

Supreme Court dismisses Southern Response Appeal

The Supreme Court has released its decision in *Southern Response v Avonside Holdings Limited* and dismissed the appeal by Southern Response. This decision clarifies what must be included when an insurer is calculating the notional cost of rebuilding an insured property.

Background

A residential property owned by Avonside Holdings Limited ("Avonside") was damaged in the earthquakes of 4 September 2010 and 22 February 2011. The property was deemed to be beyond economic repair. Avonside was insured by AMI Insurance Limited (now renamed Southern Response Earthquake Services Limited, "Southern Response"). Avonside elected to purchase another house. Its policy provided that the cost of the purchased house can be no more than the cost of rebuilding the house on the same site.

Southern Response declined to pay Avonside for a number of entitlements under the insurance policy including contingency and professional fees, on the basis that the property would not actually be rebuilt and therefore these costs would not be incurred.

In the High Court MacKenzie J found in favour of Southern Response on these issues. However, his decision was overturned by the Court of Appeal where it was determined that the insured is entitled to have an allowance for contingencies and professional fees included in the calculation of the notional rebuild cost. These allowances were each assessed at 10% of the build cost.

Supreme Court

The Supreme Court has affirmed the decision of the Court of Appeal and determined that while the amount payable under an insurance policy can be no more than the cost of rebuilding the house on its present site, the exercise that is required is to estimate the actual cost of rebuilding the house on the site. The Supreme Court expressly recognised that this would include allowances for contingency and professional fees.

In relation to the allowance for contingency costs, Glazebrook J identified that the fact that it was 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 it is the actual cost of rebuilding that must be estimated. The Court of Appeal was therefore correct to accept the inclusion of an allowance for contingencies. A 10 percent allowance for contingency fees was affirmed by the Supreme Court.

The Supreme Court also affirmed the 10 percent allowance made for professional fees, and noted that this figure was based on "orthodox quantity surveying practice."

Conclusion

This decision will have a wide reaching impact on New Zealand insurers as it confirms the minimum entitlements of the insured when electing to purchase another property under their insurance policy.

The Supreme Courts approach is also likely to be applicable to other elections under your insurance policy, such as a cash settlement or a self-managed rebuild, where the notional cost of rebuilding is relevant. Additionally, the decision may have relevance to other insurers.

If you are considering your options under your insurance policy, or would like to know more about this decision, please contact a member of our [litigation team](#).

You can find a copy of the Supreme Court decision here:

<https://www.courtsofnz.govt.nz/from/decisions/judgments-supreme/judgments-supreme-2015>

You can find our summary of the Court of Appeal decision here: <http://www.andersonlloyd.co.nz/court-of-appeal-clarifies-notional-rebuild-costs/>

Prepared by Anna Davidson