**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**ŌTAUTAHI ROHE**

**CIV-2017-409-18**
**[2017] NZHC 2997**

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| BETWEEN | HAMISH PAUL DOIG AND KAREN RACHAEL DOIG<br>Plaintiffs |
| AND | TOWER INSURANCE LIMITED<br>Defendant |

Hearing: 20 and 21 November 2017

Appearances: S Rennie and R Harris for the Plaintiffs
I Thain and L Hui for the Defendant

Judgment: 5 December 2017

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**JUDGMENT OF MANDER J**

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[1] In September 2012, the plaintiffs, Mr and Mrs Doig agreed to purchase a residential property that had been damaged in the Canterbury earthquakes. The vendors were insured under a policy held with the defendant, Tower Insurance Limited (Tower). They had made claims for earthquake damage that remained unresolved as at the date of the sale of the property. The vendors agreed to assign their insurance claims to the Doigs.

[2] The Doigs made inquiries with Tower regarding the vendors' insurance policy which provided for full replacement cover. After receiving Tower's response, the Doigs confirmed the agreement to purchase the property. It is the Doigs' case they did so in reliance on the content of two emails from Tower which led them to believe that as assignees of the vendors' insurance claims they would be entitled to full replacement of the house in the event it could not be economically repaired.

[3] The house was determined to be in need of a rebuild. However, Tower disputed the Doigs had a legal right to require Tower to pay the full cost of replacing the house. Tower maintains the assignment of the vendors' insurance claims only entitled the Doigs to the indemnity value of the property. The Doigs say Tower is estopped from denying full replacement cover to them because of the representations it made and upon which they relied before confirming the purchase of the property.

**Background**

[4] The facts are not materially in dispute. Mr Doig saw an advertisement for the sale of the property which read that it was "... the vendors' firm intention to pass the baton in allowing new purchasers to pursue and profit from a potential rebuild (Tower Insurance)". The advertisement further stated:

> ... EQ damage will not affect your enjoyment now, vendors walking away and willing to let forward thinking purchasers reap the rewards and benefits of a full replacement potential rebuild. ...

[5] The Doigs entered into a conditional agreement with the vendors on 22 September to purchase the property for $1,155,000. The agreement was subject to a number of terms and conditions which included the following:

> This agreement is conditional on the purchaser being able to arrange building and household contents insurance for the property on terms satisfactory to the purchaser within 40 working days of the date of this agreement. This clause is inserted for the sole benefit of the purchaser.
>
> This agreement is conditional upon the purchaser obtaining a report or reports (including if necessary a geotechnical report) from a building inspector and/or engineer or other suitably qualified person or persons as to the structural integrity and stability of the property, including the land, that is satisfactory to the purchaser (and in particular is satisfactory to any potential insurer of the property) with (sic) 40 working days of this agreement.
>
> The vendor has lodged a claim with EQC and/or its insurer with respect to damage to the property following the recent earthquakes, and will assign the claim to the purchaser on settlement. If the claim is settled by EQC and/or its insurer prior to the settlement date, the vendor shall:
>
> a. Provide the purchaser with all documentation in relation to the claim and the settlement of the claim; and
>
> b. At settlement will credit the purchaser with the amount received from the claim.

> The vendor will assign any claim(s) made to EQC or its insurer by the vendor relating to damage to the property from earthquakes or aftershocks, including 4 September 2010 and after, to the purchaser at settlement. ...
>
> ... The vendor will forthwith provide details of all insurance policies held in respect of the property and will keep such policies current pending settlement.

[6] After entering into the sale and purchase agreement, but before settlement of the purchase, the Doigs' solicitors made inquiries of Tower. It is necessary to set out these emails in full. On 2 October, the Doigs' solicitors made the following inquiry:

> We act for the prospective purchaser of the above property. We have been advised that although Stream will deal with the actual completion of the work required under the claims, our queries in relation to any new insurance to be taken by our client and how these claims will be dealt with, is something you would deal with.
>
> There are three claims lodged with Tower, as recorded above. All three claims have been lodged in relation to the driveway, fences, pool and paths.
>
> On behalf of our client, could you please advise as follows:
>
> 1. If for any reason the EQC repairs to be completed on the actual dwelling, end up over cap, does Tower automatically pick up the claim or should a claim be lodged now by the vendor, to cover this scenario. We understand that presently, EQC are saying that the repair work will be covered under the three EQC claims which have been lodged.
>
> 2. If the above scenario were to occur, would Tower cover the damage under its existing full replacement cover, i.e. any repair work required over and above the EQC caps would be covered fully by Tower as per the current full replacement policy held by the vendor.
>
> 3. With regard to the three existing Tower insurance claims:
>
>    a. Does Tower agree to the three claims being assigned to our client (providing the purchase is confirmed).
>
>    b. Upon assignment of the claims, will Tower agree to complete all required work under the claims on 'full replacement terms' as per the terms of the current policy with the vendors.
>
> Your assistance in relation to our above queries would be greatly appreciated.

A claim handler employed by Tower responded as follows:

> I am the claim handler for TOWER dealing with the earthquake claims at above mentioned (sic) property for the current owners, (Mr J C & Mrs V T Bradbury). I can discuss generic claim process with you, but until we receive a deed of assignment which confirms the current owners have agreed

> to pass open claims over to the new owners, I am unable to confirm any specifics with you. At current, we have not received any indication from our client that they are happy for us to disclose information about their claims, so until we have their authority, I cannot do so. Furthermore, any questions concerning the transfer of policy need to be discussed with our sales team – this is not my department, but they can be contacted on 0800 808 808 if you would like to discuss the transferring of the policy from the current owners to the new.
>
> I can confirm that if the EQC repairs are deemed over cap, it is TOWER's liability to repair the dwelling. The new owners would not be required to lodge an additional claim as the damages to the property were incurred under the previous owners policy and these claims will remain open until the damages in relation to those earthquake events are rectified. This is why we require a deed of assignment which confirms that the old owners agree to sign any right to the open claims over to the new. All settlement will be based on the previous owners policy including their policy cover and excess.
>
> As stated above, I cannot agree to the claims being transferred to your client until we receive a deed of assignment. However, supposing we do receive the deed of assignment, all settlement is based on the previous owners policy details as this is the policy which was in place at the time of the earthquakes. If there is another earthquake event, those damages would be lodged under the new owners policy and progressed according to their policy type.
>
> I hope you find this information useful. If the current owners give me their authority to discuss the specifics of the open claims in more detail, I will be happy to do so.

Later that afternoon, the Doigs' solicitors sent a further email which attached authorisation from the vendors to release information to their client. The following day, Tower replied:

> That authorisation is fine.
>
> At this stage the open claims for 8a Beachville Rd have fallen below the EQC cap totals across the three events. As such, TOWER's liability is for the hard landscaping only. The property is located in the TC3 landzone, meaning that the land requires testing to ensure reinforced foundations are not needed. The land testing is the responsibility of the EQC and they are scheduled to have all land reports available by November 2012. If, as you suggested, it is discovered that the cost to repair the house is more than initially thought as a result of the verdict on the land, then TOWER will regain responsibility of the repair if the caps are breached.
>
> Until that point we will be assessing the damages to the hard landscaping and settling claims based on the current owners policy. The current owner's policy is a full replacement policy with an excess of $250 which is applicable for each claim lodged. Once a deed of assignment is received, any settlement decisions will be negotiated with the new owners.
>
> If you have any further questions let me know.

[7] Both emails were provided to the Doigs by their solictors. Mr Doig believed that following assignment of the claims Tower would continue the replacement cover under the existing policy for the damage caused by the earthquakes. On 20 November, he instructed his solicitors to confirm the sale and purchase agreement. On 1 March 2013, settlement was completed, at which time the vendors provided a deed of assignment in accordance with the terms of the purchase agreement. The Doigs took out new insurance with Tower under a separate full replacement policy for a rental property. Since its acquisition, the Doigs have let the property and also occupied it themselves.

[8] In December 2013, Mr Doig became concerned that Tower would not provide full replacement cover for the assigned claims. There then followed extended correspondence regarding the scope of the necessary remediation of the property. This included the provision of a number of professional reports to the Earthquake Commission (EQC) and Tower. In March 2014, Tower advised that EQC had assessed the damage to the property as being under the statutory cap and that unless revised, Tower had no liability other than for hard landscaping works. Tower also advised that because the Doigs were the assignee of the vendors' claims, Tower's liability was limited to the pre-loss indemnity value of the house and not the cost to replace or rebuild.

[9] In July 2016, EQC advised that it accepted the cost to repair the house was over the statutory cap. On 21 October, Tower acknowledged that on the recommendation of a structural engineer it was not possible to economically repair the damaged house, and that it would have to be demolished and rebuilt. Tower also confirmed its position that because the Doigs' was an assigned claim, cover would be provided on an indemnity basis only. Based upon a pre-loss market indemnity value immediately prior to the first earthquake in September 2010 together with additional site improvements, Tower proposed a cash settlement of $775,500 less payments already made to the Doigs by EQC ($191,659.50) and the excess attaching to the policy ($750). The Doigs rejected the proposed settlement.

**The insurance policy and the assignment of claims**

[10] The vendors' insurance was for full replacement cover. The policy provided as follows:

> **How we will settle your claim**
>
> We will arrange for the repair, replacement or payment for the loss, once your claim has been accepted.
>
> We will pay either:
>
> - Full replacement value or
> - Present day value
>
> as shown in the certificate of insurance.
>
> ...
>
> In all cases:
>
> ...
>
> - We have the option whether to make payment, rebuild, replace or repair your house;
>
> ...
>
> **We are not bound to:**
>
> - Pay more than the **present day value** if **you** have **full replacement value** until the cost of replacement or repair is actually incurred. If **you** choose not to rebuild or repair **your house** we will only pay the **present day value**.

The following terms were defined in the policy:

> **"Present day value"** means the cost at the time of the loss or damage of rebuilding, replacing or repairing **your house** to a condition no better than new and up to the same area as shown in the **certificate of insurance**, plus any decks, undeveloped basements, carports and detached domestic outbuildings, less an appropriate allowance for depreciation and deferred maintenance, but limited to the market value of the property less the value of the land as an unoccupied site.
>
> **"You"** or **"your"** means the person(s) named in the **certificate of insurance** as the insured, **your** spouse, and **your** children normally residing at the **situation. You** or **your** does not include a de facto partner, or family members such as parents and grandparents or brothers and sisters unless they are named in the **certificate of insurance**. Where **you** jointly own the **house** this policy insures **you** jointly.

The vendors were named in the certificate of insurance as the insured.

[11] The ordinary legal effect of the assignment by a vendor of extant claims made under this type of insurance policy is not in dispute. In *Bryant v Primary Industries Insurance Co Ltd*, the Court of Appeal held that a contract of insurance is one of indemnity for the particular insured who is entitled to no more than his or her actual loss (the principle of personal indemnity).[1] An assignment cannot retrospectively make a purchaser the insured, and he or she cannot acquire more than whatever assignable rights had accrued to the insured before the assignment. Because the right of an insured to obtain replacement or reinstatement value is personal to the insured who must carry out the work and sustain the loss required to obtain that replacement benefit, that right under the policy cannot be assigned to a third party without the consent of the insurer.

[12] Under the vendors' policy, the replacement benefit was payable if and when reinstatement or replacement costs were incurred. The vendors' house suffered earthquake damage before the sale to the Doigs and before the right to claim the replacement benefit was assigned to them. Because the vendors had not incurred and would never now incur reinstatement costs, all that could be assigned to the Doigs was a claim to the indemnity value of the earthquake damaged house. The vendors could not, by assignment, transfer to the Doigs the right to obtain indemnity for replacement costs on the basis the Doigs may incur those costs in the future.

[13] *Bryant* is binding authority on this Court. However, the Doigs argue that Tower is estopped from denying the vendors have the right to claim the full replacement value of the damaged house. In *Bryant,* Cooke P, in assessing the application of the principle of personal indemnity, observed:[2]

> The principle appears to be firmly settled in other jurisdictions, and we consider that to depart from it now in New Zealand would wrench the common law too far without solid justification. There is nothing in the facts of this case to persuade us that the principle works real injustice in the kind of situation with which this case is concerned. The insurer did not represent in the policy or otherwise that the right to replace at the cost of the insurer

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1 *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 (CA).
2 At 145.

> was assignable. Neither the vendors nor the purchasers appear to have been lulled into that belief...

[14] Mr Rennie on behalf of the Doigs submitted that in the present case Tower's representations prior to the settlement of the purchase of the property take it beyond the circumstances with which *Bryant* was concerned, and that the equity of the situation requires a departure from the normal principle of personal indemnity.

**Estoppel**

*Principles*

[15] The elements required to establish an estoppel are clear and not in dispute.[3]

(a) a belief or expectation by [A] has been created or encouraged by words or conduct by [B];

(b) to the extent an express representation is relied upon, it is clearly and unequivocally expressed;

(c) [A] reasonably relied to its detriment on the representation; and

(d) it would be unconscionable for [B] to depart from the belief or expectation.

**Was a belief or expectation held by the Doigs created or encouraged by Tower?**

[16] The Doigs allege that Tower's emails created and encouraged a belief or expectation that should the repairs to the property be in excess of the EQC cap, settlement would be based on the vendors' policy. Mr Rennie submitted Tower's emails provided a reasonable basis for the Doigs' expectation that upon assignment the vendors' existing replacement cover would be available to them in the event the house could not be economically repaired.

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[3] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44], applying *Burberry Mortgage Finance and Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361 and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86.

[17] Mr Rennie submitted the Doigs' solicitors expressly inquired of Tower whether it would agree to the vendors' existing claims being assigned to the Doigs should the purchase be confirmed. Further, whether upon assignment of those claims Tower would agree to complete "all required work under the claims on 'full replacement terms' as per the terms of the current policy with the vendors".

[18] Tower's initial response in its email of 4 October 2012 was qualified by the limitation that it could not discuss the current owners' claim in the absence of authority from the present owners. However, the claim handler was prepared to discuss the "generic claim process" and confirmed that should the EQC repairs be deemed to be over the statutory cap, it would be Tower's liability to repair the dwelling. The new owners would not be required to lodge an additional claim because the damage to the property was incurred under the previous owners' policy. The claim handler explained this was why Tower required a deed of assignment to confirm the old owners agreed to assign any right to the "open claims" over to the new owners.

[19] Tower then advised that "all settlement will be based on the previous owners' policy, including their policy cover and excess". After advising there could be no agreement to the claims being transferred to the new owners until a deed of assignment was received, Tower informed the Doigs' solicitors that "... all settlement is based on the previous owners' policy details as this is the policy that was in place at the time of the earthquakes".

[20] After receiving authorisation to disclose details of the vendors' claims, Tower, in its second email, confirmed the claims presently fell below the EQC cap and that Tower would "regain responsibility for repairs if the caps are breached". Tower advised it would be assessing the damage to the "hard landscaping" and settling claims based on the current owners' policy. It was noted the current owners' policy is a full replacement policy, and that once a deed of assignment is received "any settlement decisions will be negotiated with the new owners".

[21] I doubt the emails by themselves *created* the Doigs' expectation that the assignment of the existing claims would result in a continuation of replacement

cover for the earthquake damage. However, that is not the prime basis upon which the Doigs bring their claim. The Doigs maintain the words used by Tower in its email "reasonably confirm[ed]" that under the assignment Tower would complete all work to satisfy the claims on the basis of the full replacement terms of the vendors' policy. Mr Doig's evidence was that he understood Tower was confirming it would continue the replacement cover for the damage caused by the earthquakes.

[22] The Doigs had a pre-existing belief from the way the property was advertised they could pursue "a potential rebuild" and achieve a "full replacement potential rebuild". The Doigs signed the sale and purchase agreement in that expectation. Mr Doig instructed his solicitors to make inquiries of Tower for the purpose of confirming their understanding the full replacement benefit of the vendors' existing insurance policy would be extended to them upon assignment of the existing claims. It is only necessary that the belief or expectation has been encouraged by the words or conduct of the other party. I accept Mr Doig understood Tower to be confirming in its email his original belief of the position.

**Was the representation relied on clearly and unequivocally expressed?**

[23] The representation relied upon by the Doigs is that Tower confirmed it would complete all work required to meet the claims on the full replacement terms of the vendors' policy. They believed Tower was confirming their existing understanding that assignment of the claim would result in them receiving the full benefit of the replacement policy. However, I have reservations whether the representation contended for by the Doigs was to such clear effect, or at least was in such unequivocal terms, that it was capable of creating an equitable obligation on Tower to forego its right to rely on the ordinary applicable legal principles.

[24] Tower's first email stated that settlement of the "open claims" would be based on the previous owners' policy, including their policy cover and excess, and that should a deed of assignment be received, settlement would be based on the previous owners' policy details, being the policy in place at the time of the earthquakes. In the second email, Tower noted the current owners' policy is a full replacement policy, and that once a deed of assignment is received, any settlement

decisions will be "negotiated with the new owners". Those statements, while open to misinterpretation, particularly by a person with a preconceived understanding of the effect of an assignment of the vendors' claims, are, in a strict and literal sense, consistent with Tower's current position. They do not exclude the application and effect of *Bryant*.

[25] Had Tower been communicating directly with the Doigs, I would have been inclined to accept the emails were reasonably capable of being read by them (as Mr Doig did) as confirming they would receive the full benefit of the vendors' replacement policy upon assignment of the existing claims. However, Tower's communications were not to the Doigs but to solicitors acting on their behalf. As it was put by Mr Thain on behalf of Tower, the Doigs should be viewed as "sophisticated" recipients of the information, who received the emails under the auspices or, at least, through the conduit, of professional legal advisers.

[26] As I have observed, the Doigs, as laypersons with an existing expectation of the effect of an assignment of the vendors' claims, were susceptible and perhaps even likely to interpret the emails in the way they did. However, because of the clear state of the law at the time as set out in *Bryant*, combined with the fact the statements made by Tower were to the Doigs' legal advisors and were capable of being read consistently with the correct legal position, I have reservations whether the express representation relied upon was sufficiently clear and unequivocal to meet this element of estoppel. Nevertheless, because of my findings later in this judgment, it is not necessary to come to any concluded view on this point.

*Miscellaneous evidential issues*

[27] The Doigs placed reliance on the content of a joint memorandum of counsel prepared by Tower's solicitors for the purposes of a case management conference. In outlining Tower's position, the memorandum recorded that on 4 and 5 October 2012 (being a reference to the emails) Tower "erroneously advised" the Doigs they could claim the full replacement cost of the house under the deed of assignment. The document goes on to record that Tower subsequently discovered its error but

says it is not estopped by the previous advice to the Doigs because they did not rely on it to their detriment.

[28] Arguably, the statement contained in the document amounts to an admission made on behalf of Tower as to the effect of its emails. However, the memorandum was a draft document, it was never signed, nor filed. As an unfinalised working document exchanged between counsel its status is in question. No evidence was called regarding the circumstances in which it was received, nor the basis upon which it was provided. I did not understand Mr Rennie to be contending the statement in the draft memorandum constituted a formal admission by Tower that it had misrepresented the effect of the assignment of the vendors' insurance claims, and the effect of the words used by Tower in its emails remained in issue between the parties at the hearing of this matter.

[29] Because of the approach I have taken to the estoppel issue and having accepted that the Doigs' understanding of the email was an interpretation reasonably open to them as laypersons, it is not necessary to come to any final view regarding the effect or weight to be afforded to the unsigned draft memorandum. Ultimately, it remains for the Court to determine what was represented by Tower in its emails, and I have already set out my conclusions in that regard.

[30] A related issue was Mr Rennie's criticism of Tower's failure to call any witness to speak to its contention regarding the limited effect of the emails. Mr Rennie submitted that any such witness would have to explain the inconsistency between Tower's detailed position set out in its proposed settlement letter of October 2016 that the insurance policy only provided a contract of personal indemnity to the vendors, and its emails from years earlier which referred to the full replacement policy of the "current owners".

[31] I do not consider that critique advances the position. The Doigs have been aware since December 2013 that Tower disputes they were advised that settlement of the assigned earthquake claims could extend to full replacement. The Doigs' response was to immediately place the matter in the hands of their counsel. More importantly, the issue of estoppel turns on the effect of the representation at the time

it was made. The assessment of what was represented by the communications is not advanced by a post facto explanation of what was intended by its maker, nor, at least in any material sense, by any opinion or concession by a witness as to how the statements may have been understood by the reader. The question as to how the communication could reasonably have been interpreted and what was being represented at the time it was made is one exclusively for the Court.

[32] Mr Rennie also sought to place some reliance on a deed of assignment included with Tower's letter of a proposed settlement sent in October 2016, which referred to the Doigs as "the policy holder". Mr Rennie submitted that had Tower called a witness, he or she would have to explain why Tower, for the purpose of seeking an assignment from the Doigs of any further potential claims against EQC, was prepared to treat them as the "policy holder" for "damage to the house" caused by the earthquakes.

[33] Again, I do not consider what appears to be an obvious error in the documentation included with the proposed settlement correspondence assists the Doigs. The reference to the Doigs as being the "policy holder", which is likely taken from a standard form document normally used when claims are settled between the insurer and a policy holder is, perhaps, indicative of an apparent lack of care in the way Tower frames its documents and communications, of which the emails of October 2012 could be considered earlier examples. The short point in respect of all the documents apart from the emails of October 2012, to which reference was made by the Doigs, is that they were created after they had settled the property transaction. They had no operative effect on their actions in proceeding with the purchase of the property and are immaterial to whether Tower's representations at the time gave rise to an estoppel.

**Did the Doigs reasonably rely to their detriment on the representation?**

*Reliance*

[34] The Doigs' case is they relied on the representations by Tower when they took the step to confirm the sale and purchase agreement. It appears both parties to that agreement proceeded on an understanding the policy's full replacement cover

was assignable because that was the basis upon which the property was marketed. Central to the Doigs' claim is the proposition they relied on Tower's representations in making their decision to confirm the agreement, and that absent Tower's confirmation that replacement cover would be transferred upon an assignment of the vendors' claims, they would not have confirmed the contract to purchase the property.

[35] Tower's position is that the Doigs entered into the agreement on the basis of their own mistaken belief that replacement cover could be assigned to them by the vendors. The Doigs were already contractually bound by the terms of the purchase agreement before it made any inquiries of Tower. The agreement was not conditional upon the Doigs checking the position or obtaining confirmation from Tower that the parties' understanding was correct. Mr Doig entered into the agreement without obtaining legal advice, and the contract was not dependent on the result of any inquiry of Tower.

[36] I have accepted the Doigs entered into the agreement believing they would have the benefit of the vendors' full replacement policy. That is the basis upon which the property was marketed, with the advertisement referring to the "benefits of a full replacement potential rebuild". However, a difficulty for the Doigs is that the terms of the sale and purchase agreement did not expressly make confirmation of their understanding a condition of the contract. The agreement refers to the purchaser obtaining their own insurance on terms satisfactory to them, the obtaining of geotechnical, building and engineering reports, and the assignment of claims lodged with EQC and the vendors' insurer on settlement. The vendor is also required to provide details of all insurance policies held in respect of the property.

[37] Mr Rennie submitted the Doigs had a proper basis to avoid the contract in the event they would not receive the benefit of the vendors' full replacement cover. He submitted that was the footing upon which both the vendors and the Doigs entered into the contract, and they relied on Tower's communications when confirming the property transaction.

[38] Mr Thain submitted the advertisement relied upon by the Doigs contained only statements of the vendors' belief or expectation. In the absence of there being evidence to suggest the statements were not honest, it could not constitute a misrepresentation. Similarly, Mr Thain submitted that insofar as the statement in the advertisement to the effect a purchaser could reap "the rewards and benefits" of a "full replacement potential rebuild" constituted a representation as to the law, so long as it was made honestly, it could not found an actual misrepresentation.[4]

[39] It is not necessary to come to any concluded view as to whether Tower's representations were material to whether the Doigs were contractually bound to proceed with the sale and purchase contract, or whether they could have lawfully cancelled the contract had they appreciated they would not obtain the benefit of the vendor's replacement cover. To succeed, the Doigs must establish they relied upon the representation to their detriment. I do not consider detriment, at least of a type necessary to found an estoppel, has been established.

*Detriment*

[40] The detriment relied upon by the Doigs to found the estoppel is the pleaded failure by Tower to meet their expectation that it would honour its representation to extend the obligation of replacement cover to them, as the purchasers of the property. The "relevant detriment" was identified by Mr Rennie's submissions as being the departure from the "belief and expectation created". In reference to the circumstances of this case, the detriment was described as the Doigs' confirmation of the agreement and the subsequent settlement of the property in the unfulfilled expectation that Tower would provide replacement cover for damage to the house.

[41] Mr Rennie submitted the Doigs were not seeking a reliance-based remedy but relief for the expectation created by Tower. He submitted that distinction had been recognised by the Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshaw 136 Ltd*, and the Doigs were entitled to a remedy that fulfilled the expectations that had been encouraged by Tower and upon which they had relied.[5]

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4 *Tompkins v Wensley Developments The Marina Ltd (in liq)* [2012] NZHC 1863 at [16].
5 *Wilson Parking New Zealand Ltd v Fanshaw 136 Ltd*, above n 3.

[42] I do not consider the identified "detriment" is sufficient. It goes no further than a departure from, or non-fulfilment of, a belief or expectation that has been created or encouraged. The approach taken to the identification of the Doigs' detriment by Mr Rennie conflates the necessary element to establish an estoppel, namely the detriment caused from reasonable reliance on the representation, with the nature of the relief to be provided where an estoppel has been established and an equitable remedy required.

[43] Essentially, the Doigs' case rests on detrimental reliance being demonstrated simply from Tower having failed to fulfil their expectation. Mr Rennie disavowed any reliance on the Doigs having wasted money on unnecessary inquiries or professional reports to complete the transaction, or having lost other investment opportunities as a result of Tower's representation. No evidence was proffered of any other claimed detriment.

[44] I accept Mr Thain's submission that a mere failure to fulfil an expectation is not by itself sufficient to found an estoppel. Mr Thain took me to the Court of Appeal's discussion in *Wilson Parking* regarding whether the expenditure and liability incurred by the respondent in that case could be regarded as detriment suffered in reliance on the representation giving rise to the estoppel. Had it been sufficient to simply point to the respondent's disappointment from the unfulfilled expectation created by the appellant's representation, which was not in dispute, the parties' respective contentions regarding the detriment suffered and the Court's analysis of those respective arguments would have been redundant.[6]

[45] The Doigs relied upon a passage from the Court of Appeal's judgment for the proposition that it is only necessary to show a departure from the belief and expectation created by the representation to establish relevant detriment. That passages reads as follows:

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6 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd,* above n 3, at [61]-[67].

**Equitable remedies — principles**

*The purpose of the doctrine of equitable estoppel*

> [72] The doctrine of equitable estoppel has undergone much change, particularly over the last three decades. Equitable estoppel was described by Mason CJ in *Commonwealth of Australia v Verwayen* as "a label which covers a complex array of rules spanning various categories". He saw all these categories as having the same fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."
>
> [73] Our review of the authorities suggests that the focus of the inquiry into an appropriate equitable remedy has moved away from the removal of detriment (if that term is construed in a narrow sense) to an inquiry into what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct on the part of the defendant. An assessment of the nature and extent of the element of unconscionability forms part of the analysis.

[46] I do not consider this passage supports the Doigs' position. The Court of Appeal's focus was on the approach to be taken to the assessment of an equitable remedy. In order for the Court to be examining the question of relief an estoppel must have been established. That requires a plaintiff to have relied to their detriment on a belief created or encouraged by the defendant. Absent that detrimental reliance, no estoppel arises and there is no equity to be satisfied.

[47] The Court of Appeal observed that where an equitable estoppel is established the choice of remedies was between a reliance-based remedy on the one hand and expectation-based relief on the other.[7] The Doigs considered the Court's acknowledgment of expectation-based relief designed to fulfil the expectation relied upon by a plaintiff as being akin to their situation. However, in order to be granted relief for the failure to fulfil the expectation, it is necessary there be detriment for which a remedy is required. The failure to fulfil the expectation does not of itself provide the detriment. In further explanation of the approach to be taken to the choice of remedy, the Court of Appeal observed:

> [78] In abstract terms, the test for the remedy for estoppel has been variously described as the minimum equity to do justice"; "that which is necessary to cure the unconscionable conduct: nothing more, nothing less";

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7 At [77].

> and as requiring proportionality between the remedy, the expectation and the *detriment*.
>
> (Emphasis added)

[48] The requirement of proportionality between the remedy, the expectation and the detriment highlights that each is conceptually different. Whether or not the remedy is categorised as providing expectation-based relief or a reliance-based remedy, the identification of a plaintiff's detriment remains an essential prerequisite. There can be no estoppel nor claim to equitable relief in its absence. In *Commonwealth of Australia v Verwayen*, Brennan J observed:[8]

> ... The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of the promise.

[49] The detriment need not necessarily involve the expenditure of money or other quantifiable financial detriment; it is not a narrow or technical concept.[9] However, it must be articulated and identified in the evidence adduced to support the claimed estoppel. Whether the detriment is sufficient to found an estoppel is to be judged by whether it would be unjust or inequitable to allow the assurance to be disregarded.[10] However, a failure to meet the expectation will not by itself provide the necessary substantial detriment to require an equitable remedy. It is not the existence of an unperformed promise or failed expectation that requires equity to intervene but the detrimental consequences to the plaintiff arising from having acted upon the expectation.

[50] In *Wilson Parking*, the Court of Appeal extensively discussed Australian and English authorities when evaluating the approach to relief to satisfy the equity arising from an established estoppel. The relevance of the Court of Appeal's discussion for the purposes of the present case arises not from its consideration of the approach to be taken to relief in estoppel cases per se, but to the distinction made in that analysis between expectation and detriment as separate considerations which

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8 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 429.
9 See *Blakesfield Ltd v Foote* [2015] NZHC 1325 for an example of non-monetary detriment.
10 *Gillett v Holt* [2001] CH 210 (CA).

are required to be present, firstly, to establish estoppel and, secondly, which may in combination demonstrate the need for equitable relief.

[51] The Court of Appeal referred to the judgment of Aldous LJ, in *Jennings v Rice*:[11]

> There is a clear line of authority from at least *Crabb* to the present day which establishes that once the elements of proprietary estoppel are established an inequity arises. The value of the equity will depend upon all the circumstances, including the *expectation* and the *detriment*. The task of the Court is to do justice. The most essential requirement is there must be proportionality between the *expectation* and the *detriment*.
>
> (Emphasis added)

[52] Similarly, Robert Walker LJ, when referring to the means of satisfying the equity arising in estoppel cases, observed:

> [49] It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the complainant's expectations). The equity arises not from the claimant's expectations alone, but from the combination *of expectations*, *detrimental reliance*, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances.
>
> (Emphasis added)

[53] After referring to these and other Australian and English authorities, the Court of Appeal in *Wilson* concluded:[12]

> ... The three main elements relevant to relief stem from *the ingredients necessary to establish equitable estoppel in the first place*. These are the quality and nature of the assurances which give rise to the claimant's *expectation*: the extent and nature of the claimant's *detrimental reliance* on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given.
>
> (Emphasis added)

[54] In summary, the need to show detrimental reliance in order to raise an estoppel is essential. Without detriment to a plaintiff from a defendant having resiled from an earlier communicated position in favour of the assertion of his or her legal right, no equity arises. Mere disappointment from an unfulfilled promise is

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11 *Jennings v Rice* [2002] EWCA CIV 159 (CA) at [36].

12 At [114].

insufficient. Some harm, either incurred or prospective, arising from the disappointed expectation is required to be demonstrated. Where equitable estoppel is established the Court will seek to provide appropriate relief to remedy the unconscionable conduct. That will not be achieved by the removal of detriment alone but by a remedy that provides proportionality between the expectation, the detriment, and the element of unconscionability. However, that combined focus for the purpose of achieving an appropriate remedy does not dilute the need to demonstrate detrimental reliance in order to found an estoppel in the first place.

*Evidence of detriment*

[55] Tower sought to introduce the evidence of a registered valuer, Mr Mark Shelders. In late-2015, he provided Tower with a pre-loss market indemnity valuation of the dwelling. He was instructed by Tower to prepare two further valuations of the same property on the basis of a sale on an "as is, where is" basis as at the date the Doigs took ownership of the property in March 2013 and currently as at September 2017.

[56] The plaintiffs objected to the admission of Mr Shelders' evidence on the grounds it was neither relevant nor met the threshold for the admission of expert opinion evidence. It was submitted the fact-finder was not likely to obtain substantial help from the valuation evidence.[13] Mr Rennie submitted the house was not sold on an "as is, where is" basis, and that the methodology employed by Mr Shelders to provide his valuations was unrecognised and flawed.

[57] Mr Shelders approached his task to provide a market valuation on an "as is, where is" basis in a similar way to a normal valuation. He drew on sales information of "as is, where is" properties and made appropriate adjustments based on his experience, knowledge of particular properties, and professional training. His report attests to having been prepared in conformity with both International Valuation Standards and Australian and New Zealand Valuation and Property Standards.[14] Mr Rennie's challenge to Mr Shelders' evidence centred on the degree to which any

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13 Evidence Act 2006, ss 7 and 25(1).

14 IVS 101 Scope of Works, IVS 102 Investigations and Compliance, IVS 103 Reporting, IVS 104 Bases if Value, IVS 105 Valuation Approaches and Methods, IVS400 Real Property Interests, ANZ Valuation Procedures – Real Property.

reliance could be placed on an "as is, where is" valuation obtained in the absence of knowing the value of the cost of repairs of the houses in the comparative sales figures.

[58] Counsel were content to proceed on the basis I heard Mr Shelders' evidence subject to the Doigs' objection to its admissibility. Mr Thain submitted the valuation evidence was relevant to the issue of whether the Doigs had incurred detriment from the alleged unfulfilled expectation arising from Tower's emails. Tower sought to utilise Mr Shelders' evidence to demonstrate the Doigs are financially no worse off from having entered into the property transaction.

[59] I consider Mr Shelders' evidence is relevant, and while the approach he adopted to make his "as is, where is" valuation may well be open to challenge, Mr Shelders, as a qualified and experienced registered valuer, did not resile from his valuations or the process by which he came to his conclusions. While acknowledging Mr Rennie's criticism of the methodology, I consider the valuation evidence provided by Mr Shelders to be of sufficient assistance in the circumstances of the present case to meet the substantial helpfulness test and to therefore be admissible.

[60] The controversy regarding Mr Shelders' evidence was twofold. Mr Rennie submitted the property was not sold on an "as is, where is" basis and that any valuation of the property based on comparative sales data without knowledge of the costs of repairs of the other properties was deeply flawed. In the event, Tower did not consider it necessary to directly engage with those issues. Mr Thain was content to use Mr Shelders' evidence relating to the land value of the property to demonstrate that even if the dwelling is afforded no value, the combined sum of EQC's payments, Tower's cash offer for the pre-loss market indemnity value of the house, and the value of the bare land, demonstrates the Doigs have still profited from their purchase of the property.

[61] The Doigs purchased the property for $1.155 million. They have received $191,659.50 from EQC in discharge of its statutory obligation. Tower has sought to settle the claim by the payment of $583,090.50 based on a pre-loss market indemnity

value of the residential dwelling as at 3 September 2010 of $670,000 and additional site improvements of $105,500 (after deduction of $750 excess). The Doigs have rejected this proposed cash settlement. Mr Shelders' "as is, where is" valuations were as follows:

| | |
|---|---|
| <u>As at 1 March 2013</u> | |
| Land Value | $600,000 |
| Improvements Value | $135,000 |
| Market Value (excluding chattels) | $735,000 |
| | |
| <u>As at 20 September 2017</u> | |
| Land Value | $800,000 |
| Improvements Value | $215,000 |
| Market Value (excluding chattels) | $1,015,000 |

[62] Aside from the critique of Mr Shelders' "as is, where is" valuations, Mr Rennie sought to diminish the utility of Tower's analysis of the Doigs' position by reference to what he submitted were unknown factors that may affect the land's value as a building site. However, no evidence was offered in response to the valuation evidence either about that aspect nor, more pertinently, to rebut the overall effect of Mr Thain's submission that, however the issue is approached, the combination of the payments received by the Doigs and the residual value of the property exceeds the purchase price.

[63] Any concern regarding the land value is further mitigated by the fact that while the house is not able to be economically repaired it has been successfully let and occupied in the past, and, at least to that extent, has retained some value as a dwelling. The house has to date been habitable, but even if it is to be demolished, the estimated costs of such an operation on the available evidence, approximately $59,000 based on a quantity surveyor's report obtained by the Doigs in July 2015, would still leave the Doigs in credit.

[64] I accept there is a sizeable degree of approximation in assessing the ultimate financial outcome for the Doigs, taking into account the purchase price they paid, the

EQC and insurance payments they have received and the asset they have been left with. However, on the state of the evidence, it does not appear the Doigs purchase of the property has left them in a worse financial poistion.

[65] Importantly, the onus is on the Doigs to demonstrate their detriment. They relied simply on an unfulfilled promise as proof of that element. That is insufficient, and in the absence of having adduced evidence to demonstrate the detriment they have or will incur as a result of their "deserted expectation", their claim must fail.

**Would it be unconscionable for Tower to depart from the belief or expectation?**

[66] Because the Doigs have failed to demonstrate they relied on Tower's representation to their detriment, it is not necessary to address whether it would be unconscionable to allow Tower to depart from the encouraged belief or expectation. However, in the absence of proven detriment to the Doigs arising from Tower's representation, it would be difficult to sustain an allegation that it would be unconscionable for Tower to depart from the expectation said to have been engendered or promoted as a result of the representation.

[67] The documentary evidence revealed that Tower had at an early stage considered the house was likely to be uneconomic to repair. There are emails a year prior to the Doigs involvement in October 2011, which indicated the house was likely to be a "total loss" as a result of the February 2011 earthquake, and to be over the EQC statutory cap. A building report of March 2012 concluded that repair was not a viable option and the dwelling should be demolished and rebuilt. A similar conclusion would be reached in an engineering report received by Tower in October 2016.

[68] With the exception of one issue which I will shortly address, I do not consider Tower's early appreciation the house would likely need to be rebuilt is material. It was not until July 2016 that EQC, which had initially scoped repairs for the house as being under cap, finally advised Tower the cost of remediation was over cap. It was only at that point that Tower, under the terms of the insurance policy, became responsible for the balance of the remediation costs of the earthquake damage.

[69] However, after settlement in March 2013, the Doigs continued to insure the house with Tower as a rental property under a new policy of insurance which provided for full replacement cover. They paid a premium of $1,067.51 for the first year and have continued to pay premiums to Tower for full replacement cover. I accept there is an apparent inequity in Tower accepting premiums from the Doigs for replacement cover for the house which, on information available to it, was already considered uneconomic to repair due to an event that occurred prior to the Doigs taking out this new insurance.

[70] Had there been a further earthquake event that caused further substantial damage to the house, an interesting issue would have arisen over whether Tower could have denied the Doigs replacement cover on the basis the house was already a likely "rebuild" when it entered into the new insurance contract to indemnify the Doigs and had accepted premiums for such cover knowing that to be the case. The apparently anomalous approach by Tower to the new insurance policy may have assisted the Doigs when assessing whether Tower's subsequent actions were unconscionable. However, the new insurance contract was not entered into until after the property purchase had been confirmed. Tower's willingness to enter into a new contract of insurance for replacement cover came after the Doigs had already settled the purchase of the property after receiving the October 2012 emails.

[71] While the circumstances relating to the new contract of insurance may also have been material to the assessment of equitable relief, it does not assist the Doigs in establishing the necessary element of estoppel of detrimental reliance. The Doigs, understandably having regard to the overall financial effect of the property transaction, did not contend the premiums they paid for the new insurance was sufficient to meet that requirement.

**The interest issue**

[72] In the event the Doigs were unsuccessful in establishing that Tower was estopped from denying liability to pay the Doigs the full replacement value of the property, they sought interest on the sum of the indemnity value which remained unpaid until October 2016. Mr Rennie submitted the indemnity value was payable

as from the date of the loss, and Tower was liable to pay interest for that period to compensate the Doigs for being "kept out of money that was due", regardless of fault or any question of wrongful withholding of payment.[15] Interest was claimed at the statutory rate for a period calculated from 1 January 2014. That date was nominated in acknowledgement that Tower should be allowed a reasonable period of investigation prior to being obligated to make payment.

[73] Tower defended the claim for interest on the basis it was not until July 2016 that EQC assessed the damage to the house as being over its statutory cap. It was therefore not liable to pay any amount to the Doigs under the vendors' policy before that time. I accept that whatever conclusions Tower may have reached prior to July 2016, it was not until EQC formally gave notice that it assessed the damage to the house as being over the statutory cap that Tower's liability triggered. Tower was dependent upon EQC's determination of whether the remediation costs would exceed its statutory limit before it was in a position to formally take responsibility for the earthquake damage to the house.

[74] I am not aware of any evidence that Tower supported EQC's initial assessments that the damage was under cap, or sought to dispute information that was provided by the Doigs' experts to EQC or to itself. Three months after EQC notified the claim exceeded the statutory cap, Tower, after obtaining an engineer's report, formally approached the Doigs to settle the claim on the basis of a pre-loss market indemnity value at the time of the first earthquake in September 2010. On 30 November 2016, Tower paid the Doigs $583,090.50 which reflected its valuation of the house less the amount the Doigs had already received from EQC and the applicable excesses. In the circumstances, I do not consider a four month delay between the notification by EQC and the payment made by Tower was outside the time within which payment could reasonably be expected to be paid. Accordingly, I decline the Doigs' claim for interest on that sum.

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15 *Hellenic Industrial Development Bank SA v Atkie* [2002] EWHC 1405 (QB).

## Result

[75] In the absence of the Doigs being able to establish an actionable estoppel, their claim for declaratory relief is declined. The alternative claim for interest based upon an entitlement to receive payment of the indemnity value of the house from 1 January 2014 is also dismissed.

## Costs

[76] In the ordinary way, costs should follow the event. Having successfully defended the Doigs' claim, Tower is entitled to costs. It is anticipated that because of the commendably focussed nature of the hearing the parties should be able to agree costs on a category 2B basis. If that is not the case, counsel are to exchange and file memoranda (no more than four pages) and a decision will be made on the papers.

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