IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000780
[2018] NZHC 2775

BETWEEN	SETTLERS CRESCENT PARTNERSHIP Plaintiff
AND	IAG NEW ZEALAND LIMITED Defendant

Hearing: 10, 11, 12 and 13 September 2018

Appearances: S P Rennie and W Todd for Plaintiff
I J Thain and BRD Cuff for Defendant

Judgment: 25 October 2018

JUDGMENT OF GENDALL J

Introduction

[1] The plaintiff, Settlers Crescent Partnership (the Partnership), owned four adjoining commercial buildings (the Buildings) at 14 Settlers Crescent, Ferrymead, Christchurch. These were damaged, to varying extents, in the Canterbury earthquake sequence of 2010/2011.

[2] The Buildings were insured at all material times with the defendant, IAG New Zealand Ltd (IAG) and claims were made by the Partnership for the earthquake damage. In October 2011, the parties entered into two agreements:

(a) Under the first agreement, the Partnership received and accepted the sum of $10,233,973.80, including GST, as the result of material earthquake damage to the insured Buildings on the property; and

(b) Under the second agreement, the Partnership received and accepted the sum of $86,785.83, including GST for business interruption suffered as a result of that earthquake damage.

[3] The first agreement relating to the Partnership's material damage claim (which, as I note below, is described as a "release agreement"), settled this claim outside the terms of the insurance policy (the Settlement). It is this first agreement and the Settlement which were the subject of this proceeding and the hearing before me. The second agreement relating to the Partnership's business interruption claim was not in issue.

[4] The Settlement specified that it covered the damage caused to the Buildings by the 4 September 2010 and 22 February 2011 earthquakes. For some years it appeared that the parties agreed that this settled the Partnership's claim and issues between them. However, in March 2015, some three and a half years after the Settlement, the Partnership, through a litigation funder, Risk Worldwide New Zealand Limited (Risk Worldwide), contacted IAG, indicating that the Partnership intended to pursue claims in particular with respect to the 13 June 2011 earthquake. The Partnership then initiated these proceedings in 2016.

[5] The position taken by the Partnership before me was that the Settlement only covered the damage, and resulting repair costs, for the first two major earthquakes which occurred in September 2010 and February 2011. It claimed to be entitled therefore to an additional payment under the policy for what is said to be further damage to some of the Buildings caused by the June 2011 earthquake. In response IAG maintained, amongst other things, that the Settlement precluded such a claim, and this proceeding brought by the Partnership is entirely opportunistic. This, it says, is in the sense that over three years after the event the Partnership now is seeking to obtain more money for the same loss they have already settled for.

Factual Background

[6] The Partnership is made up of four partners. A representative of one of the partners, Stuart Wilson Grant (Mr Grant), gave evidence before me on their behalf. The Buildings owned by the Partnership at the Settlers Crescent property were a small warehouse with offices above (the Small Warehouse), a large warehouse (the Large Warehouse), a car parking area with a Les Mills gym above it (the Gym), and a two-storey office building (the Office). All the Buildings were damaged in the Canterbury earthquake sequence but to differing degrees.

[7] This dispute concerns the Large Warehouse and the Gym. In 2011, they were considered to be a rebuild (although IAG, as an alternative argument, now endeavours to dispute this). It is non-contentious that the Small Warehouse and the Office were repairable at all times.

[8] During the September 2010 and February 2011 earthquakes the Buildings were insured with IAG under an Agreed Material Damage and Business Interruption Policy (the Policy). The Partnership renewed the Policy, increasing the sum assured to a slightly higher amount on 1 April 2011, that is, after the first two earthquakes.

[9] The Buildings all suffered major damage in both the September 2010 and February 2011 earthquakes. The Partnership instructed structural engineers Ruamoko Solutions Ltd (Ruamoko) to assess the damage. Ruamoko provided four very detailed reports, dated 6 – 13 June 2011. Significantly, this was before the 13 June 2011 earthquake occurred. In these reports, Ruamoko relevantly said:

(a) The northern office building:

> has suffered minor damage and is repairable.

(b) The small warehouse with offices above:

> has suffered moderate damage and is repairable.

(c) The Les Mills gym and carparking area:

> has been severely damaged and is considered to be well below current building code levels. Whilst the building is repairable, it is not considered economically feasible based on the level of ground damage present. It is therefore **recommended that the building is demolished**.

(d) The large warehouse:

> has been severely damaged and would be considered to be earthquake prone. It is therefore **recommended that the building is demolished. …** The very large amount of repair work required and the significant expense in carrying out this work. It would not be considered economically feasible to reinstate the building.

(Footnotes omitted)

[10] Effectively, the reports advised that the Large Warehouse and Gym needed to be demolished. Cameron MacPherson (Mr MacPherson), a principal of Ruamoko and the structural engineer who completed the reports, considered essentially that, given what would be a realistic assessment of the cost of the repairs, it would not be economic to repair those two buildings. He did acknowledge, however, that, as he was a structural engineer and not a quantity surveyor, precise costing of a repair was not within his specific expertise.

[11] A further significant earthquake struck Christchurch on 13 June 2011. After that June 2011 earthquake, Mr MacPherson inspected the Buildings again. Due to the further damage suffered, he reported that demolition of the Large Warehouse needed to be fast-tracked. He considered, too, that this earthquake had slightly worsened the existing damage to the Gym. Mr MacPherson's evidence, confirmed in an email he sent at the time, was specifically that:

(a) The northern Office building:

> essentially…looks the same as it was prior to [the 13 June earthquake]

(b) In respect of the Small Warehouse:

> The repairs and remedial work previously recommended still apply, and a full slab replacement is recommended.

(c) In respect of the Les Mills gym and carparking area:

> the lateral spreading that has occurred is [sic] slightly worsened the existing damage. The recommendations made in the report for this building still apply…

(d) In respect of the Large Warehouse:

> a significant amount of extra damage has occurred to this area … The recommendations for demolition still apply and should be fast tracked.

[12] The Partnership then instructed quantity surveyors, Davis Langdon, to assess certain costs. These were specifically for a rebuild (and not a repair) of the Large Warehouse and Gym, and for a repair of the Small Warehouse and Office. Davis Langdon was provided with the Ruamoko reports and other architectural and engineering reports, including specific plans and drawings completed for these purposes. On 5 September 2011, Davis Langdon reported that its assessment of the total cost was $13,104,000 (excluding GST). This included $10,680,000 to rebuild the Gym and Large Warehouse, $1,940,000 to repair the other buildings and $484,000 for external works.

[13] IAG appointed McLarens Young International (McLarens) as its loss adjustor. The Partnership engaged Mr Calder and Mr Hoyle of Mike Henry Insurance Brokers as its brokers to conduct negotiations with IAG. IAG made an offer to settle the Partnership's claim when it sent a copy of McLaren's fifteenth report to the Partnership's brokers. In this report, McLarens adjusted Davis Langdon's assessment to $10,078,111 plus GST. Nonetheless, it noted this was still in excess of the maximum sum insured under the Policy of $9,245,000 plus GST. Based on that sum,

less the excess and payment already made, McLaren indicated that the appropriate payment was $10,093,917.56 plus GST.

[14] The Partnership sought an additional contract works amount, which IAG agreed to. The Partnership then confirmed acceptance of the offer. On 12 October 2011, the Partnership signed a release agreement (the Release Agreement) to confirm the Settlement. IAG then paid the agreed settlement amount of $10,233,973.80 plus GST on 19 October 2011.

[15] The Release Agreement stated that the Partnership agreed to accept the sum:

> …in full and final settlement of our claim under [the Policy] in respect of loss or damage by Earthquake which occurred at 14 Settlers Crescent Ferrymead Christchurch on or about the Saturday, 4 September 2010, Tuesday 22 February 2011.

[16] An earlier draft of the Release Agreement stated that the Settlement had also included damage from the 13 June 2011 earthquake, but this was removed.

[17] Some two years later, in November 2013, without reference to or any involvement of IAG, the Partnership demolished the Gym and Large Warehouse. The site where those buildings once stood remains vacant today.

Issues

[18] The Partnership alleges now that the Gym and the Large Warehouse were not in fact destroyed, within the definition of that term in the Policy, after the February 2011 earthquake. Rather, they submit these buildings were repairable. Therefore, the Partnership claims that the Settlement should be treated as only being one for the repair cost of those buildings.

[19] The Partnership says the Gym and the Large Warehouse were then destroyed in fact by the June 2011 earthquake. As this destruction took place in a renewed policy period, the Partnership claims it is entitled to payment under the Policy with respect to the further damage to those buildings caused by the June 2011 earthquake. The Partnership argues too that it was inconsistent for it to fully re-insure something they

were said to have acknowledged was destroyed when the Policy was renewed on 1 April 2011.

[20] In response, IAG advances two arguments. First, it argues that the parties, irrespective of any other factors, agreed to treat the Gym and the Large Warehouse as having been destroyed by the February 2011 earthquake in reaching the Settlement. The Settlement amount was calculated, paid and accepted on that agreed basis. Therefore, IAG submits that the basis of the Settlement precludes the Partnership's current claim.

[21] Secondly, and alternatively, IAG argues that the Partnership's claim cannot succeed because the Gym and the Large Warehouse were not in fact destroyed after the June 2011 earthquake either and could have been repaired. By choosing unilaterally (and without any reference to IAG) to demolish the Gym and the Large Warehouse in November 2013, long before the Partnership gave notice of the present claim, the Partnership took away any possibility of repairing these buildings. Therefore, no further payment would be required. In any event, IAG submits that the Partnership could have no entitlement to any further payment from IAG under the Policy because it had elected not to reinstate the buildings or to commence such reinstatement and carry it out promptly, as required by the Policy.

[22] A first issue to be determined here is what are the terms of the Settlement between the parties. This will require assessing the objective basis of the Release Agreement. I will then turn to consider whether the Partnership is entitled to any further payment under the Policy. It is at this second stage that issues such as when the Buildings were in fact destroyed become relevant.

What are the terms of the Settlement?

[23] IAG claims that, at all material times prior to the claim which forms the basis of this proceeding, the parties worked on the agreed basis that:

(a) Both the Small Warehouse and Office were repairable after the February 2011 earthquake and, despite some additional damage, remained repairable after the June 2011 earthquake; but

(b) Both the Gym and Large Warehouse were to be treated as destroyed due to the damage sustained in the February 2011 earthquake. The June 2011 earthquake did not change that.

[24] IAG contends that this is the only proper basis upon which a deal for the agreed sum could have been reached. This was at the very least because the only calculations considered and the entire basis for the Settlement was the cost to demolish and rebuild, rather than repair, the Gym and Large Warehouse.

[25] IAG suggests too that this deal between two commercial parties was advantageous to both of them. The Partnership was able to walk away with a cash settlement of over $10.2 million and was not obliged to reinstate the Buildings. IAG was able to achieve finality. Both parties were also able to avoid further costs of determining whether and when the Large Warehouse and Gym were in fact destroyed.

[26] In response, the Partnership contends here that the focus should be on whether the Large Warehouse and Gym were in fact destroyed. It argues that the Settlement cannot affect its entitlement regarding the June 2011 earthquake because the parties agreed that the Settlement only covered damage from the September 2010 and February 2011 earthquakes.

[27] I consider, however, that the basis of the Settlement is a key issue in this proceeding. Depending on its terms, it may affect the viability of the Partnership's current claim.

Principles on interpretation

[28] When determining whether the parties had a meeting of the minds, the Court is entitled to look at the whole context of negotiations.[1] The Courts have made clear that, rather than the subjective views of the parties, it is an objective assessment of the facts that determines whether agreement has been reached.[2] What is important is the appearance of mutual agreement, that is, whether the communications or conduct of

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1 *Canterbury FM Broadcasting Ltd v Daniels* (1988) 2 NZBLC 103,535 at 103,541.
2 *Corrick v Silich* [2018] NZCA 221 at [40].

the parties are such that a reasonable bystander would consider the offeree to have assented to the terms proposed by the offeror.[3]

[29] It has long been accepted that evidence of surrounding circumstances is admissible in order to ascertain the meaning of ambiguous words and to demonstrate the facts in the mutual contemplation of the parties.[4] Therefore, I am able to consider facts about the parties' negotiations, including how the Settlement amount was reached.

What did the parties objectively agree?

[30] The Release Agreement stated that the Settlement was "in respect of loss or damage" caused by the September 2010 and February 2011 earthquakes. The Release Agreement does not specify what this loss or damage was. Therefore, it is necessary to look at the negotiations between the parties to identify what the loss or damage in this case objectively means.

[31] Expert reports from Mr Macpherson were before the parties when they agreed on the Settlement. His detailed opinion was that the Gym and Large Warehouse should be demolished because of the cost to repair the damage they sustained in the February 2011 earthquake. The Partnership only sought replacement/rebuild, rather than repair, costings for the Gym and Large Warehouse and they specifically gave instructions to Davis Langdon to this end. These costings were provided by Davis Langdon and then forwarded to IAG with a view to settling the February 2011 earthquake claim.

[32] Having received the Davis Langdon rebuild costings, McLarens set out the proposal for settling the claim in its fifteenth report. This was the offer made by IAG to the Partnership. It contained the basis on which the offer was made, and this formed the basis on which the offer was ultimately accepted.

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3 Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [3.3.1]. See also *Wilmott v Johnson* [2003] 1 NZLR 649 (CA) at [35].

4 *Coldefa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352; *Eastmond v Bowis* [1962] NZLR 954 at 959.

[33] After negotiating an additional contractual works amount, Mr Calder accepted the offer, on behalf of the Partnership, on 11 October 2011. He stated that the Partnership accepted the calculations. The Release Agreement was then signed the next day. Mr Grant and a fellow-partner, Mr Holmes, signed for the Partnership.

[34] Mr Grant confirmed in evidence that it was the February 2011 earthquake claim the Partnership was looking to settle and that the Partnership considered, on the basis of the June 2011 Ruamoko reports, that it would uneconomic to repair the Gym and Large Warehouse. Mr Grant acknowledged in his evidence that the Partnership entered into the Settlement on the understanding with IAG that the Large Warehouse and the Gym needed to be demolished.

[35] In its 3 August 2018 reply to IAG's affirmative defence at [28.5](d), the Partnership pleaded that:

> In entering into the [Release Agreement], both parties assumed the [Large Warehouse and Gym] would be destroyed and that the rebuild cost was limited to the sum insured.

[36] The Partnership submits, however, that if the parties had agreed that the Large Warehouse and Gym were to be treated as destroyed by the February 2011 earthquake, it is reasonable to expect that, as commercial parties, they would have included reference to this in the Release Agreement. The fact that they did not, it is submitted, indicates there was no such agreement. The Partnership argues that the witnesses for IAG do not depose to any such collateral "agreement" and that no such agreement can be weaved out of the admissible documents.

[37] Yet, the Partnership also recorded in opening submissions from their counsel, albeit relating to a McLaren report following the June 2011 earthquake, that:

> …[the McLaren report], and the evidence generally, show that as a matter of fact the parties had made a decision, informed by considerations existing at the time, that the [Large Warehouse and Gym] were to be regarded as destroyed for the purposes of the Policy whilst the other buildings were a repair.

[38] Both sides therefore acknowledge that the basis of the Settlement was that the Large Warehouse and Gym were to be treated as unrepairable. Given the clear

evidence that it was only the September 2010 and February 2011 earthquake claims being settled, this agreement that those two buildings were to be regarded as destroyed must refer to destruction in the February 2011 earthquake, and not the June 2011 earthquake. The Ruamoko reports relied upon by both parties referred to this rebuild requirement after the February 2011 earthquake. The reports themselves were completed and received prior to the June 2011 earthquake.

[39] The Partnership then went on to argue that their insurance broker, Mr Calder, did not have the authority to bind the Partnership to any such agreement. I deal with this agency issue separately below. It does not impact the objective assessment of what the parties agreed to.

[40] I consider that an objective third-party assessment of the facts and the conduct of both the Partnership and IAG (and their representatives) as contracting parties would clearly indicate that the parties reached their agreement on the assumption that the Large Warehouse and Gym had to be demolished and rebuilt after the February 2011 earthquake. Given the basis of the costings and the expert reports before the parties, as well as evidence of the parties' negotiations, this is the only sensible interpretation. The Partnership was able to point to no other possible interpretation. Unquestionably, all the calculations required for the Settlement were made on the assumption that the Gym and Large Warehouse were a total loss and needed to be demolished and rebuilt. This was actually regardless of whether in fact they might have survived the February 2011 earthquake and only needed to be demolished and rebuilt after the later June 2011 earthquake.

[41] Following much negotiation and professional advice, the deal struck and the bargain reached between these commercial parties in October 2011 had a strong element of commercial common sense. First, this deal required that both the Gym and the Large Warehouse were <u>treated</u> as destroyed in the February 2011 earthquake. Secondly, the agreed settlement figure (outside the Policy) in this bargain was expressly calculated to the knowledge of both parties, based upon the rebuild cost of these two buildings. Through their clear conduct in 2011, the parties in the Release Agreement settled a payment for a rebuild obligation for the Gym and the Large Warehouse which reflected the terms set out in IAG's offer contained in McLaren's

15th Report and the clear confirmation from the Partnership that they had fully "accepted the figures".

How does this impact the Partnership's claim?

[42] IAG submitted that the Settlement precludes the Partnership's current claim. I agree. As the Partnership has received the benefit of a substantial payment outside the strict terms of the policy, this payment being calculated on the full replacement cost (i.e. complete rebuilding) of the Gym and the Large Warehouse, it suffered no further loss relating to those buildings in the June 2011 earthquake. That is so even if those buildings were in fact repairable after the February 2011 earthquake and only finally destroyed in the June 2011 earthquake. The settlement payment received was for the complete loss and full replacement of the buildings. Once the parties agreed the Gym and the Large Warehouse were to be treated as destroyed and a total loss (and payment made on this basis) they could not be destroyed again. And, a further payment in these circumstances would result in double recovery, which is impermissible. The fact that the June 2011 earthquake occurred under a new policy period does not alter that.

Agency issue

[43] At times, counsel for the Partnership seemed to suggest that the Partnership's brokers and Mr Calder in particular may not have had actual or even ostensible authority to act in relation to the claim. However, this argument was not strongly advanced before me.

[44] I find in any event that there is clear evidence from Mr Grant that Mr Calder had the Partnership's actual authority. In addition, as IAG noted, Mr Grant and one of his fellow-partners ultimately signed the Release Agreement concluding the Settlement regardless. The validity of the Settlement is not undermined by any suggested lack of authority to act here.

Is the Partnership entitled to further payment?

[45] Given my findings on the first issue, it necessarily follows that the Partnership is not entitled to any further payment. Therefore, I do not have to determine whether

the Gym and Large Warehouse were economically repairable after the February 2011 earthquake and then in fact destroyed by the June 2011 earthquake.

[46] For completeness, however, I do note here that I would have accepted IAG's submission that, in any event, under the terms of the Policy, IAG is not bound to cash settle any claim in respect of the June 2011 earthquake, as claimed by the Partnership. The Settlement that did occur here happened outside the strict terms of the Policy. There was no specified option under the Policy to reach a cash settlement. This means that, had the Partnership proved that it did have a valid claim in regard to the June 2011 earthquake, it would still have had to incur the cost of rebuilding the Large Warehouse and Gym before IAG was required to make a payment to them. There was no obligation on IAG to cash settle a separate claim merely because it had decided to settle a previous claim in that manner.

[47] I also express a preliminary view that, as I see it, IAG may also have a reasonably strong argument here that, given the time since the damage occurred, any subsequent rebuilding by the Partnership would not have been commenced and carried out "promptly", as required by the Policy.

Alternative arguments

[48] At various points in this proceeding, alternative arguments were also raised, including an affirmative defence put forward by IAG of estoppel which was not seriously pursued before me. These did not include, however, any final pleading or argument from the Partnership concerning the possibility mistake may have occurred when the Release Agreement was entered into.

[49] As to these or any other matters arising, given first, my findings relating to the nature of the Release Agreement and its impact on the Partnership's claims here and, secondly, what seemed to be an acceptance on the part of all parties for some years that the Release Agreement satisfactorily resolved all claim issues between them, until the involvement of Risk Worldwide in March 2015 (when it advised of the additional claim, the subject of this proceeding), I need say nothing more.

Result

[50] The Partnership's claim that it is entitled to payment of $1,120,043 (excluding GST) for damage to the Buildings suffered in the 13 June 2011 earthquake fails. The parties' prior Settlement of the February 2011 earthquake damage, which assumed the Large Warehouse and the Gym needed to be demolished and rebuilt, precludes such a claim. Accordingly, IAG has not breached the policy as pleaded.

[51] Judgment is entered here in favour of IAG on the Partnership's claim against it.

Costs

[52] I reserve the issue of costs. I note the usual principle that costs should follow the event. Counsel are to discuss the matter between themselves. If they are unable to agree, they may file (sequentially) memoranda on costs (a maximum of five pages each). These are to be referred to me and, in the absence of either party indicating that they wish to be heard on the issue, I will decide the question of costs based on the memoranda filed and the material then before the Court.

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Gendall J

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