

## Another victory for homeowners – the Supreme Court clarifies how cash payments are to be calculated

The Supreme Court decision, *Tower Insurance Limited v Skyward Aviation 2008 Limited* [2014] NZSC 185, released late last year, provides some clarity about how cash payments by insurers are to be calculated where the insured holds a full reinstatement insurance policy.

Skyward Aviation 2008 Limited ("Skyward") owned a residential property that was badly damaged and subsequently red-zoned following the 2010 and 2011 Canterbury earthquakes. Skyward elected to sell the property to the Canterbury Earthquake Recovery Authority (CERA) at its 2007 value and settled the Earthquake Commission's portion of the claim.

Skyward held a Provider House (Maxi Protection) Policy with Tower Insurance Limited ("Tower"), which provided full replacement cover on a "new-for-old" basis ("the Policy"). Under the Policy, Tower had the option to "make payment, rebuild, replace or repair.

Tower elected to make payment. The Policy provided four different payment options:

- a) The full replacement value of rebuilding the house at its present site;
- b) The full replacement value of cost rebuilding the house at another site selected by Skyward, provided the cost was not greater than rebuilding the house at its present site;
- c) The cost of buying another house, provided the cost is not greater than rebuilding the house at its present site; or
- d) The present day value of the house.

### The issues

The Supreme Court considered there to be two key issues:

- Is it Tower's choice to elect under which option payment is made; and
- On what basis is the amount payable by Tower to be calculated if the claim is to be settled by Tower paying the cost of buying another house.

Tower took the position that it could choose between the various payment options and had elected to choose option (c). Tower's maximum liability under option (c) was the lower of either the cost of the cheapest comparable and not necessarily new "replacement" house, or the cost of rebuilding the house at its present location. Tower originally calculated its liability at \$365,000.

Skyward contented it had the right to elect under which option payment was to be made. Skyward argued it was entitled to be reimbursed up to the estimated costs of rebuilding or repairing the house on its present site (option (a)). If Skyward was limited to option (c), it was not limited to houses comparable to the original house. Skyward calculated Tower's liability at \$683,000

### Lower Courts

In the High Court Justice Gendall upheld Tower's position. The Supreme Court noted that Justice Gendall was correct to find that Tower had the option to make payment, rebuild, replace or repair the house – a principle that was established by Justice Asher in *O'Loughlin v Tower Insurance Limited* (a summary of which can be found [here](#)). The Supreme Court determined that Justice Gendall's analysis of the payment options assumed Skyward could elect which option to choose, but there was a disconnect between that analysis and His Honour's ultimate conclusion.

Skyward successfully appealed the High Court decision to the Court of Appeal. Tower then appealed that decision to the Supreme Court.

### Supreme Court findings

The Supreme Court unanimously found for Skyward and upheld the decision of the Court of Appeal.

The Court held that, although the Policy clearly stated that Tower could elect to make payment, rebuild, repair or replace, there was no double option enabling it to also choose between the payment options. Under the terms of the Policy, Tower's payment obligations must be determined by the choice which Skyward makes as to whether to rebuild the house, replace it on another site or buy another house.

The Court rejected Tower's argument that it could pay the cost of a comparable house. If that were the case it may allow Tower to pay out on the basis of indemnity value (ie. The value of the house immediately prior to the earthquakes rather than when new). That would compromise the ability of Skyward to obtain replacement value recovery on the new for old basis they were entitled to in the Policy.

If an insured, such as Skyward, chooses to buy another house, the only cap on the cost that the insurer must meet is that it will not exceed the cost of rebuilding the house at its present site. There is no requirement that the new house be comparable to the original house.

### **Significance of the decision**

The *Skyward* decision further clarifies the meaning of Tower's Provider House (Maxi Protection) Policy and compliments the *O'Loughlin* decision. Since the wording of many insurances policies can be broadly similar, the *Skyward* decision may be relevant to people insured under different policies or by different insurance companies.

*Skyward* may mean an insured is entitled to significantly more money than their insurer has offered. If you are unsure or think the *Skyward* decision may apply to your property please contact [Simon Munro](#), [Jonathan Nicolle](#) or a member of our litigation team.