IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2015-409-000111
[2018] NZHC 2005

BETWEEN	NICON LIMITED Plaintiff
AND	TOWER INSURANCE LIMITED First Defendant
	STREAM GROUP NZ PTY LIMITED Second Defendant

Hearing:	16-19 April 2018 Further written submissions: Plaintiff – 8 May 2018 First and Second Defendants – 21 May 2018
Appearances:	P B McMenamin for Plaintiff J P Forsey and S E Henderson for First and Second Defendants
Judgment:	8 August 2018

JUDGMENT OF GENDALL J

INTRODUCTION

[1] This proceeding has sprung out of events which followed the Canterbury earthquake sequence in 2010 and 2011. The plaintiff (Nicon) is a demolition contractor. Nicon arranged with the first defendant (Tower) to provide demolition quotes both for Tower's reserving purposes and to inform claims, and then to carry out some demolition and site clearance work relating to earthquake damaged properties in Christchurch. At the time, the second defendant (Stream) provided Tower with cost estimates for damage and acted as its project manager on damaged properties for which Tower carried insurance. Tower then carried out insurer-managed repairs or rebuilds on insured properties and organised demolition and site clearance as required.

[2] The present proceeding is before the Court for determination of certain preliminary issues which underlie Nicon's claim against Tower and Stream. That claim is based essentially on two contracts alleged to have been formed between the parties.

[3] Tower and Stream deny the existence of these contracts and, in the alternative, contend that if they do arise they do not have the effect and meaning which Nicon alleges.

[4] These proceedings were issued some time ago, having been commenced by Nicon's first statement of claim filed on 4 March 2015. Following a 20 June 2017 minute issued by Fogarty J in this Court, on 9 August 2017 the parties requested the Court to hear issues which comprise the fundamental aspects of this dispute as preliminary questions.

[5] Those agreed preliminary questions are:

(a) Whether or not a Heads of Agreement signed on 28 February 2011 (the HOA) binds Tower and Stream (and indeed Nicon too)?

(b) If the answer to (a) is "yes", whether the HOA obliged Tower and Stream to offer all the demolition work to Nicon in respect of properties for which Nicon had provided assessments?

(c) Whether or not Stonewood Homes Limited (Stonewood) was an agent of Tower and Stream for the purposes of the HOA?

(d) Whether Nicon is entitled to a fee of $350 (excluding GST) for each quote that was commissioned by Tower and Stream after 21 July 2011 and prepared by Nicon?

BACKGROUND FACTS

[6] The Christchurch earthquakes of 2010 and 2011 presented a major problem for insurance companies which were contractually obliged to make good the damage sustained to the properties of their policyholders. It was imperative that the companies were able to secure the services which would be required to discharge that obligation.

[7] The first of these was the need to determine whether a property should be repaired, demolished, rebuilt or cash settled. This entailed estimating the cost of each option. This calculation included the cost of demolition of the irreparably damaged properties and site clearance. Once that process was completed and the decision was made to demolish and (in some but not all cases) to rebuild, the insurer had to have available the resources necessary to carry this out.

[8] Tower almost immediately contracted with Stream to provide project management services to manage the claims process. Stream in turn contracted with other companies to provide the assessments and cost estimates. These were passed back to be reviewed by Stream and were then presented to Tower so that it could decide how to settle its claims.

[9] One such company retained by Stream was Stonewood. Stonewood was a major building company which had the expertise and quantity surveyor staff needed to assess rebuild costs, and if this was decided on, to rebuild houses. It was originally thought that demolition would occur in tandem with the process of rebuilding so Stonewood would be responsible for arranging demolitions of properties amongst its other duties.

[10] Mr Bryce Wilson (Mr Wilson), the National Franchise Manager of Stonewood, was acquainted with Mr Nigel Giltrap (Mr Giltrap), the sole shareholder and director of Nicon. As both a demolition and drilling contractor Nicon had equipment that would be suitable for demolition work. Mr Wilson approached Mr Giltrap and, having satisfied himself that Mr Giltrap's company had the capacity to carry out the demolition work which it was anticipated Stonewood would require, Mr Wilson provided Nicon with a letter on 8 October 2010 confirming that Stonewood intended to utilise Nicon's services.

Nicon's first association with Stream

[11] It quickly became apparent that the anticipated process was quite unrealistic and Stream took charge of the demolition process almost immediately. At this point Mr Wilson introduced Nicon to Stream. As a result, Mr Anthony Honeybone (Mr Honeybone), who was employed by Stream as a project manager, made contact with Mr Giltrap and they met at Stream's premises for a discussion. Nicon says two commitments were made at that meeting. First, Mr Honeybone on behalf of Stream made a commitment to use Nicon for the demolitions which Stream was managing on behalf of Tower. Secondly, Mr Giltrap made a commitment to keep his company available to carry out any work which was required by Stream.

[12] Following this meeting, Stream instructed Nicon to carry out the demolition of a property at 8A Rupert Place, Christchurch. This was the first demolition to be carried out as a consequence of the September 2010 earthquake and the first arising from Nicon's association with Stream. It bore the hallmarks of the demolitions which followed in that, although the instruction for the demolition was given by Stream, the work was done on behalf of Tower. The instruction for the demolition included a direction that the invoice for the work should be addressed to Tower. On completion of the work, the subsequent invoice was duly addressed to and paid by Tower. A few other demolition requests followed and were carried out by Nicon and paid for by Tower.

[13] After this period however, Nicon says that, contrary to expectations, little work eventuated. Mr Giltrap was obliged to consider whether Nicon should take up work

which was available in other quarters. The problem was that, if it did so, Nicon could not guarantee the capacity to meet Stream/Tower's requirements as they might arise from time to time.

The Heads of Agreement (HOA)

[14] Mr Giltrap took this problem to Mr Honeybone, letting him know that unless there was a firm commitment that he would receive work from Stream, he would have to take up other work and thereby prejudice his ability to carry out that required by Stream. Shortly afterwards Mr Honeybone called Mr Giltrap and it is claimed Mr Honeybone advised him that Mr David Norris (Mr Norriss), the CEO of Stream, had agreed to provide the written commitment he sought.

[15] At the invitation of Mr Honeybone, Mr Giltrap returned to Stream's offices where Mr Honeybone printed off the HOA. That day the HOA was signed by Mr Giltrap on behalf of Nicon and by Mr Norris on behalf of Stream.

[16] The HOA states:

> 17 February 2010
>
> **HEADS OF AGREEMENT**
>
> **THE PARTIES**
>
> This agreement shall be between *Nicon Ltd* (herein named the contractor") and Stream Group NZ LTD as agent for Tower Insurance (herein named "Stream") where it is agreed that both parties shall act in good faith to meet all of the intended objectives and outcomes of this agreement.
>
> **DESCRIPTION OF SERVICES**
>
> **Stage 2 (Quoting)**
>
> The contractor is to provide Stream with expert advice on cost effective demolition options and pricing.
>
> The contractor shall provide an accurate estimate of the costs recovered from salvageable items and offset these against the demolition costs for each individual project.
>
> **Stage 3 (Execution of the works)**
>
> The contractor shall provide the necessary resources to tender and carry out demolition work as allocated by Stream Management Team.

SERVICE LEVEL AGREEMENT

It is desired that the contractor visits the site and returns the detailed quote to demolish the dwelling within 2 working days to maintain the required momentum to achieve the target completion dates for stage 3.

TERMS OF ENGAGEMENT

The contractor agrees to keep all shared pricing information confidential.

In exchange for the provision of this service by the contractor it is also then agreed that Stream will offer the opportunity to undertake the demolition work for Tower and its contracted partners to *Nicon Ltd* as a preferred contractor.

This agreement shall not preclude Stream from engaging other contractors if required to facilitate the timely remediation of the complete claim volume. Stream reserves the right to enter into a competitive tendering process for any of its contracts, at any stage, to ensure a market rate for demolition contracts is maintained.

Signed on behalf of the Contractor: …….

Date:

Signed on behalf of Stream: ……..

Date: 28/2/11

[17] The effect and meaning of this document are the subject of questions (a) to (c) at para [5] above.

[18] It is the case of Nicon that the words "demolition work" in the HOA necessarily mean the demolition work that ensues on properties for which Nicon has provided the assessments and estimates of the demolition costs that the contract requires of it.

[19] It is on this basis that Nicon claims that by virtue of the HOA (a document effectively signed by Stream as agent for Tower), Stream and Tower have bound themselves to provide to Nicon the demolition work that eventuates on properties for which Nicon had provided demolition assessments.

[20] In response, the position of Stream and Tower is that the HOA is simply not an agreement binding on the parties. It takes this position for a number of reasons which I deal with below. And, in any event, Stream and Tower have advanced the alternative argument that, even if the HOA is a binding agreement it does not in its terms

guarantee to Nicon further demolition work even if demolition quotes for individual projects have been provided. Their position is that the HOA simply provides an opportunity for Nicon to be considered to do demolition work as a "preferred contractor" subject to two matters. The first is the requirement that Nicon is able to facilitate remediation work in a timely fashion, and the second is a specific proviso in the last paragraph of the HOA that the defendants have the right to enter into a "competitive tendering process" for any of its contracts "at any stage to ensure a market rate for demolition contracts is maintained."

[21] After signing the HOA document, Stream commissioned Nicon to assess and provide quotes for many properties. Nicon says that overall it assessed something in excess of 1500 properties. The requests sometimes came from Stream directly, but in most instances they were channelled through Stonewood.

Charges for assessments

[22] After a time, although many quotes were being commissioned, little remunerative work followed as it seems that at this stage generally the demolition process was delayed. In July 2011, Mr Giltrap again approached Stream because Nicon was performing a great deal of work in assessing properties and preparing quotes without any commensurate financial return. In discussions with Messrs Honeybone and Norriss, Mr Giltrap raised the question of Nicon being paid for the quotes. He said this should be at a rate of $350 (excluding GST) for each quote.

[23] Mr Giltrap's evidence is that this was agreed to at the time. This agreement, he said, was on the basis that any such payment would be credited against the demolition cost for those properties where subsequently demolition in fact occurred. Mr Giltrap sent a letter to Mr Norriss on 21 July 2011 stipulating the rate he proposed of $350 (plus GST) per quote which was to be paid for each assessment, to be deducted from the final fee in the event of demolition. This letter on Nicon letterhead stated:

> Dear David
>
> As discussed last week, due to the significant amount of work, time and effort our team put into preparing the demolition assessments/quotes for Stream/Tower/Stonewood Homes we propose a rate of $350.00 ex GST per quote as this work has impacted on our resources and cash flow.

As we are all aware the rebuild work has not yet commenced. The rate of $350.00 ex GST per quotation is to be paid to Nicon Ltd for each assessment/quote provided, this amount being deducted from the invoicing on completion of the demolition.

We are aware that most of the quotations will require revisiting at some point due to the extended delays between quoting and demolition. This price includes revisiting of each quotation once.

To date Nicon Ltd has provided Stream/Tower/Stonewood Homes with 292 assessments/quotes.

I am happy to discuss further.

Kind regards

Nigel Giltrap

[24] On 28 July 2011 Mr Giltrap says that Nicon then sent an invoice to Stream for quotes. This invoice on Nicon letterhead was in the following terms:

TAX INVOICE
Tower Insurance Ltd
Attention: Janelle Bates
C/- Stream NZ
P O Box 86
Shortland Street
Auckland 1140
NEW ZEALAND

Invoice Date
28 Jul 2011

Invoice Number
INV-0074B

GST Number
52-190-932

Nicon Ltd
184 Walkers Road
RD 7
Rolleston 7677
Canterbury
NEW ZEALAND

Description	Quantity	Unit Price	GST	Amount NZD
Quotation Charge..to be refunded on completion of demolition by Nicon Limited	215.00	350.00	15%	75,250.00
			Subtotal	75,250.00
			TOTAL GST 15%	11,287.50
			TOTAL NZD	86,537.50
			Less Amount Credited	72,220.00
			AMOUNT DUE	14,317.50

Due Date: 20 August 2011
Payments can be made by internet banking to the following account:
02 1266 0014543 83 Nicon Ltd
Please enter your invoice number in the reference field.

[25] Tower and Stream deny ever receiving this invoice. Mr Giltrap, however, suggests this is not correct and, on receipt of the invoice, Mr Honeybone realised how

much would be entailed by these charges and had a further discussion with Mr Giltrap. Mr Giltrap maintains that Mr Honeybone assured him that Nicon would get all the demolition work from Stream and that there was no need for these charges. Mr Giltrap, having seen the properties concerned, however, believed that many would not be demolished so Nicon could derive no income from them other than by charging a fee for the quotes. Mr Giltrap says it was agreed simply that payment of the fee would be deferred until the end of the project when it could be determined which properties had been demolished and which had not. Then a final accounting could be carried out.

[26] Tower and Stream deny that it was agreed that payment would be made for quotes. They claim that Nicon's 21 July 2011 letter was only a proposal. Indeed, they go further and say that the proposal was expressly declined.

[27] Subsequent to July 2011, Nicon did carry on performing assessments and providing demolition quotes to Stream/Tower. It also continued to carry out demolitions which were commissioned by Stream and paid for by Tower. This was occurring until about August 2012. At that point Mr Giltrap, however, realised that demolition work had dried up and was not coming through.

Stream/Tower stop giving work to Nicon

[28] Up until that time, it is Nicon's case that Stream was complying with the HOA contract and was allocating to Nicon virtually all of the demolition work.

[29] Stream, by its solicitors, has acknowledged now that it stopped allocating work to Nicon in the latter part of 2012 because, at that time, demolition work in the Christchurch city centre had largely been completed. This released other demolition contractors who had been engaged in that work and created a surplus of supply in the demolition market.

[30] Stream claims to have availed itself of this opportunity to obtain prices below those quoted by Nicon. Whether this is true or not, Nicon submits that it is apparent from the evidence that such prices were not obtained by a competitive tender process

in the absence of which it says Stream/Tower were not entitled to deprive Nicon of its contractual right to the work.

NICON'S OVERALL CLAIMS

[31] Nicon claims that Stream (and Tower by the agency between Tower and Stream) breached the HOA by not offering demolition work to Nicon for the properties for which the plaintiff had provided quotes.

[32] Many of the quotes were requested by, and provided to, Stonewood as part of a package of information Stonewood was providing to Stream and Tower for Tower's reserving and claims assessment purposes.

[33] Nicon alleges that, for the purposes of the HOA, Stonewood was an agent for Stream and Tower. Stonewood is not referred to in the HOA, is not a party to it and appears to itself deny an agency relationship in the context of the allocation of demolition work.

[34] Nicon says it incurred loss. The alleged loss at first glance would seem likely to be expressed as a loss of profit claim for the demolition work undertaken by others on properties for which Nicon previously provided quotes. The loss of profit claim possibly appears from the pleadings, however, to extend to all properties for which demolition quotes were provided, irrespective of whether the dwellings on these properties were required to be demolished or not, and irrespective of whether or not any demolition occurred after Nicon had advised Tower and Stream that it was quitting the demolition market. Although that aspect is not altogether clear, it is not strictly relevant at this point when I am called upon simply to determine the preliminary issues outlined above.

[35] As a further (second) cause of action and in the alternative, Nicon sues under the agreement it says was reached between it and Stream that Stream and/or Tower would pay Nicon the $350 (excluding GST) for each quote provided after 21 July 2011 referred to above. Nicon claims this cost, in its second amended Statement of Claim, for what are said to be 1083 quotes undertaken. This amounts to a total of $379,050 for which Nicon says demand has now been made.

THE PRELIMINARY QUESTION PROCESS

[36] Rule 10.15 High Court Rules provides:

> **10.15 Orders for decision**
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for—
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> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[37] This permits the Court to make orders relating to those questions noted at para [5] above.

[38] In addressing the purpose of this preliminary question procedure, *McGechan on Procedure* notes:

> **HR10.15.01 Purpose**
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> As stated by Eichelbaum J in *Innes v Ewing* (1986) 4 PRNZ 10 (HC) at 18:
>
> > "[C]learly the underlying purpose is to expedite proceedings by limiting or defining the scope of the trial in advance or obviating the need for a trial altogether …"
> >
> > As r 10.15 expressly makes clear, it is not necessary that the decision on the separate question will dispose of the proceeding.

[39] It is clear from r 10.15 of the High Court Rules that a preliminary question to be decided may include any question or issue in a proceeding whether of fact or of law or partly of fact and partly of law and whether raised by the pleadings, agreement of the parties or otherwise.

[40] In the present case, considerable disputed factual evidence was provided at the hearing before me, a hearing that extended over a period of some four days. I will address aspects of this in this judgment.

THE FOUR PRELIMINARY QUESTIONS

[41] I turn now to the four questions noted at [5] above posed for answer by the Court.

(A) Is the HOA binding?

[42] The first question is whether or not the HOA signed on 28 February 2011 binds Tower, Stream and Nicon.

[43] The HOA document has been set out in full at para [16] above. From the evidence it is not disputed that the document was printed on Stream headed paper and was signed by Mr Giltrap for Nicon and Mr Norriss for Stream.

The authorities

[44] There are a number of authorities which deal with similar situations where a document entitled "Heads of Agreement" is in issue. The enquiry is clearly an objective one, as Thomas J noted in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*:[1]

> [140] Certainly, the exercise cannot be subjective in the sense that the court listens to the opposing claims of each party and, as a matter of credibility, prefers the evidence of one party to the other. Some objective reference is required to determine the parties' true intention outside the credibility of their competing claims. That objective reference can only come from the commercial context or purpose of the agreement, the agreement itself, and reliable evidence extrinsic to the agreement.

[45] In *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Ltd*, the Court of Appeal was faced with the question of whether the parties had intended that a document prepared by them entitled 'Heads of Agreement' was to be a binding agreement.[2] The Court held that:[3]

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1 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Limited* (CA) [2002] 2 NZLR 433

2 Above n 1.

3 At [53].

The prerequisites to formation of a contract are therefore:

(a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and

(b) An agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause), on every term which:

(i) was legally essential to the formation of such a bargain; or

(ii) was regarded by the parties themselves as essential to their particular bargain.

[46] Therefore, the critical issue in determining whether a document purporting to be a HOA is a binding agreement is "whether the negotiators achieved their objective of agreeing on all terms they (or either of them) considered essential".[4]

[47] A HOA may contain gaps. The Court of Appeal noted that an agreement to agree will not be held void for uncertainty if the parties have provided a workable formula or objective standard, or machinery (such as arbitration) for determining the matter which has been left open.[5] It concluded that there is no legal obstacle standing in the way of parties agreeing to be bound now while deferring important matters to be agreed later: "it happens every day when parties enter into so-called 'heads of agreement'."[6]

[48] In that case, the Court of Appeal found that the document in question did not represent a binding agreement. The negotiators had marked items in the document as "not agreed" and they did not then record that their agreement was to be regarded as complete. It was therefore found to be more of a progress report.

[49] In determining whether the parties intended to be bound, the Court can look at the words of the agreement and the background facts or circumstances (including statements made by the parties in the course of the negotiations, and any draft contract

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4 At [70].
5 At [62].
6 At [65], citing *Pagnan SpA v Feed Products Ltd* (1987) 2 Lloyd's Rep 601 at 619.

terms).[7] The Court may also have regard to the parties' conduct after the contract is said to have been made.[8]

[50] In *Reading Entertainment Australia Pty Ltd v AMP Capital Shopping Centres Pty Ltd,* the High Court in addressing the type of arrangement at issue here accepted that:[9]

> …the normal inference in such cases is that the parties intended that their contractual liability would be suspended until a formal contract was drawn up and signed. However, it will be a question of the parties' deemed intention on the facts of each case whether some rights and obligations were intended to apply immediately. The authors of Law of Contract in New Zealand suggest that the relevant questions are:
>
> (a) Was the way the agreement was concluded such as to indicate that the agreement was intended and expected to have effect immediately?
>
> Or:
>
> (b) Did the form of words used indicate that some contractual effect was to be given to the preliminary agreement?

[51] In *Kyoto Trustee Ltd v Annik New Plymouth Ltd,* the plaintiff sought damages for breach of contract.[10] The defendants contended that, although all contractual terms had been agreed in a HOA, there was no intention to be bound until the parties had signed formal contractual documents and this did not happen. Woodhouse J disagreed, however, and concluded:[11]

> There is no evidence that the parties agreed that they would not be bound until formal documents had been signed. Nor does the evidence justify an inference that there was no intention to be bound until formal documents had been signed. The evidence positively indicates that the parties considered themselves to have concluded a binding agreement before the formal documents were sent to the defendants' solicitor for signature in November 2012. This comes, first, from the fact that the contracts in respect of which Kyoto sues followed an agreement, described as a heads of agreement, entered into by the parties in August 2012. This agreement was binding on the parties. Its terms are not in issue; it is an agreement in writing signed by the parties. The heads of agreement, with an oral variation made a few days later, contains

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7 *Reading Entertainment Australia Pty Ltd v AMP Capital Shopping Centres Pty Ltd* [2017] NZHC 2337 at [76].

8 *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd*, above n 1, at [56].

9 *Reading Entertainment Australia Pty Ltd v AMP Capital Shopping Centres Pty Ltd*, above n 6, at [80], referencing J Finn "Conditional Contracts" in Burrows, Finn and Todd (eds) Law of Contract in New Zealand (5th ed, LexisNexis, Wellington, 2016), at 264-265.

10 *Kyoto Trustee Ltd v Annik New Plymouth Ltd* [2014] NZHC 1572.

11 At [3].

> the essential terms of the matters subsequently agreed in detail and incorporated into the formal documents. The written communications between the parties that followed do not support the defendants' argument. They support a conclusion that the parties were working out the detail on the basis that they would be bound once they had done so. The defendants expressly acknowledged that all remaining detailed terms had been agreed before the formal documents were sent to the defendants' solicitor for signature.

[52] In *Lifestyle Appliances Ltd v Autel TV Services Ltd,* the parties wrote and signed a HOA.[12] This was later replaced with a full contract. Although it was not necessary for his ultimate determination, Venning J considered that:[13]

> …the heads of agreement document itself could have constituted a binding agreement between the parties to it. It recorded the essential elements of the agreement, namely the parties and purchase price. It was only conditional upon due diligence… The heads of agreement are not an agreement subject to contract, rather they were an agreement binding on the parties that would be spelled out in further detail by later contract… It is significant that while the agreement referred to a written agreement, the written agreement was to be an unconditional agreement.

[53] I am satisfied these cases illustrate that a heads of agreement document like the present HOA is able to constitute a binding contract between parties in appropriate circumstances.

Intention to be bound?

[54] Turning now to the present case, Mr Norriss gave evidence on behalf of Stream and Tower. His evidence was that the HOA was a non-binding document which set out the principles on which the parties' relationship would work. While more than "just for show", he said it was not a binding agreement. And the evidence is clear, the defendants contend, that no further agreement was discussed or intended.

[55] I accept the defendants' submission here that the HOA was not produced after extensive negotiation, nor was legal advice sought. Nonetheless, these factors are not determinative of whether the HOA was intended to be binding. The HOA does not set out precise details as to how requests would be delivered and paid for and it does not provide for termination or dispute resolution. However, these are not essential to

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12 *Lifestyle Appliances Ltd v Autel TV Services Ltd* (2005) 8 NZBLC 101,626.
13 At [54] – [55].

formation of a binding contract. I find that the provisions in the HOA are sufficient to cover everything legally essential to the formation of the agreement. The lack of provision for a further, more detailed contract indicates to me that the HOA covered all matters the parties considered necessary.

[56] I find too that on all the evidence which was before the Court, all the parties here acted on the basis that the HOA was binding right up to mid-2012. The HOA was seen as being important and beneficial to both Nicon, on the one hand, and Stream and Tower, on the other. Consideration was provided by each party as follows:

- Nicon was to provide to Stream (and Tower) advice on cost effective demolition options and pricing;

- Nicon was to keep resources available to ensure it could tender for and carry out demolition work allocated to it;

- Importantly, within two working days of requests, Nicon was to visit nominated sites and provide detailed and confidential demolition quotes;

- Stream "in exchange" was to offer "the opportunity to undertake the demolition work for Tower…to Nicon as a preferred contractor", subject to the provisos discussed at [20] above.

All this happened for some time with the parties performing their parts of the "bargain" without issue.

[57] I conclude that the HOA in this case is a binding contract between the parties. The document contains all terms essential to the agreement and does not record that it is conditional on any further agreement being concluded. In the HOA the parties agreed to "act in good faith to meet all intended objectives and outcomes of this agreement". I consider the evidence is sufficient to show that the parties considered themselves bound. After the agreement was signed, Stream commissioned Nicon almost exclusively to assess and provide quotes for demolition work on its properties. Nicon was then for some time also being given virtually all of the demolition work

carried out on the properties it had provided quotes for, until this stopped it appears quite abruptly in mid-2012.

[58] Counsel for the defendants suggested that the relationship between the parties after the signing of the HOA does not appear to have changed from that which existed before. He submitted that this indicates there was no agreement. I disagree. I consider this supports the view that any prior oral agreement between the parties as to how they would operate before 28 February 2011 was then simply implemented and its terms encapsulated in the written HOA.

Uncertainty?

[59] Contrary to the defendants' submissions, I do not find the HOA to be void for uncertainty. While there are aspects that are not expressly set out in it that might be considered important to the contractual relationship between the parties, it is possible for such matters to be implicit in what has been expressly agreed.[14] Counsel for the defendants particularly focused on the price charged for any demolition works that were allocated and the process required for a competitive tender arrangement as examples he claimed of essential matters upon which there was no consensus ad idem.

[60] I consider that the price charged for allocated future demolition works is not an essential term to the agreement in the HOA. It is clear that, as a long-term agreement to establish the overarching relationship of the parties, the parties obviously considered that the HOA did not need to contain a set price for work. Instead, the price for specific demolitions was to be quoted as they arose. This interpretation is supported by the presence of the clause enabling Stream, if it wished, to enter into a competitive tendering process for demolition work to ensure Nicon was offering a market rate. This protected the defendants from being overcharged by Nicon as well as enabling Nicon's quotes to reflect current circumstances. As the Court of Appeal noted in *Electricity Corporation of New Zealand Ltd v Fletcher Challenge*:[15]

> The parties may have thought it unnecessary to the essence of their bargain to reach agreement upon such matters or it may have been difficult or even

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14 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at [30].

15 *Electricity Corporation of New Zealand Ltd v Fletcher Challenge* [2002] 2 NZLR 433 (CA) at [51].

> impossible to predict what might arise in the future, particularly under a long term contract. It may therefore have been thought satisfactory - and it would often be more economically efficient - to leave such matters to be worked out if necessary in the course of the performance of the contract.

[61] I acknowledge that the specific mechanics of the way in which the agreed competitive tendering process noted in the last paragraph was to operate is not set out in the HOA. This perhaps provides some possible ambiguity as to how the process was to operate. However, the ambiguity is not so great that the HOA is void for uncertainty. General principles do exist in the contracting world as to how a competitive tendering process works that can be implied into the HOA here. The lack of specificity indicates to me that the parties intended to leave it in Stream's hands as to exactly how the competitive tendering process would run, presumably based on its standard practice with other general building contractors at the time.

Conclusion on Question (A)

[62] I consider that the parties at the time and with their subsequent dealings intended to be bound by the HOA and, further, that it does provide sufficient certainty as to how the relationship between the parties was to work.

[63] Accordingly, the answer to question (A) is "Yes".

(B) Was Tower/Stream obliged to offer Nicon all the relevant demolition work?

[64] The second question noted at [5] above is whether the HOA obliged Tower and Stream to offer all the demolition work to Nicon in respect of properties for which Nicon had provided assessments. This question requires the Court to determine the correct interpretation of the words used in the HOA.

The authorities

[65] The "modern" approach to interpretation of contracts was established by Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building*

Society.[16] In essence, it advocates a common sense and purposive approach to interpretation as opposed to a narrowly literal approach, and permits the admission of extrinsic evidence to provide context.

[66] The Supreme Court held in *Firm PI 1 Ltd v Zurich Australian Ltd* that:[17]

> … the proper approach is an objective one, the aim being 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 at the time of the contract".

[67] The Court went on to note that:[18]

> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[68] It is also clear that the interpretation of a contract should be in accord with business common sense.[19]

[69] The clause of the HOA in issue provides:

> In exchange for the provision of this service by [Nicon] it is also then agreed that Stream will offer the opportunity to undertake the demolition work for Tower and its contracted partners to [Nicon] as preferred contractor.
>
> (emphasis added)

Demolition work?

[70] A first issue here is what do the words in the HOA "the demolition work" mean. I consider that the expression "the demolition work" clearly refers to the demolition

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16 *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896 (HL) at 114–115. Adopted in New Zealand in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

17 *Firm PI 1 Ltd v Zurich Australian Ltd* at [60], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society, above n 3, at* 115 per Lord Hoffmann; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14] per Lord Hoffmann.

18 At [63].

19 *Investors Compensation Scheme Ltd v West Bromwich Building Society, above n 3, at* 912; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444.

of properties for which Nicon provided a quote for demolition costs. The phrase refers to "the" (specific) demolition work rather than potential demolition work in general. This interpretation was not really challenged in any major way before me by counsel for the defendants. It is the interpretation that fits with business common sense in light of the contract as a whole and the relevant extrinsic evidence.

"Offer the opportunity to undertake the demolition work…as a preferred contractor"?

[71] I find that to offer someone an opportunity to undertake work means to present them with the chance to accept or reject that work.

[72] The defendants submitted that "preferred contractor" meant Nicon was to be one of a number of contractors utilised by Stream. They contend any relationship between the parties was a preferential one and not an exclusive one. In response, Nicon argued that the term did establish a more exclusive relationship between the parties as it obligated Stream to offer it the relevant demolition first.

[73] *The Concise Oxford English Dictionary*[20] relevantly defines "prefer" as "to like (someone or something) better than another or others; tend to choose". I consider that in this context the ordinary and plain meaning of the term is that in a general sense Stream will prioritise or tend to choose Nicon when allocating its demolition work. This creates an approach whereby work will be first offered to Nicon as Tower's preferred contractor and then only offered to other contractors if Nicon either declines, or cannot meet the time frames required, or its pricing is not generally competitive with market rates at the time. The provisions of the final clause of the HOA, outlined again at [75] below, make this clear.

[74] It is common sense, in my view, that these are the meanings of the phrases at issue here. Otherwise, Nicon would have to fulfil its obligations under the HOA (which the evidence indicates it did, making at the time much of its business available for Stream's work, purchasing additional equipment to handle the work, arranging insurance, and promptly attending to the many site visits required for the hundreds of quote assessments provided, all with the knowledge of Stream at least) with no

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20 *The Concise Oxford English Dictionary,* (Eleventh Ed), Oxford University Press.

preferred contractor status arising in return. If this were to occur it would mean no possible benefit to Nicon would arise under the HOA. This is simply not in keeping with business common sense.

Stream/Tower's ability to engage other contractors?

[75] The final clause of the HOA, however, is important. It provides:

> This agreement shall not preclude Stream from engaging other contractors if required to facilitate the timely remediation of the complete claim volume. Stream reserves the right to enter into a competitive tendering process for any of its contracts, at any stage, to ensure a market rate for demolition contracts in maintained.

[76] This exclusion/ reservation clause prescribes particular circumstances in which Stream is permitted to engage and allocate work to other contractors.

[77] These exclusions support the interpretation I have taken above. The first makes it clear that Stream is allowed to engage other contractors if, when Nicon is offered the work, it has indicated that it does not have the capacity to undertake the work in a timely manner and thus to meet the necessary time frames. But initially, where Nicon is able to do the work in a timely way, Stream is not permitted to simply engage another contractor instead for no specific reason. This, of course, is also subject to the further reservation and exclusion I outline below.

[78] This second reservation permits Stream to enter into a competitive tendering process for any contract <u>at any stage</u> to ensure a market rate for demolition contracts is maintained under the HOA. However, in my judgment, Nicon as the "preferred contractor" is clearly meant to be part of this tendering process. Otherwise, those words, "preferred contractor" would mean nothing. I agree with Nicon's submission that this clause does not allow Stream to sidestep offering to Nicon the chance at least to be engaged in any competitive tendering process that occurs. Whether indeed this may or may not have occurred here is another separate matter, however.

Extrinsic evidence

[79] This interpretation of the HOA is also in keeping with the extrinsic evidence. Nicon went to Stream seeking a commitment from it about the amount of work it would pass on to Nicon. If it had not got a commitment from Stream that it would be the "preferred contractor" for demolition work, the evidence is clear that Nicon would have seen itself able to take on other work and not necessarily made itself available at the time to provide the many detailed demolition quotes required by Stream on what were very tight time frames. It needed assurances, which Stream gave through the HOA. The defendants seemed to accept in evidence that the HOA was entered into to provide Nicon with a firm commitment at least to be properly considered for future work as its "preferred contractor". Those words "a preferred contractor" were chosen specifically and in a natural and business common sense way, they must mean something. As I note above, to ignore Nicon entirely in any competitive tendering process Stream arranged for post August 2012 demolition contracts on properties for which Nicon had earlier provided quotes, certainly in my view, does not accord Nicon the degree of priority the HOA envisaged. Quite the contrary. The evidence before me tended to confirm that, after this time, Nicon was generally ignored when the so-called competitive tendering process was undertaken.

[80] The Supreme Court held in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* that the subsequent conduct of the parties is a valid consideration in the interpretation of a contract.[21] As I mentioned above, after the HOA was signed, initially Nicon was given virtually all the demolition work commissioned by Stream. I consider that this conduct supports the interpretation of the HOA as establishing the described preferred contractor relationship and, even if market pricing issues had arisen, this at least required Nicon to be invited to be part of a competitive tendering process for property demolitions for which it had previously provided quotes.

Conclusion on Question (B)

[81] Before me, counsel for the parties made submissions about whether, in the circumstances, Stream was entitled to enter into a competitive tendering process to

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[21] *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC; [2008] 1 NZLR 277.

ensure market competitiveness and whether it in fact had. That is not precisely in line with the question I have been asked to answer here. That question is whether the HOA obliged Tower and Stream to offer all its demolition work to Nicon in respect of properties for which Nicon had provided assessments.

[82] The answer to that question (B), strictly speaking, is "No", but this is subject to a qualification.

[83] That qualification relates to what was in reality an ancillary question posed at the hearing before me. This dealt with the broad issue under the HOA: in what way were the defendants obliged to involve Nicon in its decision-making for the allocation of demolition work after mid-2012?

[84] This of course, as I have mentioned above, brings into play amongst other things the final clause of the HOA outlined at para [75] above. My general conclusions on this issue are outlined at paras [77] and [78] above. To recap, the description in the HOA of Nicon as a "preferred contractor" and the general provisions of the HOA itself do not allow Stream or Tower to sidestep offering to Nicon the chance at least to be engaged in any competitive tendering process that may occur. Although it is strongly disputed by Nicon, the defendants argue that Nicon voluntarily left the demolition market in September/October 2012 which ended the preferred relationship. That issue was not resolved in evidence before me and in any event is potentially a subsequent matter for consideration in this proceeding outside the preliminary issues I am required to determine here.

(C) Was Stonewood an agent of Tower and Stream?

[85] The third question noted at [5] above asks whether, for the purposes of the HOA, Stonewood was the agent of Tower and Stream. This question deals with the factual issue that many of the requests to Nicon for quotes came through Stonewood rather than directly from Stream.

Discussion

[86] Stonewood is not mentioned in the HOA. However, the evidence indicates that Stonewood, who was contracted by Stream, was instructed to source demolition quotes exclusively from Nicon. These quotes were for the benefit of Stream and Tower. Mr Wilson gave evidence that Stonewood could derive no benefit from commissioning demolition quotes and that Stonewood had no relationship with Nicon other than passing on the instructions from Stream. Nicon addressed the quotes (for which it had received requests through Stonewood) to Stream and all invoices for demolitions undertaken were addressed to Tower, care of Stream. Tower paid these invoices. I also accept that Stream alone had the authority to commission demolition assessments and order demolition. Mr Norriss accepted that Stream originated all requests for demolition assessments and Stonewood's arrangement with Nicon became obsolete once Stream formed a direct relationship with Nicon.

[87] Nicon submitted that the evidence before the Court gives rise to an irresistible inference that all the quotes were commissioned by Stream pursuant to the HOA and that Stonewood's role was only to pass on the requests from Stream and return Nicon's quotes to Stream. I agree.

Conclusion on Question (C)

[88] I consider that the facts here clearly support the view that Stonewood was the agent of Stream and Tower in the sense that it passed on their instructions for demolition quotes and information about demolitions generally to Nicon. This means that the quote requests passed on through Stonewood as agent are still from Stream and thus come under the HOA.

[89] Accordingly, the answer to question (C) is "Yes".

(D) Is Nicon entitled to fees for its quotes after 21 July 2011?

[90] The final question asks whether Nicon is entitled to a fee of $350 (excluding GST) for each quote Stream/Tower commissioned from it after 21 July 2011.

Discussion

[91] It is clear from the evidence that neither Stream nor Tower paid Nicon specifically for demolition quotes commissioned at the outset or throughout their relationship. Nicon maintains, however, that it is entitled to such a fee because the parties agreed to it after certain discussions which were then solidified in a letter dated 21 July 2011 from Mr Giltrap. The operative part of that letter which was from Mr Giltrap to Mr Norriss of Stream is set out at [23] above.

[92] In my view, it is clear from the evidence before the Court, however, that no formal acceptance was given on the part of Stream to what was in essence only a proposal from Nicon. Nicon must therefore rely on subsequent conduct as indicating acceptance by Stream.[22]

[93] By way of background, as I have set out above, at para [21] – [23], Mr Giltrap approached Stream in July 2011 to discuss the fact he said that Nicon was performing a great deal of work without any commensurate financial return. He then sent the letter in question to Mr Norriss on 21 July 2011 which proposed payment of $350 (excluding GST) for any quote commissioned from Stream. Mr Giltrap appeared to accept in his evidence that this letter was only a proposal and, in any event, no quantum had been agreed at that stage.

[94] Mr Honeybone's evidence is that the proposal was rejected by Tower, and he communicated this fact to Mr Giltrap. He accepts that Mr Giltrap, nevertheless, went on to request payment on several occasions but Mr Honeybone testified that he told Mr Giltrap he was unable to get Tower's agreement to pay for the quotes and Mr David Ashe of Tower had confirmed this. Mr Honeybone said in evidence that he told Mr Giltrap he could elect, if he wished to, not to provide the quotes any longer. Subsequent to July 2011, however, Nicon continued to provide demolition quotes.

[95] Both Mr Honeybone and Mr Giltrap did refer in their evidence to statements made by Mr Honeybone about a "wash up" at the end of Nicon's engagement. Mr Giltrap claims this referenced a later payment for the quotes, a payment that he

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22 A principle first accepted in *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666.

claims was agreed. Mr Honeybone, on the other hand, stated in his evidence that any recompense to Nicon for its work in providing the quotes would "largely get washed up in the amount of actual demolition work it received from Stream".

[96] Nicon claims an invoice was sent to the defendants requesting payment for quotes which had already been commissioned. The defendants say they have no record of an invoice being received and in their evidence neither Mr Honeybone nor Mr Norriss recall an invoice being sent. Copies of what are said to be the invoice are before the Court and are confusing to say the least. On its face the invoice appeared to relate to quotes prior to July 2011 so it may not, in any event, reflect the purported agreement.

[97] In his evidence, Mr Giltrap acknowledges that the original invoice was "voided" on 3 August 2011. He said also that it was not until about one week after Tower had made its final payment on the last demolition job completed by Nicon that Mr Giltrap says he raised again his invoice for the issue of $350 payments per quote. Mr Giltrap claims he delayed this because "otherwise Tower probably would not have paid me for the final job."

[98] In my view, Mr Giltrap's delay in making this demand until after Nicon had ceased its operation made on the basis of his claim that he waited for these residual works to be completed first, is hardly credible. If indeed a large amount was truly due to Nicon for the past quotes it had provided, normal commercial practice would be for this amount to be promptly pursued. Further, the evidence indicates that Nicon, in any event, did not itself act consistently with its own proposal in the sense that it did not deduct $350 plus GST from its charges for those demolitions it had carried out subsequent to the 27 July 2011 letter.

Conclusion on Question (D)

[99] On the basis of the evidence before me, I find that, while there were discussions about payments for quotes, there is no evidence that an agreement of this nature was reached by the parties. There is no indication Stream accepted Mr Giltrap's bare proposal. Although Nicon purported to provide what was a rather confusing invoice

said to be issued in accordance with its proposal,[23] Stream and Tower say it was never received nor paid and in fact ultimately voided by Mr Giltrap. They have maintained throughout that it was never agreed for a payment to be made for the quotes.

[100] The evidence and the matters I have noted above, including subsequent events I have mentioned, do not support the existence of any agreement that Tower and Stream would pay Nicon $350 (plus GST) for each demolition quote it undertook after 21 July 2011. While Mr Giltrap made this proposal, the evidence indicates it was rejected by Stream and Tower.

[101] Accordingly, the answer to question (D) is "No".

RESULT

[102] As I have outlined above, I now determine the preliminary questions outlined at [5] above as follows:

(a) Question (A) – Is the HOA binding on Tower, Stream and Nicon?

Answer – Yes.

(b) Question (B) – Was Tower/Stream obliged to offer Nicon demolition work in respect of properties for which Nicon had provided quotes/assessments?

Answer – No, but subject to the qualifications I note at paras [83] and [84] above.

(c) Question (C) – Was Stonewood an agent of Tower and Stream?

Answer – Yes.

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[23] The invoice given in evidence was not the original. It was for $86,537.50 (including GST) but showed a credit of $72,220. Mr Giltrap was unable to explain what this credit referred to.

(d) Question (D) – Is Nicon entitled to a fee of $350 (plus GST) for each quote that was commissioned by Tower/Stream after 21 July 2011 and prepared by Nicon?

Answer – No.

COSTS

[103] Before me no specific submissions were made by counsel on costs. Costs are therefore reserved. In the event that counsel and the parties are unable to agree on the issue of costs, then counsel may file submissions on costs (sequentially) by way of memoranda and in the absence of either party indicating they wish to be heard on the question of costs, I will decide that issue based upon the memoranda filed and all other material before the Court.

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Gendall J

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