual principles otherwise.

MR STEWART QC:

Well, you wouldn't just limit clause 3 on, "We are not bound to, (a) to replacement, or repair beyond what is reasonable, practical or comparable," for the depreciation issue. I mean they to me, Your Honour imply that there is a qualitative yard stick or measurement on buying another house, if you accept that replace does capture the buying of another house. Now if you don't accept that, well then I am lost on that argument too.

McGRATH J:

Well I think you have to persuade, just speaking entirely for myself, I think you have to persuade me of that because I can see other contextual indications to the contrary. But I do not regard this as an impossible argument if you can back it up by reference to the text.

MR STEWART QC:

To the remaining meaning, to another house.

McGRATH J:

Showing that replacement includes buying another house. That to me is what this case comes down to.

GLAZEBROOK J:

Well I probably also have to have some help at some stage on why pay the costs means you can't buy something other than that. Because all it says is Tower is not going to pay any more than a certain amount, it doesn't say that you can't pay more than the certain amount and then Tower having to. So it doesn't say, "You can only replace this house with a house that is comparable," and the limitation comes in the, "Costs must not be greater than repairing or rebuilding your house." But it is just I am not sure why pay the costs means you are not allowed to have anything else.

MR STEWART QC:

So you mean that the insured could buy a \$500,000 house when he is only entitled to 400,000 and he tops up the rest of it.

GLAZEBROOK J:

Yes.

MR STEWART QC:

I am not going to advance that proposition further today. I mean I can't see there is any possible –

ARNOLD J:

Actually I thought there was a linguistic argument that might work for you there.

MR STEWART QC:

Well it does.

GLAZEBROOK J:

There is in the third option but I am not sure that it does with replacement or repair, I am not sure that it comes out of, "We are not bound to," the linguistic argument.

MR STEWART QC:

Oh, no.

GLAZEBROOK J:

No but that is the point I was making. But I understand the other one.

MR STEWART QC:

Oh sorry I am going back to the, "We will pay, this cost."

GLAZEBROOK J:

I mean we are not bound to pay the costs so if somebody wants to rebuild their house in an as new condition and put a turret on it, Tower will say, "Well, you can put a turret on it if you want to, but we are not," according to this, "We're not paying any more," or say had a turret on it in the first place and the turret is going to cost a million to put up, they will say well that is not reasonable, practical or comparable

with the original and we're not going to pay for that, but if you want to put the turret back up, well by all means pay your million dollars to put the turret up.

MR STEWART QC:

Yes and there is another component of the submission as filed, which said that "If the cost to rebuild on another site was \$500,000 and the insured found a house for \$600,000 and said I'll pay the extra 100," then it is not being advanced that Tower would resist that.

GLAZEBROOK J:

I thought it was.

WILLIAM YOUNG J:

But not now.

GLAZEBROOK J:

Oh, not now. Oh, okay.

McGRATH J:

Where are we going from here? We have got, I think, we are starting to focus on what the key question is, but we haven't really got orally your position on this matter, so for me it is replacement but as I think Justice Glazebrook is bringing out, it is actually the whole of that clause and what it means. So what do you say it means in these circumstances and how do you support that?

MR STEWART QC:

Yes. The argument is, the proposition is, that you get words used interchangeably without, potentially get "reinstate", "replacement", "rebuild", "replace" but if you look at page 142, we have here, "We will arrange for," under, "How we will settle"; "We will arrange for repair, replacement or payment for loss." Now there is no reference there to "rebuild" or "buy another house" in those terms.

McGRATH J:

Yes

MR STEWART QC:

Now then it goes on to say –

McGRATH J:

But doesn't paying them, doesn't that direct it towards buying another house?

MR STEWART QC:

No, that payment there is simply the PDV.

McGRATH J:

For the loss.

MR STEWART QC:

Yes. And yet on the "we will pay" unquestionably contemplates rebuilding and also buying another house.

WILLIAM YOUNG J:

The trouble is, "we will pay" looks as though it is a referable to the payment option but you say it also applies to the repair and rebuild and replace option does it?

MR STEWART QC:

So it has to be connected to what it is saying above, "Yes we will arrange for these things and we will pay for them."

WILLIAM YOUNG J:

Well, of course, I mean you can do it indirectly because all they have to do, if the payment options are constrained, then that in reality constrains the rebuild and repair options because if it is cheaper to pay, the insurer can be expected to do so.

MR STEWART QC:

Yes, well they can do. I mean I guess the better explanation is it there to facilitate resolution of claim, when the claims in the insurer's view are over the top, rather than saying in each case, we want to get the most miserable deal we can for the insurer. I mean you do want to retain your business I would have thought.

McGRATH J:

Now let's get back to it. You referred to the "we will arrange" clause.

MR STEWART QC:

Yes.

McGRATH J:

Okay you have made that point. Any other contextual matters you can rely on.

MR STEWART QC:

We have the option, across the page, whether to rebuild, replace or repair.

GLAZEBROOK J:

I am sorry, where are you?

McGRATH J:

"In all cases..."

O'REGAN J:

It is the third bullet point down on 142, on the right-hand side.

MR STEWART QC:

So here we are getting the use of the rebuild and replace.

McGRATH J:

We have had the, the point made against you there is that the choices are between payment on the one side and rebuild, replace or repair your house on the other.

MR STEWART QC:

Yes but they are all modes of providing replacement, full replacement. Rebuild, replace or repair. Now rebuild can be on that site, rebuild a house on another site. Now you could say well that is replacing the house with a house on another site, but it can also mean buying a house on another site and if that is one of the payment options, it is difficult to see why there should be push back. I'm saying on the proposition that "replace" does capture both buying a house on another site and also buying another house altogether. I mean, it is not a stretch, is it?

McGRATH J:

You are saying buying another house is replacing another house, it is not caught by a separate payment clause.

MR STEWART QC:

Correct.

McGRATH J:

Right, I understand that.

O'REGAN J:

So do you rely on – this relies on your argument about the concept of replace includes buying an alternative existing house?

MR STEWART QC:

Yes. And I had it somewhere; I get the sense where this is heading. I just wonder if I could just have 10 minutes with my learned junior, if we have an early break for the morning?

McGRATH J:

I am very happy if you think that will assist you, we will take the morning break now and we will resume at half past 11.

MR STEWART QC:

Right, Your Honour.

COURT ADJOURNS:11.15 AM

COURT RESUMES: 11.32 AM

MR STEWART QC:

There is one further matter, Your Honours. If you go to page 143...(audio break 11:32:30 11:32:37)

McGRATH J:

I see. So what you're saying is "rebuild" is a narrow term that "replacement"; "replacement" covers rebuilding and buying another house?

MR STEWART QC:

Yes.

McGRATH J:

If we, we can take the repair out.

MR STEWART QC:

Yes.

McGRATH J:

Understand that.

MR STEWART QC:

Then that phrase, “replacement and repair” in that context appears in the third paragraph of, “We are not bound,” which is dealing with the comparable issue about...

McGRATH J:

So, hang on, just let me sort of see that in the – yes, so if you satisfy us on that, the key clause you want to bring in to this is in the following subclause of the, “We are not bound to,” clause?

MR STEWART QC:

Yes.

McGRATH J:

Yes, I understand that.

O'REGAN J:

Yes, but all of these are talking in terms of costs though, aren't they? So that's saying, “We won't pay you,” it's not saying, “The new house you buy has to be comparable, they're saying, “The amount we pay you will be replacement cost, and replacement cost has to be calculated on the basis that what you would have done if you'd replaced would have been comparable to the old house.” So, it's, it doesn't seem to me that that's saying the new house has to be comparable, it's saying, “When we calculate our maximum liability, which is replacement cost, we're doing it, we're asking the valuer or whoever calculates it, to calculate it on the basis that the notional replacement was a like-for-like replacement or a like-for-like but new-for-old replacement of the house that was destroyed.”

MR STEWART QC:

Yes, but there's still a qualitative requirement there in buying the new house to comply, to, "We don't have to pay those costs."

O'REGAN J:

Well, it just says, "We won't pay the cost of replacement –

MR STEWART QC:

Beyond.

O'REGAN J:

– beyond what's comparable."

MR STEWART QC:

Yes, that's right, so...

O'REGAN J:

So that's consistent with the fact that the liability under the policy is to pay replacement value, no matter what you do, Tower will pay replacement value, but only when you've actually incurred some costs yourself.

MR STEWART QC:

Yes. But this goes to the point, Your Honour, that in respect of the third option payment, to buy another house providing it's not the only – the only restriction on that, the Court of Appeal said, was it can't exceed the cost to rebuild the house on the original site, no other restrictions, no other criteria are relevant in selecting that other house. I'm saying that, by the fact of replacement, does in parts of the policy encompass buying another house. It does mean that you've got to also have regard to, "We won't pay the cost for another house beyond what is reasonable, practical or comparable with the original."

O'REGAN J:

But you've accepted that you can buy a \$10 million house if you want to, as long as you're prepared to pay the other 9.5 million yourself.

MR STEWART QC:

Yes, absolutely. So, that's talking about what Tower's contribution is –

O'REGAN J:

Yes.

MR STEWART QC:

– I agree.

O'REGAN J:

So it doesn't have to be a comparable house.

MR STEWART QC:

Well...

O'REGAN J:

It's just got to be – the value, the amount Tower pays, has to be calculated on the basis of a comparable house.

MR STEWART QC:

That's right.

O'REGAN J:

Yes.

MR STEWART QC:

Yes. Now there was one final thing. We gave you a memorandum on a decision of the Court of Appeal –

McGRATH J:

That's right, yes, I'm sorry. Now this is an *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483 case.

MR STEWART QC:

Yes –

McGRATH J:

Do you want to address that now? I'm sorry, we didn't get back to you.

MR STEWART QC:

Are you prepared to hear from us on that?

McGRATH J:

Yes, we're prepared to hear you.

MR STEWART QC:

Yes, and my learned junior, Mr Smith, will address you on that issue, Sir, on the *Avonside* issue.

McGRATH J:

Thank you, Mr Stewart.

MR STEWART QC:

Thank you, Sir.

MR SMITH:

Thank you, Your Honour. I don't know, does the Court have copies of the *Avonside* decision? I have got a small supplementary bundle –

McGRATH J:

No, no, I don't – oh, yes, we do.

MR SMITH:

– if you need it.

McGRATH J:

Was it put in the...

MR SMITH:

It wasn't put in anything we've filed, Your Honour.

McGRATH J:

I don't think it was in the supplementary bundle. We've got a supplementary bundle, but I don't think it was in that.

MR SMITH:

No, no. I have a slim supplementary bundle I could hand up, which has copies of *Avonside* in it, if that would be of assistance.

So there are two cases in that bundle. The first is the *Avonside* decision, and then the second is the full unreported version of the *O'Loughlin v Tower Insurance Limited* [2013] NZHC 670, the version in the original bundle is the reported version, which is just an extract. So on – this issue arises out of the proposition that whatever entitlements an insured may have they do not under any circumstances include the right to take the money that would have been spent on special foundations in the red zone and to apply those to rebuilding elsewhere or to buying another house to get a better house or...

Now, in the Courts below, the, Skyward has accepted, based on the *O'Loughlin* decision, that that proposition is correct, that it is not entitled to take the costs in order to spend it on foundations in the red zone and apply those somewhere else. I'm not sure if that is properly characterised as a concession or simply an acceptance of the, that that result of the *O'Loughlin* decision was correct. Now of course –

WILLIAM YOUNG J:

Where's it dealt with in the *O'Loughlin* decision?

MR SMITH:

It's dealt with at paragraphs 173 and following. So there's a – so the *O'Loughlin* decision proceeded on the basis that the parties were concerned to monetise the O'Loughlins' entitlement. So it was talking about what is the cash value of what they are entitled to receive. The evidence was that it would cost \$620,000 to build on the actual site with its damaged red zone ground or 540,000 to rebuild somewhere else.

GLAZEBROOK J:

What paragraph? Sorry I took a bit of time to find the *O'Loughlin* decision. What paragraph?

MR SMITH:

173 and follows.

O'REGAN J:

No it is in this new bundle, because that is the reported version.

MR SMITH:

Sorry Your Honour. So the reported version cuts out about paragraph 90.

GLAZEBROOK J:

Oh yes, right, okay I am with you now.

O'REGAN J:

So 173 to 182.

WILLIAM YOUNG J:

So to get there the Courts have relied on the "we are not bound to" clause, about reasonable and comparable.

MR SMITH:

Yes and to date at least, everyone has accepted that the result must be correct and what we say is that, that is only because of the application of this idea that it must be comparable.

WILLIAM YOUNG J:

Could be a two-edged sword because I agree that that, if this aspect of Justice Asher's decision is right, then that helps you. But that if you are wrong, then it may well be that this aspect of the decision is wrong.

MR SMITH:

Well yes that must follow Sir, that's really my point. That this issue about red zone foundations really brings into relief the concern we are talking about and previously everyone seems to have accepted that Tower has a point about this but it is difficult to reconcile that with the actual reason the Court of Appeal went on to adopt, of saying that there are no qualitative limitations and the relevance of the *Avonside* decision to this point is simply that it confirms that the cap, so of course buying another house, capped at the cost of rebuilding on the original site. The *Avonside* decision says well when you are calculating what that cap is, it's really a pretty simple question of asking yourself to estimate what it would actually cost to rebuild on the site and you don't arbitrarily assume that the ground conditions are other than what they actually are. So when you come to calculate the cap, taking the facts of *O'Loughlin*, the cap would have been the 620, not the 540, but they could only ever

be entitled to 540 because that was what they would need to spend to rebuild a comparable house somewhere else and although Justice Asher didn't have the evidence to monetise or estimate the actual cost of buying a comparable house, from paragraphs 181 and 182 of the judgment, it is clear that his approach would, he saw it, applying equally to a rebuild on another site or buying another house.

Now my learned friend I think accepts that when we are talking about rebuilding on another site, that comparable limitation does apply, but he says that that is because of the use of the word "rebuilding", and he says that if you are rebuilding, it is inherent in that, that you are building what was there before. Whereas we say, "Well, we would certainly agree that that supports that construction, but we would find support for that in other propositions which apply equally when you are buying another house, which is the "reasonable, practical, comparable" clause, and then is also the rationale of these policies. Of course an insurance policy, in the absence of anything else that is in it, if the policy started and finished with the main insuring clause it would be an indemnity policy and the insured would get its actual loss, whatever that might be, and that doesn't necessarily of course mean market value. Even when we go back as far as the *Castellain v Preston* (1883) 11 QBD 380 (CA) decision, there are dicta in the judgment which say, of course, that doesn't necessarily mean the market value, because the value of a home to someone may not be reflected in its market value and they may be entitled to have it reinstated if that is the best measure of their actual loss, but nonetheless indemnity for the actual loss would be the starting point.

Now of course Tower's policy doesn't stop there, it goes on to modify the customers' entitlements in a number of ways but most notably it does that, and this is to pick up the point Your Honour Justice McGrath was making, this policy like other depreciation-focussed policies, modifies the principle of indemnity by providing new for old, as when new, cover and that is recognising that although it may not be a loss which technically has been caused by the insured event, it is nonetheless a loss that is practically crystallised by the insured event, and that the cost of rebuilding a new house is something which the insured is actually going to incur so it should be indemnified for that cost. And Tower has no quibble with that and accepts that this policy provides that the principle of indemnity that would ordinarily apply, is varied by providing for new for old cover, but it says there is no reason for the policy to go any further than that in varying what you would ordinarily expect an indemnity insurance policy to do, and it does not do so. There is no call for an insured to be able to, in

replacing, or perhaps I should say reinstating, because that is not a word which is used under operative clauses of the policy, in reinstating their property to be able to do so with something that is not comparable with what they had before.

WILLIAM YOUNG J:

But say they buy the \$10 million house and put \$500,000 towards it. Do you accept now that they can do that?

MR SMITH:

Yes we accept that it is Tower's, or EQC and Tower's contribution which is capped rather than the cost of the house.

WILLIAM YOUNG J:

So doesn't that suggest the comparability clause applies to the assessment of the rebuild cost rather than what the insured uses the money to buy?

MR SMITH:

I would accept that the comparability clause goes to the cost that Tower is liable to pay.

WILLIAM YOUNG J:

But that is calculated by reference to the rebuild cost.

MR SMITH:

Well, that is where we part company, Your Honour, so we say that there are two limbs to that. It's Tower pays the cost of buying a comparable house, well, Tower pays the cost of buying another house, capped at the cost of rebuilding on the original site but in doing so, it is not liable to pay the cost of acquiring anything that is not comparable with the original.

WILLIAM YOUNG J:

So are you departing then from what I thought was the acknowledgement that the insured could buy a \$10 million house which is entirely incomparable but put \$500,000 in?

MR SMITH:

I am not departing from my learned senior's concession on that point. We say it is Tower's cost, so it may be that the insured is entitled to go and buy a house that is not comparable, but what they are not entitled to do is to require Tower to pay for that. So if they acquire the \$10 million house, it is the \$500,000.

WILLIAM YOUNG J:

Sorry, but doesn't that suggest that the comparability exercise is addressed so the rebuild cost, which is the cap, rather than what the new house looks like?

MR SMITH:

Well it is the cost that Tower has to pay that is assessed as being limited and what is comparable.

ARNOLD J:

Just to understand, are you saying then that to take the situation where the insured does find the \$10 million house, you have accepted the insured can do that? So – but Tower is entitled to pay, not the full replacement value but a lesser sum if that lesser sum was sufficient to buy on the market a house that was comparable. Because we are now not talking about actually buying a comparable house, you must be talking about an emotional figure to buy one.

MR SMITH:

That's right and the way we would put it is to say that Tower is only liable to pay the full replacement value, which is the cost of acquiring a comparable house as when new, and if the customer wants to go out and acquire a house that is different or better and therefore more expensive than a comparable house as when new, then to require Tower to pay for that would be to require it to give more than full replacement and it is not obliged to do that.

WILLIAM YOUNG J:

Where does the *Avonside* case deal with ground conditions, just flicking through it I thought they perhaps didn't take the same approach as Justice Asher.

MR SMITH:

So the *Avonside* decision, it's under the contingencies and professional fees section which starts at paragraph 49. It is perhaps useful just on the way through to draw attention to paragraph 3 and even paragraph 9 which set out the policy provisions at

issue and Your Honours can see that they are very similar to the ones at issue in this case, to the extent you would think that perhaps one of them had copied the other. But paragraphs 49 and following and specifically paragraph 52, so we agree with Mr Campbell's general submission that it is irrelevant that rebuilding will not take place. What is required is an assessment of the costs that would be incurred if rebuilding were actually to occur.

WILLIAM YOUNG J:

It is the next paragraph I was interested in. "We do not think safe ground can be assumed"

MR SMITH:

Yes.

WILLIAM YOUNG J:

So that is rather different from Justice Asher isn't it?

MR SMITH:

Well we submit that it's consistent with Justice Asher's judgment because what *Avonside* holds is that for the purpose of calculating the cap, comprised of the cost of rebuilding on the original site, you have to take the actual ground conditions on the original site, so that is the 620 in Justice Asher's judgment.

WILLIAM YOUNG J:

Say I went – sorry that is the cap?

MR SMITH:

Yes.

WILLIAM YOUNG J:

Say I then want to build on TC3 land somewhere else, I buy a nice section by the Avon River, I am entitled to require you to put down heavy foundations on that site, providing it is not going to cost more than it would cost to do the same in the red zone.

MR SMITH:

Well if that issue arose then there would be a question about whether in all the circumstances, the insured was entitled to acquire a TC3 site as opposed to a better site and whether issues such as mitigation for loss –

WILLIAM YOUNG J:

You don't have to mitigate loss if you are insured do you?

MR SMITH:

Well, the –

WILLIAM YOUNG J:

I mean it is not contract, not pay for damages, it is a claim on a contract.

MR SMITH:

No, it is not a mitigation of loss in the sense that would ordinarily follow because there is no breach. It is simply a question of quantifying what is the loss that is being caused by the insured event and there are obligations in the policy to take reasonable steps not to exacerbate the loss.

WILLIAM YOUNG J:

Can I just go back a little? Say we didn't have a red zone, I have got a land that is TC3, it is not economic to rebuild on that land in terms of the cost but I have my eye on a very nice bit of land by the Avon, equally TC3. I say well you guys you can either rebuild on that site but it is really heavy foundations or you can spend the same amount of money, no more than that amount of money and rebuild on my new section by the Avon with the heavy foundations. Now wouldn't that be something you would just have to wear?

MR SMITH:

If that situation arose, it would depend on the factual circumstances

WILLIAM YOUNG J:

But it is my choice, it is the section of my choice in the policy isn't it?

MR SMITH:

Yes, subject to not again, not having to do more than is reasonable practical et cetera. So if, to take an extreme example, there for some reason were one section.

I mean let's say, let's move away from the earthquake scenario. You know there is a section beside the river that everyone calls the swamp because it has got particularly bad ground and you choose that section rather than one of the others where the foundation costs would be substantially lower, certainly want to reserve the argument that in those circumstances the insurer can say, well hang on, that's not a reasonable cost for you to put us to, that is not a cost that is caused by the insured event, that's a cost that's caused by you choosing particularly bad land when you don't need to do that. Now, as I say, it will be a factual question, because –

WILLIAM YOUNG J:

Okay, well, it's an argument for another day, I guess.

MR SMITH:

It's an argument for another day, I think, Your Honour.

WILLIAM YOUNG J:

It's not obvious though, I guess, is it?

MR SMITH:

I accept there's not an obvious argument either way – answer, either way, and it's an argument –

WILLIAM YOUNG J:

I mean, is it – so after, apart from 53 in *Avonside*, is there anything else that appears on this heavy foundations argument?

MR SMITH:

No, Your Honour.

GLAZEBROOK J:

What are we expected to do on this? Because if the point has never been taken, what are we supposed to be doing on it? We, it's not been taken, we haven't had a proper argument on it, can we really sensibly make a comment on it, or are you trying to use this as an argument to say we should interpret the policy in a different way, or what –

MR SMITH:

Quite right, Your Honour. I'm trying to use it to say, well, that concession can only be rationally justified on our interpretation of the policy –

McGRATH J:

Yes.

MR SMITH:

– and no one said –

WILLIAM YOUNG J:

So you're giving a bit of hostage to fortune to that argument, of course.

MR SMITH:

Well, well, quite, Your Honour, but we'd – the answer will be what the answer will be, but it will be rationalised.

GLAZEBROOK J:

Well, is that right, though, because isn't, can't the concession be justified on, well, for a start you can't really – you can if you want to rebuild on red zone property, but you're stuck in the middle of it with no services, et cetera, so practically you can't rebuild on red zone. And so the comparable costs are without those foundation costs because they're not –

WILLIAM YOUNG J:

Not necessarily, because –

GLAZEBROOK J:

No, no, but the concession can be justified –

WILLIAM YOUNG J:

Yep.

GLAZEBROOK J:

– on the basis that they have conceded that the comparable costs don't include that, because it would be unreasonable to expect. It's not conceded on the basis that you could never have that...

MR SMITH:

No, it's not conceded on the basis that you would never have that. But if it's conceded on the basis that it's not reasonable or it's not comparable, then one needs to ask, well, why is it relevant whether it's reasonable or comparable, and that, the reason it's relevant is because the policy requires the cost to be reasonable and comparable.

O'REGAN J:

I thought Mr Campbell's submissions said that that wasn't a concession, it was just an explanation to the Court that that's why, the basis on which the claim has been made. So, I mean, I would have thought this argument is just opening it up for him to say, "Well, I haven't conceded this point, and if you're opening the ground up then I'll take the opening."

MR SMITH:

I'm not saying that it was a concession made by my learned friend personally in the Court of Appeal. It was, it's fair to say that it was a presentation of an explanation of the way Skywards' claim had been quantified. I'm characterising it as a concession in the sense that, well, they're not, they're saying they're not claiming that cost –

GLAZEBROOK J:

No, but –

MR SMITH:

– and they're not entitled to claim it.

GLAZEBROOK J:

– the concession could just be, "We accept in these circumstance that the cap doesn't include the costs of putting down those foundations in the red zone, because we don't intend to buy anywhere that needs that, and so we agree that we get that less than that, because that would be the comparability."

MR SMITH:

Well, that could be the concession –

GLAZEBROOK J:

Or it may be they'd just under-claimed –

MR SMITH:

– but that's now –

GLAZEBROOK J:

– and now they can claim more, but...

MR SMITH:

This is why the *Avonside* decision brought this issue to a head or led at least to us raising this issues, because, I'm perfectly – I mean, it's up to my learned friends, obviously, whether they maintain that concession and terms –

GLAZEBROOK J:

But we wouldn't be dealing with it here.

MR SMITH:

No.

GLAZEBROOK J:

If they are going to withdraw the concession, if it is a concession, surely they argue that when it comes to the...

MR SMITH:

Well, yes, Your Honour. The difficulty is simply that, it seems on the face of the judgment that that, of the *Avonside* judgment, that that concession is, well, inconsistent. Now, if the Court's willing, I'd be perfectly happy to proceed on the basis that that point's been conceded in this case, and it'll be perhaps an issue for another day about whether red zone versus TC3 versus whatever other particular ground conditions there might be and whether, how the policy responds to those situations. Tower's certainly content to proceed on that basis, but it was thought responsible to draw to the Court's attention this *Avonside* comment and –

WILLIAM YOUNG J:

So you see the *Avonside* comment as against you?

MR SMITH:

No. We see the *Avonside* comment as consistent with *O'Loughlin*, because we say had Justice Asher passed his reasoning more thoroughly, what His Honour would have said, because His Honour said that the house had to be comparable, is to say the cap, yes, the cap is 620. That is the actual cost of rebuilding on the original site but the O'Loughlins can only ever get access to \$540,000 because that is all they will incur in rebuilding a comparable house on another site outside the red zone and all they can get if they buy another house, is the cost of buying a comparable house on the site outside the red zone.

WILLIAM YOUNG J:

So you are not troubled by what is said at paragraph 53 of *Avonside* then?

MR SMITH:

No.

WILLIAM YOUNG J:

Well not even a little bit.

MR SMITH:

No, unless Your Honours have any questions on that point.

WILLIAM YOUNG J:

It is just that we can't assume, safe ground can't be assumed that is the point I am focussing on.

MR SMITH:

Yes.

WILLIAM YOUNG J:

And I would have thought that was akin what Justice Asher had said.

MR SMITH:

Not as I read Justice Asher's judgment. I say Justice Asher's judgment is really directed at the first limb of the causes, saying how do we quantify the cost of rebuilding on another site or the cost of buying another house and His Honour says, in both of those situations, "There's a comparability requirement." *Avonside* is dealing with the second limb, the cap, and Justice Asher doesn't expressly deal with

that but had he dealt with it, in my submission it would have been that the cap is 620 but the cap is practically irrelevant on the facts of the case because the O'Loughlins exercising their policy entitlements will never trouble the cap.

McGRATH J:

Thank you Mr Smith, that is helpful. Now, Mr Campbell.

MR CAMPBELL QC:

Your Honours, if I may very briefly deal with one point that I think ultimately is not going to have any bearing on the issues before the Court, but nonetheless, my learned friend Mr Stewart said early on his submissions that Tower was obliged to pay present day value immediately and up front and I would like to express my agreement with that characterisation of Tower's obligation but simply to point out that that is not what Tower did, of course. It didn't pay anything until March 2013, two and a half years after the September 2010 earthquake and I wouldn't like the Court left with the impression that Tower was paying present day value or indemnity value up front and then just leaving the rest of its obligation in issue.

GLAZEBROOK J:

Was it obliged to pay present day value in fact, if it could decide to repair, then wasn't its obligation to repair? I mean having decided to pay it, might have had to pay present day value but had it decided to repair or reinstate, couldn't it just get on with that? Of course you might say it should have got on with it a bit quicker than March 2013.

MR CAMPBELL QC:

I agree with both of those points, Your Honour. The first one is a very fair qualification to what I just put but so is the second. There are two very broad issues for the Court and I have dealt in my written submissions with the two questions in the order that they were put. I don't think that it much matters which order the questions are dealt with but I did it this way because I thought there might be some value in understanding what the choices were before going on to the second question, which is, which party has the right to choose between those choices?"

So question 1, I have set out at the top of page 7 of the written submissions and this is, if you like, the comparability question. On what basis is the amount payable by Tower to be calculated if a customer's claim is to be settled by Tower paying the cost

of buying another house? Now the basis, we say, upon which the amount payable by Tower is to be calculated under that option has two limbs which are reflected in the Court of Appeal's answer to the question. The first is that there is a calculation of the cost of buying another house including fees. That seems to me to be the only issue that the meaning of that limb appears to be the only issue that remains on the table today. The second limb is that Tower is obliged to pay that cost but only up to the cost of rebuilding your house on its present site. Now as I understand it, Tower has given away its argument that that second limb operates as a limit on how much the policyholder can actually spend as opposed to a limit as the Court held below, on what Tower has to pay. So the first limb, the cost of buying another house, and it will be helpful to have page 142 of the case book which has the "we will pay" clause in front of Your Honours. That "we will pay" clause in the left-hand column there sets out four options for measuring the payment obligation. The first two options each refer to paying the full replacement value of your house, either at the situation or on another site. By using that definition of full replacement value those first two options place a comparability limit, if I can just use that as a shorthand, comparability limitation on what the insured can do because the definition of full replacement value refers to 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. So there are a number of comparability limitations there. Firstly, the reference to "your house" in the definition, because that itself is a defined term and refers to the house at the current situation, and then the reference to the same condition and extent and up to the same area. The fourth of the options for measuring the payment obligation refers to the present day value and that term uses pretty much the same language but then makes an allowance for depreciation. So the definition of present day value again refers to the cost of rebuilding, replacing or repairing your house to a condition no better than new and up to the same area as shown in the certificate of insurance. So options one, two and four have a clear and express comparability limitation.

WILLIAM YOUNG J:

The cost of repairing the existing house is the baseline against which everything has to be compared. Sorry, the state of the existing house I should say, is the comparability baseline.

McGRATH J:

When it refers to in the definition of full replacement value, the same condition, is that referring to a depreciated condition?

MR CAMPBELL QC:

No, because it says the same condition as when new.

McGRATH J:

Yes, thank you.

MR CAMPBELL QC:

Now the third option, the “buy another house option” doesn’t use any of those definitions. It doesn’t refer to full replacement value or present day value and it doesn’t incorporate those limitations that one finds in those definitions, nor does it adopt any of the limiting language that is found in there because that third option could have used some of that language in the “we will pay” clause itself. So it doesn’t just, as an example, say, “We will pay the cost of buying another house of the same condition and extent or size as your house, when new.” All that it says is, “We will pay the cost of buying another house.” It does not even say “replacement house” and, just as an aside, Tower’s written submissions constantly refer to this third option as being an option of buying a replacement house, but that is not how it is expressed in the option itself. It is just, “buy another house.” And the proviso at the bottom of that column then goes on to say, “We will only allow you to rebuild on another site or buy a house,” so again, not a replacement house but just a house.

GLAZEBROOK J:

Sorry, where are you?

MR CAMPBELL QC:

The proviso. Now with that third option there is the second limb that the cost can’t be more than the cost of rebuilding your house on its present site and I think, Justice Young, you were suggesting that that is where the comparability limitation comes in and I agree with that. The cap on Tower’s liability does, of course, require one to assess the cost of rebuilding on a, if you like, like-for-like or comparable basis, but only for the purpose of determining that monetary cap. It doesn’t limit or qualify the concept of another house in the first limb. And the policy doesn’t otherwise place any limit on the condition [inaudible] area or style of another house. The clause that Tower relies on, on page 143 on the left-hand column at the top, “We are not bound to pay the cost of replacement or repair beyond what is reasonable, practical or comparable with the original” does not assist Tower. This clause does not apply to

the “buy another house” option. The Court of Appeal below, in my submission, with respect correctly held that this clause does not apply to the “buy another house” option. The limitation of this clause does refer to the cost of replacement but contrary to what my learned friend has submitted, buying another house is not, under this policy, the same as replacement. And there are a number of reasons why. If the idea of replacement included buying another house, there would be no need for the third option to be expressed under the “we will pay” clause, and that’s because it would already be subsumed within the second option, “The full replacement value of your house on another site you choose.” Because when you look at the definition of full replacement value that is defined as, “The costs actually incurred to rebuild, replace or repair your house.” So if replacement and replace already included buying another house, then full replacement value would already encompass the cost of buying another house and it would already be under option two, the cost of buying another house on another site that you choose.

WILLIAM YOUNG J:

You might be playing an interpretive rigour to the policy that it can’t really withstand because these words are used pretty loosely I think, aren’t they? I mean I understand the proposition, I am sympathetic to it, but that is quite a rigorous interpretation of a very poorly drafted policy.

ARNOLD J:

And that is something against which you have cautioned in your own submissions quoting, citing Lord Bridge’s caution. It did seem to me that there was a somewhat of an inconsistency in that.

MR CAMPBELL QC:

With respect, Your Honour, although the interpretation might involve some rigour, what Lord Bridge was cautioning against was semantic niceties as much as anything, and I wouldn’t characterise this part of my submission as involving semantic niceties.

WILLIAM YOUNG J:

So you are saying don’t try and make huge sense out of variations and language?

MR CAMPBELL QC:

Yes.

WILLIAM YOUNG J:

That is what Lord Bridge is talking about.

MR CAMPBELL QC:

Yes, whereas what I am saying is when you read the “we will pay” clause, the natural reading of it, whether you are a lawyer or a lay person, is that that third option is talking about something quite different from full replacement on another site you choose.

ARNOLD J:

It seems to me to be this slightly more fundamental problem now that Tower has abandoned its argument that the house purchase has to be comparable and, once you accept that it doesn't have to be comparable, then the comparability is only relevant to an identification of the amount payable so that you – and it seems very odd to have a concept of full replacement value which you have to figure out, suddenly to introduce another concept of value based on comparability, a different notion of comparability – if you are not also saying that the new house has to actually be comparable. I mean, it is a very odd contractual structure then isn't it? You see what I mean? You are introducing another value component sort of randomly.

WILLIAM YOUNG J:

So another cap really.

ARNOLD J:

Pardon?

WILLIAM YOUNG J:

Another cap.

GLAZEBROOK J:

It's another cap, it is if you bought a comparable house, what would the price of that be in terms of comparability.

ARNOLD J:

It is entirely notional. It is rather different to say that the obligation or the entitlement under the contract is to buy a comparable house and the price flows from that. It is

another thing, it seems to me, to say, well, the house doesn't have to be comparable but the price of it must be, the cost of it must be.

GLAZEBROOK J:

And not comparable to the cost of rebuilding which is what is the cap.

ARNOLD J:

Exactly.

GLAZEBROOK J:

But comparable to the cost of buying a comparable house if you did buy a comparable house.

McGRATH J:

Well, let us pause and let Mr Campbell pick up.

WILLIAM YOUNG J:

The cost of which he will like I suspect.

O'REGAN J:

You could just say, I agree, if you like.

MR CAMPBELL QC:

Just to be clear, Justice Arnold, when you were saying, you were using the word "you" at various points there. But that was the reference I think to Tower I think, rather than to me?

ARNOLD J:

Sorry, I don't want to – yes, it is Tower's position.

GLAZEBROOK J:

Well, if the insured buys a house and Tower only has to pay the notional comparable value seems to be the argument, of buying a comparable house. So not the cap of replacement on the site which is the specific cap, it is probably being rather – well the trouble is that the argument has become subtle because there is probably an argument that says, well, you are only allowed to buy a comparable house because it says the cost of buying another house, and the cost must not be greater than buying

on the present site. But once that argument is abandoned, which is possible on the semantic look at that third option, then you are into notional comparability or multiple notional comparability.

McGRATH J:

Right, Mr Campbell.

MR CAMPBELL QC:

Two notions at least, two notions of comparability. Yes, well, Tower's position, if that is what it now is, is a variation on the theme that it has been putting forward in the Courts below that, in my submission, there is no more support for that proposition than there is for the proposition that it was putting in the High Court and in the Court of Appeal.

O'REGAN J:

Is there any – can I just ask you two things? One is, options 1 and 2 talk about rebuilding the house at the situation whereas option three talks about rebuilding on its present site. Do you accept that those are the same thing?

MR CAMPBELL QC:

Yes, it is just another example of loose language in the policy.

O'REGAN J:

Right. And the other is the cost of buying another house. You heard the discussion between Justice Young and Mr Stewart about the problem where you obviously if you buy another house you have to buy some land as well. What do you say the cost of buying another house is? Do you say there is some partition of land value and house value or is it just the cost of buying the property with the house on it?

MR CAMPBELL QC:

There has to be a partition, it seems to me. As difficult as that will be, but that's I suspect one reason why the cap, the second limb if you like, simply is a cap on Tower's liability, so that in many instances one won't have to do the partitioning because it will be perfectly obvious that the overall purchase price for the land and the house is such that the insured will have spent more on the house than the second limb, the cap on Tower's liability, and that will be that.

O'REGAN J:

But once you are allowed to buy any house at all, you are saying at that point, how do you measure the cap? If Tower is saying, "We think cap number one is going to be lower than cap two, the cost of rebuilding on the present site, how do you say you calculate cap number one? You forget about what house you bought, you pretend you bought a comparable house, is that what you are saying, and then you, you ask a valuer effectively to say, ignoring land value what would a comparable house cost to buy.

MR CAMPBELL QC:

No, Skyward's position is that you simply look at the cost of buying the other house that you have chosen to buy and you do not have to worry about whether it is comparable or not and you do not have to worry about some notional comparable house. There is no comparability limitation on that first limb of option three.

O'REGAN J:

So really you are saying the default position under the third limb is that Tower pays replacement value?

MR CAMPBELL QC:

Yes, unless the insured has gone and bought another house that is actually less than full replacement value, which it may well do.

O'REGAN J:

Well, only if it is a very benign insured I would have thought.

McGRATH J:

What do you say to the suggestion that if that argument is correct, it is rather surprising because there doesn't appear to be particularly good reason for recovery of what I would call was the depreciation component if the right – well, if the, another house, "a" house, has just gone out and purchased by the insured, why is it that a sum which clearly you can understand the policy should cover, because it is going to be the cost of getting yourself re-housed and, similarly, why should that be part of what is recovered if you buy another house? Now this is not focussing on the words and I assure you that I understand the importance of understanding the words, but it does seem strange to me, in an insurance policy, to have terms that end up the way you are arguing they should be.

MR CAMPBELL QC:

Yes, Your Honour, I have addressed that to some extent in paragraph 42 of my written submissions, but I will deal with it orally. But you may just want to reference that.

McGRATH J:

Yes please do, yes.

MR CAMPBELL QC:

It is certainly the case that when full replacement policies were first developed in the United States, that the reinstatement that the policyholder had to carry out in order to be able to recover more than indemnity or present day value, was tightly circumscribed in the policy. It had to be like-for-like, and you wouldn't be able to go and do it elsewhere on a different site, it would have to be – in the case of damage rather than destruction, you would just repair what was there. Even in the case of destruction, you were only entitled to the full cost of reinstatement, if you reinstated like-for-like on site. Now for whatever reason, and I can speculate as to what the reasons are if you like, policies have expanded from that opening position because it is commonplace these days to find that reinstatement cover, full reinstatement cover or full replacement cover, allows the insured to recover the full cost of replacement or reinstatement, even if they are doing something other than replacing on a like-for-like basis.

McGRATH J:

Even if they are just buying another property that is in a depreciated state?

MR CAMPBELL QC:

Yes, and I have referenced some other cases for what they are worth in paragraph 42 of my written submissions as illustrations of this. In all of those cases the ability of the policyholder to go and do something off-site or to simply buy another property that is suitable to their requirements, only applies where the original property has been destroyed. That is the common theme that one sees in these full replacement policies.

WILLIAM YOUNG J:

Can I just give you some numbers – you might just want to write them down – because perhaps it would clarify my thinking. Assume you have got a house and land worth a total of \$400,000, 200,000 land value, 200,000 depreciated value of the house and a replacement value of the house of 400,000.

GLAZEBROOK J:

Sorry, does that mean to rebuild it, it would cost 400,000?

WILLIAM YOUNG J:

Yes, to rebuild the house would cost 400,000. So the house is a write-off, the insured says, "Right, I am going to buy another house, so I'm going to buy, spend \$400,000 on a house which is effectively the same value as the house I have lost, but you are, and I am going to keep the other, keep my original land or sell it or whatever. Now on that basis the insurer is, as it were, getting insurance for the depreciation but not actually incurring the cost. Now on the face of the policy I think the insured is probably entitled to do that, because I think it is unreal to differentiate between land and value when the new house is bought because it is an undifferentiated sum. So the insured says, "Well, replacement value is \$400,000, I am going to spend \$400,000, I have bought another house, kindly pay me the \$400,000." Now what do you say about that? Was the insured entitled to say, "No, you have to buy another house for \$600,000." Do you understand?

MR CAMPBELL QC:

In your example, when the insured goes and buys another property, they are spending \$400,000 on land and building?

WILLIAM YOUNG J:

Yes.

ARNOLD J:

So divide them up, so 200,000 for the land, the section, 200,000 for the house. What is the obligation of the insurer?

MR CAMPBELL QC:

The insurer's obligation is only to pay the cost of buying the house, not the cost of buying the land.

WILLIAM YOUNG J:

Why do you say that? Because it is an entirely hypothetical idea. You are not buying a house, other than the land it sits on. No doubt a valuer or someone can make an assessment of it. But why, if I say in ordinary parlance, "I bought a house and it cost me \$400,000," no one is going to say, "What did the land cost you?"

MR CAMPBELL QC:

Yes, I understand that, Your Honour, but I suppose it is not an issue that one has had to deal with in this case so I am dealing with it a little bit on the hoof.

WILLIAM YOUNG J:

No, it is really because you accepted the proposition that you might split land and value at house value. That is really why I have tried to crystallise that with an example and also perhaps come back to Justice McGrath's suggestion of talking about replacement insurance being depreciation insurance.

MR CAMPBELL QC:

Well, if I can just address Justice Young's question. With option two, rebuilding full replacement value on another site, it seems to me fairly clear from that, in the way that full replacement value is defined and the reference to another site you choose, that all that Tower is obliged to pay there is the cost of rebuilding the house, not paying for the other site.

WILLIAM YOUNG J:

Up to \$400,000, yes.

MR CAMPBELL QC:

Yes. When one then turns to option three, and again I qualify this by saying that I don't understand this to be an issue in this case, so it's on the hoof, it then –

MR CAMPBELL QC:

Option three then immediately talks about the cost of buying another house, and so it strikes me that, given that option two must make that distinction between the cost of building the other house elsewhere, rather than the site, that the natural wording of option three is that it is talking about the cost of buying that house, not the house and the land.

WILLIAM YOUNG J:

This is for another case too.

MR CAMPBELL QC:

It may be.

GLAZEBROOK J:

Well, Mr Stewart would also say that the insurance is only for the house as well, that was his answer to that proposition. So if the insurance is only for the building then it would seem odd if you got insurance for a loss that wasn't actually covered, which would be the other way. I understand your semantic argument as well but that is what his answer was, I think.

MR CAMPBELL QC:

Well, it is true that the policy covers the house, not the land.

GLAZEBROOK J:

And so therefore why would you, if you buy another house get a payment for the land portion.

MR CAMPBELL QC:

It tends to support that distinction, yes. Now if I can go back to Justice McGrath's question and my attempts to answer it. So historically or when these policies first emerged they were very much confined to, you are not going to receive more than indemnity.

McGRATH J:

Yes.

MR CAMPBELL QC:

Unless you do like-for-like. They have expanded over the years to allow the insured more freedom and flexibility to depart from like-for-like. As I say in paragraph 42, it is up to the parties to decide how they want to, or to agree on what sort of reinstatement or replacement will entitle the insured to recover costs in excess of indemnity or in excess of present day value. So here, and it has become common, the parties are free to say or agree that we will pay more than present day value if you either, firstly, build on another site that you choose, or if you simply go and buy

another house. So it is simply a matter of contractual freedom as to what the parties want to do.

McGRATH J:

I certainly understand that. But what, Mr Campbell I would like to do, and I have thought about this and I would like to take you up on your offer, five minutes ago, to speculate on the reasons why an insurer might agree to do that.

MR CAMPBELL QC:

I hadn't forgotten that, Sir, I was just about to. The first is that – two combined reasons I think, Sir. The first is that it becomes ultimately a matter of indifference to the insurer when faced with the prospect of paying full replacement value on the site, whether the policyholder spends the money rebuilding on-site, rebuilding off-site, buying another building, whether it is commercial or domestic policy, or rebuilding off-site and building something different, or indeed rebuilding on-site and building something different, because a lot of commercial policies allow the insured to rebuild a different, more suitable building on-site, so, firstly, ultimately became a matter of indifference because these things were not going to increase the financial exposure of the insurer and all of those, whenever policies do this and give that extra freedom to the policyholder, they always put this limit on. They say, "We are not going to pay you more than it would have cost, if you had rebuilt like-for-like on-site." So that's one reason.

McGRATH J:

The limit that is imposed here?

MR CAMPBELL QC:

Yes, so we see here.

McGRATH J:

That's the first reason, yes.

MR CAMPBELL QC:

And the second is, as my learned friend said, insurance is a very competitive market, so one way in which you sell lots of policies is to give extra benefits and freedoms and flexibilities to the policyholder and say, "Well, traditionally we may have required you to rebuild like-for-like on-site if you wanted to recover more than indemnity, but

we are now going to allow you to build elsewhere, or indeed just buy another house elsewhere.”

McGRATH J:

“And we give you the depreciation we would have been up for, the depreciation element we would have been up for if you had built a new house.”

MR CAMPBELL QC:

Yes.

McGRATH J:

Right, thank you.

MR CAMPBELL QC:

If I may return to paragraph 38 where I was explaining or submitting really why the clause on which Tower relies does not apply to the buying of a house option because buying another house is not replacement. So, the first reason was redundancy, the second is – if we go to the above “we will pay” clause, the first paragraph under “How we will settle your claim,” is, “We will arrange for the repair, replacement or payment for the loss.” Now in that clause, if replacement means or includes buying another house, as Tower wishes it to, then Tower would have the option of, rather than paying for the loss, of actually going out and buying another house for the insured, and even Tower no longer asserts that it has such an option, and for good reason. That would be an extraordinary thing for an insurer to say, “Well, we are very sorry about what has happened to your house but have we got a deal for you, we have found another house that is at a good price for us, whether it is within the same suburb as now seems to be conceded, or maybe a bit further afield, doesn’t really matter.” And then the third reason is to acknowledge that in the policy the term “replace” and derivations thereof is sometimes used as well as “rebuild and repair” but it doesn’t follow from this that replace must mean something or must refer to buying another house.

One has to remember that this policy responds not just to total losses such as have occurred in much of Canterbury from the earthquakes, the policy is primarily designed to respond to partial losses, and so the terms used, “repair”, “replacement”, “rebuild” and so on, are terms that one has to understand in relation to the possibility of partial losses as well. And the term “replace” is for many losses the term that is

the more natural one to use, if there has been damage to a roof, and it can't simply be repaired. What you have to do is take the roof and put it back on, the way in which you would normally describe, that is that you are replacing the roof, and so in that instance what Tower is promising to do is pay the cost of replacement of the roof. And one can see this reflected on page 142 to some extent on the right-hand column, in all cases, the sixth paragraph down, there is a limitation there on what Tower has to pay if the house wasn't built in compliance with applicable rules at the time. It says, "We will not pay the costs in those instances of rebuilding, replacing or repairing any part of your house." So one has to read these terms with reference, not just to the possibility that the entire house has gone and that one is rebuilding it but also to the more common instance of a partial loss. And finally I would add to the –

ARNOLD J:

Just on that.

MR CAMPBELL QC:

Yes.

ARNOLD J:

If the whole house was non-compliant and was a total loss, what happens then? Could the insured say, "Well, I want to buy a replacement house on another site"?

MR CAMPBELL QC:

Sorry, Your Honour, is your question whether if –

ARNOLD J:

If the whole house is non-compliant.

MR CAMPBELL QC:

Yes.

ARNOLD J:

This clause said, "We won't pay the costs of rebuilding, replacing," and so on. And as I understand your argument, replacing does not include buying a new house, is that right?

MR CAMPBELL QC:

Yes.

ARNOLD J:

So is the insured in those circumstances entitled to say, "Well, you won't replace, rebuild or repair my non-complaint house. But the option I want is to go and buy a new house, somewhere else, another house"?

MR CAMPBELL QC:

That is not going to assist the insured, Your Honour, because option three, the cost of buying another house has the limit on it, though they don't have to pay more than the cost of rebuilding and the cost of rebuilding, of course, has to take into account all these other limits and so that would be the answer to that.

ARNOLD J:

Okay. By the way, on the argument now that it is accepted that the house that you – the replacement house doesn't have to be comparable, the other house, is it your argument that an insured could buy a place anywhere, as Tower said in its submissions, for example, it could buy a replacement apartment in London or something?

MR CAMPBELL QC:

Yes, there is no limitation in the policy.

ARNOLD J:

So as long as the insured produces the, actually incurs that cost, then Tower is obliged to pay?

MR CAMPBELL QC:

Yes, so long as the insured actually incurs the cost of buying another house, they can't go and buy a factory or a boat, it has to be a house.

ARNOLD J:

This seems slightly odd in terms of the replacement policy that you could buy a replacement anywhere in the world.

MR CAMPBELL QC:

Well, again that is a consequence of Tower choosing to offer this flexibility to insureds without imposing any limitation on what the other house has to be or where the other house has to be. And again it becomes a matter, in my submission, of indifference because of the cap on Tower's liability.

O'REGAN J:

Does a house have to be a house or could it be an apartment? I mean "house" is actually a defined term in the policy, but it clearly is only defined as the house that was subject to the insurable event –

MR CAMPBELL QC:

Yes.

O'REGAN J:

– not the new one. But are you saying is any place you can live in as a domestic residence, or do you say it has to be a stand-alone building that's used for domestic purposes?

MR CAMPBELL QC:

I would have thought the former rather than a stand-alone residence. Again, not an issue in this case. Option three doesn't put "house" in bold, so it's not using the definition, but the definition, if it was of some assistance, simply refers to the domestic building shown in the certificate of insurance and then includes a whole lot of other things as well, and that would suggest to me that it doesn't have to be a stand-alone building.

O'REGAN J:

So this policy is used for apartments as well as – well, I mean, sorry, for things other than stand-alone houses, it's just any domestic place you live in?

MR CAMPBELL QC:

That's my assumption, but I don't know, Sir. As you can see, I don't act for Tower.

McGRATH J:

You're not representing today's insurers.

GLAZEBROOK J:

They may have other special things with apartments, because you've got body corporate fees and things, so, it may, there may be slightly different policies possibly.

MR CAMPBELL QC:

Maybe, I'm not sure.

O'REGAN J:

Because it does say "another house", "Buy another house", which does seem to indicate that it's something similar to what you've already got in physical form.

MR CAMPBELL QC:

I'm not sure that I agree with that, Sir. I think it simply has to be [inaudible] other than the one that you had, or have.

O'REGAN J:

In your own, yes.

MR CAMPBELL QC:

And in the next, in the proviso it simply refers to buying "a house".

McGRATH J:

Yes.

GLAZEBROOK J:

And so you'd just say a house is a domestic house, it can't be a commercial property effectively, that's the only limitation?

MR CAMPBELL QC:

Yes. Now finally on that point –

GLAZEBROOK J:

Well, it could be a rental property but not a rental domestic property, of course.

MR CAMPBELL QC:

Yes.

GLAZEBROOK J:

Yes.

MR CAMPBELL QC:

Finally on that point, there is an element of circularity, it seems to me, in Tower's submission that "replacement" encompasses buying another house, and the circularity is that there is, Tower is assuming that the other house is a replacement, that it is comparable. But that of course is the issue, does the other house have to be comparable in terms of style, size, area, condition and so on?

Now I then move on perhaps to another slight speculation as to why there is no comparability limitation on the third option. Now I think it might be helpful to dwell on that just momentarily. And that is that when one is rebuilding on site or rebuilding on another site, it's not going to be at all difficult to do that in a comparable way. It's quite different if you are buying another house, because the house that is insured firstly might be bespoke, it's not necessarily going to be a villa of which a few hundred might have been built of the same style and condition in Christchurch in the early 19th century, it might be an architect-designed house. In which case, that option would be of no utility. And it seems to me that the "buying another house" option recognises that by not imposing any sort of comparability limitation on what that other house to be. And it's important in that context to understand that your house does not simply mean the domestic building itself, it includes all the other things such as swimming pools, gates, fences, paths and driveways other than metal paths and driveways. So even a villa of which a few hundred might have been built of the same style and condition in the early 20th century, when you add on those other things, the garage, the swimming pool, the decks, you may not be able to find something that is comparable in that sense, or at least there'd be some difficulty in doing so.

O'REGAN J:

And that would be presumably even more so if the house was in a small town and the insured wanted to keep living in that small town.

MR CAMPBELL QC:

Indeed. And of course presumably this policy is sold all over the country.

Now that is, those submissions deal really with the text of the policy. The balance of my submissions respond to what I've said Tower's attempts to go outside the policy and pray in aid things such as the indemnity principle and to suggest that the

purpose of full reinstatement policies doesn't, would impose some sort of limitation, and I've tried to deal with that in answer to Justice McGrath's question. And, finally, Tower suggests that the Court of Appeal's interpretation, allowing the other house to be anything that the insured likes, severs any connection between the property which has been lost and the property by which it is reinstated, and I deal with this at paragraph 43. But that submission assumes the very thing that it seeks to prove, and that is that there is some connection. And again, that goes back to my answer to Justice McGrath's question, which is to say, well, the connection between the old house and the new house is a matter of agreement between the parties and of interpreting that agreement, and one cannot make any assumption that there has to be a connection. There is a connection for options one, two and three, it's explicit, there is no other connection for the "buy another house" option.

Now that leads finally to the *Avonside* point and the supposed concession below, and Justice O'Regan was quite right, I don't accept that Skyward or I made a concession in the Court of Appeal. There was a brief discussion about the way in which Skyward had calculated the cost of rebuilding on another site, and although I don't remember precisely what said, what I mostly remember is Justice Miller having to explain to me what TC3 land was, because that was not something that I'd paid much attention to, and my, what I was explaining was simply that the cost of rebuilding elsewhere had been calculated by Skyward on the basis of just standard – using that in loose terms – foundations, rather than foundations that might have been required at the original site. Neither party at that point had done any geotech investigation of the original site to see what those foundations at the original site might be. And so, in the Court of Appeal, Tower had suggested that specially designed foundations at the original site might have added another \$150,000 to the cost of foundations, just because that was their experience. I want to emphasise there's no evidence that it would cost \$150,000 extra to build the foundations at the original site, that's just a submission that Tower made and –

WILLIAM YOUNG J:

So there's been no geotechnical investigation specific to the site?

MR CAMPBELL QC:

Sorry, Your Honour?

WILLIAM YOUNG J:

There's been no geotechnical investigation specific to the site at Skyward's house?

MR CAMPBELL QC:

That's correct, and I think that's still the case.

And the, as I recall, there was no focus on that aspect of Justice Asher's decision in *O'Loughlin*. There was, of course, focus on the other issue that we're coming to, which is whose choice is it between the various options, but the decision of Justice Asher that one couldn't use the cost of those foundations as part of the amount available to the insured was not, as I recall – it has never been a focus of this case anyway, and so it wasn't the focus at all in the Court of Appeal. And I know that the Court of Appeal, when they refer to this concession, actually referred to the wrong paragraphs of Justice Asher's decision on that point.

WILLIAM YOUNG J:

Do you have a – I mean, my very quick look at the *Avonside* case, para 53, suggested to me, and I understood what Mr Smith said, that perhaps the Court of Appeal there wasn't entirely on the same page as Justice Asher on this issue.

MR CAMPBELL QC:

Absolutely. It's inconsistent with Justice Asher's decision, and that's why I thought my learned friends were bringing *Avonside* to your attention, because it was inconsistent, that's what they said in the original memorandum asking for leave to file further submissions. I don't think it particularly matters, Your Honour, whether – well, my learned friend has said, "Inconsistent with Skyward," well, inconsistent both with what –

WILLIAM YOUNG J:

Yes.

MR CAMPBELL QC:

– the Court of Appeal said at paragraph 7 of the *Skyward* judgment and what Justice Asher said in *O'Loughlin*. But that's not, all that that would go to, in any case, is the calculation of the cap –

WILLIAM YOUNG J:

Of the regal cap.

MR CAMPBELL QC:

– on Tower’s liability, it doesn’t have any impact on the comparability, supposed comparability limitation.

GLAZEBROOK J:

Did you want us to say anything in this judgment about that?

MR CAMPBELL QC:

About whether *Avonside* or *O’Loughlin* is correct? Certainly not, if that is what you are suggesting.

GLAZEBROOK J:

No, no, no, I wasn’t suggesting that. Do you want to say anything about the so called concession or not?

MR CAMPBELL QC:

Well, I think it might be appropriate to record that it is not a concession, it was not a concession that Justice Asher’s decision on that issue was correct. It was nothing more than an explanation of how Skyward had calculated the cost of rebuilding on another site, and that is clear from the statement of claim itself, that the cost of rebuilding was calculated by reference to, I think, standard 2B foundations.

O’REGAN J:

But are you wanting to leave open the possibility of now claiming more?

MR CAMPBELL QC:

Possibly, given that all that has happened in the proceedings so far has been that three preliminary issues have been put and answered. We have final answers to question three already, it is a very narrow question that one. Otherwise the matter is proceeding. I am not involved in the carriage of the High Court litigation but I understand that matters continue to move forward in preparation for a trial. Is there a trial date? There is no trial date yet. So all those other issues, such as how much it would have cost to rebuild on the other site and so on, have always been put to one side.

My submissions then went on to look at the second limb. I understand that Tower has given that aspect of its argument away and has reverted to the position that, in any case, Tower held itself in the High Court and Court of Appeal. And that takes me to question two, which is really about whose choice is it between the four payment options. Now under the heading, "How we will settle your claim," the first paragraph talks about, "We will arrange for the repair, replacement or payment," and it is clear from the clause in the right-hand column that says, "That in all cases, we, Tower have the option whether to make payment, rebuild, replace or repair your house," that it is Tower that has the right to choose between payment, replacement, repair. The "we will pay" clause addresses the situation where Tower has chosen to make payment, and Justice O'Regan made the point, quite correctly, that this question, and in fact the other one, are both predicated on the assumption that Tower has elected to make payment. So this issue is assuming that Tower has elected to make payment, who then has the choice of the four payment options under the "we will pay" clause. Now the policy does not expressly state who has that choice. It doesn't say that, it doesn't expressly say that it is the insured's, it does not expressly say that it is Tower's, but there are many indications in the policy that it is Skyward's choice, not Tower's. The first is the clause that immediately follows the proviso, "We will only allow you to rebuild on another site or buy your house if your house is damaged beyond economic repair." And that only makes sense and assumes that it is Skyward that, were it not for that proviso, would generally be at liberty to choose between the four options for measuring payment, and it simply restricts Skyward's liberty to choose options two or three. The second is on page 143 under the "We are not bound to" in the top left, "Not bound to pay more than the present day value if you have full replacement value until the cost of replacement or repair is actually incurred. If you choose not to rebuild or repair your house or buy another house, we will only pay the present day value," and again that assumes that it is Skyward who has the choice between rebuilding or repairing, which would be option one or option two or buying another house, which is option three, or doing none of those things and simply taking present day value. Thirdly the second option, option two, rebuilding on another site, that unsurprisingly talks about another site that you choose, so that is consistent with Skyward having the choice. The fourth reason is that if Tower had the choice between the four options, Tower would be entitled to choose to pay present day value. Tower resists that point by saying, "Well, the certificate of insurance," sorry, the words at the end of the clause as shown in the certificate of insurance, limit Tower's ability to pay present day value, but in our submission that reference is simply a reference to the various details in the certificate of insurance

that one has to refer to in order to make sense of each of those options. Because, for instance, the definition of “your house” and “situation” only makes sense by looking at things that are shown in the certificate of insurance. And then, finally, even if Tower’s point about the certificate of insurance were correct and they were, in any event, the only three options on the table were one, two and three, there would still be absurd consequences if Tower had the choice between those options, and essentially this is because Tower would, in practice, be able to force the insured to take present day value. We have to understand the operation of this clause, not just in the context of red zone land, but in the context, say, of a house that is destroyed by fire. There’s nothing else otherwise in the surrounding area affected. Usually the insured in those situations will want to rebuild on-site, but on Tower’s approach Tower could say, “Well it’s actually going to be cheaper for us, for you to buy another house elsewhere.” Maybe, they now acknowledge, in the same suburb, but, “We want you to buy another house.” If the insured didn’t want to buy another house, they would never get more than present day value because, even if they went and rebuilt their house, like-for-like, on-site, Tower would say, “Sorry, we said we would buy another house, we would pay the cost of buying another house. You haven’t done that, so you just get present day value.” That can’t be how the parties intended this obviously to operate.

So I then address the clauses on which Tower relies to say that it has this option. It primarily relies, of course on the clause that, “In all cases we have the option whether to make payment, rebuild, replace or repair your house.” But that, in my submission, is directed towards the first choice which is between, broadly speaking, paying money or effecting the repair or the replacement or rebuilding itself. And Tower in its written submissions seem to acknowledge, at paragraphs 28 to 29, that that first choice is really what this clause is directed at. The second choice between the different measurements of payment obligation, Tower simply says, “Well, it must follow that if we have got the right to choose at the first stage between payment or repair and so on, that we must also have the right to choose between the measurements of our payment obligation.” But there is no necessary connection, in my submission, between those two things, and I have referred in the written submissions to the caution from the High Court of Australia in the *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) CLR 384 case, that one has to keep in mind the distinction between, on the one hand, having a choice between, broadly speaking, payment or directly effecting reinstatement, and then on the other hand, if you have chosen to make payment, a choice between, broadly speaking, payment,

or directly effecting reinstatement. And then on the other hand, if you've chosen to make payment, a choice between how you measure that payment obligation. As the High Court says, those are quite distinct concepts. And, to take that further, if it had been intended the Tower was going to have the right of choice between the various payment obligations, it would have been very easy for that particular clause on which Tower now relies to have continued on and added words to make that clear, or for there have to been a further clause addressing that very point.

Your Honours, those are my submissions on the appeal. I'm conscious of the time. I'm also conscious that there's a cross-appeal, which I don't have to spend much time on, but you may be surprised to hear that I do want to say just one or two things about the cross-appeal on costs, which I could do now or after.

McGRATH J:

Well, just, what I don't want to do is drag too far into the lunch hour, but then can you tell me how long do you expect to be?

MR CAMPBELL QC:

About 30 seconds, I think.

McGRATH J:

Mr Stewart, how long do you expect to be on everything you want to say in response to that, to reply to the main argument?

MR STEWART QC:

No more than 15 minutes.

McGRATH J:

So, is everyone comfortable with going on? So, let's start the 30 seconds.

MR CAMPBELL QC:

Thank you, Sir, I'm looking at the clock.

On the cross-appeal, as I understand it, Tower doesn't oppose this, assuming that their substantive appeal does not succeed.

I make only two points. One, the only issue that then remains is the actual calculation of costs. It seems to me that that should be remitted to the High Court, and I imagine that is this Court's preference. That's because there is a disagreement between the two parties as to whether band C or band B is appropriate, and I don't think that's something that this Court can enter into upon. So, I would suggest they be remitted.

McGRATH J:

Understand that.

MR CAMPBELL QC:

The second is that there is an important point of principle here which, although Tower is not really opposing that point now, although it did in the leave application, it is rather, I would invite the Court to say something about it because it is coming up elsewhere in other matters where suggestions are made, I suspect in reliance on what the Court of Appeal did in this case, suggestions are made by insurance companies that costs should lie where they fall, even when the policyholder has succeeded on questions of policy interpretation, and the insurers say, "Well, it's really a test case, this applies to lots of our policies, so we think that we shouldn't pay any costs," and that's why I would invite the Court to say something rather than just that Tower doesn't oppose it.

Those are my submissions, unless you have further questions.

GLAZEBROOK J:

So say Tower, rightly, didn't oppose this, something of that nature is what you're asking?

MR CAMPBELL QC:

Yes, indeed, thank you.

McGRATH J:

Thank you, Mr Campbell. Now, Mr Stewart.

MR STEWART QC:

Sorry, I missed the last part, but I think we've conceded that they should have had costs in the High Court too – is that what you said? Yes.

Your Honours, I've just talked to my learned junior, and a number of the points that I, were going to touch on –

McGRATH J:

Yes.

MR STEWART QC:

– they are actually in the written submission, which you would have read.

McGRATH J:

So you're talking about costs now?

MR STEWART QC:

No, no, I've nothing to say on costs.

McGRATH J:

You're replying?

MR STEWART QC:

Yes, I just want to...

McGRATH J:

You've said all you want to say on that?

MR STEWART QC:

Yes. There's only one point actually, because I see that a number of the points that I was going to mention are covered in the submission, so...

McGRATH J:

Yes.

MR STEWART QC:

But one that, it is covered, but it – if I could just mention it briefly? If we go to paragraph 58 of my learned friend Mr Campbell's submission, and this is a part of his submission as to why Tower can't have the choice in relation to the measure of payment, because he says Tower could elect to engage the fourth point, being the

present day value. We say that we can't under this policy for the reason, if you look at page 142, it's got, "We will pay one, two, three, four," and then finally it's got there, "As shown in the certificate of insurance." Now if you go to the certificate of insurance at page 132, the PDV value is not mentioned there, it doesn't feature.

WILLIAM YOUNG J:

But they can calculate the equivalent, because it is a defined expression in the policy.

MR STEWART QC:

Well, we don't – I don't think they can calculate it, can they?

WILLIAM YOUNG J:

Well, if you look at page 144. "Present day value" is a defined term and one could always calculate it.

MR STEWART QC:

Well, have we got enough information to calculate it on this particular property, but we are not insured for that anyway.

WILLIAM YOUNG J:

Well, you are insured for that because if they don't replace or reinstate then they are covered for present day value, so it is a present day value plus replacement extension effectively.

MR STEWART QC:

Yes, I accept that, but it is not a payment, the way the full replacement policy works, that we could elect to make in satisfaction of full replacement. I mean, that would be absurd, in my submission.

WILLIAM YOUNG J:

Yes, well I agree with that.

GLAZEBROOK J:

Yes, especially if they do, do any of the three options.

O'REGAN J:

That's right.

GLAZEBROOK J:

I suppose you could say, if they refused to do the option on Tower's argument, if they refuse to do the option that Tower asks them to do, then they could be stuck with present day value, which I think was the point that Mr Campbell was making. So if Tower says, "Well, you have to do this," and they say no, then they are stuck with present day value.

MR STEWART QC:

We could not choose it.

GLAZEBROOK J:

No.

MR STEWART QC:

And one of the reasons is that it is not in the certificate, and my learned friend at paragraph 58 of his submission says that the matters in the certificate are there to inform the details such as insurance and what not, but they all appear, those items in the certificate, in the definition section of the policy. You don't need to go to the certificate. If we look at – we've got area, at page 144, under full replacement value, and then another matter there is the insurance. I am sorry, the situation of the house is in the definition, and so is the area. And my learned friend says on the top of page 14, "If Tower's point were correct, options two and three would not be available either." Well, option two is a full replacement and expressed to be a full replacement item and, we say, by virtue of what I have submitted about replacement, so is item three, the buying of another house.

WILLIAM YOUNG J:

I think this is a hare you are chasing actually, it is not really the primary problem you have got in the case, to my way of thinking anyway.

MR STEWART QC:

Well, it's incorrect.

WILLIAM YOUNG J:

That's a relief.

MR STEWART QC:

I didn't want you to pick it up, that's all, and it is not Tower's contention that it is able to engage that fourth option.

WILLIAM YOUNG J:

No.

MR STEWART QC:

We've been accused of a few other things but that's not one of them.

McGRATH J:

Right, that is it.

MR STEWART QC:

Nothing further, Your Honours, thank you.

McGRATH J:

Did you want to reply on the costing? I suppose you don't. Thank you very much, counsel, we will reserve our decision on this one.

COURT ADJOURNS:1.09 PM