IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2010-409-2710
[2013] NZHC 2472

BETWEEN	BODY CORPORATE 83501 Plaintiff
	WILLIAM MALCOLM MURPHY & OTHERS Second Plaintiffs
AND	CHRISTCHURCH CITY COUNCIL First Defendant
	TIMOTHY HARVEY FIELD Second Defendant
	GORDON KENNETH STAMPER Third Defendant
	ANTON SUMMERFIELD Fourth Defendant
	LSC CONSULTING LIMITED Fifth Defendant
	THE EARTHQUAKE COMMISSION Sixth Defendant
	IAG NEW ZEALAND LIMITED Seventh Defendant

Hearing:	11 July 2013 and 17 September 2013
Appearances:	N R Campbell QC and J Moss for Applicant (Third Defendant) M G Ring QC and G J Turner for Respondent (Seventh Defendant)
Judgment:	20 September 2013

RESERVED JUDGMENT OF FOGARTY J

Introduction

[1] The applicant applies for an order granting leave to bring a third party claim against the respondent. These proceedings were commenced in 2010. They are complex. The subject matter is an apartment complex. The original litigation was a leaky home claim. That has been complicated by earthquake damage.

[2] The case is now set down for hearing in mid-October for eight weeks. The parties are in the final stages of preparation for trial. There are also going to be attempts to settle the case, beginning sometime next week.

[3] In July of this year, Mr Stamper the third defendant sought leave to join IAG as a third party. IAG is already a third party. I treat Mr Stamper's application for leave to plead a claim against IAG, at this late stage, as an application to cross-claim.

[4] The application by Mr Stamper for leave to bring third party and/or joinder claim against IAG pleads:

> The Broadform Policy provides a general indemnity for the Applicant for all amounts up to $1 million which the Applicant shall become legally liable to pay arising from property damage happening within the geographical limits during the period of insurance and caused by an occurrence in connection with the business.

[5] This "Broadform" insurance policy was taken out by Mr Stamper's company, Ice Properties Limited, in the late 1990s and early 2000s. For some time IAG has been declining cover. It is only in the last couple of months that a measure of acceptance was reached as to existence of a policy, in favour of Ice Properties Limited, between 1996 and 2005. IAG has reserved its position on indemnity in all respects, but for contending that the claims in these proceedings against Mr Stamper, if upheld, would not qualify for indemnity under this policy. This was because the subject matter of the claim, a defective construction, was a "product" of Ice Properties Limited, and as such excluded from the indemnity otherwise provided by the contract of insurance, should that contract apply. This is because any liability will be a "Product Liability". "Product Liability" is excluded, in this context, by the policy.

[6] It is accepted that Mr Stamper personally is one of the insured persons with cover under the public liability policy. Mr Stamper naturally describes Ice Properties Limited as his company. It is now in liquidation. He was a director and shareholder. He is a named person in the policy.

[7] Mr Stamper's counsel argue that it is not possible before the trial verdict to exclude cover by reason of the "Product Liability" exceptions. Therefore leave should be granted now to plead indemnity against IAG.

The nature of the claims against Mr Stamper

[8] The multi-unit complex consists of 42 self-contained residential apartments together with a basement car parking facility, indoor swimming pool, gym complex and outdoor leisure area.

[9] The plaintiffs' claim pleads, either as particulars of the non-delegable duty of care, or (arguably) as separate duties:[1]

> 52. Mr Stamper was a co-developer and/or project manager in relation to the construction of the Complex.
>
> 53. Consequently, Mr Stamper owed the Plaintiffs as owners and/or future purchasers of the Units a non-delegable duty of care to ensure that:
>
> 53.1 The building work was carried out in a good and workmanlike manner;
>
> 53.2 The Complex complied with the provisions of the Building Act, the Building Code, and other relevant standards;
>
> 53.3 The building work was conducted in accordance with the Building Consents; and
>
> 53.4 That the contractors and consultants who were engaged on the building work had the necessary experience and level of expertise to ensure that the work was carried out in a good and workmanlike manner and that it complied with the Building Act 1991, the Building Code, the relevant technical literature and other relevant standards.

It goes on to plead:

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[1] Fourth amended statement of claim, filed 11 July 2013.

54. In so far as any aspect of the building works or their supervision were carried out by Bealey Avenue or Ice Properties, Mr Stamper assumed personal responsibility for that work and had control over it.

55. Mr Stamper breached his duty of care and caused or materially contributed to the Plaintiffs' loss.

56. Mr Stamper was negligent in that he:

    56.1 conducted, carried out, or permitted the building work on the Units to be completed with the Defects set out above and so created a foreseeable risk of leaks and moisture ingress in contravention of the Building Code, in particular clauses B2, E2 and E3;

    56.2 carried out or caused the building work to be conducted in such a way that it did not correspond with the Building Consents;

    56.3 failed to supervise the subcontractors on site adequately or at all or ensure appropriate sequencing of work and to ensure that all work was conducted in a good and workmanlike manner and in compliance with the Building Code and the Building Consents;

    56.4 failed to ensure that adequate plans, specifications, and the relevant technical literature were made available to the subcontractors and tradesmen on site and were followed and adhered to; and

    56.5 failed to detect and/or take any reasonable steps to have the Defects in the Complex rectified during the course of the building works.

57. As a consequence of Mr Stamper's negligence the Plaintiffs have suffered loss as follows:

    57.1 As a result of the negligence and defects set out in paragraph 56 above the Complex was damaged and required repair or demolition and reconstruction to ensure that the Complex is watertight, structurally sound and compliant with all relevant standards and ordinances under the Building Act 2004 and the Building Code and the Plaintiffs have suffered economic loss as a result in an amount to be particularised before trial; and/or

    57.2 As a result of that negligence and those defects, the Complex was made more susceptible to sustaining damage as a result of the Earthquakes and Aftershocks and did sustain that damage and the Plaintiffs have suffered economic loss as a result in an amount to be particularised before trial; and

    57.3 The Second Plaintiffs have suffered considerable stress, anxiety and inconvenience arising from their ownership of

> the Units affected by moisture ingress and the need for such extensive repairs.

The Broadform liability policy

[10] The relevant insuring clauses are attached as Appendix 1. Appendix 2 is the same page, but with the key passages underlined. The appendices form part of this judgment. I have found it helpful to refer to both insuring clauses 1 and 2, as a whole, while also focusing on individual sub-clauses. "Insured's Products" is defined as:

> ***"Insured's Products"*** means –
>
> (a) anything (including labels, instructions and any container or package other than a vehicle), after it has ceased to be in the possession or under the control of the Insured, which has been manufactured, constructed, grown, extracted, produced, processed, assembled, erected, installed, sold, handled, supplied or distributed in or from New Zealand by the Insured;
>
> ...

[11] Mr Stamper's entitlement to indemnity is to the same extent as Ice Properties Limited. Condition 6(a) provides:

> Claims made between or against any corporation or person indemnified under this Policy will be treated as though each had been issued with a separate policy in the name of that corporation or person. Each corporation or person will be separately subject to the terms, definitions, insuring clauses, exclusions, conditions and limits of this Policy insofar as they can apply.

[12] Mr Stamper does not contend for "Product Liability" cover. Mr Stamper relies upon clause 1, "General Indemnity". The question becomes whether any finding of liability can only fall within "Product Liability".

[13] Mr Ring QC for IAG argues that the whole complex is the "Insured's Product". The gist of the claim seeks damages against Mr Stamper for the cost of repair of the Insured's Product, by reason of defects caused by the negligence of Mr Stamper.

[14] Mr Ring QC argues that clauses 1 and 2, read as a whole, exclude from indemnity any liability of Mr Stamper in tort, as pleaded in the current statement of claim.

[15] There is common ground between the parties as to the relationship between the first two insuring clauses. The first clause provides for a general indemnity to the insured arising from property damage, provided it happens within the geographical limits, during the period of insurance, and caused by an occurrence in connection with the business of the insured, except product liability. Clause 2 provides for an indemnity to the insured for liabilities of the insured arising from loss or damage to tangible property caused by design defect in connection with the business or arising out of the insured's products, caused by an occurrence in connection with the business. But this excludes:

> 2(c) Damage to the Insured's Products themselves if such damage is attributable to any defect therein or the harmful nature or unsuitability thereof.

[16] Mr Ring QC said that clause 2(c) is at the heart of his argument. I agree, that to understand clause 1 on general indemnity and clause 2 on product liability, it is necessary to read the whole of clauses 1 and 2 together. Clause 2(c) is reinforced by clauses 2(d), (e) and (f).

[17] Read together, these two clauses do not intend to indemnify the insured for making good poor quality products of the insured. As distinct from indemnifying damage or loss occasioned as a consequence of making poor quality products.

[18] By contrast, Mr Stamper's counsel argue that the complex is not an Insured's Product. Second, that the liability of Mr Stamper may flow from his discrete pleadings of negligence, in respect of defects over parts of the complex, in a manner that avoids the product liability exclusion.

Applicable principles

[19] It is common ground that unless the applicant's proposed claim against IAG is untenable, the Court should be considering granting leave for the claim to be

considered in the upcoming trial, subject only to considerations as to late pleading. IAG seeks an order as to whether or not the applicant's claim is untenable now. This is because, as is commonplace in all leaky home/earthquake claims, significant efforts are going to be made by the parties to see if the litigation can be settled pre-trial. That process is going to start next week. IAG is currently engaged as a party in the earthquake dimension of the claim, but is not currently engaged as a party in the leaky home aspect of the claim.

[20] Mr Campbell QC argued that it was premature to consider the legal point, because the legal basis upon which the plaintiffs' claim against Mr Stamper might succeed is uncertain. Mr Ring QC argued that this Court was entitled to examine whether or not the claim could succeed by Mr Stamper against IAG based on the current statement of claim, with the qualification that the claim should be read to establish the "gist" of the claim. But in the meantime, IAG are entitled to argue that the present claim, as pleaded and having regard to the gist of it, simply cannot possibly trigger an indemnity by IAG under the policy. I agree. As I understood it, both sets of counsel agreed that the following proposition from *Derrington* is good law.[2]

> **8-309** Proof that the insured's liability comes within the cover is sometimes controversial. It is necessary to ascertain the substantive legal basis of the claim in the third party claimant's action, and for this purpose to look at the true nature of the cause of action and not at the way that it has been expressed in the pleadings...

[21] For the reasons which follow, I think that whether or not the claim is untenable in this case turns on a question of law as to whether the complex is an Insured's Product.

[22] This Court has had the benefit of sophisticated argument by Queen's Counsel on the point. I am of the view that I should give a judgment on the issue now. That judgment is subject, of course, to the right of appeal. I am also of the view that, whichever way I decide the point of law, it will not in fact affect the evidence to be led at trial by the plaintiffs or by Mr Stamper.

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2 Desmond Derrington *The Law of Liability Insurance* (2nd ed, LexisNexis, Sydney, 2005).

Authorities in support of Mr Stamper's application

[23] There are at least three decisions of the High Court in support of the argument for Mr Stamper*: Body Corporate 27017 v Wensley Developments Limited (In Liquidation) (The Point), Body Corporate 197217 v Auckland City Council (Waterford Apartments)* and *Body Corporate 2012 v Eden Village Limited (In Liquidation) (Eden 1)*.[3]

[24] Of these three decisions, I consider the Wensley decision to be more analogous. This is because the statement of claim alleged that Wensley was the developer, project manager and builder of the units. There is no record, however, in that judgment of it being pleaded that Wensley had overall responsibility for the quality of the building with a non-delegable duty of care.[4]

[25] In *Waterford*, the pleading was that the insured was the head contractor. A pleading which Sargisson AJ considered to be a contentious fact.[5]

[26] In *Eden Village*, again the pleading was that the insured was the head contractor. Sargisson AJ held that it was a matter for proof at trial whether for the purpose of policy the entire complex was the insured's product. Second, that it was arguable that the whole of the complex was not Equinox's product.[6]

[27] I regard these three decisions as distinguishable immediately on the material fact distinction, that the claim against Mr Stamper is that he was the co-developer with a non-delegable duty of care. That is a pleading contending he was responsible for a careful design and build of the whole complex. As the pleadings set out above reflect, there is no allegation that he was actually the contractor to build the whole or any part of the construction.

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3 *Body Corporate 27017 v Wensley Developments Limited (In Liquidation) (The Point)* HC Invercargill CIV 2007-425-712, 21 February 2011, Panckhurst J; *Body Corporate 197217 v Auckland City Council (Waterford Apartments)* HC Auckland CIV 2004-404-818, 16 May 2008, Sargisson AJ; *Body Corporate 2012 v Eden Village Limited (In Liquidation) (Eden 1)* HC Auckland CIV 2006-404-1931, 14 November 2011, Sargisson AJ.

4 See *Wensley* at [15].

5 See *Waterford* at [39].

6 See *Eden* at [28].

[28] So by contrast to the pleadings in these other three cases, the pleading going into the trial is that Mr Stamper owed the plaintiffs a non-delegable duty of care, as a consequence of being a co-developer and/or project manager in relation to the construction of the complex.[7] That is the origin of his duty of care. It is not alleged that he owed a duty of care because he was in fact a contractor or a head contractor. Paragraph 54 pleads the assumption of personal responsibility, but is not pleading that he was a contractor. Paragraphs 52-54 are pleading the existence of the duty of care. Paragraph 55 pleads the breach. Paragraph 56 pleads the negligence, that is the breach of duty of care. Sub-paragraph 56.1 talks about conducted or carried out the building work. But in context, it is not a particular alleging that he was hands-on building or constructing.

[29] In context, if it was the plaintiffs' suggestion that Mr Stamper was a contractor or a builder directly, that would have to be pleaded as a particular. Paragraphs 56.1 and 56.2 need to be read, "as co-developer and project manager he conducted, carried out, or permitted the building work", etc.

[30] A project manager can be involved in the sequencing of building work, and in that sense conduct it or carry it out, or permit it to occur.

[31] The pleadings as a whole establish a duty of care as a co-developer and project manager, not as a contractor. He is not pleaded to be a contractor. On the contrary, it is pleaded his duty was to ensure the quality of the contractors and consultants expertise and work, see sub-paragraph 53.4.

[32] If it is to be alleged at trial that Mr Stamper was a contractor, or was directly building any part of the unit (wielding a hammer, saw or some other tool), I would require that particular to be pleaded. In the meantime, I proceed on the above interpretation of the pleadings as to the gist of the claim.

[33] To sum it up, the gist is that Mr Stamper was a co-developer with his company Ice Properties Limited, and project manager. In that sense, he having overall responsibility for the construction of the whole of the complex.

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[7] See paragraphs 52 and 53 of the Fourth amended statement of claim, set out above.

[34] The IAG policies in *Wensley* had, as here, a general exclusion for property damage to the insured's products. The definition of products was, as here, broad, including products constructed, erected or installed by the insured. Panckhurst J received a submission from Mr Till QC that the products exclusions did not extend to "separately identifiable property or parts" and "other separately identified property, if any". So that, if the point included separately identifiable property or parts, property damage to these may be covered under the policies.

[35] Panckhurst J distinguished a decision of MacKenzie J in *Arrow International Limited v QBE Insurance (International) Limited.*[8] This was a leaky building case. Arrow was the design and build contractor, although all the work was subcontracted. MacKenzie J found that the damage to the leaky building occurred before the inception date of the policy, therefore there was no cover. However, in case the earlier finding was wrong, he also considered whether the defective products exclusion precluded cover under the policy. He found that it did:

> [89] I consider that a building comes within the definition of the word "product" in the policy, set in paragraph [4] above. The word "property" is not on its ordinary meaning limited to goods. It can include a building. Counsel for Arrow places some reliance on the reference to a container as pointing to the conclusion that a building is not property within the meaning of that provision. I do not agree. Clearly some forms of property may have a container. Equally clearly, others may not. I do not discern any intention to limit the term "property" to property which is or may be placed within a container of some kind.

[36] MacKenzie J's decision was unsuccessfully appealed to the Court of Appeal. The appeal was dismissed by reference to the first finding, that the damage occurred before the inception of the policy, without consideration of the products exclusion clause finding.

[37] Panckhurst J found he should not rely on the *Arrow* decision because the findings just discussed, by MacKenzie J, in respect of products liability were obiter, and it would seem this aspect of the case received limited attention. Panckhurst J considered that the definition of products was not straightforward.

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[8] *Arrow International Limited v QBE Insurance (International) Limited* [2009] 3 NZLR 650 (HC).

[38] Panckhurst J concluded in respect of that policy, in the face of that statement of claim, that the meaning of "constructed" and the application of the limitation phrase "other separately identifiable property (or parts)" in the products exclusion clause, and/or the "faulty workmanship" exclusion clause cannot be finally determined in advance of trial.[9]

[39] Mr Campbell QC says IAG's submissions proceed on the assumption that Mr Stamper built ("constructed" or "erected") the complex (an implicit cross-reference to the policy), and that thereby IAG addresses only one of the alleged bases of Mr Stamper's liability. Independently of having a project manager's non-delegable duty of care, Mr Stamper may have personal liability based on direct personal participation in defective works.

[40] IAG's response to that argument is that something can be "the product" of a person, whether or not that person has personally manufactured, constructed or erected the product.

[41] The definition of Insured Products[10] does not say that the insured has to be personally constructing or erecting. It is in the third person. It can be constructed or erected by the insured. That can be done for the insured by an agent, or be done by the insured.

[42] IAG's principal argument is that it would make commercial nonsense of the policy for the definition of insured product to exclude the complex.

[43] I proceed on the basis that, read in isolation, the definition of "insured's products", including within the proposition "constructed or erected by the insured" is ambiguous, in the sense that it can possibly fail to capture personal negligence by an insured:

- Permitting the building work.
- Failing to supervise subcontractors.

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9 *Wensley* at [57].
10 See [10] above.

- Failing to ensure appropriate sequencing of work.
- Failing to ensure that adequate plans and specifications were made available to the subcontractors and tradesmen.
- Failing to detect defects and having them rectified.

[44] This ambiguity is, I think, the reason why the *Wensley, Waterford and Eden 1* decisions postponed the issue of indemnity or not until after trial. In this proceeding, I have had the benefit of argument not put to Sargisson AJ and Panckhurst J.

IAG's argument that the whole complex is the insured's product

[45] Mr Ring QC's principal submission is that it would be commercial nonsense for an insurer to indemnify a builder for defects in construction. To do so would allow a builder to erect a shoddy building, sell it, and claim an indemnity to meet claims against the builder by the owner for defective construction. That result would leave the builder with the margin between the value of an apparently sound building, with hidden defects due to shoddy construction. Mr Ring relied on two Canadian cases and a recent dictum of the New Zealand Court of Appeal.

[46] The Supreme Court of British Colombia in *Privest Properties Limited v Foundation Co of Canada Limited* says: [11]

> ...If the insurance proceeds could be used to pay for the repairing or replacing of defective work and products, a subcontractor would receive initial payment for its work and then receive further payment from the insurer to repair or replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a good and workmanlike manner: ...

[47] A later decision of the same Court is to the same effect: *Pier Mac Petroleum Installation Limited v AXA Pacific Insurance Co*.[12] There the Supreme Court held that a general liability policy of this type is intended to protect the insurer from liability for damage to the property of others, not to pay the costs associated with repairing or replacing the insured's defective work or products. Otherwise, the

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11 *Privest Properties Limited v Foundation Co of Canada Limited* (1991) 57 B.C.L.R (2d) 88 at 131, [209].

12 *Pier Mac Petroleum Installation Limited v AXA Pacific Insurance Co* (1997) 41 B.C.L.R (3d) 326 at [20]-[22].

insured would be discouraged from good workmanship, because carelessness in the first instance would be more cost effective. Indeed, the insured may be able to receive a second payment from its insurer for the remedial work.

[48] Mr Ring submitted this reasoning has been recently endorsed by the New Zealand Court of Appeal in *Timtech Chemicals Limited v QBE Insurance (International) Limited*.[13] Timtech supplied chemicals for treating timber. It entered into an agreement with Carter Holt Harvey to treat its timber. Timtech sought professional indemnity cover from QBE.

[49] QBE and Timtech entered into a contract of insurance, whereby QBE would indemnify Timtech for claims arising from faulty or inadequate design or specification, with an exclusion that it would not be liable in respect of claims relating to faulty or inadequate manufacture, workmanship, construction or fabrication, supervision of manufacture, or breach of any express or implied warranty arising out of the sale of goods.

[50] As a result of incorrect operational settings by Timtech when treating Carter Holt's timber, the timber was not fit for its intended purpose. The incorrectly treated timber was sold at a loss. The High Court held that Timtech's liability did not arise from giving incorrect advice to Carter Holt, but rather from a breach of contract in failing to treat the timber to the contract specifications. The Court of Appeal upheld the decision of the High Court. The liability of Timtech to Carter Holt was a result of incorrect fixing of set points during the process of treating timber, not from incorrect technical advice. In [38] the Court said:

> [38] This case instances the trend over recent years for insurers to issue professional indemnity policies to insured parties who are not professionals, at least not in the traditional or strict sense of that term (for example, doctors and engineers). Counsel for QBE made this point in their submissions. Because the giving of advice generally forms only part of the business of this type of insured, policies issued to them carefully define the scope of their professional business practice, and equally carefully exclude risks usually insured under a general liability policy and product liability policy. If that were not the case, sloppy workmanship by the insured would be encouraged, if not rewarded.

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[13] *Timtech Chemicals Limited v QBE Insurance (International) Limited* [2012] NZCA 274; (2012) 17 ANZ Ins Cas 61-939, at 72, 989, [38].

That paragraph cites the Supreme Court of British Colombia's decision in *Pier Mac.*

[51] The Supreme Court of British Colombia in *Privest Properties Limited v Foundation Co of Canada Limited* described this point of view as a policy. The common law of contract has very narrow grounds of contracts being void or impaired for policy reasons. I respectfully follow the Supreme Court in *Privest, Pier Mac* and *Timtech*, but via the established common law jurisprudence in the United Kingdom and in New Zealand, whereby all commercial contracts are to be read in their commercial context. Reading contracts in their commercial context requires the Court to take into account the facts and goals of the contracts, as would be clearly appreciated by the contracting parties going into the negotiations.[14] It is the contracting risk-taker, the insurer, who will not unreasonably insure risk.

[52] There would be no commercial incentive, and rather be a disincentive for an insurance company to insure a manufacturer or a construction company against the cost of remaking or rebuilding a defective product. On the contrary, as part of assessing the risk of a defective building or other product causing harm to others, during or after construction, it is an important consideration to an insurer that there be normal business incentives on the constructor or manufacturer to build a high quality product. That is the context within which one approaches the interpretation of the general indemnity clause and the product liability cover, clauses 1 and 2 of this contract.

[53] Once one has reflected upon the commercial context, the qualifications to insuring clauses 1 and 2, as underlined in Appendix 2, seem logical and, indeed, obvious. It is not the purpose of the policy to indemnify Ice Properties Limited or Mr Stamper against harm they inflict on themselves by their own negligence. It is rather covering the risk that the insured will become legally liable to meet a claim made by another for that person's property damage, for property other than the building complex. For instance, it might be a neighbour's property, undermined during excavation for the foundations of the complex.

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[14] *Pren v Simmonds* [1971] 1 WLR 1381 (HL), Lord Wilberforce; *Investors Compensation Scheme Limited v West Brunswick Building Society* [1998] 1 WLR 896, 912-913, Lord Hoffmann, adopted by the New Zealand Court of Appeal in *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74 (CA), 81-82.

[54] Therefore, one can understand that insuring clauses 1 and 2 remove any risk of having to indemnify the insured for damage for the insured's products themselves if such damage is attributable to any defect therein, or the harmful nature of unsuitability thereof.

[55] At first sight, one would not normally treat the buildings constructed by construction companies as the insured's products. But to go the other way, and read this policy as indemnifying the developer and project managers, in relation to the construction of a complex, for building a defective complex and incurring damages by reason of breaches of warranties of quality, express or implicit in the contract of sale, of the whole or parts of the complex, offends commercial commonsense.[15]

[56] This makes sense of the backup exclusion cover under the heading **GENERAL EXCLUSIONS (APPLICABLE TO ALL INSURING CLAUSES)**:

> **Faulty Workmanship**:
>
> 7. The cost of rectifying faulty workmanship or performing, completing, correcting or improving any work undertaken by the Insured

[57] Consideration of the commercial context resolves potential ambiguity in the policy. The policy emerges clearly as in no way indemnifying Mr Stamper's liability for any defects he caused to the complex, or any part, whether as a developer, a project manager, or in any particular way.

Conclusion

[58] For these reasons, the application, to join IAG as a third party or, alternatively, to bring any cross-claim claim to the same effect, is dismissed.

[59] IAG is entitled to costs calculated on a 2B basis. I would expect the parties to resolve the question of costs. Or, alternatively, submit submissions of no longer than five pages each, having previously exchanged the submissions in draft.

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[15] See *Lumley General Insurance (NZ) Ltd v Body Corporate 205963* [2010] NZCA 316, (2010 16 ANZ Ins Cas 61-853 at 41; *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [21].

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A P P E N D I X 1

INSURING CLAUSES

1. **General Indemnity**

Where a Limit of Indemnity is shown in the Schedule State will indemnify the Insured for all amounts which the insured shall become legally liable to pay arising from

(a) Personal Injury, or

(b) Property Damage

happening within the Geographical Limits during the Period of Insurance and caused by an Occurrence in connection with the Business.

Exclusion to this Insuring Clause

Product Liability

The indemnity under this Insuring Clause shall not apply to or include liability for Personal Injury or Property Damage arising out of the Insured's Products.

Limit of Indemnity

The liability of State under this Insuring Clause in respect of Property Damage shall not exceed the Limit of Indemnity specified in the Schedule for any one Occurrence.

Deductible

State shall not be liable under this Insuring Clause for the amount specified in the Schedule in respect of any one Occurrence.

2. **Product Liability**

Where a Limit of Indemnity is shown in the Schedule State will indemnify the Insured for all amounts which the Insured shall become legally liable to pay for

(a) Personal Injury of physical loss of or damage to tangible property including resultant loss of use happening within the Geographical Limits during the Period of Insurance and caused by Design Defect in connection with the Business, or

(b) Personal Injury or Property Damage arising out of the Insured's Products happening within the Geographical Limits during the Period of Insurance and caused by an Occurrence in connection with the Business.

Exclusions to this Insuring Clause

The indemnity under this Insuring Clause shall not apply to or include liability in respect of

(a) **Aircraft Products**

Personal Injury or Property Damage arising out of any of the Insured's Products installed in any Aircraft.

(b) **Building Products**

Design Defect where the design, formula, specification, plan or pattern relates to the construction of buildings or other structures.

(c) **Damage to Insured's Products**

Damage to the Insured's Products themselves if such damage is attributable to any defect therein or the harmful nature or unsuitability thereof.

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Damage to the Insured's Products **themselves** if such damage is attributable to any defect therein or the harmful nature or unsuitability thereof.