IN THE COURT OF APPEAL OF NEW ZEALAND

CA520/2013
[2014] NZCA 483

BETWEEN	AVONSIDE HOLDINGS LIMITED Appellant
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Respondent

Hearing:	24 July 2014
Court:	Stevens, Lang and Clifford JJ
Counsel:	N R Campbell QC and A M E Parlane for Appellant B D Gray QC and C R Johnstone for Respondent
Judgment:	1 October 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The respondent is to pay to the appellant the contingency and professional fees determined by Mr Harrison, the appellant's quantity surveyor.

C The decision of the High Court on the allowance for external works is confirmed.

D The respondent is to pay the appellant costs for a standard appeal on a band A basis and reasonable disbursements. We certify for second counsel.

E In the absence of agreement, the question of costs in the High Court is to be decided by that Court.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Avonside Holdings Ltd (Avonside), owned a rental property at 1146 Avonside Drive, Avondale, Christchurch (the Property). The Property was insured in November 2009 under a Premier Rental Property Cover policy (the Policy) issued by AMI Insurance Ltd (AMI). AMI's liability under the Policy has been assumed by the respondent, Southern Response Earthquake Services Ltd (Southern Response).

[2] As a result of the earthquakes of 4 September 2010 and 22 February 2011, the Property was, the parties agreed, damaged beyond economic repair. Following each of those events, the Earthquake Commission (EQC) paid Avonside the maximum amount payable under the Earthquake Commission Act 1993, being the sum of $115,000 (including GST), a total of $230,000.

[3] The land on which the Property stood was red-zoned in June 2011. Avonside accepted the Canterbury Earthquake Recovery Authority's Option 2 and sold the land to the Crown, retaining its rights against Southern Response under the Policy. Avonside elected under the Policy to buy another house.[1] In those circumstances, the Policy provided that Southern Response would:

> … pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your rental house on its present site.

[4] Southern Response's liability is for the excess over the amount paid to Avonside by EQC.

[5] This is an appeal by Avonside against a decision of MacKenzie J in the High Court at Christchurch determining whether, and to what extent, an allowance for

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[1] Given that the land was red-zoned, Avonside's "election" was more apparent than real. As we understand matters, rebuilding the Property at that address was not a practicable option.

contingencies, the costs of professional fees and the cost of replacing external works should be included in the calculation of the cost of rebuilding the Property.[2]

Facts

[6] The material facts are not in dispute. In addition to those set out above, it is sufficient for us to summarise the relevant terms of the Policy and the circumstances in which the dispute between Avonside and Southern Response comes before us.

[7] The Policy is, as indicated, a rental property insurance policy. As such the Policy provides cover for Avonside's "rental house".

[8] Under the heading "Our definition of 'rental house'" the Policy provides as follows:

> **Property covered by this policy**
>
> a. This policy covers residential dwellings that you own for the purpose of lease under a tenancy agreement. It does not cover commercial buildings, caravans or temporary structures.
>
> b. The following all form part of 'your rental house' and are covered by this policy:
>
> - the residential dwelling and its permanent fixtures
> - carpets and floor coverings that are permanently glued to the floor
> - kitchen stove and hob, range hood, waste disposal unit, permanently fixed dishwasher
> - extractor fans and fixed heaters
> - bathroom towel rails, including fixed heated towel rails
> - permanently fixed clothes dryers
> - domestic outbuildings (such as garage, shed) and domestic glasshouses
> - fences, gates, walls, decks and bridges
> - domestic paths and driveways constructed of concrete, stone, brick, pavers or tarseal
> - swimming pools of permanent construction
> - spa pools, if permanently plumbed
> - domestic underground and overhead services
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> at the address stated in the Policy Schedule

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2 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433.

[9] The Policy describes in the following way what the insurer will pay if covered (that is, not excluded), unforeseen and sudden physical loss or damage occurs:

> **1 What we will pay**
>
> a. We will pay to repair or rebuild your rental house to an 'as new' condition, up to the floor area stated in the Policy Schedule.
>
> b. We will use building materials and construction methods in common use at the time of repair or rebuilding.
>
> c. If your rental house is damaged beyond economic repair you can choose any one of the following options:
>
> i **to rebuild on the same site.** We will pay the full replacement cost of rebuilding your rental house.
>
> ii **to buy another house.** We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your rental house on its present site.
>
> iii **a cash payment**. We will pay the market value of your rental house at the time of the loss.
>
> d. If your rental house is damaged and can be repaired, we can choose to either:
>
> i. repair your rental house to an 'as new' condition, or
>
> ii. pay you the cash equivalent of the cost of repairs.

[10] Where the loss event is an earthquake, the Policy provides cover by way of top up for loss or damage not covered by the EQC:

> a. If your rental house is damaged by earthquake … we will pay the difference between the maximum amount payable by the Earthquake Commission and:
>
> i the cost of repairing or rebuilding your rental house, or
>
> ii the sum insured stated on the Policy Schedule,
>
> whichever is the lesser.
>
> b. Cover is provided on the same basis as 'Cover for your rental house' on page 2.
>
> c. This cover does not include any excess you may have to pay to the Earthquake Commission.
>
> d. You will not have to pay any excess to us.

[11] The term "Full replacement", as used in cl 1(c)(i) of "What we will pay", is defined in the Policy to mean "replacement with a new item, or repairing to an 'as new' condition". By contrast the term "market value" means "the value of an item immediately before the loss or damage occurred, taking into account wear and tear and depreciation".

[12] Cover is also provided for certain additional costs in the following terms:

Cover for additional costs

We will pay for the following additional costs

1	Professional fees	a. We will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild your rental house. These expenses must be approved by us before they are incurred.
2	Demolition and debris removal	a. We will pay the reasonable cost of demolition and debris removal. These expenses must be approved by us before they are incurred.
3	Removal of rental house contents	a. We will pay the reasonable cost of removing your rental house contents from your rental house when this is necessary to carry out repair or reinstatement of your rental house.
4	Compliance with building legislation and regulations	a. If additional work is required to ensure that the repair or rebuilding of your rental house complies with the building code, we will pay the reasonable costs of the additional work. b. We will not cover any additional work required: i. if a notice has been served requiring compliance with the Building Act 1991 or the Resource Management Act 1991 before the loss or damage occurred, or ii. if your rental house did not comply with the relevant governing building controls when it was built or at the time of any alteration, or iii. to any undamaged part of your rental house, whether or not it complies with the building code.

[13] The issues raised on this appeal involve the interpretation of the two core provisions "Property covered by this policy" and "What we will pay". The Policy's provisions relating to "Cover for additional costs" are also relevant.

The challenged High Court decision

[14] At the hearing before MacKenzie J evidence as to the calculation of the cost of rebuilding the Property was given by three principal witnesses. They were:

A. For Avonside, Mr Harrison, an independent quantity surveyor engaged by Avonside to produce an estimate of the cost to rebuild the Property at 1146 Avonside Drive.

B. For Southern Response:

(i) Mr Phillips, Southern Response's "build technical adviser"; and

(ii) Mr Farrell, a quantity surveyor working for Arrow International (NZ) Ltd, Southern Response's project manager for the repair and rebuilding of insured houses after the Christchurch earthquakes.

[15] Mr Phillips gave evidence as to the basis upon which Southern Response approached the exercise of costing the rebuild of the Property. Mr Farrell and Mr Harrison are both quantity surveyors. They gave evidence as to the actual costing of the rebuild. We return to that evidence in more detail later. It is sufficient to note at this point that after each of these witnesses had been sworn, had read their brief of evidence and had been (relatively briefly) cross-examined, Messrs Harrison and Farrell gave evidence together using a "hot tub" procedure (the method by which the Court receives concurrent expert evidence). They did so initially by reference to a table of comparison between Avonside and Southern Response's estimates that Mr Farrell had prepared. After some time, it was clear to the Judge that that evidence was not proving to be particularly helpful. The Judge then asked Mr Farrell and Mr Harrison to prepare overnight a schedule which clearly isolated the differences between them.

[16] Following that process, the areas of dispute between Avonside and Southern Response were reduced to five items: builder's margin, contingencies, professional

fees, demolition costs and external works. At issue in this appeal are three of those items only: contingencies, professional fees and external works.

[17] The parties' approach to, and MacKenzie J's decision on, each of those issues can be summarised as follows.

Contingencies

[18] Avonside and Southern Response agreed on the following definition of contingency sums:

> Contingency sums are for items, the nature or extent of which cannot be defined otherwise in the contract document. Such sums are wholly under the control of the architect, engineer or client's representative administering the works and may be expended or deducted in part or in whole under his/her authority.

[19] Mr Harrison included a figure of 10 per cent of the total price, some $143,200, for contingencies. Mr Farrell made no allowance for contingencies.

[20] MacKenzie J determined there should be no allowance for contingencies in the calculation of the cost of rebuilding the Property.[3] The Judge reasoned that, in a notional rebuild, there could by definition be no unexpected items for which a contingency allowance would be provided in a contract. What was required was the best assessment of the cost of rebuilding, based on all known circumstances. Because there would be no actual rebuild, that assessment would never be put to the test. There was, therefore, no need to add a contingency sum to reflect possible contingencies which would never be encountered.

Professional fees

[21] Mr Harrison made an allowance, based on his experience, as to the fees of relevant consultants involved in designing, consenting and supervising rebuilding the Property. He set that allowance at 10 per cent of the total cost (including an allowance for contingencies), amounting to some $157,000. The approximate breakdown of that allowance was:

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3 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*, above n 2, at [24].

- structural engineer – 1.5 per cent;
- design fees – 5.5 per cent;
- geotechnical – 1 per cent;
- land survey – 0.25 per cent; and
- project manager or quantity survey – about 1 per cent.

[22] Mr Farrell made an allowance of $29,000 to cover geotechnical fees, consent fees, engineering and drafting.

[23] MacKenzie J agreed with the approach taken by Mr Farrell.[4] The Judge reasoned that it was not necessary to include professional fees which were not essential to the rebuilding. In particular, in a notional rebuild, architectural design was not required. Furthermore, the Policy itself dealt differently with architects' fees. They were covered as additional costs, not as part of the basic cover.

External works

[24] External works represent items such as fences, walls and the driveway. These items are covered by the Policy within the definition of "your rental house". The issue arose in the present case because certain of the external works at the Property were repairable and reusable at a lesser cost than the cost of their replacement. Mr Harrison prepared his estimate on the basis of the replacement of all external works at a cost of $114,376.34, and not their repair to an "as new" state. Mr Farrell prepared his estimate of total rebuilding costs on the basis of their repair to an "as new" state at a cost of $79,421.50.

[25] MacKenzie J again agreed with the approach taken by Mr Farrell for Southern Response.[5] He reasoned that, as the external works in issue fell within the cover provided by the Policy in respect of "your rental house", damage to those works was to be taken into account when deciding whether the rental house was damaged beyond economic repair. To answer that question a global assessment, rather than an item-by-item assessment, was required. But once that threshold was met and the insured chose the option of buying another house, the question was

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4 At [30].
5 At [42].

different. The cost of rebuilding the Property could require an item-by-item assessment. There was nothing in the Policy that precluded the reuse of any part of the house or its associated works which were not themselves damaged beyond economic repair and which could, when repaired, perform its function as part of the rebuilt house. Therefore, the assessment of the cost of rebuilding the Property could take into account such possible reuse.

Arguments on appeal

[26] Central to the respective positions adopted by Avonside and Southern Response in arguing this appeal is the manner in which they interpret the core "What we will pay" provisions of the Policy as prescribing the amount Southern Response is required to pay Avonside. Both Avonside and Southern Response acknowledge that a notional exercise is required to be carried out to determine that amount. As Mr Campbell QC for Avonside put it:

> Under the buy another house option the cost that Southern Response will pay "must not be greater than rebuilding your rental house on its present site". That is a reference to a rebuilding that will never occur, and to costs that neither party will ever incur. It therefore requires assessment of a hypothetical (or notional) rebuilding cost.

[27] Avonside and Southern Response differ, however, as to the implications of that hypothetical exercise for the items in dispute.

[28] Avonside's approach is that in assessing the notional rebuild cost it is not relevant that the rebuilding will not take place, or that Avonside will not actually incur any rebuilding costs. The hypothesis (or notion) on which the cost is to be assessed is that the house is rebuilt on its present site.

[29] For Southern Response Mr Gray QC argued that, as a policy for a rental property, the Policy protects the rental income stream derived from the Property by either providing for an 'as new rebuild' or for the investment of the costs of that 'as new rebuild' in the purchase of another house. Therefore the limit of liability found in cl 1(c)(ii) of "What we will pay" is, in effect, determined by what would be the full replacement cost under cl 1(c)(i). Putting aside cover for additional costs (which might be payable if the Property was actually rebuilt), the notional rebuild

calculation was to be prepared on the basis of the cost of rebuilding, in terms of the plans and the site, what had been built when the Property was first erected.

[30] In general, therefore, architectural plans were not required, new engineering advice was not required, and there were no unforeseen risks. All relevant risks had been identified when the Property had originally been built. All that was required was the cost of repeating – albeit using current building techniques and materials – the original exercise of constructing the existing house.

[31] Those central differences in approach are reflected in the positions Avonside and Southern Response took on each item in dispute.

Contingencies

[32] For Avonside Mr Campbell's submission was that in estimating the rebuild cost it was necessary to assume, albeit hypothetically, that the rebuild would occur. Costs could not be excluded from the estimate of the rebuild cost merely because the rebuild was not going to happen and costs would not be incurred. If that approach were taken, it was difficult to see what costs would ever be included in the estimate.

[33] Southern Response's argument was that Avonside had misconstrued the Judge's decision. An allowance for contingencies was not required because, given the nature of the notional exercise involved in estimating the rebuild costs, all relevant risks were known. In particular, there was no risk posed by ground conditions. The cost that was required to be determined was that of duplicating the construction of the Property in accordance with its original plans and specifications. As the structure of the Policy showed, contingencies that might be incurred if the Property were actually rebuilt were addressed in the "Cover for additional costs" provision.

Professional fees

[34] Mr Campbell argued that MacKenzie J had misunderstood the approach taken by Avonside's expert, Mr Harrison. Mr Harrison had not, as the Judge had characterised it, calculated professional fees typically involved in an individually

designed house building project. Rather the fees he had estimated were those that would be involved in actually rebuilding the Property on the same site. Avonside's approach to professional costs was orthodox, as recognised by Southern Response's witnesses. The amount MacKenzie J allowed for professional fees, namely $29,000, was itself inconsistent with earlier, higher, estimates by Southern Response of the professional fees likely to be involved if the Property was actually rebuilt. Southern Response's witnesses had not explained the basis for the calculation of the lower amount. Moreover, the Judge's error was influenced by a wrong approach to that part of the Policy that dealt with additional costs. The professional fees that Avonside said should be included in the rebuild cost were not "additional" in that sense.

[35] Southern Response supported the Judge's reasoning. The earlier, higher, estimate prepared for Southern Response reflected actual costs of rebuilding, including the costs of full architectural input. The allowed amount of $29,000 was a proper estimate of professional fees involved in the notional exercise of rebuilding the Property.

External works

[36] Avonside disputed MacKenzie J's interpretation of the Policy as regards his item by item approach to the rebuild exercise and his acceptance, in that context, of a lesser cost where individual items could be repaired to an "as new" condition, rather than being rebuilt. As a matter of interpretation, the Policy distinguished between repairing and rebuilding. Here the Property, including the parts that may have been repairable, had no value to the insured. Thus it was sensible that the limit on the insured's entitlement was to be assessed on the basis of rebuilding each and every part of the Property, including those parts that were repairable.

[37] Southern Response adopted and supported MacKenzie J's reasoning.

Analysis

[38] MacKenzie J's judgment depended very much on his assessment of the evidence put before him. Given the relatively few issues in dispute between

Avonside and Southern Response, the focus at trial was on that evidence, rather than more general questions of the interpretation of the Policy. Before us, there was a greater focus on questions of the interpretation of the Policy than there would appear to have been in the High Court. We acknowledge that, in part, that may have been due to the approach we took. Nevertheless, it is important that we also carefully consider the evidence of the three principal witnesses.

The evidence

[39] Mr Harrison had prepared a number of costing estimates (Brief Estimate Summaries) and more detailed, supporting analyses of those summaries (Trade Breakups). As Mr Phillips and Mr Farrell acknowledged, Mr Harrison's estimates reflected an orthodox quantity surveying approach to preparing an estimate of the cost of rebuilding the Property, including allowances for contingencies and professional fees.

[40] Mr Phillips explained Southern Response's approach to the notional costing exercise called for by cl 1(c)(ii) of "What we will pay" by focussing – as now relevant – on the questions of estimates for professional fees and contingencies.

[41] Mr Phillips emphasised, a number of times, the difference between the general notional costing exercise called for and an actual rebuild. He first described the general approach in this way:

> The exercise therefore is to measure the cost to rebuil[d] the existing rental house, to the same design, layout and configuration, as it was at the time of the loss, in this case an earthquake, but the same for fire or flood, if a total loss. The calculation of the cost to rebuild, necessarily does not include any of the costs covered under cover for additional cost. Those aspects fall under the separate covers set out on page 3.

[42] In terms of professional fees and compliance costs, Mr Phillips explained:

> The same approach [ie as to demolition costs] applies to the covers for professional fees and compliance costs. Unless the policy holder was in fact rebuilding on the same site, then the cost to design the replacement rental house, including any engineering or geotechnical input into the foundations, would not be paid to the policy holder. Costs must be incurred, after first being approved by the insurer, to be indemnified.

> The same for compliance costs for additional work to bring the rental house up to Building Code standard as at the date of the application for building consent. If no building consent is required, because the house is not in fact being rebuilt on the same site, under clause [(c)(i)], then there are no costs to indemnify.

Mr Phillips approached the question of contingencies in a similar way.

[43] In cross-examination Mr Phillips agreed with Avonside's counsel Mr Shand as to the various elements of an actual rebuild process, and that exercise produced what was described as an "elemental" estimate. Moreover, including a builder's margin and a contingency percentage of 10 per cent would not be unreasonable "particularly since the earthquakes". But, in re-examination, Mr Phillips' evidence was that the notional rebuild costed under cl 1(c)(ii) was not the same process as the rebuild project he had discussed with Mr Shand.

[44] In summary, Mr Phillips clearly distinguished between the cost derived for an actual rebuild and a notional rebuild. In the case of a notional rebuild, various costs would not actually be incurred: hence they were not included in the sum to be calculated under cl (c)(ii).

[45] Mr Farrell's evidence reflected the same approach. For example, he explained:

> For the proposed notional rebuild of the insured dwelling, we have applied a reasonable cost to prepare the documentation needed for building consent. This includes a cost to redraw the existing drawings obtained from the Council file, apply any compliance driven changes, including engineering, required to secure consent for the same design. Consent costs have been included in this sum.
>
> No contingency has been applied to the replacement estimate as we have assumed good ground and precluded any 'unknowns' within the foundations and excavation. No contingency is applied to the superstructure as once again, we are applying the theory of a notional build to compliant drawings, under a 'fixed lump sum contract'. This in my view constitutes standard practice within the marketplace and appropriate to this particular project.

[46] The issues of contingencies and professional fees were both discussed further in the "hot tub" procedure. Again, the evidence reflected those different approaches to an estimate of actual and notional rebuild costs.

[47] The difference of approach to external work received little attention in the evidence. Messrs Harrison and Farrell simply agreed that the different approaches taken produced the different cost estimates set out at [24]. It was, in effect, left to MacKenzie J to interpret the Policy on that point.

[48] Against that background, we now address the matters in dispute before us.

Contingencies and professional fees

[49] The approach contended for by Southern Response means that costs for contingencies and professional fees that would be incurred where the rental house was actually rebuilt on the same site, whether as part of "the full replacement cost" or as part of "additional costs", are excluded from the calculation of the cost of rebuilding under the "to buy another house" option. The rationale for that exclusion is that because the exercise is a notional and not an actual one, contingencies that would as a result not be incurred need not be included. Southern Response argues this is the correct interpretation of the Policy.

[50] We do not agree with that approach to interpreting the terms of the Policy. Clause (c)(ii) of "What we will pay" does not refer to "the full replacement cost". What it says is that:

> We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater that rebuilding your rental house on its present site.

[51] The cost of rebuilding the rental house on its present site involves both the full replacement cost and additional costs, encompassing contingencies and professional fees. That is the amount the insurer would be liable for where the insured chose the "to rebuild on the same site" option. We are satisfied, therefore that it is an amount equivalent to the sum of both of replacement and additional costs, and not the lesser amount of solely "the full replacement cost", that is to be paid by the insurer to the insured when the insured elects the "to buy another house" option. In our view, if the Policy had intended any limit to "the full replacement cost" to apply in cl (c)(ii), it would have said so.

[52] We agree with Mr Campbell's general submission that it is irrelevant in the present context 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. As Mr Campbell submitted, costs cannot be excluded merely because the rebuild is not going to happen and costs will not be incurred.

[53] Accordingly, for example, we do not think "safe ground" can be assumed. Similarly, we consider that a reasonable estimate for professional fees and contingencies prepared on the basis that the Property is actually being rebuilt on the site should be included. This is so even though the exercise is necessarily a notional one. Where, for example, the Building Code has changed, or there is – as would be the case here – a different assessment of ground risks that would need to be addressed if the Property were to be rebuilt on the site, those costs are, in our view, properly within the cost of rebuilding.

[54] In our view, therefore, Mr Harrison's approach to the issues of professional fees and contingencies is to be preferred. That is very close to the approach taken by Southern Response when it prepared what we understand to be an actual estimate of rebuilding costs, that is the quantity surveying estimate based on the detailed rebuild/repair analysis.

[55] A not dissimilar approach to the notional exercise involved was taken by Dobson J in *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd*.[6] That case concerned a Southern Response "premier house" cover policy. In addition to the options to rebuild on the same site, to buy another house or to receive a cash payment, the insured had the option to rebuild their house on another site of their choosing. If that option was chosen, the insurer's liability was stated to be "the full replacement cost of rebuilding your house on another site you choose. This cost must not be greater than rebuilding your house on its present site". "Full replacement" had the same meaning as in the Policy. The issue was how the additional costs provisions were to be applied with respect to costs of rebuilding that were occasioned by the need to comply with "building legislation and rules".

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

[56] Southern Response there made a similar argument to the argument it made here: that is, the *notional* "full replacement cost" of rebuilding the house on the original site capped the liability to pay the cost of rebuilding the house on the chosen other site.[7]

[57] Dobson J interpreted the policy as quantifying the insurer's liability to compensate for additional costs of rebuilding, to the extent they were occasioned by the need to comply with the current Building Act and codes, as those costs are actually incurred at the new site. Taking that approach avoided both an artificiality, and a windfall.[8] If the approach argued for by the insured was taken, then greater costs might have been incurred at the existing site than would be incurred at the new site. In that situation a windfall would arise. The situation could be the other way round, so that the insured would be left out of pocket. On that basis, the notional rebuild cost (excluding additional costs), that is the "full replacement cost", was not an appropriate means to quantify the insurer's liability where the insured elected to build a new house at another site.[9]

[58] We take the same approach here. That is, the cost that is payable as part of the required notional exercise – here under cl 1(c)(ii) – is the cost that would actually be incurred (whether as a component of full replacement cost or in terms of matters covered by additional costs) to rebuild the house on the existing site. Thus items such as contingencies and professional fees cannot be excluded on the basis that they will not, in fact, be incurred because it is a notional cost that is being calculated.

External works

[59] With respect to the claim for external works, this turns on the interpretation of the wording of the Policy. We agree with the reasoning of MacKenzie J summarised at [25] above. The cap on Southern Response's liability is the full replacement cost approach to rebuilding the Property. If in that rebuilding process, an "as new" property can be produced by repairing or reinstating external works

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7 At [42]–[43].
8 At [46].
9 At [49].

rather than rebuilding those items from new, then we consider that is the way the cap is to be calculated.

[60] We acknowledge that, where an insured chooses the option of buying another house, he or she will receive a lesser benefit in respect of external works that could be repaired and reinstated. In the normal course, that would no doubt be a matter the insured would take into account when deciding which option to take. The fact that, as a matter of practicability, the option of rebuilding on the site was not available to Avonside does not, in our view, call for a different interpretation of the Policy.

Outcome

[61] The appeal is allowed in part.

[62] The respondent is to pay the contingency and professional fees determined by Mr Harrison, the appellant's quantity surveyor.

[63] The decision of the High Court on the allowance for external works is confirmed.

Costs

[64] The appellant has succeeded in two out of the three issues argued on appeal. In terms of financial outcome the balance of success favours the appellant by a significant margin. We therefore consider the appellant is entitled to costs.

[65] The respondent is to pay the appellant costs for a standard appeal on a band A basis and reasonable disbursements. We certify for second counsel.

[66] The outcome of the appeal will necessitate a different costs outcome in the High Court. In the absence of agreement, the question of costs in the High Court is to be decided by that Court.

Solicitors:
Grant Shand, Christchurch for Appellant
Wynn Williams Lawyers, Christchurch for Respondent