IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000103
[2019] NZHC 2244

BETWEEN	PINOT PROPERTIES LIMITED Plaintiff
AND	VERO INSURANCE NEW ZEALAND LIMITED Defendant

Hearing: 4 September 2019 (by telephone conference)

Appearances: M J Borcoski for Plaintiff
F A Darlow for Defendant

Judgment: 6 September 2019

JUDGMENT OF OSBORNE J
(Transfer application)

Introduction

[1] Pinot Properties Ltd (Pinot), as the plaintiff in this Court in a claim on an earthquake insurance policy, applies for an order transferring the proceeding to the Canterbury Earthquakes Insurance Tribunal (the Tribunal). The defendant, Vero Insurance New Zealand Ltd (Vero) opposes the application.

[2] The application has been dealt with in accordance with the Practice Note in relation to such applications.[1]

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[1] Practice Note "*Canterbury Earthquakes Insurance Tribunal Act 2019: Arrangements for transfer of proceedings*" (1 July 2019) HCPN 2019/2 (civ).

[3] The single issue is whether Pinot's claim meets the criteria for a claim to be brought before the Tribunal. Pinot says that the insured building and property constitute a residential building and/or residential property. Vero says that they do not.

Outcome

[4] In this judgment I determine that Pinot's building and property do not constitute a residential building or residential property. This flows from the Court's conclusion that those terms primarily refer to the use to which the building and property is intended to be put and is put. Pinot's claim in relation to their damage in this case does not meet the eligibility criteria to come before the Tribunal.

The statutory regime

[5] The Tribunal was established under the Canterbury Earthquakes Insurance Tribunal Act 2019 (CEIT Act) to:[2]

> … provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes.

[6] Section 9 of the CEIT Act specifies the claims which may be brought before the Tribunal:

> **9 Eligibility criteria to bring claim before tribunal**
>
> (1) The eligibility criteria to bring a claim before the tribunal are that the claim—
>
> (a) must arise from a dispute between the parties under section 8; and
>
> (b) must seek resolution of liability, or remedies, or both; and
>
> (c) must be within the jurisdiction of the tribunal to make an order under section 46.
>
> …

[2] Canterbury Earthquakes Insurance Tribunal Act 2019, s 3.

[7] The application of the CEIT Act to damage arising from the Canterbury earthquakes to a residential building or residential property is provided for in s 8 of the CEIT Act, which materially states:

> **8 Application of Act**
>
> (1) This Act applies to disputes between policyholders and insurers about insurance claims for physical loss or damage arising from the Canterbury earthquakes to a residential building or residential property.
>
> …
>
> (5) For the purpose of subsection (1), **residential building** and **residential property**—
>
> (a) include similar terms (such as home) used in a contract of insurance between a policyholder and an insurer; and
>
> (b) have the meanings given in a contract of insurance to residential building, residential property, or any similar term.

[8] Section 16 of the CEIT Act provides for transfer of proceedings from a court to the Tribunal:

> **16 Claim brought by transfer of proceedings from court**
>
> (1) If a person who is a policyholder or an insured person (or both) is a plaintiff in court proceedings relating to an insurance claim in dispute, a Judge may, on the application of that person or on the Judge's own motion, order that the proceedings be transferred to the tribunal.
>
> (2) An order to transfer proceedings may be made under subsection (1) only if—
>
> (a) the proceedings meet the eligibility criteria for a claim under section 9 (however, the proceedings may also include additional parties to those referred to in section 8, but may not include a class action—*see* clause 6(2) of Schedule 2); and
>
> (b) the other party or parties to the proceedings have been given a reasonable opportunity to comment; and
>
> (c) the Judge making the order believes that the transfer is in the interests of justice.

Pinot's property

[9] Pinot described its property in its statement of claim in the following terms:

> **The Building on the Property**
>
> The plaintiff owns Lot 2, Deposited Plan 45933 (title reference CB27B/666), known as 205 Manchester Street, Christchurch (**Property**).
>
> At all material times, a building was situated on the Property (**Building**).
>
> *Particulars*
>
> 4.1 The Building was originally constructed in 1882, and is a three storey building comprising office space, a ground floor restaurant, and a basement used for storage, along with ancillary hard landscaping.
>
> 4.2 Structural strengthening works were undertaken to the Building in 1982.
>
> 4.3 The main structural system is unreinforced masonry brick walls around the perimeter with timber frames internally (gravity loads).
>
> 4.4 A new iron roof was installed in approximately 2008, along with new parapets and valley gutters.
>
> 4.5 The Building has a floor area of approximately 1112m^2.

[10] The statement of claim goes on to assert that at 4 September 2010 the building was leased to three tenants, being:

> (a) a company operating a café and bar business on the basement, ground floor and northern courtyard areas (including two car parks);
>
> (b) a company whose business use was defined as "offices, signage, car parking and accommodation" on the first floor (including seven carparks); and
>
> (c) a company whose business was defined as "offices and accommodation" on the second floor (including one carpark).

[11] In support of Pinot's application for transfer, its director Stephen Cohen provided an affidavit. Mr Cohen identified the three tenants. He continued:

8. The First Floor and the Top Floor were both purposed for residential living. They contained the following amenities:

8.1 In respect of the First Floor:

(a) Two toilets;

(b) One full bathroom, including a shower and a toilet;

(c) One kitchen, and

(d) 7 bedrooms that could be easily occupied as such or, alternatively, used as offices.

8.2 In respect of the Top Floor:

(a) Two toilets;

(b) One full bathroom, including a shower, a bath and a toilet;

(c) One kitchen;

(d) 4 bedrooms that could be easily occupied as such or, alternatively, used as offices;

(e) Two large living areas; and

(f) One balcony facing north.

9. When the plaintiff purchased the building back in 1992 the Top Floor at the time was renovated to make it suitable for apartment use. This was of long term appeal as my family lived in Melbourne and it would provide a 'bolt hole' in Christchurch for when we retired.

10. In addition, soon after the plaintiff purchased the building a Pat and Jenny Scott lived on the Top Floor. After that, Lily Cooper also lived there before the earthquakes. In addition, before Melbourne Limited took over the First Floor, an owner of a finance company lived and worked there for some time. As such, the Property has been used for residential purposes throughout the time that the plaintiff has owned it.

[12] Mr Cohen concluded his affidavit by referring to claims made to the Earthquake Commission (EQC) in relation to earthquake damage to the Property. He exhibited two letters from EQC to Pinot dated 16 September 2014, relating to the Property, in which EQC referred to Pinot's "dwelling" and set out a calculation of Pinot's cash settlement entitlement for two claims. In each letter it was stated that:

> … your dwelling has been referred to your private insurer as the damage exceeds EQC's liability under the Act.

[13] Counsel for Vero has produced the lease agreements for the first and second floors each of which begin their description of the premises with "first floor offices" and "second floor offices" respectively. Both recognise under the heading "Business use" that the permitted use is both offices and accommodation.

[14] The agreement to lease for the second floor includes a marked-up plan of the second floor. It shows several partitions or room walls on that floor which are to be removed up to the main beams leaving some existing posts (together with some other alterations). The special terms of lease require the landlord to remove the identified walls and provide that the tenant will not replace those walls on termination. The effect of the wall removals is to leave the majority of the top floor as an open plan area (contrary to Mr Cohen's description of it as containing "4 bedrooms"). It does retain a number of named rooms such as toilet, shower, laundry and kitchen.

Additional matters identified by Vero

[15] Vero refers to matters in evidence or lacking in the evidence:

(a) There is no evidence that the building was being used for residential purposes at the time of the earthquakes or recently beforehand;

(b) Pinot had not insured the building for EQC cover for the period 1 June 2010 to 1 June 2011, Pinot's broker having confirmed that they were not aware that there was a residential component to the building when they placed cover;

(c) Mr Cohen advised Vero's loss adjuster on 3 May 2012 that:

> The EQC [sic] was claimed by way of procedure but as no residential tenancy the claim was rejected by eqc;

(d) Mr Cohen advised Vero in October 2012 that the first floor had previously been rented to a domestic tenant, that the tenancy had reverted to commercial offices about 15 years previously, and that it had remained so through to the earthquake. Mr Cohen had explained that there was therefore no need for EQC cover; and

(e) EQC's payments to Pinot had been on the basis that it would cover residential portions of the building, EQC calculating one residential unit on the second floor as 33 per cent of the building and the rest of the building as "commercial" (67 per cent).

Further information from Pinot

[16] Counsel for Vero advises that Mr Cohen has explained in relation to the EQC claim that:

(a) the non-payment of EQC levies for 2010/2011 was as a result of broker misunderstanding;

(b) EQC initially rejected Pinot's claim; and

(c) EQC ultimately accepted that cover applied to part of the building (by inference one residential unit accounts for 33 per cent of floor space).

Approach to residential buildings and property under the Earthquake Commission Act 1993

[17] I will briefly consider the EQC position, but not extensively as the definitions of "residential building" are materially different under the Earthquake Commission Act 1993 (EQC Act) and under the CEIT Act.

[18] Given that the EQC Act contained definitions, it must be taken that Parliament intentionally set to one side the definitions in that Act in order to have, for the eligibility criteria in the CEIT Act, definitions specifically designed for the CEIT Act.

[19] The Earthquake Commission Act draws a distinction between "residential buildings" and "dwellings" – recognising that there may be one or more "dwellings" within a "residential building".

[20] On the information here provided to the Court it is apparent that EQC conducted a dwelling apportionment and concluded that a dwelling within the building accounted for 33 per cent of the building. EQC therefore accepted liability for the

damage to that dwelling (referred to in its letter also as a "residential unit") but was not the insurer of the remaining (commercial) portion of the building. That was because the building failed to qualify as a "residential building" under the definition in EQC Act.[3]

The character and use of Pinot's building and property

Pinot's evidence

[21] Mr Cohen's evidence concerning the building is set out at [10] above.

[22] Mr Cohen did not exhibit copies of the agreements to lease. Those for the first and second floors were produced by Ms Darlow for Vero. What Mr Cohen referred to in his affidavit as the "top floor" is the same as the "second floor", as referred to in the relevant lease document.

Vero's position

[23] Vero relies substantially on the nature of the policy taken out by Pinot as being a standard policy for commercial premises.

[24] To the extent Vero was able to refer to knowledge of the actual use of the building, it produced (through counsel) the two agreements to lease to which I have referred. Ms Darlow noted also other matters of evidence as set out at [14] above.

Conclusions as to how the building was being used

[25] I am satisfied that at the time of the Canterbury earthquake sequence the building and property were primarily being used as hospitality and commercial premises. The ground floor and basement were primarily occupied for the purposes of a café and bar business. The first floor was primarily occupied for office purposes. The second (top) floor was primarily occupied for office purposes.

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[3] Applying Earthquake Commission Act 1993, s 2, the dwelling or dwellings in Pinot's property were found to constitute less than 50 per cent of the total area of the building.

[26] The upper two floors, incorporating toilets, bathrooms and kitchens, had the potential for residential use and I am satisfied that historically there may have been residential use. But the single example cited by Mr Cohen of someone living in the premises before the earthquakes falls short of identifying the relevant period of use or indeed the extent of the premises so occupied. The fact that the agreement to lease for that floor involved a clear redesign of the floor to make it suitable for open-plan office use indicates that, at least from late-2008, that office use was its primary intended use.

[27] In summary, this was, at the time of the Canterbury earthquake sequence, a building for hospitality and commercial use albeit with the capacity for people to be accommodated on the upper two floors if they wished. I am not satisfied, on Mr Cohen's evidence, that anyone used it as their residence at the time of the earthquakes or at the time the insurance policy was taken out.

Application of the Act

Submissions for Pinot

[28] Ms Borcoski submitted that the property is a residential building and/or residential property. She submitted that it is evidenced by the fact that EQC responded to claims in relation to the property. Ms Borcoski submitted that the purpose of the definitional guidance given in s 8(5) of the CEIT Act is to provide guidance on what is a residential building for the purpose of s 8(1). Ms Borcoski submits that the CEIT Act permits guidance to be obtained from contracts of insurance by referring to descriptions or defined words used in such contracts to describe a residential building or property (such as the word "home"). She submits that it is not a requirement of the CEIT Act that the contract of insurance must include the terms "residential building" or "residential property" or similar, or that those terms be defined in that contract of insurance. She notes that s 8(5)(a) is expressly an inclusionary definition. She submits that, if s 8(5) prescribed the only circumstances in which a building or property will be "residential" for the purpose of the CEIT Act, then it would create unintended consequences. For instance, she submits that owners of residential units in a unit title development could not lodge claims with the Tribunal as the development would be insured under a commercial policy rather than a domestic policy. Such would be inconsistent with the purpose of the CEIT Act.

[29] Ms Borcoski submitted that the interpretation of the terms "residential building" and "residential property" must have regard to the purpose of the CEIT Act, citing examples of provisions (ss 8(3), 8(7) and 11) which have inclusionary provisions (that is, extending what might otherwise be a more limited scope of operation of the CEIT Act).

[30] Finally, Ms Borcoski submitted that the natural and ordinary meaning of the term "residential" as used in the CEIT Act means something that is suitable or allocated for residence. Ms Borcoski submitted that the term "residential building" and "residential property" should not be interpreted so as to confine them to premises used at a particular time (such as the date on which the policy was issued or the insured event occurred). She observed that residential premises may be out of residential use at a particular time but still be suitable and intended for resumed residential use.

Submissions for Vero

[31] Ms Darlow submitted that the terms "residential building" and "residential property" as used in the CEIT Act must be construed as referring to a building or property which is in use as a residence. The fact that a property is capable of being used as residential accommodation does not automatically mean that the premises are "residential" for the purposes of the CEIT Act.

[32] Ms Darlow rejected Pinot's proposition that such an interpretation would exclude claims by unit owners in unit title developments from eligibility to the Tribunal. The commercial policies which cover such properties and units contemplate that the properties are actually being used for residential purposes.

Discussion

<u>The Canterbury Earthquakes Insurance Tribunal Act itself</u>

[33] As provided by the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in the light of its purpose.[4]

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4 Interpretation Act 1999, s 5(1).

[34] The ordinary meaning of the term "residential", as used in connection with "residential building" or "residential property", has a focus on its use or service as exemplified in the first definition in the Oxford English Dictionary:[5]

> Serving or used as a residence; in which one resides; providing accommodation in addition to other services.

[35] The term "residence" is defined in the Oxford English Dictionary as:

> The circumstance or fact of having one's permanent or usual dwelling place or home in or at a certain place…

[36] These constructions of the term "residential" in the CEIT Act focus on the use to which premises are being put. I recognise that Ms Borcoski contends for an extended interpretation which goes beyond use to potential use or suitability, whether or not so used.

[37] The primary focus on the use to which premises are put is not the only means of determining the eligibility of a claim before the Tribunal. A claim in relation to a building will not lose its eligibility by dint of having been temporarily unoccupied (for instance being unoccupied between a sale and purchase). But what is required in that situation is that there remains an intended use of the building as someone's residence. The fact that a building might remain suitable to be used as a residence does not of itself constitute the building for the purpose of the CEIT Act a "residential building" or "residential property".

[38] The provisions of the EQC Act do not assist with the correct interpretation in terms of "residential building" and "residential property" as they appear in the CEIT Act. The purposes of the two statutes are different in nature and the concepts of "residential property" involved in each Act are materially different. Parliament chose not to carry the definitions in the EQC Act into the CEIT Act.

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5 *Oxford English Dictionary* (3rd ed, 2010, online ed).

Parliamentary materials in relation to the Act

[39] The Court is permitted to use Parliamentary history to assist in construing legislation but not so as to alter the meaning where the statutory words are clear.[6]

[40] Between the introduction of the Canterbury Earthquakes Insurance Tribunal Bill (as a Government Bill) to Parliament and the Bill being reported back from the Governance and Administration Committee, an amendment was made to introduce express reference to the term "home" in clause 8(5). The initial Bill had contained only what is now s 8(5)(b), giving "residential building" and "residential property" the meanings given in a contract of insurance to those or similar terms. On the reintroduction of the Bill, what became s 8(5)(a) was introduced so that the terms "residential building" and "residential property" include similar terms (such as "home") used in a contract of insurance between a policy holder and an insurer.

[41] At the Court's direction, counsel provided additional Parliamentary materials in relation to the CEIT Act. Ms Borcoski submitted, in her supplementary memorandum providing the materials, that none directly assisted with the interpretation of "residential building" or "residential property" beyond what is already defined in the CEIT Act.

[42] The Cabinet paper referred to "homeowner" in explaining that the Tribunal should be "homeowner oriented", but that discussion was in the context of the policyholder (rather than insurers or EQC) having the right to initiate process.

[43] That said, the Cabinet briefing, in explaining the mischief being addressed, referred to the time (then) taken to resolve claims which:

> … adversely impacts on homeowners' mental health and wellbeing. The uncertainty makes it hard for people to get on with their lives.

[44] This wording was subsequently picked up in the Explanatory note to the Bill when it was introduced to Parliament, stating that the Tribunal would "…assist

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6 See the discussion in Ross Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 290 – 301.

policyholders and insured persons to obtain some closure and help them get on with their lives".

[45] The various Ministers, on the first, second and third readings of the Bill, referred interchangeably to "homeowners" and "policyholders".[7]

[46] These materials confirm what is evident from the final form of the CEIT Act itself, particularly with its express reference to "home" in s 8(5)(a) of the CEIT Act. There is a legislative focus on homeowners. The term "residential building" takes that sense of the place used by one or more persons as their home. In short, the legislative history reinforces the ordinary meaning of the term "residential" as "serving or used as a residence".

Application of the eligibility provisions of the Act

The insurance policy

[47] The insurance policy entered into between Pinot and Vero is expressly entitled "material damage and business interruption policy". It contains standard policy provisions and extensions of the nature one would expect in relation to commercial premises. In the "material damage" section of the policy (the first page of narrative), express provision is made in relation to stock, the cost of rewriting of records, money and other property. There are then extensive provisions including in relation to such property. The "material damage" section is then followed by a "business interruption" section.

[48] The single reference in the policy to residential use (headed "MD29 Residential Accommodation") is in a provision extending cover to the insured for the reasonable expenses of finding alternative accommodation where residential accommodation insured by the "material damage" section is rendered uninhabitable. The expenses covered are specifically those "incurred by the Insured or the occupant (being an employee of the Insured)".

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7 Minister for Courts, Hon Andrew Little, on the First Reading, 4 September 2018; Acting Minister of Justice, Hon David Parker, on the Second Reading, 11 April 2019; Minister of Police, Hon Stuart Nash, on the Third Reading, 23 May 2019.

Discussion as to the nature of the policy

[49] The policy was plainly taken out by Pinot to insure commercial premises (which happen to have within them some accommodation suitable for residence) rather than a policy taken out for a "home" or residential premises.

[50] The terms and the nature of the policy also accord with such evidence as has been provided as to the actual use of the premises at the time the policy was written. The premises were being used for hospitality and commercial purposes, not residential purposes. The fact that the building had some capacity for accommodation (in a minority of its area) does not alter the correct characterisation of the building as commercial or non-residential.

Outcome

[51] The dispute between Pinot and Vero about Pinot's claim is not a claim for physical loss or damage to a "residential building" or "residential property" as those terms are used in the CEIT Act. As such, it does not meet that eligibility criterion to bring a claim before the Tribunal under s 9(1)(a) of the CEIT Act.

[52] Section 16(2) of the CEIT Act precludes the transfer of this proceeding given that it does not meet the eligibility criteria for a claim under s 9.

[53] The application for transfer will accordingly be dismissed.

Costs

[54] Costs must necessarily follow the event.

[55] Costs have been kept to a minimum because the parties have complied with the Practice Direction in relation to transfer.

[56] Counsel for the defendant was required to file a single memorandum both in opposition and submission, and to then appear (by way of telephone conference) at a short hearing. In the absence of Items in Schedule 3 High Court Rules applying

specifically to these steps, I proceed by analogy to Item 10 (preparation for first case management conference) and Item 13 (appearance at first or subsequent case management conference). The appropriate band is Band B.

Orders

[57] I order:

(a) The plaintiff's application for transfer of the proceeding to the Canterbury Earthquakes Insurance Tribunal is dismissed.

(b) The plaintiff is ordered to pay to the defendant in any event the costs of the application in the sum of $1,561.

Case management

[58] I adjourn the proceeding to a case management conference (by telephone) at 2.45 pm, 17 September 2019 (Gendall J). Counsel are to file five working days before a joint memorandum detailing interlocutory progress, identifying any directions required to take the proceeding to trial, and covering all Schedule 5 matters.

Osborne J

Solicitors:
Saunders Robinson Brown, Christchurch
Fee Langstone, Auckland

This judgment was delivered by me on 6 September 2019 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date: