IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-409-765
[2017] NZHC 1473

BETWEEN	BODY CORPORATE 74246, JAMES HAWKINS MCGILLIVRAY AND PIERA LOUISE MCGILLIVRAY AS TRUSTEES OF THE 1091 FERRY ROAD FAMILY TRUST AND YVONNE CHAPLIN AND GEOFFREY CHILDERS SAUNDERS AS TRUSTEES OF THE RATA TRUST Plaintiffs (Discontinued)
AND	QBE INSURANCE (INTERNATIONAL) LIMITED Defendant
	ALLIANZ AUSTRALIA INSURANCE LIMITED Third Party

Hearing:	22 and 23 May 2017
Counsel:	P Davis for Defendant C Laband and R Tosh for Third Party
Judgment:	29 June 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 29 June 2017 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors:	Fee Langstone, Auckland DLA Piper, Auckland

[1] QBE Insurance (International) Ltd (QBE) and Allianz Australia Insurance Limited (Allianz) are insurers. QBE provided earthquake cover for a property at 1091 Ferry Road, Christchurch (the property) for the period "4 September 2009 at 4 pm to 4 September 2010 at 4 pm". Allianz provided cover for the same property with an "Effective Date" of 4 September 2010 and an "Expiry Date" of 4 pm on 4 September 2011.

[2] At 4.35 am on 4 September 2010 the property was severely damaged by the first Christchurch earthquake. QBE settled the claim for repair cost. It now claims that the effect of the two policies is that the property was doubly insured, and Allianz must make a 50 per cent contribution to the settlement. It is common ground that the insured, Body Corporate 74246, did not seek or give instructions to obtain double insurance.

[3] The central issues in this proceeding are:

(a) whether the Allianz policy should be interpreted to incept at 4 pm on 4 September 2010 (being the expiry time of the QBE policy); and/or

(b) whether there is an implied term that the Allianz policy incepted at 4 pm on 4 September 2010; and/or

(c) whether the Allianz policy must be rectified so that the policy incepted at 4 pm on 4 September 2010.

Background

[4] The following background is not disputed.

[5] In September 2009, Body Corporate 74246 and QBE entered into a Material Damage and Business Interruption Insurance Policy in respect of the property for the period 4 September 2009 at 4 pm to 4 September 2010 at 4 pm (the QBE policy).

The QBE policy

[6] The period of insurance for the QBE policy is defined as follows:

Period of insurance

From: 4 September 2009 at 4 pm to 4 September 2010 at 4 pm.

[7] The policy also includes the following clause:[1]

> **11 Other Insurance**
>
> If the insured shall be entitled to indemnity under any other policy of insurance, any benefit under this policy shall be in excess of such other insurance.

Damage to the property

[8] The property sustained physical damage as a consequence of:

(i) excavation and construction of a building on a neighbouring property prior to the 4 September 2010 Christchurch earthquake;

(ii) the 4 September 2010 Christchurch earthquake; and

(iii) the 22 February 2011 and 13 June 2011 Christchurch earthquakes.

[9] Extensive building works were required to repair the vibration damage, the 2010 earthquake damage and the 2011 earthquake damage. The total estimated repair cost was $3.32 million (plus GST). The repair cost attributable to the 2010 earthquake damage was 28 per cent of the total estimated repair cost, being $929,000 (plus GST). The plaintiffs claimed from QBE the sum of $929,000 (plus GST), together with interest and costs.

Settlement of claim

[10] QBE accepted that Body Corporate 74246 had a valid claim for some of the 2010 earthquake damage under the QBE policy, but disputed the amount payable.

---

[1] This clause is found in the QBE Statutory Liability Policy, in the agreed bundle of documents, which Mr James refers to in his Brief of Evidence dated 22 May 2017 at [19] as the policy wording he received from QBE after 19 September 2009. Ms Davies in her opening submissions referred to a clause 7, without reference to any policy contained in evidence. In any event, the substance of the clauses is consistent.

[11] By settlement agreement dated 29 October 2015, Body Corporate 74246 and QBE agreed to settle the plaintiffs' claims on the basis that QBE would pay to the plaintiffs $970,000 (including GST), comprised of:

(a) $485,000 (including GST) under the QBE policy; and

(b) $485,000 (including GST) in respect of which QBE made no admission of liability under the QBE policy and which QBE intended to claim from Allianz by way of contribution.

[12] That disputed sum forms the basis of the present proceedings.

The Allianz policy

[13] In August 2010, Mr James, an insurance broker responsible for securing insurance cover for the property, approached Mr Lowe of Allianz about providing cover for the property as QBE no longer wished to provide it. He sent Mr Lowe a schedule, summarising the QBE cover as "4 September 2009 to 4 September 2010". Mr Lowe responded, advising Mr James of their rates and that their standard policy wording would apply.

[14] This proved acceptable to Mr James, who issued a commercial package policy to Body Corporate 74246 confirming cover for the period 4 September 2010 to 4 September 2011. He also issued a cancellation notice in respect of the QBE policy, effective from 4 September 2010.

[15] The terms of the Allianz policy were recorded in the Allianz Business Pack provided to Body Corporate 74246 in November 2011. It relevantly records:

Period of Insurance:

Effective date: 04/09/2010

Expiry date: 4pm on 04/09/2011

[16] And further:

> "Period of Insurance" means the period commencing on the effective date and ending on the expiry date as shown in the Schedule.

[17] Like the QBE policy, it limits cover to sums not otherwise recoverable from another insurer:

> **6 Other Insurance**
>
> You must give Us written notice of any insurance or insurances already effected, or which may be subsequently effected covering, whether in whole or in part, the subject matter of the various Sections of this Policy. We will only pay over and above that amount recoverable from the other insurance.

Contribution sought

[18] QBE has sought contribution from Allianz by letter dated 12 October 2015 in respect of the $970,000 (including GST) settlement payment by QBE to Body Corporate 74246 on 30 October 2015.

The Evidence

[19] QBE did not call evidence. Allianz called five witnesses:

(a) Mr John Chaplin, the point of contact on insurance matters for Body Corporate 74246;

(b) Mr Darren Lowe, formerly of Allianz, responsible for issuing the Allianz policy for the property. He has worked in the insurance industry for 27 years;

(c) Mr Denis James, an insurance broker, responsible for securing cover for the property. He worked in the insurance industry for 46 years and is now retired;

(d) Ms Nicola Kendrick, who entered details of risks into Allianz's computer system; and

(e) Mr Andrew West, an insurance expert with 30 years' experience.

[20] A clear narrative emerges from the witnesses of fact. QBE no longer wanted to provide cover for the property after its policy expired at 4 pm on 4 September 2010. Mr Chaplin instructed Mr James to find a new insurer to take over from QBE. There was no discussion about the potential for overlapping cover, Mr Chaplin stating in evidence:

> I can confirm that I did not instruct Mr James to obtain cover that overlapped in time with the QBE policy.

[21] Under cross-examination he stated it was not discussed.

[22] Mr Lowe, then at Allianz, was approached by Mr James about cover on 19 August 2010. Mr Lowe advised Mr James that Allianz was prepared to provide cover. No start time was discussed. The schedule sent to Mr Lowe about the QBE policy referred to an expiry date of 4 September 2010 without a specific expiry time. Mr James accepted the Allianz proposal on behalf of Body Corporate 74246.

[23] Standard Allianz terms were used. The effective start date of 4 September was noted, but the start time was left open on the assumption made by both Mr James and Mr Lowe that this would be determined by the expiry of the existing QBE policy in accordance with what they understood to be accepted market practice. After the earthquake there was no discussion or thought given by Mr James to making a claim against the Allianz policy for the 4 September 2010 earthquake. Allianz however did pay out on subsequent earthquakes. An Allianz policy certificate generated in 2014 (prior to this litigation) records a start time of 4 pm on 4 September 2010.

[24] Mr West also gave evidence that it is market practice for locally issued policies to expire at 4 pm on the date of their expiry, as was the case with the QBE policy. He also explained that when arranging cover, the commonly held expectation of an underwriter and the broker operating in the New Zealand market is that there is seamless cover. He said that stating a fixed time was generally avoided by major insurers so that there were no inadvertent gaps in cover. In particular, he noted:

> The inception date of the replacement policy is expressed as the same date that the existing policy expires without specifying the exact time that the policy commences, and reliance is placed on the commonly held

> understanding that the policy incepts at the time of expiry of the expiring policy (which in this case was 4 pm on 4 September 2010).

[25] Under cross-examination Mr West accepted that the start time depended on what was agreed, and that there were examples of policies with fixed start times and with different expiry times. But he said that he had never issued a policy with an inception commencement time.[2] He also said that by far the majority of the commercial property business placed in the New Zealand market would be through insurance brokers and their schedules and wordings would not have a time of inception on the policy. He was not specifically cross-examined on the opinion expressed at [24] above.

Interpretation

[26] The first issue is whether the Allianz policy should be interpreted to incept at 4 pm on 4 September 2010.

[27] Ms Davies for QBE submits (in short):

(a) The common law principle of pro rata contribution by insurers applies in circumstances where two contracts of insurance cover the same loss.[3]

(b) The Allianz policy should be given its natural and ordinary meaning, namely that the effective start date of the policy cover is, as stated in the policy schedule, "4 September 2010".

(c) The Allianz policy is consistent with pre-contractual correspondence recording an invitation to provide, and an offer and the acceptance of policy cover from "4 September 2010 to 4 September 2011". On the objective facts the only available interpretation is that it was to incept on 4 September 2010.

---

2 The transcript refers to "date" but in context it is clear that Mr West was referring to inception time.

3 Citing *Albion Insurance Co Ltd v Government Insurance Office (NSW)* [1969] HCA 55, (1969) 121 CLR 342.

(d) The evidence of pre-contractual understanding from Messrs James and Lowe about assumed inception time is not admissible because it does not establish background facts known to both parties. It was not known nor assumed by Mr Chaplin (or, by extension, Body Corporate 74246).

(e) Moreover, this assumption should not be imputed to the insured because:

(i) Body Corporate 74246 did not know about the so-called standard practice of using an effective start date rather than an inception time to avoid potential gaps in policies.

(ii) There is nothing in the policy wording or in the correspondence between Allianz, Mr James and Body Corporate 74246 to suggest that the effective date of 4 September 2010 would not be effective prior to 4 pm.

(iii) Knowledge of agents beyond that acquired during the negotiations should not be imputed to principals.[4]

(f) The evidence does not support an industry practice or custom of fixing:

(i) a policy inception time at 4 pm; or

(ii) a policy expiry time at 4 pm.

(g) Post contractual conduct does not support Allianz's construction: the policy was issued 10 weeks after the September event without an inception time.

---

[4] Citing Peter Watts and F M B Reynolds (eds) *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at [8-207]-[8-216].

(h) Double insurance is beneficial to an insured, for example enabling cover in circumstances where one insurer liquidates.

(i) Allianz thus overtly assumed responsibility for cover from 12 am on 4 September 2010 and should not be allowed to resile from the clear terms of its policy because of the QBE policy.

[28] Ms Laband for Allianz however contends that Allianz did not insure the property until 4 pm on 4 September 2010 (after the earthquake at 4.35 am) because on a proper interpretation of the Allianz policy, construed against the relevant factual matrix, the 'Effective Date' for commencement of the Allianz policy stated in the Allianz Business Pack is 4 pm on 4 September 2010:

(a) It is unlikely that the absence of a specified start time was a mistake and/or that they actually meant 12 am. Rather the start time depended on the circumstances.

(b) The structure and object of the bargain was simple, that is to replace an existing policy and ensure seamless cover.

(c) While unintended double insurance may have a benefit, the evidence was that such benefit was theoretical only.

(d) The surrounding circumstances show that not specifying an inception time was standard practice and concordant with the expectation that the policy would provide seamless, not double, cover.

(e) Market practice was that the usual start and expiry time was 4 pm and the majority of major insurers issued policies without a start time.

(f) Subsequent conduct, including the fact that the claim was only made against QBE, supports a finding that double cover was not anticipated.

Preliminary issue – the basis of QBE's claim (as a non-contracting party) against Allianz

[29] It is common ground that:

(a) it is lawful for an insured to have double insurance;

(b) where there is double insurance, the insured is to be indemnified once, but the insurers are to contribute pro rata;[5] and

(c) the obligation to contribute arises from the "considerable hardship on the insurers that one alone of several co-insurers should bear the whole loss".[6]

[30] But, as the authors of *MacGillivray on Insurance Law* comment:[7]

> As a rule, however, insurers are not content to leave their liability on this basis, and have accordingly inserted conditions in their policies to protect themselves as far as possible against fraudulent over-insurances, and at the same time to obtain the maximum benefit from the contributory liability of co-insurers.
>
> …
>
> Most fire and other non-marine indemnity policies contain one or other or both of the following conditions:
>
> (1) requiring the insured to disclose other insurances upon the same property subsisting at the time the policy is issued or coming into existence thereafter; and
>
> (2) providing that in the event of other insurances subsisting at the time of the loss the insurer shall only be bound to pay to the insured the proper proportion of the loss.

[31] I turn then to examine the claimed existence of double insurance in light of this legal frame.

---

5 *Albion Insurance Co Ltd v Government Insurance Office (NSW)*, above n 3, and see Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at 646-677.

6 John Birds, Ben Lynch and Simon Milnes (eds) *MacGillivray on Insurance Law* (13th ed,Thomson Reuters, London, 2012), at [25-001]. This comment was cited by Ms Davies.

7 At [25-001]-[25-002]. Ms Davies did not cite this passage, but as it follows on immediately from the passage cited by her, I am content to rely on it.

Assessment

[32] As the Supreme Court stated in *Firm PI 1 Ltd*, the aim of interpretation is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.[8] As the Court emphasised however, "text remains centrally important".[9]

[33] The Court of Appeal in *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* also recently adopted the approach taken by the United Kingdom Supreme Court in *Arnold v Britton*:[10]

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean…And it does so by focussing on the meaning of the relevant words…to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions [of the contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of the party's intentions.

[34] I proceed on this basis.

[35] Plainly all parties to the negotiations intended to agree to cover that would replace the QBE cover at the *expiry* of the QBE policy. Ms Davies, for QBE, in fact put it this way in her written closing:

> The intention communicated to Allianz by the plaintiffs broker was for a new policy to start on 4 September 2010 *when the QBE expired*, and that is exactly what happened.
>
> (Emphasis added)

---

8 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147; [2015] 1 NZLR 432 at [60]-[61].

9 At [63].

10 *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131, [2016] 2 NZLR 829 at [35], citing with approval *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15]. See also *Hulbert Developments Ltd v Tairua Marine Ltd* [2016] NZHC 1270 at [29].

[36] While Ms Davies qualified this in oral argument to mean when Mr James assumed the QBE policy expired, namely on 4 September 2010, her written submission accurately records the position.

[37] I accept the first *Arnold* factor and some objective facts (the fourth *Arnold* factor) appear, at first blush, to favour the QBE interpretation. The actual words used in the contract and in the communications between Mr James and Mr Lowe refer to *effective start date*, not a specific inception time. This is recorded in Mr James' summary of the cover and later in the Allianz policy documentation issued some ten weeks after the September earthquake event. The third *Arnold* factor (purpose) is neutral, that is the purpose of the contract is simply to provide insurance in the period stated.

[38] But the second and fourth *Arnold* factors (other relevant provisions and the remaining objective facts) overall strongly suggest double insurance was not intended:

(a) First, there was never any request for or suggestion of overlapping or double cover.

(b) Second, the documentary trail shows that the schedule provided to Allianz records an end date for the QBE cover of 4 September 2010 while the schedule provided by Allianz shows a start date for its cover of 4 September 2010. This implies seamless rather than overlapping cover was anticipated by the contracting parties.

(c) Third, clause 6 of the Allianz policy (see [17]) and the fact that no clear notice of prior insurance for the purpose of it was given, reinforce the view that neither party considered there to be or agreed to any overlap between the policies.

(d) Fourth, as the authors of *MacGillivray on Insurance Law* say, the clear object of this type of clause is to avoid double cover. The effective start date should be read in the context of this clause.

(e) Fifth, subsequent conduct supports this interpretation. No claim was made against Allianz in relation to the September 4 earthquake and the Allianz policy certificate issued in 2014, prior to the QBE claim, records a start time of 4 pm.

[39] The fifth factor listed in *Arnold* is commercial commonsense. I have not found it necessary here to place reliance on such considerations.[11] But to the extent it is relevant; I also consider it counts against QBE's interpretation. Ms Davies sought to argue that an interpretation providing double insurance was commercially sensible, as it provided Body Corporate 74246 with an alternative method of recovery if one of its insurers became insolvent.

[40] I disagree. First, there is nothing in the objective (or subjective) evidence to suggest that was a matter of concern to Body Corporate 74246. Second, the commercial package sent to Body Corporate 74246 in relation to the QBE cover refers to its A+ credit rating. Third, if Body Corporate 74246's intention was to obtain double insurance, it makes little commercial sense to do so for one day. It makes no sense for Allianz to do so (while at the same time agreeing to clause 6). Finally, clause 11 of the QBE policy indicates that Body Corporate 74246 could only obtain a benefit under the QBE insurance in excess of any cover provided by Allianz. This is not reconcilable with an intention to obtain double insurance, except on the tortuous basis that two escape clauses have the effect of providing double cover.[12]

[41] Overall, while the actual words used in the communications between Mr James and Mr Lowe refer to *effective start date*, not inception times, I do not consider these displace the objective intention to obtain and provide seamless cover revealed by the factors listed at [38]. Apart from the open textured nature of the words used, nothing in the background facts supports the notion that the parties were intending to contract for double insurance. I note in forming this view I did not take into account the subjective assumptions made by Mr James and Mr Lowe.

---

[11] The Supreme Court has cautioned against placing too much reliance on commercial commonsense in *Firm PI 1 v Zurich Australian Insurance Ltd* above n 8, at [62], [77]-[79] and [88]-[93].

[12] At common law it has long been settled that two escape clauses will not leave the insured without insurance. Rather, liability to provide cover will be shared. See Robert Merkin and Chris Nicoll, above n 5, at 655-657.

[42] I am therefore satisfied that the parties did not intend by the contract of insurance to provide double insurance. Rather the clear intention of the parties, objectively assessed, was to simply obtain seamless cover.

[43] For completeness I turn then to examine whether a condition limiting the period of the insurance cover should be implied or if rectification is appropriate.

Implied term

[44] Ms Davies submits (again in summary) that there is an insufficient basis to imply an inception time of 4 pm:

(a) It is not supported by industry practice or custom: some of the policies produced in evidence to the Court had a different start time,[13] and the key expert witnesses variously conceded in cross-examination that not every insurer used a 4 pm inception time.

(b) It is not necessary or reasonable in the circumstances to imply a fixed inception time.

[45] Ms Laband contends an inception time of 4 pm should be implied because:

(a) the implied term is necessary to give the policy the effect that the parties objectively intended – that is to obtain new and seamless cover; and/or

(b) uncontradicted expert opinion evidence is that where there is an expiring policy, unless another time is expressly agreed, a renewal or replacement policy takes effect from the time of expiry of the previous policy so as to provide seamless cover; and

(c) this outcome is not inconsistent with any of the express terms.

---

[13] In total sixteen policy schedules from ten insurers formed part of the common bundle, including the relevant QBE and Allianz policies. Of these, six had an inception time of 4 pm. A further nine, including the Allianz policy, provided no start time but an end time of 4 pm. Only one of the three IAG policies differed from the QBE and Allianz policies: it had a start date of 20 October 2010 and an end time of 12 am on 20 October 2011.

Assessment

[46] Ms Davies' careful submissions belie the objective facts. The insurer and the insured were not contracting to secure double insurance. Rather, they were contracting to secure insurance over the affected property at the expiry of the QBE insurance. This conclusion is reinforced by, but not dependent on, the industry assumptions made by Mr James and Mr Lowe. Rather (as I have explained) the instructions given to Mr James, the content of the negotiations and language used in the correspondence between the parties to the insurance contract envisages that the Allianz cover would commence at the expiry of the QBE cover, as Ms Davies quite properly acknowledged in her written submissions.

[47] In recent times it has been suggested that the question of whether to imply a term is a matter of interpretation: that is whether the term to be implied would spell out what the instrument, read against the relevant background, would reasonably be understood to mean.[14] This is to be compared with the conditional framework for assessment set out in *BP Refinery*.[15]

[48] For my part, the outcome is no different under either approach:[16]

(a) A provision fixing an inception time would spell out what the instrument, read against the relevant background, would reasonably be understood to mean – the correspondence shows seamless cover was expected and conversely there is nothing to show that the parties intended the insured to benefit from double cover.

(b) A provision enabling seamless, not double cover is reasonable and equitable – notional reasonable people in the position of the parties would have assumed seamless not double cover was to be provided.

---

[14] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [21]. See also *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [81]. The Supreme Court there also referred to the qualifications imposed on *Belize Telecom* in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, namely at [26]-[28].

[15] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13 at 10.

[16] See also the approach taken by the Court of Appeal in *BDM Grange Ltd v Trimex Pty Ltd* [2017] NZCA 12 at [63]-[75].

(c) If I am wrong about the interpretation, the provision is necessary to give the contract efficacy and commercial coherence by specifying a clear inception time in order to avoid the mischief of double insurance anticipated by clause 6.

(d) Against the background facts known to both parties, including in particular the complete absence of a request for or offer to provide double insurance, the provision goes without saying.

(e) The provision does not contradict any express term of the contract. Rather it simply adds an inception time to the start date to accord with the expectations of the parties to the contract.

[49] Given the foregoing, I am satisfied that an implied term incorporating an inception time (if necessary) is efficacious.

[50] Ms Davies also argued that if QBE had defaulted, Body Corporate 74246 would have sought to enforce the ordinary meaning of the contract; that is an inception time of 12 am on 4 September 2010. But had this argument been promoted by the insured, I am satisfied that the understanding Mr James shared with Mr Lowe for Allianz about the object of the effective start date (namely to ensure seamless not double cover) should then be imputed to the insured. He was the agent for the insured in all respects and had been so for several years. It would defy the true character of his role, and his specific instructions, for the insured to disown Mr James' knowledge on this discrete point.[17]

[51] For completeness, I address the issue of industry practice or custom. On the evidence before me, I am not satisfied the assumptions made by Mr James and Mr Lowe reflect industry-wide practice. It is, however, notorious within the community of interest in this case, namely insurance brokers and major insurance providers in New Zealand that cover will be seamless and a fresh contract of insurance will incept from the expiry of the previous cover. In this regard, the evidence given by Mr James, Mr Lowe and Mr West was credible and persuasive, particularly in the

---

[17] Peter Watts and F M B Reynolds, above n 4, at [8-207]-[8-208].

complete absence of any contradicting evidence by QBE. Indeed, I would have expected evidence from QBE, an insurer, had seamless cover not been standard practice among brokers and major insurers in New Zealand.

[52] Finally, I also note that were it necessary to weigh the assumption of seamless contracts, the correct approach, as discussed by the authors of *Bowstead and Reynolds on Agency* would be to determine whether industry practice should be imputed to the principal by reference to the scope of the delegation.[18]

[53] In *Jessett Properties Ltd v UDC Finance Ltd*, Hardie Boys J commented on the general approach to imputation of knowledge:[19]

> The general principle that notice given to or knowledge acquired by an agent is imputed to his principal only if the agent was at the time employed on the principal's behalf is recognised in the texts and the cases…
>
> …it is apparent that knowledge acquired before the agency began, or probably even during its currency but outside the scope of the engagement, should not in general be imputed to the principal.

[54] But he went on to observe:[20]

> All turns on the nature of the agent's engagement.

[55] *In Jessett Properties Ltd,* a tenant of a property under an unregistered lease, Now Investments Incorporation Ltd (Now), secured finance with UDC against that lease. Now was managed by Mr Wallis. Now defaulted on the rental payments and the lessor, Capital Investments Ltd, fell into arrears with its mortgagee ANZ, which knew about the lease to Now. ANZ exercised its power to sell the property. As it happens Mr Wallis purchased the property on behalf of a company to be formed, Thara Holdings Ltd (Thara). Thara subsequently issued a lease to Jessett Properties Ltd. At issue was whether Mr Wallis' knowledge of the previous security with UDC could be imputed to Thara. The Court said it was significant that Mr Wallis had been appointed to negotiate on behalf of Thara with ANZ because of his knowledge of the

---

18 At [8-208] and [8-211]. The orthodox approach to implying a term by custom is found in *Everist v McEvedy* [1996] 3 NZLR 348 (HC), per Tipping J.

19 *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA) at 143.

20 At 143. In coming to this conclusion, he relied on *Blackburn, Low & Co v Thomas Vigors* (1887) 12 App Cas 531, at 537-538, per Lord Halsbury LC.

business and indeed that his principal had "purchased" the knowledge which he had.[21]

[56] In the present circumstances, Body Corporate 74246's delegation to Mr James was wide: to obtain an entire contract of insurance, as he had done for several years. There can be little doubt that it purchased his knowledge of the property, the existing insurance and the industry assumptions of seamless cover upon which insurance with Allianz was to be obtained.

[57] In the result, had it been necessary to do so, I would have implied an inception time of 4 pm (which corresponds to the end time for the QBE insurance policy).

Rectification

[58] Ms Davies submits that rectification is not reasonable:

(a) There is no need to rectify, because the contract accurately records what was sought by Body Corporate 74246 and offered by Allianz.

(b) There was no drafting mistake or failure to record accurately what was intended at the time the contract was entered into.

(c) Rather any (alleged) mistake was simply made by Mr James, who did not notice or advise Allianz of the expiry time on the QBE policy.

[59] Ms Laband responds that it was the common intention of both of the parties to the Allianz policy that the 'Effective Date' for commencement as stated in the Allianz Business Pack would be 4 pm on 4 September 2010, and to the extent the policy does not reflect this it should be rectified to do so by adding '4 pm' before 04/09/10 to the 'Effective Date' stated in the Business Pack given:

(a) Both Body Corporate 74246 and Allianz intended the cover under the Allianz policy to commence seamlessly after the cover under the QBE

---

[21] At 144.

policy ceased at 4 pm on 4 September 2010, right up to the conclusion of the contract.

(b) Allianz's Certificate of Insurance refers to '4 pm on 04/09/2010' as the Effective Date, consistent with both parties' intentions.

Assessment

[60] The law on rectification was recently explained in two Court of Appeal authorities: *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd*[22] and *Davey v Baker*.[23] The Court of Appeal in *Davey v Baker* made the following observations:[24]

> This Court in *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd* held that rectification will be ordered where the parties have agreed a contractual arrangement but the terms in which the arrangement is recorded do not accurately reflect the agreed terms.
>
> …
>
> It is suggested that a mistake in the interpretation of an instrument or in the legal consequences of entering into an instrument is regarded as insufficient to ground rectification; rectification is a remedy to ensure the instrument contains the provisions which the parties intended it to contain, and not those which it would have contained had the parties been better informed. The remedy of rectification is strictly limited to a clearly established disparity between the words of the document and the intentions of the parties.

[61] In *Hanover Group* the Court had earlier said:[25]

> Contractual interpretation is to be approached on an objective basis, from the perspective of a reasonable and properly informed observer. Rectification will be ordered where the parties have agreed a contractual arrangement but the terms in which the arrangement is recorded do not accurately reflect the agreed terms. Oral evidence may be given to show that the recorded terms do not reflect the true agreement between the parties.

[62] In those decisions the Court of Appeal held the party seeking rectification must show:[26]

---

22 *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd* [2013] NZCA 442, (2014) 18 ANZ Insurance Cases 61-988.

23 *Davey v Baker* [2016] NZCA 313, [2016] 3 NZLR 776.

24 At [37], [40].

25 *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd*, above n 22, at [30].

26 At [30]; *Davey v Baker*, above n 23, at [37]. These principles were outlined by Peter Gibson LJ

(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

(2) there was an outward expression of accord;

(3) the intention continued at the time of the execution of the instrument sought to be rectified;

(4) by mistake the instrument did not reflect that common intention.

[63] I am not satisfied that rectification is the most appropriate remedy in this case. It is a discretionary equitable remedy, typically applied to ameliorate the harsh effects of the strict application of rules of contractual interpretation.[27] Where a remedy has been provided by interpretation and implied term, it is unnecessary.

[64] Moreover, there is a case to be made that "4 pm" was not omitted by mistake, but rather, as various witnesses explained in evidence, to avoid inadvertent gaps in cover. Here, the use of a start date was intentional to the extent that Mr James wanted to secure and Mr Lowe wanted to provide seamless cover and left the inception time out to secure that objective. It has only become necessary and efficacious to identify an inception time to expressly address a plainly unintended consequence, namely double insurance (or, conversely, to expressly state that seamless cover was intended).[28]

[65] I acknowledge the authority cited by Ms Laband, *Equity Syndicate,*[29] is analogous. In that case the English High Court granted a rectification claim in order to correctly define the true scope of the policy in focus. The Court observed:[30]

> There is no unfairness in permitting rectification, which merely ensures that effect is given to what the parties to the insurance contract actually agreed and what all parties concerned understood to be the position. To refuse rectification would be unfair to Equity as it would render it liable to contribute to Ms Ball's liability which it never intended or agreed to insure

---

in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560 (CA) at [33], and endorsed by Lord Hoffman in *Chartbrook Ltd v Permission Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [48].

27 See *Clode v Sullivan* [2016] NZHC 1561 at [107], [118].

28 This is not simply a case of implying a term or rectifying a contract simply because the parties would have agreed had it been suggested to them. *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd,* above n 14, at [21].

29 *Equity Syndicate Management Ltd v Glaxosmithkline plc* [2015] EWHC 2163 (Comm), [2016] Lloyd's Rep IR 155.

30 At [47].

> and for which it has received no premium. It would provide Axa with a windfall claim to contribution when it is the only insurer to have received premium for insuring Ms Ball.

[66] While there are clear parallels to the present facts, the better remedy in this case lies in the objective interpretation of the contract in light of the factual matrix or implication of a term to respond to a clearly unintended consequence of standard form drafting.

Outcome

[67] The QBE claim fails. The contract, when read in context, incepted at 4 pm on 4 September 2010.

Costs

[68] Allianz is entitled to costs. I consider a 2B award to be appropriate. The parties may file submissions, no more than three pages in length, on quantum if necessary within 10 workings days.