IN THE COURT OF APPEAL OF NEW ZEALAND

CA142/2017
[2017] NZCA 561

BETWEEN	PAUL GEOFFREY MYALL Appellant
AND	TOWER INSURANCE LIMITED Respondent

Hearing:	26 September 2017
Court:	Harrison, Miller and Clifford JJ
Counsel:	N R Campbell QC and K P Sullivan for Appellant M C Harris and S S McMullan for Respondent
Judgment:	4 December 2017 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The amount owed by Tower under the policy is increased by $111,412, being the difference in the cost of tiles between the experts.

B The appeal is otherwise dismissed.

C The cross-appeal is dismissed.

D No order for costs.

REASONS OF THE COURT

(Given by Miller J)

[1] "Riverlaw" was an historic and well-restored mansion owned by Paul Myall, insured by Tower under a full replacement policy, and damaged beyond repair in the Canterbury earthquakes of 2010 and 2011. It is common ground that in these circumstances Tower might elect to pay full replacement value in lieu of reinstatement. It so elected and prior to trial it paid a total of $2,971,644.12.

[2] The parties contest the meaning and measure of full replacement value under the policy. In his statement of claim Mr Myall said that Tower ought to have paid a total of $6,921,094. By the time of trial however the difference between the experts hired by both parties had narrowed to around $2 million. Mr Myall's claim was largely unsuccessful before Dunningham J in the High Court, and he now appeals.[1]

Riverlaw

[3] An account of the background is found in the judgment below.[2] Much of it does not concern us. Notably, we need not address reasons for delay in processing Mr Myall's claim. For our purposes it suffices here to note salient features of the property before turning to the policy and the issues before us.

[4] Riverlaw was a three-storey home (and category 2 heritage-listed building) on a grand scale. It comprised 799 square metres and contained eight bedrooms and six bathrooms. It was of brick construction, with some walls being of triple brick. Much of the interior was of exposed timber (kauri, rimu, cedar and baltic pine), and feature ceilings were of pressed zinc. It had working chimneys, though a computer-controlled heating system had been installed, and a variety of Victorian, Italian, and other designer tiles throughout the house.

The policy

[5] When seeking cover in 2004 Mr Myall explained that Riverlaw was a stately home on which $600,000 had been spent in refurbishment, including restoration of woodwork. He advised that the floor area of the house was 650 square meters, about 20 per cent less than it proved to be when measured during the claims process.

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1 *Myall v Tower Insurance Ltd* [2017] NZHC 251.
2 At [5]–[20].

On Tower's recommendation he adopted its Super Maxi Protection Policy, which he renewed annually. It was a full replacement policy which was described by the Supreme Court in *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* in this way:[3]

> [24] The insurance policy is for full replacement value and proceeds on the basis of replacement on a new for old basis. The availability of such policies reflects a recognition that a traditional indemnity value policy may not provide sufficient funds to enable a damaged building to be repaired or rebuilt given that such exercises will require new materials in compliance with current building standards which may be more stringent than those in place when the building was constructed. A replacement policy thus covers the impact of depreciation and increased building costs…

[6] Tower covered the property for "sudden and unforeseen accidental physical loss or damage" and undertook to repair, replace or pay out, at its option. Its obligation to pay was limited to the full replacement value of the house:

> **We will pay:**
>
> **HOUSE**
>
> - the **full replacement value** of **your house** at the **situation**; or
> - the **full replacement value** of **your house** on another site **you** choose. This cost must not be greater than rebuilding **your house** at the **situation**; or
> - the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding **your house** on its present site;
> - architects', engineers' and surveyors' fees in respect of the rebuilding or repairs where authorised by **us**;
> - the cost of demolition and removal of debris including the **contents**.
>
> …
>
> (Emphasis in original.)

[7] Full replacement value received this definition:

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

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3 *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341.

…

(Emphasis in original.)

It is not in dispute that Tower is obliged to pay no more than the cost of rebuilding up to the area of 650 square metres shown in the certificate of insurance.

[8] Tower's promise was qualified. The policy stated that "in all cases":

> - if, as a result of changes in government or local body by-laws, **you** are not able to rebuild or repair the damaged part of **your house** to the same specifications as before the loss or damage occurred, **we** will pay any additional costs incurred to rebuild the damaged part;
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> …
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> - **we** will not pay the costs of rebuilding, replacing or repairing any part of **your house** which at the time it was built, was otherwise than in accordance with a building permit or other applicable consent issued by the relevant authority;
> - **we** will use building materials and construction methods commonly used at the time of loss or damage;
>
> (Emphasis in original.)

[9] The policy also provided that "we are not bound to":

> - pay the cost of replacement or repair beyond what is reasonable, practical or comparable with the original;
> - repair or reinstate **your house**, **contents** or **personal effects** exactly to their previous condition.
>
> (Emphasis in original.)

The issues

[10] The appeal raises three questions of law or construction:

(a) What is the meaning of "full replacement value" (which we will call FRV henceforth) when Tower has elected to repay rather than reinstate. Mr Campbell QC, for Mr Myall, argued that some provisions that cap Tower's liability when reinstating do not apply to the payment of money.

(b) On whom rests the onus of proving FRV.

(c) How should FRV be adjusted to reflect the 149 square metres which was uninsured.

[11] There follow seven questions of application. All proceed on the premise that the amount Tower must pay is calculated by estimating the notional costs of rebuilding the house in accordance with the policy:[4]

(a) Whether FRV includes the cost of waxing — as opposed to varnishing with polyurethane — timber surfaces constructed, for purposes of this notional exercise, of Fijian kauri, which is an available substitute for the original timbers.

(b) Whether FRV includes concrete block throughout for exterior and interior walls, as Mr Myall would have it, or for exterior ground floor walls only with other walls being timber and gib-board. The answer has consequences for the foundations.

(c) Whether FRV includes replacing existing chimneys, although they cannot lawfully be used for air quality reasons, or replica structures.

(d) Which cost estimate should be preferred for tiling.

(e) Whose evidence should be preferred for various other residual items.

(f) What allowance ought to be made for professional fees.

(g) What allowance ought to be made for preliminary and general costs.

[12] Tower has also cross-appealed the Judge's finding on the allowance that should be made for contingency costs, which is an eighth question of application.

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[4] We record that some matters remain to be decided in the High Court. We express no view about them.

Does FRV vary with the mode of settlement?

[13] Mr Campbell's argument was straightforward: Tower promised to pay full replacement value as defined, and some of the clauses limiting what Tower must do apply only when it elects to reinstate. Specifically, the policy stated that Tower "will use" building material and construction techniques commonly in use at the time of loss or damage, and that Tower need not "repair or reinstate" the house exactly to its previous condition. Counsel accepted that the promise to pay was qualified by the provision that Tower need not pay the cost of replacement or repair beyond what is "reasonable, practical or comparable with the original".

[14] This argument envisages that when deciding whether to pay or reinstate Tower will make two assessments of full replacement value, each on a different basis. It would be surprising if the content of the promise would vary in that way. In our opinion it does not, for three reasons.

[15] First, we agree with Dunningham J that the primary obligation to pay the cost of rebuilding "to the same extent and condition as when new" does not require that the building be rebuilt exactly to its original specifications. The Judge held:[5]

> The word "extent" clearly means a house built to the same size, and providing the same facilities, as the original. The word "condition" imports both the state of being "as new", and the quality of the building at the time it was new. In my view, the primary obligation allows some tolerance from building something which is identical to the original building, because it only requires Tower to achieve the "extent and condition" of the house when new, rather than to rebuild "as when new". As a consequence, the wording of the primary obligation in the policy imports the notion of rebuilding something which is equal to, but not necessarily identical to, the original building.

[16] The Judge concluded that:[6]

> I consider Tower's primary obligation in this case is to pay for a house of equivalent size, functionality and quality and which reasonably recreates the character and appearance of the original. The latitude afforded to Tower to deviate, where reasonable, from the original specifications is reinforced by the other express terms of the policy.

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5 *Myall v Tower Insurance Ltd*, above n 1, at [37].
6 At [40].

[17] This approach is consistent with that taken by Dobson J in *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd*.[7]

[18] Second, the statement that Tower will use materials and methods in common use follows the introductory words "in all cases", indicating that it applies when Tower opts for a cash settlement. It is not redundant in cash settlement cases because the assessment of FRV requires a notional rebuild; as this Court put it in *Avonside*, "what is required is an assessment of the costs that would be incurred if rebuilding were actually to occur".[8] Similarly, the statement that Tower need not reinstate exactly to previous condition is one of several provisions to follow the introductory words "we are not bound to". Those provisions include the statement, which counsel accepted is applicable to case settlements, that Tower need not pay the cost of replacement beyond what is reasonable, practical or comparable with the original. Finally, when the basis of settlement provisions are read as a whole it can be seen that they are not separated into those governing reinstatement and payment respectively, for some provisions speaking of what Tower must pay necessarily apply to cases of actual reinstatement.

[19] Third, we accept Mr Harris's submission for Tower that the basis of settlement provisions must be read together to ascertain and apply the insurer's promise. The policy provides guidance about what it is reasonable or practical to pay; the exercise should assume that current materials and practices would be used.

The burden of establishing FRV

[20] Mr Campbell argued that the Judge erred by insisting that Mr Myall prove Tower's proposed figure for each item in dispute failed to match the policy standard. Counsel submitted that Mr Myall need only show his own figure for a given item met the policy standard. The burden then shifted to Tower to prove that figure exceeded what was reasonable, practical or comparable with the original.

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7 *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965 at [24]–[25].

8 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483, (2014) ANZ Insurance Cases 62-040 at [52]; aff'd *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141 [*Avonside* (SC)].

[21] It is correct that when dealing with some items Dunningham J inquired whether Mr Myall had shown that Tower's figure was unreasonable. For example, when dealing with "other house differences" she held that Mr Myall had not discharged the onus of showing that Tower was wrong.[9]

[22] We do not consider this an error, however. No question of shifting burdens arises; the Court was applying a policy standard, FRV, not considering whether an exclusion applied, and it was doing so in a particular factual context. Tower had accepted liability and it need only pay the minimum sum required to meet the policy standard. It had put up a sum, broken down by item, that it deemed sufficient. The question for decision was whether Tower's proposal met the policy standard. If it did not, then the Court presumably would have adopted Mr Myall's proposal. We note that at various points in his submissions Mr Campbell argued that Mr Myall need only show that his estimate was more likely accurate than Tower's, which is another way of making the same point.

Adjusting for under-insurance

[23] As noted, the parties agree that the FRV of the house must be adjusted for Mr Myall's mistake when advising Tower of the size of the house. They do not agree on how that ought to be done.

[24] Mr Campbell pointed out that scaling, the method adopted by Tower, assumes that all costs vary with scale. He submitted that in this case some costs are fixed, meaning that they would not vary if the area to be rebuilt were reduced from 799 to 650 square metres. He instanced bathrooms, arguing that fittings do not vary much in cost and submitting that the items that do vary, such as interior walls and wiring, are likely to cost less.

[25] Mr Harris accepted that scaling is not the only available way to adjust for under-insurance. He instanced a hypothetical case in which the area given was originally accurate but the insured added an extension without telling the insurer.

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9 *Myall v Tower Insurance Ltd*, above n 1, at [77].

In that case the insurer might exclude the extension when calculating FRV. But in most cases, including this one, scaling is a practical and accurate method.

[26] The objective must be that of accurately calculating FRV for the area insured, but the policy says nothing about how it is to be done. Scaling begins with the entire building, which in this case is what the parties intended to insure and would have done but for Mr Myall's error in calculating the floor area. It ought to be straightforward in application. But it does assume that costs are variable with the reduction in area. That assumption is empirical in nature and capable of being displaced. As Dunningham J noted, the greater the reduction in area the less likely that some costs would vary.[10]

[27] In this case Mr Myall says that some costly items, such as bathroom fittings for example, are fixed and that ought to be reflected in the FRV calculation. For its part, Tower did not simply scale back the costs of replacing the building at its original size; rather, it assumed both that Mr Myall would rebuild at 650 square meters and that the new house, being smaller, would feature (staying with the same example) fewer bathrooms and bedrooms.

[28] The Judge preferred Tower's approach, reasoning that:

> [96] The starting point for determining how the adjustment is to be made is to consider what the policy was insuring. Each renewal certificate clearly stated that what was being insured was an owner occupier house, built in 1885, based on "area square meter 650". Details such as the number of rooms, including service rooms such as bathrooms and kitchens, were not specified in the policy and I do not consider Tower was contractually bound to rebuild the same number of rooms despite the under-insurance. The primary descriptor of the property was its square area and the premium was calculated on that basis.
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> [97] Consequently, I do not agree, as Mr Myall's quantity surveyor suggests, that Tower must put to one side costs that are "not affected by the floor area, such as the number of toilets, showers and door or the kitchen, vanity units and the like". To do so suggests that the floor plan must be artificially shrunk, by approximately 20 per cent to accommodate the same number and size of doors, windows, walls, joinery, appliances, bathroom fittings and the like.
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> [98] I consider that is an unrealistic scenario. Mr Myall contracted to insure a large stately home with the general characteristics of his home, but

[10] At [101].

> which was 20 per cent smaller than his house actually was. Realistically, such a home would have commensurately fewer bathrooms, bedrooms, and reception rooms and therefore proportionately fewer structures such as doors, walls and windows, fewer fittings, and less joinery, without its function being compromised. I therefore do not accept, Mr Harrison's costing which endeavoured to include the same number of rooms and fixtures and fittings in a house which was one fifth smaller than the actual house.
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> (Footnote omitted.)

[29] Mr Campbell argued that this approach is wrong, for Tower's obligation is to rebuild to the same extent and condition as when new, up to the area shown in the certificate of insurance, and this means that Tower must pay for the same number of bedrooms, bathrooms, cabinets, fireplaces, electrical fittings and so on.

[30] We are not persuaded that the Judge was wrong. It was not suggested that Mr Myall intends to rebuild a house of 799 square metres; rather, both parties assumed that the notionally rebuilt house would comprise 650 square metres. It is then a question of judgement whether the smaller building would feature the same number of rooms. In this case the reduction in area was substantial, around 20 per cent. It was open to the Judge to find that in the circumstances the house would be built with fewer rooms to maintain its stately interior proportions. She noted that many of the costs were calculated by reference to the extent of work to be done, rather than as fixed costs.

Treatment of exposed timber interior surfaces

[31] Mr Myall had had interior timber surfaces stripped and hand-waxed and considered that FRV should provide for hand waxing. Tower proposed polyurethane. The Judge accepted that the surfaces had recently been waxed but was not satisfied either that waxing was in common use or that polyurethane would not achieve an equivalent finish.[11] Waxing is more expensive; around twice as costly as polyurethane.

[32] Mr Campbell argued that this was a stately home and waxed surfaces were a feature that Tower must be liable to replicate; and further, that the clause entitling Tower to use materials in common use is inapplicable in a cash settlement. We have

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[11] At [49].

already rejected the latter argument. We accept that the analysis must begin with the original waxed surfaces, but we are not persuaded that waxing is now in common use or that polyurethane, which is, does not serve as an aesthetically and functionally adequate substitute on the Fijian kauri which would be used in the rebuild.

Concrete block or timber for upper walls

[33] The house originally featured thick exterior and interior walls made of brick. Mr Myall accordingly wished to include in FRV the cost of structural concrete block and brick veneer on all exterior walls. Tower proposed timber framing with brick veneer for exterior walls on the upper floors. The difference in cost is around $153,222.

[34] Dunningham J rejected a claim that Tower's method would result in a loss of thermal or acoustic properties or any functional disadvantage. That left a claim that it was not adequate because the walls would be noticeably thinner and less substantial. She discounted this aesthetic claim, finding no evidence that the house would suffer aesthetically and reasoning that the additional cost of Mr Myall's proposal was not justified.[12]

[35] Mr Campbell submitted that Mr Myall's proposal was closer to the condition of the house when new and ought to have been accepted, especially given the aesthetic advantage of visibly thicker walls.

[36] We do not agree. Tower need not follow the exact specifications, and the advantages of concrete block are modest. The walls would look the same internally and externally and the structural elements would not be visible. The cost of concrete block was substantially higher — $153,222 — and there would be implications for the foundations. We accept Mr Harris's submission that it would not be reasonable to use concrete block for the modest aesthetic advantage it might offer.

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12 At [54].

Chimneys

[37] The house featured working chimneys as well as a computer-controlled heating system. Tower provided for the latter, but instead of working chimneys it provided for lightweight non-functional structures designed to replicate the look of the originals. It is not in dispute that the originals could no longer be used for their intended purpose, the result of regional government rules prohibiting the use of open fires. The difference between the parties' estimates is $179,975.

[38] The Judge found that Mr Myall's proposal was not reasonable or practical.[13] Mr Campbell argued that this was an error, because it cannot be known whether open fires will always be prohibited. We agree with the Judge. The possibility that fireplaces could again be used must be considered speculative, and Tower did pay for the heating system.

Cost of tiles

[39] Mr Myall's tiling allowance was $111,412 higher than Tower's. Both allowed the same area and tile type. The difference was in the cost of supply. Tower relied on the invoices Mr Myall obtained during renovations in 2004 and added an allowance for labour and inflation, with no independent inquiry of a supplier. Its quantity surveyor, Mr Eggleston nonetheless considered that his estimate included a considerable contingency factor. Mr Myall's estimates were based on "usual local rates", according to his quantity surveyor, Mr Harrison, who was not challenged on what those might be. It appears that the usual local rates Mr Harrison had in mind were local rates for imported tiles. Dunningham J held that Mr Myall had not discharged his onus of displacing Tower's costings.[14]

[40] Mr Campbell argued that all Mr Myall need do is show that his estimate was more likely correct and submitted that he had done so; Mr Harrison supplied more detail, said he used current local rates, and was not cross-examined on those rates.

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13 At [56]–[57].
14 At [63].

[41] The evidence is sparse, but Mr Harrison's unchallenged evidence was that tiles from the UK, which formed a substantial part of the total, were costed at current rates and adjusted to New Zealand currency. Mr Eggleton used the same tiles but did not check current rates. We infer that in his opinion a lower rate could be got because of the nature and presumably size of the order, but he did not provide any foundation for that opinion, nor is it possible to evaluate his claim that he had ample contingency in his estimate.

[42] On this issue we differ from the Judge. Mr Harrison appears to have used actual current supply rates and Mr Eggleton did not. This ground of appeal succeeds.

Residual items

[43] This category, known as "all other house differences" comprises a number of components on which the quantity surveyors different on quantum or rates. They amounted to $273,901. The Judge held that:[15]

> Despite the difference amounting to $273,901, neither party sought to identify the complaints they had with the other party's costing. Mr Eggleton provided his costings and rates so Mr Harrison could have pointed to any disagreement he had with Mr Eggleton's methodology or the rates he had adopted. In the absence of any identified error in Mr Eggleton's costings for all these sundry matters, the plaintiff has not discharged the onus on him to show that it is wrong. Accordingly, Tower's costings on these components are upheld and can be used in calculating full replacement value.

[44] Mr Campbell accepted that it is difficult to compare the two quantity surveyors' work, but he attributed that to Mr Eggleton's failure to employ the standard industry format and submitted that the Judge was wrong to place an onus on Mr Myall to displace Tower's estimate.[16] Mr Harris responded that Mr Myall refused to allow the experts to confer and settle differences, so leaving his expert with the burden of proving the additional differences. Mr Harrison provided no breakdown or explanation.

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15 At [77].

16 Mr Campbell was here referring to *Standard method of measurement of building works* (Standards New Zealand, NZS 4202:1995, June 1995).

[45] We are not prepared to depart from the Judge's view. The evidence is scant. It affords us no basis to say that Mr Harrison's estimate is more reliable than Mr Eggleton's. He did use a standard format but it does not allow us to identify and assess the differences.

Professional fees

[46] The Judge found that both quantity surveyors originally assessed professional fees, being those of architects, engineers, surveyors and landscapers, at 15 per cent of rebuild cost.[17] This is a standard way of estimating such costs. However, Mr Eggleton later decided that it was inappropriate for so large a project and adopted an estimate of $485,760, about half Mr Harrison's estimate of $806,389.35 and much less than he had earlier estimated in his own initial report. The Judge opted for the lower figure, noting that Mr Harrison had agreed that Mr Eggleton's figure was "within a reasonable range".[18]

[47] Mr Campbell submitted that Mr Harrison had shown his estimate was orthodox and more likely correct. The Judge misunderstood Mr Harrison's concession, which was confined to Mr Eggleton's allowance for an architect, not for all professions.

[48] Mr Harris responded that Mr Harrison did concede that Mr Eggleton's allowance for the architect's fee was reasonable and Mr Harrison's estimates assumed differences in scope that the Judge rejected, such as the use of structural concrete throughout. Mr Eggleton was not challenged on his evidence in cross-examination.

[49] Mr Harrison described Mr Eggleton's approach as a "risk analysis" assessment and his own percentage approach as a reasonable estimate. He considered his approach preferable at the early stage of a project, before "more defined" documents are prepared. In our view it is reasonable for a court to prefer the "risk analysis" approach because it is not making a preliminary estimate that will be adjusted as the project evolves. The court is fixing the amount that the insurer must pay. We note that Mr Harrison acknowledged that he himself had begun with five per cent. He also

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17 *Myall v Tower Insurance Ltd*, above n 1, at [84].
18 At [86].

accepted that Mr Eggleton's figure for architectural fees was within a reasonable range. For these reasons we are not persuaded that Dunningham J was wrong.

Preliminary and general costs

[50] This is a modest difference of $38,514. Dunningham J stated that it appeared to relate to the difference in rebuild costs because both quantity surveyors used the same rate, seven per cent of rebuild cost. She found that no error had been shown in Mr Eggleton's approach.[19]

[51] Mr Campbell submitted that the Judge misunderstood the experts' approach, for neither used a percentage in their final reports and Mr Harrison's was more detailed and included some items, such as site access and establishment, that Mr Eggleton did not. However, Mr Harrison did not discuss the topic in his briefs and Mr Eggleston was not cross-examined on it. Mr Harrison's figure also included some works which the Judge did not accept as part of the notional rebuild. We are not persuaded that she was wrong.

Tower's cross-appeal

[52] The Judge allowed a contingency sum of 10 per cent of construction costs of $6,178,232, reasoning that the flat sum of $255,300 (about 4.7 per cent) that Mr Eggleton proposed was unrealistic for a one-off rebuild of a large and complex home. Tower contends that Mr Eggleton's sum was specifically tailored to the project and should not have been rejected.

[53] The experts agreed that a contingency sum is included to cover costs the nature or extent of which cannot be specified in advance. It must be a reasonable estimate. Initially Mr Harrison allowed five per cent. He said that the higher estimate at trial was based on his experience. He related the adjustment to his decision to reduce his estimates of the contractor's margin and provisional and general costs. By contrast, Mr Eggleton originally allowed 12 per cent, though this included inflation. He explained that he reduced his estimate before trial because he had been able to assess

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19 At [78]–[79].

the risk that specific items would increase in cost. He said that it is not standard practice to adopt a 10 per cent allowance on large projects, and he was not challenged on this evidence.

[54] When reviewing a similar 'notional rebuild' in *Avonside* the Supreme Court held that an allowance of 10 per cent was standard and appropriate:[20]

> [39] Mr Harrison, in accordance with what is agreed to be standard quantity surveying practice, included a sum of 10 per cent for contingencies. Southern's witnesses both agreed that there were "unknowns" in any building project, including in a rebuild of this type (existing house in an existing location).
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> [40] We accept Avonside's submission that the fact that this is a notional, rather than actual, rebuild does not affect the inclusion of an allowance for risks generally encountered. Such risks are relevant to estimating the cost of an actual rebuild and, as noted above, it is the actual cost of rebuilding that must be estimated. The Court of Appeal was thus correct to accept the inclusion of an allowance for contingencies.
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> (Footnotes omitted.)

[55] Mr Campbell pointed out that Mr Eggleton adopted the same figure in another case, *Young v Tower Insurance*:[21]

> [140] In his evidence before me, Mr Eggleton strongly disputed Mr Miles' 15 per cent contingency margin added in his estimate. Mr Eggleton said a 10 per cent contingency allowance was the proper market rate. The 10 per cent contingency allowance, as I understand it, has also been agreed by other quantity surveyors as a generally accepted rate. I agree with Mr Eggleton that a contingency margin of 10 per cent is more appropriate in this case.

[56] We are not satisfied that the Judge was wrong to characterise 10 per cent as a standard allowance. We have preferred a risk-weighted approach when dealing with professional fees. However, Dunningham J was not persuaded that Mr Eggleton's allowance of less than five per cent was realistic and we are not persuaded that she was wrong. The contingency sum covers all construction costs and as the Judge noted, this would be a large and complex project. Mr Harrison's estimate was orthodox and we agree with the Judge that it should be adopted.

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20 *Avonside* (SC), above n 8.

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

Result

[57] The appeal is allowed in part. The amount owed by Tower is increased by $111,412, being the difference in the cost of tiles between the experts.

[58] The appeal is otherwise dismissed.

[59] The cross-appeal is dismissed.

[60] Both parties have had a measure of success on the appeal. In the circumstances costs should lie where they fall.

Solicitors:
Succeed Legal, Wellington for Appellant
Gilbert Walker, Auckland for Respondent