IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007454
[2013] NZHC 2566

BETWEEN	CRYSTAL IMPORTS LIMITED Plaintiff
AND	ALLIANZ NEW ZEALAND LIMITED First Defendant
	HHR CHRISTCHURCH NTL LIMITED Second Defendant

Hearing: 2 September 2013

Appearances: Z G Kennedy and I Rosic for Plaintiff
G S A MacDonald for First Defendant
J B M Smith QC and J L Wass for Second Defendant

Judgment: 2 October 2013

JUDGMENT OF VENNING J

This judgment was delivered by me on 2 October 2013 at 12.15pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Minter Ellison Rudd Watts, Auckland
DLA Phillips Fox, Auckland
Greenwood Roche Chisnall, Wellington
Copy to: J B M Smith QC and J L Wass, Wellington

Introduction

[1] Crystal Imports Limited (Crystal) is the owner of a property in Cathedral Square, Christchurch on which the Warner's Building (as it was popularly known) stood.

[2] The Warner's Building was destroyed by the Canterbury earthquake of 22 February 2011.

[3] Crystal seeks, by way of summary judgment, a declaration that its interest in the Warner's Building is insured by Allianz New Zealand Ltd (Allianz). In the alternative Crystal seeks a declaration that the defendants are estopped from denying that its interest in the Warner's Building is insured.

Background/parties

[4] In 2006 Crystal bought the land at 50-52 Cathedral Square and the Warner's Building, a four storey brick building, located on it. The ground floor of the building contained a bar known as the Warner's Bar. The Warner's Building also had accommodation on its top three floors and on part of the ground floor. (The accommodation area is referred to hereafter as Warner's Hotel to distinguish it from Warner's Bar. The Warner's Building is used to describe the building as a whole including both the accommodation and bar areas.)

[5] Crystal agreed to lease the land and Warner's Hotel to AAPC NZ Pty Ltd (Accor). The lease did not extend to the Warner's Bar which Crystal retained control over. The parties completed an agreement to lease and formal lease. The lease runs for 52 years and is not due to expire until 2059.

[6] Accor then constructed the Novotel Tower (Novotel) on the balance of the land. Following completion of the Novotel, Accor operated the Novotel and the accommodation in Warner's Hotel as an integrated hotel under the Novotel brand. In December 2010 Accor sold the Novotel to HHR Christchurch NTL Limited (Host) and assigned the leasehold title (including its leasehold interest in Warner's Hotel) to Host.

[7] Although the Warner's Building and Novotel were on the same land, the ownership of the two buildings was divided. Accor, and subsequently Host, owned the Novotel while Crystal retained ownership of the Warner's Building subject to Accor's, and subsequently Host's, interest in the Warner's Hotel through its long-term leasehold title. In practical terms, Crystal only retained the outright ownership of Warner's Bar.

[8] Prior to Accor taking possession of Warner's Hotel, Crystal had formerly held insurance cover for the entire Warner's building with NZI. In 2008 Crystal insured the Warner's building for full reinstatement in the sum of $11,890,000.

[9] Accor insured its New Zealand asset portfolio with Allianz. When it took possession of Warner's Hotel under the lease it extended its existing special risk policy with Allianz to cover Warner's Hotel.

[10] In 2008 and 2009 Accor confirmed to Crystal that the Warner's Hotel was covered under Accor's policies for its full value. Crystal's interest as lessor/interested party was noted on these policies. Crystal arranged cover for Warner's Bar only but did not renew its own comprehensive insurance cover over the entire Warner's building.

[11] As with other years, for the period 1 January 2011 to 31 December 2011, Warner's Hotel was insured under Accor's 2011 policy with Allianz (the 2011 policy). The 2011 policy insured the Warner's Hotel for full replacement value. Crystal was noted on the schedule of insured.

[12] Host was also noted as an insured party following its purchase of the Novotel and taking an assignment of the lease in Warner's Hotel from Accor on 18 February 2011.

[13] Host provided Crystal with a certificate issued by Allianz (the 2011 Allianz Certificate) which certified, inter alia, the interests insured included:

> HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited and Crystal Imports Pty Limited.

It also noted the BNZ Bank as an interested party.

[14] On 22 February 2011 a major earthquake struck the Canterbury region. The earthquake caused substantial damage to the Warner's Building. The building was subsequently demolished in October 2011.

[15] In April 2012 Crystal lodged a claim with Allianz for the cost of reinstating the Warner's Hotel, the demolition costs in respect of the building in the amount of $260,000 plus GST, and consequential losses.

[16] Allianz confirmed Crystal was listed in the Schedule of Insureds to the 2011 policy and that cover was available under it for "the property known as the Warner's Building". Allianz subsequently accepted and paid Crystal's claim under the 2011 policy for the demolition costs.

[17] However, Allianz has declined to make any additional payments to Crystal because Host disputes Crystal's right to claim as an insured under the 2011 policy for its losses in respect of the Warner's Hotel.

[18] Host originally sought summary judgment as a defendant against Crystal and summary judgment on its cross-claim against Allianz but has now withdrawn those applications. The only matters for resolution are Crystal's applications for summary judgment on its first and alternative causes of action.

[19] The principal issue is between Crystal and Host. Essentially, they are arguing over entitlement to the limited cover available under the Allianz policy which is insufficient to address both their losses.

Allianz's position

[20] Mr MacDonald confirmed Allianz's position was similar to that of a stakeholder. It will meet its obligations under the policy. However, Allianz considers that on any view of it, it cannot be liable for anything more than the cover provided in the policy limits. For present purposes Allianz adopted Host's

submissions and submitted the application for summary judgment should be dismissed.

The issues

[21] The issues are:

(a) whether Crystal's interest in Warner's Hotel as lessor is insured under the Allianz 2011 policy; and

(b) whether the defendants are estopped from denying Crystal's interest in the Warner's Hotel is insured under the 2011 policy.

Principles

[22] Counsel are agreed that the principles applicable to summary judgment applications are those summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd*.[1] In this case, the plaintiff must satisfy the Court there is no arguable basis for Host's assertion that Crystal's interest in Warner's Hotel is not covered by the Allianz 2011 policy.

[23] Counsel also agreed that the general approach to contractual interpretation as discussed by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* was applicable to the interpretation of the insurance contract in this case.[2] The Court's task is to objectively ascertain the meaning the parties intended their words to bear.

[24] However, Mr Smith QC also submits that where the interpretation depends on an assessment of the factual matrix which cannot be made on a summary basis, summary judgment is not appropriate.[3]

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1 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2008] NZAR 307 at [26].
2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444.
3 *Devereux Howe-Smith Realty Ltd v Piper* HC Auckland CIV-2009-404-3162, 2 December 2009 at [51].

Was Crystal's interest in Warner's Hotel insured under the Allianz 2011 policy?

[25] Although counsel agree the principal issue is whether Crystal's interest as lessor of the Warner's Hotel is insured under the 2011 policy they approached determination of that issue from different points of view.

[26] For Crystal, Mr Kennedy focused on the 2011 policy, the 2011 Allianz certificate and previous brokers' confirmation of cover, which noted Crystal as an interested party.

[27] For his part, Mr Smith referred to the lease documents and correspondence between the parties leading up to the sale and assignment by Accor to Host, which he submitted confirmed that neither Accor nor Host were obliged to insure Crystal's interest in Warner's Hotel and that neither Accor nor Host had ever intended to insure Crystal's interest in Warner's Hotel.

[28] There is force in Mr Smith's submissions that the lease did not oblige the lessee to insure Crystal's interest in Warner's Hotel. The lessee's obligation in relation to insurance is contained in clause 9 of the lease:

> **9. INSURANCES**
>
> 9.1 During the term, the Lessee shall maintain:
>
> (a) full reinstatement insurance for any Lessee's Improvements erected as [sic] the Land from time to time ...

Under that clause, the lessee's obligation was limited to maintain reinstatement insurance over lessee's improvements. The only clause in the lease defining lessee's improvements is clause 8 which provides:

> **8. OWNERSHIP, PURCHASE AND REMOVAL OF LESSEE'S FIXTURES**
>
> 8.1 All improvements (including the Building) which are placed or installed in or on the Land by the Lessee ("**Lessee's Improvements**") shall be the property of the Lessee who shall unless otherwise provided in this Lease be responsible for their maintenance and insurance.

"Building" is defined in the lease as meaning:

(a) the building to be constructed on the Land by the Lessee in accordance with the Agreement; and

(b) the existing building located on the Land at the date of this Lease (excluding the Adjoining Property)[4] ... .

[29] If the definition of building is applied literally, there is an argument that the Warner's Hotel, being part of the existing building on the land at the date of the lease, is to be regarded as a lessee's improvement as referred to in clause 8.1. However, there is a strong contrary argument that Warner's Hotel was not a lessee's improvement. Clearly, Warner's Hotel was not placed or installed in or on the land by the lessee. There is force in Mr Smith's submission that as the words "including the Building" appear after "All improvements" they are intended to modify that phrase. The words do not modify "lessee's improvements" as a defined term, rather they form part of the definition of that term.

[30] Further, if the literal approach was to apply, the clause would effectively transfer Crystal's interest in Warner's Building to the lessee. That cannot have been the intention. If it had that effect Crystal would not have any insurable interest in Warner's Hotel or Warner's Building for that matter. The better interpretation of clause 9 is that the lessee's improvements are those improvements placed or installed on the land by the lessee, which includes buildings constructed on the land by them (the Novotel).

[31] The evidence also appears reasonably clear that Accor, as Host's predecessor in title under the lease, had rejected any obligation to reimburse Crystal for its separate insurance of Crystal's own interest in Warner's Hotel and that Crystal was aware that was Accor's position. After it took possession, Host maintained that position.

[32] The relevant correspondence starts on 14 July 2008 when Crystal invoiced Accor for a portion of the insurance premiums it had paid to NZI, relating to the accommodation area (Warner's Hotel) leased by Accor. Accor declined to pay the invoice. Mr Travers, on behalf of Accor, said in an email to Crystal's solicitors:

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4 "Adjoining Property" in turn is defined as the Warner's Bar.

> We note that your client has sought payment of certain insurances from us. We are not responsible for [Crystal's] insurances for the building. We have taken out our own insurances as required under the Lease. We are required to cover fire protection services which relate to the warrant of fitness – please have your client send through a revised invoice on this basis. See attachments in this regard.

[33] Mr Chamberlain, Crystal's director, replied to the email on 22 August 2008. He restated Crystal's position that Accor was obliged to pay for the insurance but noted that, in the meantime, Crystal would continue to insure the property and to bill Accor for the cost of insurance related to the Warner's Hotel. He concluded by stating:

> Unless paid punctually as directed in the Lease, then the Lease will be in default.

[34] In a further email communication on 27 August 2008 Mr Chamberlain noted the invoices remained unpaid and that as a result "[t]he lease is now in default". Mr Chamberlain sent a further, follow up, email on 25 February 2009. On 5 March 2009 Accor replied, this time through a Mr Marklew. Mr Marklew did not directly engage with the issue of the unpaid premiums issued by Crystal. Rather he advised:

> **Insurance**
>
> I have attached a confirmation of cover of our interest in Warner's – its part of a $581m global policy.
>
> My reading of the lease states we are responsible for:
>
> - reinstatement insurance on the improvements erected on the land
> - public risk cover for a liability up to $15m.
>
> I cannot see where we have further obligations in regard to policy payments.

[35] Accompanying that letter was a confirmation of cover note from Interrisk, Accor's insurance brokers. That noted the insured as:

> Warners Hotel [Accor] as Lessee, ... and all other owners of Accor managed properties and owner operators of franchised properties, including subsidiary or controlled companies now existing or hereafter formed or acquired. ...

While not noting Crystal as an insured, the cover note went on to record under Interested party, "noting Crystal Imports Limited as Lessor".

[36] On 27 February 2010 Mr Marklew forwarded a further email stating "we're not engaging with the issue of the unpaid invoices" and noting:

> I believe we have the insurance covered through our insurers. We have a global deal which covers all our properties. Has anyone given u a certificate of currency for this? [I]f not I will obtain one and forward it to u. I will also check the fire inspections & reporting requirements & find out if they are being complied with. ...

[37] Mr Chamberlain considered that, following his discussion with Mr Marklew, Crystal's interest as lessor of Warner's Hotel was sufficiently covered. Some further correspondence then passed between Mr Chamberlain and Mr Marklew on the issue of whether Accor could include cover for the Warner's Bar on the Allianz policy. Ultimately that proposal was not pursued and Crystal maintained its own insurance for Warner's Bar.

[38] Mr Smith referred to further communications between the parties which, he submitted, confirmed Crystal had its own cover for Warner's Hotel. He referred to an email sent by the Interrisk brokers on 16 February 2010. In the letter the broker refers to a discussion with Mr Chamberlain. It records Mr Chamberlain:

> advised that he was covering his part of the building and that ACCOR, (as per the lease) are covering their part. I advised that this was not a good situation to have two insurers on the same overall property and I gave him a number of examples of how this can be very messy in the event of a claim, particularly if one insurer has a different stance in regards to settlement and/or treatment of the claim to that of another insurer. ...

[39] The reference to separate parts of the building is ambiguous. Mr Chamberlain's reference to "his part of the building" could readily be understood as a reference to Warner's Bar, as opposed to a distinction between the respective interests of Crystal and Accor in Warner's Hotel. When read as a whole the letter is not clear. Mr Oh's response to the broker on behalf of Accor is equally ambiguous:

> Happy for us to cover the entire building and I agree [Crystal] are not going to cancel their insurance. I would rather be safe than sorry.

[40] Perhaps of most significance in relation to this issue is the correspondence that passed between the parties when Accor sold and assigned its leasehold interest in the land and Warner's Hotel to Host. At that time, as a condition of Crystal's

consent to the assignment, Mr Chamberlain sought to take the opportunity to clarify the insurance issue by asking that a new clause be included recording that the lessee shall maintain:

> (b) full reinstatement insurance for the Existing Hotel (meaning the hotel currently situated on the Land (but excluding the bar area comprising part of the ground floor of the Existing Hotel), which hotel is known as Warners Historic Hotel); ...

[41] Accor would not agree. Further correspondence ensued between the parties. The parties reverted to their pre-existing positions. Crystal's solicitors took the view the existing lease covered the position in any event. Accor did not accept that. Mr Travers stated:

> ... I am happy that the Lease be left as is. As to what constitute Lessee's Improvements is a matter for interpretation which can be decided as necessary at a later date.

[42] Then, immediately before settlement of the assignment on 8 February 2011, Crystal's solicitors wrote to Accor advising that Crystal was not able to consent to the assignment because of the dispute over whether Accor was responsible for insuring Warner's Hotel. They said Crystal required certainty over the interpretation.

[43] Mr Travers then restated Accor's position that Crystal's interpretation of the lease was flawed and went on to say:

> Notwithstanding this, the Lessee has insured the Warner's Building since the date possession was provided under the Lease.
>
> The refusal to enter into the documentation without the insurance claim made by the Lessor being paid by the Lessee constitutes an unreasonable refusal by the Lessor to consent to the assignment and is placing transactions involving approximately $190 million at risk of not occurring ...

[44] In light of that response Crystal's solicitors again confirmed their instructions were that Crystal would leave the insurance issues to the side. Crystal confirmed its approval of the assignment.

[45] Drawing that exchange of correspondence together the position is as follows. Both Crystal and Accor acknowledged the ambiguity in the existing lease as to whether Accor was obliged to maintain insurance for Crystal's interest in Warner's

Hotel. They took differing views as to Accor's obligations under the lease regarding Crystal's interest. Accor flatly refused to pay insurance premium invoices submitted by Crystal to it. However Accor insured Warner's Hotel. In doing so, Accor and/or its brokers had, at times, noted Crystal as an interested party and communicated that to Crystal.

[46] Mr Kennedy accepted that the lease was ambiguous as to whether or not the lessee was obliged to pay for insurance on Warner's Hotel but submitted that was not the issue in the present case. The issue was whether, as a matter of fact, Crystal's interest in the Warner's Hotel was insured by Allianz.

[47] Mr Kennedy also submitted that the evidence of Messrs Travers and Bullard's (Host's general counsel) statements as to Host's intention was strictly inadmissible. It could not assist with the interpretation of the insurance policy itself.

[48] I accept that submission. The position is, as Tipping J noted in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[5]

> It is necessary, however, to distinguish between the subjective content of negotiations; that is, how the parties were thinking, their individual intentions and the stance they were taking at different stages of the negotiating process, on the one hand, and, on the other, evidence derived from the negotiations which shows objectively the meaning the parties intended their words to convey. ...
>
> There is no problem with objective evidence directed to the context, factual or linguistic, in which the negotiations were taking place. That kind of evidence can properly inform an objective approach to meaning. Whereas evidence of the subjective content of negotiations is inadmissible on account of its irrelevance, evidence of facts, circumstances and conduct attending the negotiations is admissible if it is capable of shedding objective light on meaning.

[49] While the evidence of the negotiations and correspondence between Accor and Crystal is relevant when seeking to interpret the 2011 policy and the 2011 Allianz certificate in issue, it still begs the question of whether, as a matter of fact, Crystal's interest was insured.

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5 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 2, at [27], [29].

[50] Against that rather lengthy background I turn to what, in my judgment, is the principal issue, construction of the 2011 policy and the 2011 Allianz Certificate.

[51] The composite 2011 policy issued by Allianz confirmed insurance for Accor's and a number of its related entities' interests in a number of hotels and lodges throughout New Zealand. The policy confirmed cover for both the Novotel and Warner's Hotel. The policy went on to record as insured:

> Including owners of managed properties, owner operators of franchised properties, body corporates and/or subsidiary or controlled companies (where applicable) now or previously existing or hereafter formed or acquired.
>
> Including mortgagees, lessees and other interested parties for their respective rights and interests.
>
> **As more fully described in the schedule titled *APPENDIX 1* attaching to and forming part of the policy**.

[52] The Schedule of Insured's in Appendix 1 then included as follows:

Hotel	Owner/Lessee	Operator/ Operational Lessee	Head Lessee	Financiers
Novotel Christchurch Cathedral Square Warners Hotel	HHR Christchurch NTL Limited			HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited, Crystal Imports Pty Limited, BNZ Bank as mortgagee

[53] The schedule and some certificates refer to Crystal Imports Pty Ltd rather than Crystal. Mr Smith conceded there was little merit in the defendants taking that point. He accepted it appeared to be a mistake by the Australian lawyer or broker intending to refer to the corporate entity Crystal. For present purposes I accept that the reference to Crystal Imports Pty Ltd is a reference to Crystal.

[54] Despite the reference to Crystal in the Schedule of Insureds, Mr Smith argued that Crystal was not a named co-insured in respect of its interests as lessor and owner of Warner's Hotel under the 2011 policy. He submitted that the only insured named in the schedule as owner in respect of the Novotel and Warner's Hotel was the Host Group and that, to the extent the schedule referred to Crystal and the BNZ Bank, the

policy did no more than note their interest which did not have the effect of making them co-insureds under the policy. He submitted that it did nothing more than record the existence of an interest.[6]

[55] Mr Smith referred to the operative clause of the policy which provides that:

> WHEREAS the Insured named in the Schedule has paid or agreed to pay to the Insurer ... the premium, the Insurer agrees, ... to indemnify the Insured as specified herein against loss ...

and suggested that it was only the premium paying insured that has cover under the policy. I am unable to accept that submission, which would read down the definition of insured. Any one of the parties identified as the insured could pay the premium (indeed any one or more could contribute to payment of the premium). The reference in the first part of that clause to the insured is to be construed as requiring nothing more than that one or more of the insured has either paid or agreed to pay the premium. For example, although the premium may have been paid by a member of the Accor Group it is not suggested by the defendants that Host is not covered by the policy. The important point is that the clause then confirms that in exchange, the insurer agrees to indemnify the insured "as specified herein".

[56] I return to Mr Smith's argument that the legal protection given by noting is illusory. If ordinary agency requirements for co-insurance are not satisfied the fact that a person's interest has been noted on a policy does not make that person a party to the insurance nor does it confer any right to rely on a policy term for his or her benefit.[7] However, in *First National Commercial Bank Plc v Barnet Devanney (Harrow) Ltd*,[8] the principal issue was whether the brokers were negligent in failing to include a mortgage protection or non-invalidation clause. To the extent it was relevant, Gage J confirmed that the policy was a composite policy rather than a joint policy, adopting the reasoning of the Court of Appeal in *General Accident, Fire and Life Assurance Corp Ltd v Midland Bank Ltd*.[9]

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6 Raoul Colinvaux, Robert Merkin and Judith P Summer *Colinvaux's Law of Insurance* (9th ed, Sweet & Maxwell, London 2010) at [14–006], [14–010]; and *Eurocrest Ventures Ltd v Zurich Insurance Plc* HC ChD Claim No. HC1104182, 25 April 2012 at 7.

7 *Colinvaux's Law of Insurance*, above n 6, at [14–010].

8 *First National Commercial Bank Plc v Barnet Devanney (Harrow) Ltd* [1999] Lloyd's Rep IR 43.

9 *General Accident, Fire and Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 KB 388.

[57] Mr Smith also referred to *Eurocrest Ventures Ltd v Zurich Insurance* where the Court stated:[10]

> ... the noting of an interest means no more than recording its existence. Its practical significance is to place the insurer on notice that the beneficial owner of the proceeds of any claim made by the Insured may be other than the Insured ... because of their interests in the property being insured. It does not give rise to an additional and separate insurance of the lease or mortgage interest as such.

[58] However, the answer is that, in this case, Crystal is more than noted as an interested party. It is recorded in the policy issued by Allianz as an insured for its respective rights and interests. In *Eurocrest* the applicant, Eurocrest, sought a declaration the insurer was obliged to indemnify it because an insurance certificate provided for its interests to be noted. However, importantly, it was not referred to as an insured either in the policy or on the certificate. The case is readily distinguishable from the present.

[59] Mr Kennedy submitted that Crystal was covered by the introductory words of the second part of the definition of insured "... owners of managed properties" as Crystal remained the owner of Warner's Hotel, which was managed by Accor. Mr Smith submitted that was a reference to the owner of the property as noted in the second schedule. The only party noted in the second schedule as owner was Host. However, while Host was the owner of the Novotel and lessee of Warner's Hotel it was not the owner of Warner's Hotel itself.

[60] Whether Crystal's interest as owner of the managed property was covered under the policy is not dependent upon Crystal being recorded as owner in the schedule. Crystal was the owner of Warner's Hotel. The issue is whether Warner's Hotel fits the definition of a "managed property". It is common ground that Warner's Hotel was operated by Accor, even after the sale and assignment to Host. On its face, the inclusion of "... owners of managed properties" as insured means Crystal, as owner of Warner's Hotel, was insured to the extent of its interest. Crystal could, and perhaps should have been recorded in the schedule as owner of Warner's Hotel. The fact it was not does not affect its status as owner of a managed property.

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[10] *Eurocrest Ventures Ltd v Zurich Insurance Plc*, above n 6, at [7].

[61] Even if the phrase "owners of managed properties" could somehow be read down to only include Accor's interest as an owner of managed properties, the second part of the definition of insured goes on to include mortgagees, lessees, and other interested parties for their respective rights and interests. Clearly Crystal was an interested party to the extent of its interest as lessor of Warner's Hotel.

[62] Mr Smith then submitted it was significant that Crystal was referred to as a financier in the schedule. He submitted that BNZ's interest was also recorded as an insured, but its interest as mortgagee could not make it a co-insured under the policy. The basis of settlement under the policy was replacement value which was inconsistent with mortgage insurance. The insured events had nothing to do with mortgagor's default. Mr Smith submitted that showed that not every entity recorded in the schedule could be regarded as an insured under the policy. However, that overlooks the important qualifier that each of "the insured" under this part of the definition are insured "for their respective rights and interests".

[63] I consider that, on the wording of the Allianz 2011 policy, Crystal is an insured. First, on the plain meaning it is an owner of one of the managed properties, namely Warner's Hotel. But even if that phrase is able to be read down to exclude Crystal's interest as the owner of the leasehold interest, Crystal comes within the definition of insured as "including mortgagees, lessees and other interested parties for their respective rights and interests as more fully described in the schedule ...".

[64] The phrase, "their respective rights and interests" is a phrase regularly used in insurance policies. In *General Accident, Fire and Life Assurance Corp Ltd v Midland Bank Ltd*, the Court of Appeal held that in its natural sense the phrase indicated a number of insured parties were simply combining their interests under one policy for convenience.[11] The phrase indicates an intention that the identified insured have combined in one policy for cover from the insurer in respect of their right or interest, whatever it may be. It is to be given a construction which will fit in with the essential nature of the contract which is being undertaken.[12]

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11 *General Accident, Fire and Life Assurance Corp Ltd v Midland Bank Ltd*, above n 9.
12 At 407–408.

[65] The reference in the clause to "as more fully described in the schedule" is best interpreted as a reference to the description of the interests rather than a requirement the insured be expressly referred to. The schedule attempts to provide categories of rights and interests. I do not consider the fact Crystal is, (incorrectly), referred to in the financier's column to be of any moment. It clearly is not a financier (nor for that matter, was Host). The only relevant interest Crystal had was as owner and lessor of Warner's Hotel. It had an insurable interest in that capacity. It was an insured under the 2011 policy.

[66] In reliance on *Colinvaux's Law of Insurance* at [14–006] that:

> The mere fact that a policy states that it covers the interest of both the assured and named or identifiable third parties does not of itself give those third parties the right to enforce the contract or to rely upon its terms.

Mr Smith submitted that the naming of Crystal in the policy did not give it any right to enforce the contract of insurance. However, importantly, as noted this was a composite policy. A composite policy such as the present effectively creates a bundle of separate contracts between the insurer and the insured.[13] The authors of *Colinvaux's Law of Insurance* go on to note third party rights can arise in one of three ways:

- first, as a result of the operation or rules of agency.

- secondly, as a beneficiary – the third party may be the beneficiary of a trust or a promise; and

- thirdly, the third party may be able to rely on the Contracts (Privity) Act 1982.

[67] Mr Smith submitted that none of these three situations applied in the present case. There was no agency and no declaration of trust. He noted that the plaintiff did not plead the Contract's Privity Act. But this was a composite policy arranged by Accor which provided cover for the insured identified in it, to the extent of their different interests. Accor (and Host) had authority to arrange insurance for Warner's

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[13] *McAleenan v AIG (Europe) Ltd* [2010] IEHC 128 at [80].

Hotel. It is clear enough that Crystal wanted its interest covered. It is a question of interpretation whether the policy actually insured Crystal's interests.

[68] After the hearing Mr Smith filed a memorandum drawing the Court's attention to the provision in the insurance policy to the effect that the policy was an English translation of the Master Policy issued in Paris – and that in the event of any dispute as to the meaning of any term, the equivalent French term will prevail. The answer to that submission is that there is no dispute over the standard terms in the contract. The issue of interpretation only arises because of the way the schedule referred to Crystal.

[69] In my judgment it is clear that the 2011 policy, the primary contractual document, records Crystal as an insured to the extent of its respective rights and interests. Importantly, it identifies the property which Crystal claims an interest in, Warner's Hotel, as part of the insured property. Crystal had an insurable interest as owner and lessor of Warner's Hotel. Prima facie Crystal is entitled to the declaration it seeks that its interests as owner/lessee of Warner's Hotel are covered by the 2011 policy.

[70] It is unnecessary for me to consider the other arguments raised by Mr Kennedy on this principle in any detail. He submitted that commercial common sense supported the plaintiff's interpretation of the insurance policy. Why would Crystal not make sure its interest in Warner's Hotel was insured? In response Mr Smith referred to the evidence of Mr Dunckley, a valuer, that the value of Crystal's residual leasehold interest was limited to approximately $500,000, to support a submission that the interest was limited in value. I do not consider the commercial common sense argument to be compelling either way. It does not assist the interpretation of the effect of the policy.

[71] On the face of the policy there is no reason to read down the cover that Crystal is entitled to as an insured. The issue of quantification of its insured interest and apportionment between it and Host of the limited cover is for another day. However for present purposes, I am satisfied that Crystal was an insured under the 2011 policy to the extent of its rights and interests in the Warner's Hotel.

Insurance certificate

[72] Crystal also relies on the 2011 Allianz certificate sent by Host's Australian lawyers to Crystal's solicitors confirming the insurance certificates for the Accor Group. The certificate recorded the interests insured as HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited (Host) and Crystal Imports Pty Limited (Crystal).

[73] The certificate was provided in response to a request from Crystal's solicitors of the Australian solicitors for Host. The certificate refers to Novotel, Christchurch, 50 Cathedral Square, Christchurch, but it is apparent from the preceding communications between the parties that when referring to Novotel they were referring to both Novotel and Warner's Hotel as they were on the same site.

[74] Mr Kennedy submitted it would have been apparent to Host that Crystal would rely on the 2011 Allianz certificate as evidence of its interest in Warner's Hotel as being noted and that continued after Host's assignment was settled. Allianz initially accepted Crystal's interest was covered. As noted Allianz accepted and paid Crystal's claim under the 2011 policy for the cost of demolition of the Warner's Building.

[75] Mr Kennedy also relied on *Outlook Credit Union Co-operative Limited v Commercial Union Assurance Co Ltd*.[14] In that case the Judge accepted a submission that a Certificate of Currency was documentary evidence of a contract of insurance on the terms of the policy referred to in the certificate:

> Whether or not, therefore, it is technically correct to regard the certificate of currency as a "policy", it is plainly evidence of and incorporates the terms of a contract of insurance.

[76] Mr Smith submitted that the 2011 Allianz certificate did not establish Crystal's interest was insured. He submitted *Outlook Credit Union Co-operative Ltd* could be distinguished and confined to its facts. He submitted it did not support a general proposition that a certificate can prevail over the terms of policy. I agree

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[14] *Outlook Credit Union Co-operative Limited v Commercial Union Assurance Co Ltd* (1988) 5 ANZ Insurance Cases 60–842 (QSC).

with that latter point but the certificate in this case is consistent with the policy which identifies Crystal as an insured party. The position might be different if Crystal was not also identified as an insured party under the policy, but it is. To the extent the certificate repeats the reference to Crystal it is consistent with the policy.

[77] Mr Smith also submitted that the better approach was to be found in the case of *Recreational Services Ltd v QBE Insurance International Ltd* a decision of Randerson J.[15] But in that case there was a conflict between the terms of the certificates and the terms of the policy. Randerson J noted that the certificates clearly stated the indemnity was subject to the terms of the policy, inter alia, so that he was not persuaded the issue of the certificates had any bearing on the true construction of the policy itself.[16] That is quite a different position to the certificate in this case. There is no such relevant conflict.

[78] For the foregoing reasons I consider that the issue of the 2011 Allianz certificate, particularly in the circumstances that it was issued, is also supportive of the plaintiff's position that its interest in Warner's Hotel was insured at the material time. The earlier 2010 policy referred to by Host is not relevant.

[79] Mr Smith raised a number of further points. He noted the suggestion in Mr Travers' affidavit that the agreement to lease was open to the interpretation that Accor actually purchased the Warner's Hotel from Crystal in 2006. However, to the extent the lease could be said to be ambiguous that was clarified by an amendment to the agreement to lease on 9 February 2011. It cannot be disputed that Crystal owned the Warner's Building, including the Warner's Hotel from the outset. The only building that Accor owned was the Novotel. Accor's interest in Warner's Hotel was as lessee of the Hotel and as ground lessee of the land on which it stood.

[80] Host also relies on the two insurance certificates issued by the broker Interrisk, dated 21 January 2011 and 28 January 2011. There is force in Mr Kennedy's submission that those certificates appear to only relate to the Novotel. It is for that reason that they contain no reference to Crystal given that it did not have

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15 *Recreational Services Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2004-404-7111, 14 September 2005.

16 At [26].

any interest in the Novotel building. Unlike the 2011 Allianz certificate they were not part of any communication between the parties' solicitors. Further, on Mr Chamberlain's undisputed evidence neither of these certificates was provided to Crystal. Crystal was not aware of them. They are to be contrasted with the 2011 certificate dated 11 February 2011 provided by Allianz through Host to Crystal and also the further confirmation of cover issued by Interrisk on 14 February 2011 which refers to Crystal as an insured.

[81] I conclude that the Crystal's interest as lessor of Warner's Hotel was covered under the 2011 policy issued by Allianz.

Estoppel

[82] In the event I am wrong I turn to consider Crystal's alternative argument, that the defendants are estopped from denying that its interest in Warner's Hotel is insured.

[83] In the present case Crystal must show that:

(a) the defendants have created a belief or expectation through some action or representation that Crystal's interest in Warner's Hotel was insured;

(b) Crystal's belief or expectation was reasonably relied on by it;

(c) Crystal would suffer detriment if the belief or expectation was departed from; and

(d) it would be unconscionable for the defendants to be allowed to depart from that belief or expectation.[17]

[84] Crystal argues that the certificates of confirmation of cover in 2008 and 2009 taken with the 2011 Allianz certificate represented to Crystal that its interest in

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[17] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.2].

Warner's Hotel was insured under the 2011 policy. Crystal relied on the representation to its detriment by not insuring Warner's Hotel. Next, Ms Rosic submitted that both defendants, Host and Allianz, must have known that Crystal would rely on the representations contained in the 2011 Allianz certificate. The representation was made in circumstances where Crystal was seeking reassurance that insurance cover over Warner's Hotel would continue during the assignment of Accor's interests to Host.

[85] Mr Wass submitted that the estoppel argument must fail. Logically, as an alternative argument, it must proceed on the basis that the Court had rejected Crystal's argument as to the interpretation of the policy and the Allianz certificate. Therefore, he submitted, if Crystal's interpretation of the policy was wrong Crystal must accept it was wrong to rely on the certificate because whatever the certificate suggested, when read in isolation, it could not reflect coverage under the underlying policy.

[86] I accept that, if the alleged representation was based on the interpretation of the provisions of the policy itself, and that was resolved against Crystal, then an estoppel argument based on the policy could not succeed. However, the estoppel argument is based on the 2011 Allianz certificate, and the circumstances in which it was issued, not the policy wording. The issue is whether the circumstances of the provision of the 2011 Allianz certificate create the estoppel, not the correct interpretation of the policy.

[87] The background to the provision of the Allianz certificate of currency of insurance is important. Leading up to the settlement of the assignment Crystal's solicitors wrote to Host's solicitors asking for "a copy of the insurance Host will put in place for the Novotel and Ibis Hotels" noting:

> My client will be keen to see that there is a seamless transition during the assignment so that the properties are not uninsured at any time.

[88] In response to that inquiry on 10 February, Mr Greiner, Host's Australian solicitor, then sought confirmation from Host. Mr Nappely, the vice-president of Host confirmed it was continuing all coverage currently provided through Accor. By

copying in Messrs Fair and Cass of Interrisk Australia, insurance brokers for Accor, to that email, he asked them to provide whatever information was needed.

[89] In response Mr Cass asked Mr Fair to issue property certificates directing him to:

> ... make sure we have Crystal Imports Pty as a named insured as they are part owners of the Hadley's pub that forms part of the Novotel Christchurch which we have as part of the overall placement.

[90] Mr Smith made the point that Mr Cass was wrong on a number of regards in that communication. As noted, Crystal was incorrectly identified as an Australian company, and Warner's Bar was not known as Hadley's pub. However that instruction led on to Ms Girvin of FMR Risk, Accor's New Zealand broker, to request a certificate of insurance for the Ibis Christchurch and Novotel Christchurch from Allianz. She noted that the insured name was to be as follows:

> Accor Group and all other related subsidiaries, including HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited, Crystal Imports Pty.

Interestingly, the BNZ was to be recorded as an interested party (as opposed to an insured).

[91] That then led to the issue of the 2011 Allianz certificate, which was sent to Mr Greiner and in turn forwarded by him to Crystal's solicitors. Importantly, neither Crystal nor its solicitors were privy to the communications between Host's Australian solicitors and the brokers.

[92] Mr Wass submitted that Allianz's issue of the certificate and Host passing it on to Crystal could not constitute a representation by Allianz to Crystal. But from Crystal's (and its solicitors') point of view, in response to an inquiry as to the state of insurance of the Warner's Building, particularly the Warner's Hotel, Host through its agents, the brokers, obtained a certificate of currency from Allianz, which on its face confirmed that Crystal was an insured party. Allianz should have been aware it would, or could be passed on to Crystal as a named insured. The inquiry by the solicitors was in the context of ensuring that insurance cover of relevant interests continued. The certificate went further than simply confirming the currency of the

insurance, it identified Crystal as an insured. In those circumstances it was reasonable for Crystal to rely on the certificate of currency provided in response to its inquiry. The 2011 Allianz certificate was a representation on behalf of both Allianz and Host that Crystal's interest as an insured was noted. Allianz issued the certificate and Host provided it. The 2011 Allianz certificate was also consistent with the 2008 and 2009 certificates noting Crystal's interest.

[93] Mr Wass suggested that Crystal did not rely on the 2011 Allianz certificate. He referred to the communication from Mr Chamberlain on 19 August 2011 (some six months after the earthquake) in which he stated:

> As you will know the insurance is messy from the point that I have partial cover over the Building's ground floor, and your Client has cover over the three upper floors operating as the Hotel. ... Before I can contemplate a replacement Building I will need to know what existing cover your Client has in place for the Owner's benefit. My cover allows only for replacement of a ground level Building on the site which will be limited to retail outlets.

Mr Wass submitted that this showed Crystal had not relied on the Allianz certificate. However, as I read that Mr Chamberlain was simply confirming, as was the case, that the insurance Crystal held covered the ground floor only and that he was seeking to clarify the effect of the cover that Host held over the Warner's Hotel in relation to Crystal's benefit as owner. That is the reason for the reference to the query about the insurance in place for the owner's benefit. Mr Chamberlain was interested in the extent of cover with a view to replacing the Warner's building as a whole.

[94] There can be no issue that Crystal would suffer loss or detriment if Host and Allianz were permitted to depart from the representation and deny or exclude Crystal from insurance cover for Warner's Hotel.

[95] Finally, it would be unconscionable to allow Host and Allianz to depart from the representation Crystal's interest in Warner's Hotel was insured, given that Crystal did not arrange its own insurance and the Warner's Building has been destroyed.

[96] For those reasons I conclude that if the policy was to be interpreted against Crystal so that it was unable to rely on it then, in any event, the defendants would be estopped from denying that as at the time of the earthquake Crystal's interest in

Warner's Hotel was insured by and under the 2011 policy. Again, the value of that insurable interest, the effect it may have on Host's insurable interest and, if necessary, the apportionment of the limited insurance proceeds between the parties must be for another day.

Result/judgment

[97] Crystal is entitled to the declaration sought. There will be an order that Crystal's interest as lessor and owner of Warner's Hotel is insured under the 2011 policy issued by Allianz.

Costs

[98] Crystal is to have costs on a 2B basis together with disbursements as fixed by the Registrar. I allow for second counsel.

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Venning J