IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-173
[2018] NZHC 1177

IN THE MATTER	of Te Aho o Te Kura Pounamu
BETWEEN	MINISTER OF EDUCATION First Plaintiff
	SECRETARY OF EDUCATION Second Plaintiff
	BOARD OF TRUSTEES OF TE AHO O TE KURA POUNAMU Third Plaintiff
AND	McKEE FEHL CONSTRUCTORS LIMITED First Defendant
	PREMIER ROOFING WELLINGTON LIMITED Second Defendant
	RDT PACIFIC LIMITED Third Defendant
	SEALCO WATERPROOFING SYSTEMS LIMITED Fourth Defendant
	LUMLEY GENERAL INSURANCE (NZ) LIMITED, DUAL NEW ZEALAND LIMITED AND AIG INSURANCE NEW ZEALAND LIMITED Proposed First Third Parties

Hearing: 10 May 2018

Counsel: M S R Lucas for Applicant (Third Defendant)
J N Bierre for Respondent (Proposed Third Parties)

Judgment: 23 May 2018

JUDGMENT OF THOMAS J
(APPLICATION FOR LEAVE UNDER S 9, LAW REFORM ACT 1936)

[1] Te Aho o te Kura Pounamu (the Correspondence School) operates on land and buildings at 11 Portland Crescent, Thorndon, Wellington. In 2009 and 2010, work was undertaken to re-roof two blocks of the Correspondence School (the Works). A certificate of practical completion was issued and a code compliance certificate obtained. However, various leaks developed and unsuccessful attempts were made to fix them. The plaintiffs, the Minister of Education, the Secretary for Education and the Board of the Correspondence School, commenced proceedings in March 2017 claiming negligence in that the roofing work was defective, non-compliant with the building consent and/or the Building Act 1991, the Building Act 2004 and other applicable statutes, bylaws and good trade practice. The cost of remediating the defects and damage is estimated at not less than $1,282,521 excluding GST. The plaintiffs sue the construction company (the first defendant), the roofing company (the second defendant), the project management company (the third defendant, RDT) and the waterproofing systems company (the fourth defendant).

[2] This decision concerns an application by RDT for leave to commence proceedings against third parties pursuant to s 9 of the Law Reform Act 1936 (the Act). The proposed third parties are Lumley General Insurance (NZ) Limited, DUAL New Zealand Limited and AIG Insurance New Zealand Limited (together the Insurers). The application is opposed.

Factual background

[3] In August 2009, the Minister of Education engaged Interact Architects and Designers Limited (Interact) as the architects in respect of the Works (the Interact Contract). The Interact Contract was based on the NZIA AAS 2008 (First Edition) Agreement for Architectural Services. The Interact Contract provided for Interact to be discharged from liability unless a breach was notified in writing to Interact within six years of the date of the contract.

[4] The Interact Contract described Interact's scope of works as:

> To provide design and construction documents for Building Consent, construction and observation onsite.

[5] The scope of services to be undertaken during administration of the Works included providing observation to the level selected. The level selected included:

> Check selected materials and components supplied to Site for compliance with contract documents.
>
> Review representative samples of critical work.

[6] Interact was also to review the warranties and guarantees provided by the contractor.

[7] Interact issued a Works instruction on 26 January 2010 approving a change of roofing membrane from Ardex Butynol to Epispan Roof Membrane (the Instruction). At the end of June, Interact reviewed warranty documents which recorded that a different product, Grey Trelleborg EPDM, had been applied (the Warranty).

[8] On 5 July 2010, RDT issued a certificate of practical completion for the Works.

[9] Interact issued a Quality Statement dated 4 December 2012 addressed to the Correspondence School. The statement confirmed Interact had observed the architectural work in accordance with the terms and conditions of engagement and verified that inter alia:

> The plans and specifications and supplementary information issued for the purpose of construction are in accordance with the scope of works in the Building Consent and any other contractual obligation.
>
> To the best of our knowledge work to date has been constructed in accordance with the contract documents.

[10] The plaintiffs claim RDT was responsible for inter alia contract/construction supervision of the Works and/or onsite observation of the Works. The plaintiffs claim RDT owed them a duty of care to observe and/or inspect the construction of the Works and breached that duty.

[11] RDT considers that, in the event it is found liable to the plaintiffs for any losses, damages or liability, Interact should be a concurrent tortfeasor in that Interact owed duties of care to the plaintiffs but breached them. Furthermore, that Interact owed RDT a duty to exercise reasonable skill and care when checking materials and components supplied to site for compliance with contractual documents, reviewing work and warranties and guarantees, and advising on practical completion. RDT considers Interact breached that duty by failing to identify the discrepancy between the roof membrane specified in the contractual documents and that installed. Interact is therefore liable to RDT in respect of any losses for which RDT is found liable in the plaintiffs' claim.

[12] RDT's problem is that Interact was removed from the Companies Office Register on 10 July 2017. Interact cannot, therefore, be joined as a third party or defendant. It is not a "perfectly good common law defendant".[1]

[13] The Insurers provided professional indemnity insurance for Interact for the period from and including 1 December 2014 to 30 November 2015 (the Policy). The Policy provides cover for claims made and notified during the period of insurance and claims arising from circumstances notified during the Policy period.

[14] RDT, therefore, seeks to commence proceedings against the Insurers under s 9 of the Act which provides that, where a person is to be indemnified against liability to pay damages or compensation under a contract of insurance, the amount of the insured's liability will be a charge on all insurance money that is or may become payable in respect of the liability. The charge arises at the time of the event giving rise to the claim regardless that the amount of liability may not have been determined at that time. Section 9(4) of the Act provides that every charge is enforceable by way of an action against the insurer in the same way and in the same court as if the action were to recover damages or compensation from the insured. No action is to be commenced, however, except with leave of the Court. Leave is not required if the insured is insolvent, bankrupt or being wound up at the time of the event giving rise to the claim.[2] There is no suggestion this is applicable and leave is therefore required.

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1 *Chow v Thomson* [2012] NZHC 712.
2 Law Reform Act 1936, s 9(2).

[15] The application is on the basis that, following communication between RDT and Interact between March 2015 and May 2015, Interact had knowledge of circumstances which could give rise to a claim against it during the Policy period. It relies on s 9 of the Insurance Law Reform Act 1977 if Interact failed to provide notification or timely notification to the Insurers of those circumstances. Section 9 would excuse any late notification or failure to notify, provided there is no material prejudice to the Insurers.

[16] The Insurers oppose the application on the basis no claim was made against Interact and there were no known circumstances during the Policy period which could have given rise to the claim.

The Policy

[17] The Policy was a "claims made and notified" policy, relevantly providing:[3]

> **The Companies** … shall … indemnify **the Insured** against liability for losses arising from **Claims** first made or notified against any of them and notified to **the Companies** during the **Period of Insurance** specified … arising out of civil liability whenever and wherever the same was or may have been committed or omitted by any of them when performing their **Professional Duties** ... as architects …

[18] The right of indemnity depended upon Interact giving the Insurer immediate notice in writing of:[4]

> (1) any **claim** made or notified against them; or
>
> (2) knowledge of circumstances which could give rise to a **Claim** against them "("**Known Circumstances**")"; or
>
> (3) the receipt of notice from or information as to any intention by another party to claim against them; …

[19] Provided Interact complied with this condition prior to expiration of the Policy, any claim or loss made after the expiration of the period of the Policy is deemed to have been made during the Policy.[5]

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3 Clause 1.01.
4 Clause 3.03.
5 Clause 3.05.

[20] It is not in dispute that no claim in respect of the alleged defects at the Correspondence School was made against Interact or notified to the Insurers during the Policy period. Neither were any circumstances giving rise to the claim notified.

[21] Section 9 of the Insurance Law Reform Act 1977 provides:

> **9 Time limits on claims under contracts of insurance**
>
> (1) A provision of a contract of insurance prescribing any manner in which or any limit of time within which notice of any claim by the insured under such contract must be given or prescribing any limit of time within which any suit or action by the insured must be brought shall—
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> …
>
> (b) … bind the insured only if in the opinion of the arbitrator or court determining the claim the insurer has in the particular circumstances been so prejudiced by the failure of the insured to comply with such provision that it would be inequitable if such provision were not to bind the insured.

[22] The effect of s 9 is that an insurer can only decline cover on the basis of an insured breaching a policy condition requiring the insurer to be notified of a claim in a particular manner or within a particular time, if the insurer has been so prejudiced by the insured's failure that it would be inequitable if the provision did not bind the insured. The Insurers do not claim any such prejudice in this case.

[23] As Tipping J observed in *Sinclair Horder O'Malley Ltd v National Insurance Co of New Zealand Ltd*:[6]

> Section 9 does not breathe new life into a contract of insurance which has already died. Rather, it prevents a fatal knife being struck at a claim under a living contract.

Issue

[24] It is accepted that the three criteria to be met by a party seeking leave under s 9(4) of the Act are:[7]

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6 *Sinclair Horder O'Malley Ltd v National Insurance Co of New Zealand Ltd* [1992] 2 NZLR 706 (HC) at 714. Overturned on appeal, but on a different point: *Sinclair Horder O'Malley Ltd v National Insurance Co of New Zealand Ltd* [1995] 2 NZLR 257 (CA).

7 *Chow v Thomson*, above n 1, at [13].

(a) there is a prima facie claim against the insured;

(b) the insured has a prima facie claim under the Policy of insurance; and

(c) the insured is not a perfectly good common law defendant.

[25] The Insurers accept that criteria (a) and (c) are met but say criterion (b) is not satisfied.

[26] The issue for determination is, therefore, whether Interact had knowledge of circumstances which could give rise to RDT's proposed claim during the Policy period. If Interact did have such knowledge, those circumstances ought to have been notified to the Insurers pursuant to the Policy. If Interact did not have such knowledge, then s 9 of the Insurance Law Reform Act 1977 cannot assist RDT.

The law

[27] The phrase "circumstances which may give rise to a claim" has been considered in a number of cases. The interpretation of the phrase and how it has been applied in light of the facts of the various cases is worth exploring.

[28] *J Rothschild Assurance Plc v Collyear*, a decision of the Queen's Bench Commercial Court, is often cited as the leading authority on what comprises circumstances which may give rise to a claim.[8] The case concerned a life assurance company seeking to be indemnified by its professional indemnity insurance underwriters for losses it may have sustained by reason of the need to compensate investors for mis-selling of pensions to them. Following an accountant's report to the Securities and Investment Board in 1993, the self-regulating organisation of which the plaintiffs were a member wrote to their members to say the report disclosed a "problem which needs to be tackled" regarding non-compliance in the selling of pensions in certain classes of cases. The industry regulator's letter noted that various groups had been formed to conduct a review aimed at developing recommendations for establishing the nature and extent of the problem and what the cost of rectification

8 *J Rothschild Assurance Plc v Collyear* [1999] 1 Lloyd's Rep 6 (QB).

would be. It provided recommendations to its members as to how they should deal with complaints in the meantime.

[29] The plaintiffs' solicitors then purported to give notice to the plaintiffs' insurance underwriters referring to the industry regulator's letter and the report as together comprising circumstances which may give rise to a claim. This was not accepted by the underwriters.

[30] The underwriters' resistance to the notification was on the basis of a purported blanket notification, that no cause for concern specific to any case had been mentioned, no reference had been made to any criticism or complaints directed against the plaintiffs personally and that the report was no basis for fearing a claim against the plaintiffs. The plaintiffs had also, at the request of the regulating body, undertaken a monitoring exercise of their own cases which had identified no issues.

[31] Rix J held that the test of materiality for notice was a weak one, it being circumstances which *may* give rise to a claim rather than which are likely to give rise to a claim. He held the notification was a valid one.

[32] The meaning of the phrase was also considered by the Federal Court of Australia in *FAI General Insurance Co Ltd v McSweeney*.[9] That case concerned an insurance policy held by a firm of accountants whose clients included a group of travel agencies. Pursuant to the accountant's advice, the travel compensation fund accepted the group of travel agencies was in a financial position to continue trading and provided insurance. It was subsequently found that the accountants had engaged in conduct intended to disguise the truth. The insurers purported to avoid the contract of insurance on the basis the accountants had failed to comply with their duty of disclosure.

[33] Lindgren J undertook a helpful analysis. He began by opining that the expression "circumstance which may give rise to a claim" involved the notion of a circumstance which, as a matter of objective fact, possesses the quality that it "may

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9 *FAI General Insurance Co Ltd v McSweeney* (1999) 10 ANZ Insurance Cases ¶61-433 (FCA).

give rise to a claim".[10] He made an obvious but necessary statement that, if it could be *known* that a circumstance definitely would or would not give rise to a claim, certainty would be provided. However, the question was what degree of likelihood there was that a known circumstance will give rise to a claim.[11] He noted the commercial context and object of a proposal must be borne in mind, pointing out that every time an accountant prepares accounts or an auditor performs an audit, there is the possibility of a claim. Likewise, where loss is suffered as a result of a business failure, it is not uncommon for a loss sufferer to target those having some connection with the business who are insured. He emphasised that speculation should not be used to disclose every mere possibility of the making of a claim.

[34] Lindgren J reviewed the approach taken in *FAI General Insurance Co Ltd v Hendry Rae & Court*, where Pidgeon J discussed the issue with reference to examples.[12] In the first, where a ship foundered with potential claims when survivors reached shore, he considered the foundering of the ship would be a circumstance which may result in a claim, even if the claim had not been made at the time of completion of an insurance proposal. He then noted a second example, in the context of professional indemnity insurance, saying if it became known to a partner that he had made a serious mistake in writing a report, for example using a wrong valuation, this would be a circumstance necessary to disclose.

[35] Lindgren J concluded it was not desirable to attempt to define precisely the shade of meaning in the phrase. When considering the appropriate connection between known circumstances and the claim, he described the following:[13]

> … circumstances "may give rise to a claim" if they would, as at the time of the proposing of the insurance, immediately suggest to a reasonable person in the proponent insured's position who reflected upon those known circumstances, that the bringing of a claim against the insured in respect of them was a "definite risk" or a "real possibility" or "on the cards". Perhaps the notion of the "springing to mind" of the making of a claim also appropriately expresses the shade of meaning intended.

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10 At 75,031.
11 At 75,032.
12 *FAI General Insurance Co Ltd v Hendry Rae & Court* (1993) 7 ANZ Insurance Cases 61-200 (WASC).
13 *McSweeney*, above n 9, at 75,033–75,034.

[36] Lindgren J acknowledged the accountants had issued accounts which contained a statement they knew to be false and they intended their client to act in reliance on it. He was not satisfied, however, that as at the relevant date there were the necessary indications that the client might make a claim against the accountants. In those circumstances, he was not satisfied the accountants were aware of circumstances which may give rise to a claim. He therefore distinguished between the making of a claim and the existence of legal liability. He did, however, say:[14]

> Ordinarily it can be expected that what will be known will include the fact that the circumstances have actually led a person at least to contemplate the making of a claim. However, I do not exclude the case where the underlying circumstances establishing liability themselves, of their nature, would prompt a reasonable person immediately to foresee the making of a claim as a real possibility. In such a case, the length of time that has passed without any suggestion of a claim and the degree of obviousness of liability may assume importance.

[37] It is fair to say there is a difference of approach between the Queen's Bench authority of *Rothschild* describing the test as a weak one,[15] and the Australian decision of *McSweeney*,[16] which discussed the need for an indication that someone was actually contemplating making a claim. The latter was in the context of accountants who had issued accounts containing a statement they knew to be false. It is difficult, however, to reconcile some of the reasoning within that decision. Lindgren J seemed to agree with the analysis in *Hendry Rae*, which included the example of a professional partner who knew he had made a serious mistake.[17] Lindgren J also said his conclusion did not exclude underlying circumstances establishing a liability themselves. The difference in outcome may rest on a desire to distinguish fraudulent behaviour from genuine errors and to protect insurers from all-encompassing liability for the former. Nevertheless, the decision that the accountants were not aware of circumstances which may give rise to a claim could be considered somewhat problematic.

[38] In the New Zealand High Court decision *Attorney-General v Aon New Zealand Ltd*,[18] Mallon J assessed a similar threshold to require notification in circumstances where the Ministry of Agriculture and Forestry appreciated a claim for damages was

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14 At 75,034.
15 *J Rothschild Assurance Plc*, above 8.
16 *McSweeney*, above n 9.
17 *Hendry Rae & Court*, above n 12.
18 *Attorney-General v Aon New Zealand Ltd* HC Wellington CIV-2005-484-1814, 10 April 2008.

a possibility and had sought advice from Crown Law. Crown Law advised such a claim was unlikely to be successful. Mallon J noted a claim which is unlikely to be successful is still relevant to an insurer's assessment of the insured risk but the advice was relevant to whether a claim was a reasonable possibility. Mallon J considered *McSweeney* and concluded there was nothing else to indicate the Ministry considered a claim for compensation to be a reasonable, real or definite risk as opposed to a remote possibility.

[39] The later High Court case of *Barnes v QBE Insurance (International) Ltd* concerned an appeal from the decision of the Weathertight Homes Tribunal to dismiss an application by Mr Barnes to join the respondent insurer as respondent in proceedings against Mr Barnes.[19] Mr Barnes' company held professional indemnity insurance from the insurer. On the last day of his insurance cover, Mr Barnes purported to notify his insurer of circumstances which may give rise to a claim. He listed 54 buildings using a monolithic cladding or similar construction methodology on which his company had worked. At the time of the notification, no specific claims had been made against him or his company, although there was widespread publicity about leaky buildings, the Hunn Report had been completed and legislation addressing problems identified in the Hunn Report was in effect. Mr Barnes believed his company's reports relating to those buildings might give rise to possible claims in the future. The issue was whether, during the policy period, there were circumstances which may give rise to a claim.

[40] Faire J referred to *Attorney-General v Aon* which was agreed by counsel as correctly stating the test.[20] He noted that decision appeared to set a higher test than that in *Rothschild Assurance Plc* but, in any event, it did not affect his decision.[21] He concluded the notification circumstances disclosed no objective justification for Mr Barnes' opinion that his company's reports on other buildings may give rise to possible claims against it in the future. He observed:[22]

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19 *Barnes v QBE Insurance (International) Ltd* HC Auckland CIV-2010-404-5651, 4 April 2011 (per Faire J).

20 *Attorney-General v Aon*, above n 18.

21 *J Rothschild Assurance Plc*, above n 8.

22 *Barnes*, above n 19, at [57].

> A vague reference to publicity surrounding leaky buildings of similar construction to those in respect of which the appellant had completed reports does not fall within that category.

The notification was therefore found invalid.

[41] Leave to appeal to the Court of Appeal was granted as to whether Faire J was right to conclude that the circumstances identified by Mr Barnes were such as may, in the opinion of a reasonable practitioner of the insured's business, give rise to a claim.[23] Although Allen J, in granting leave, noted it was arguable the circumstances were closer to those arising in *Rothschild* than Faire J believed, there was no real criticism of his analysis of the law. It does not appear the appeal was in fact pursued.

[42] Turning to the present case, it is not in dispute that the question of whether there were circumstances which may give rise to a claim, or Known Circumstances as they are described in the Policy, is to be assessed objectively. In my analysis, I have used the articulation of the test in *Attorney-General v Aon New Zealand Ltd*:[24]

> …the test is an objective one, requiring notice when a reasonable person in the insured's position would consider that there was a reasonable possibility of a claim. Notice is not required if the possibility of a claim is remote or unlikely. However, providing there is a real or definite risk of a claim, notice is required even if the claim is not probable.

[43] Therefore, there are two questions:

(a) what was the Insured's position; and

(b) would a reasonable person in that position consider there was a reasonable possibility of a claim?

The evidence

[44] In support of its application, RDT filed an affidavit from an associate director setting out what it contends are the facts which demonstrate Interact was aware there were Known Circumstances during the Policy period.

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[23] *Barnes v QBE Insurance (International) Ltd* HC Auckland CIV-2010-404-5651, 13 October 2011.
[24] *Attorney-General v Aon*, above n 18, at [66], applied in *Barnes*, above n 19.

[45] RDT described the circumstances on which it relies to say there were Known Circumstances during the Policy period as follows:

> 13. In around November 2014, RDT was approached by the Ministry of Education about leaks in the roof at the Correspondence School.
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> 14. On 25 March 2015, RDT emailed Interact about the roof membrane. Interact advised RDT that:
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> 14.1 it would review works instructions 1–20 to see if any related to the roof membrane. Interact had issued Words Instruction 7 ("WI7") on 26 January 2010. (WI 7 approves a change of membrane, from Ardex Butynol to Epispan Roof Membrane. …);
>
> 14.2 it had reviewed a warranty document. (The warranty documents record that a different product, Grey Trelleborg EPDM, had been applied. …); and
>
> 14.3 that it could not find any correspondence approving a change from Epispan to something else.
>
> …
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> 15. This exchange shows that Interact had reviewed the contractual documents, and was aware that the product referred to in the warranties did not comply with the contractual documents.
>
> 16. In April 2015, RDT was pursuing the roofing contractor to repair the membrane.
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> 17. On 3 May 2015, Interact emailed RDT asking about the investigations into the roof. On 4 May 2015, RDT advised Interact that the Ministry of Education's legal team was looking at it. Interact asked to be advised if there was any legal action pending.

[46] I note the RDT employee who held the discussions and email correspondence with Interact did not provide an affidavit.

[47] Interact's response was from Mr Watson, a former director who had not been involved in the Works:

> 16 My search of the files was merely to collect information to pass on to RDT regarding any change of product. It was not a "*review*" of the file to ascertain whether the contract documents had been complied with or specifically to check whether any warranties complied with those documents. I was not "*aware*" at any time in 2015 that the warranties did not comply with the contract documents as alleged by RDT and by Mr Simpson in his affidavit.

17 At no time during the call or email correspondence on 25 March 2015 did Ms Radcliffe state or intimate to me that there was an issue with the architectural services provided by Interact. As far as I am aware no one else at Interact had any contact from any person concerning the Correspondence School during the 2014/2015 policy year.

18 As I had not received any further communication from RDT about the information I had supplied, I followed up Ms Radcliffe by email on 3 May 2015 in part because she had said that she would send me a draft letter that they were putting together to the main contractor so I would be able to "*confirm our facts are indeed correct prior to releasing it*" and I had not received any draft.

19 She responded on 4 May 2015 by return email that the matter was "*with the MOE legal team*" but that there was "*No action to date*" and "*your information did help*". Ms Radcliffe didn't raise or intimate there was any issue with Interact's services. But, because she said the matter was with the MOE's legal team, I thought it prudent to get her to let me [k]now if there was any legal action pending. Ms Radcliffe responded that she would "*most certainly let you know*" … . I didn't hear anything further from RDT.

20 At the time I didn't have any knowledge that there was any issue with Interact's services and so did not notify Interact's insurers of my correspondence with RDT.

Analysis

[48] In Ms Lucas' submission for RDT, the fact Interact must have been aware of the difference between the membrane specified in the Instruction and that referred to in the Guarantee would, on its own, have been sufficient to make Interact aware of the real possibility of a claim. The fact that Interact then became aware of the involvement of the Ministry's legal team put the matter beyond any suggestion of a mere possibility.

[49] The Insurers say the communications between RDT and Interact simply show RDT asking Interact whether the roofing membrane had been changed from Epispan. Mr Bierre, appearing for the Insurers, submitted that at no stage during the correspondence did RDT state or intimate to Interact there was any issue with the architectural services Interact had provided.

[50] Mr Bierre pointed out that, by the time of the enquiry, the director of Interact who had been involved in the Works was extremely unwell and the enquiry was dealt with by Mr Watson, who had no involvement in the Works. He simply looked at Interact's files and responded to the specific question asked of him. It was not, in

Mr Bierre's submission, a review of the file to ascertain whether the contract documents had been complied with or whether any warranties complied with those documents.

[51] Mr Bierre suggested the mere fact the Warranty referred to a different product from the Instruction was not of the significance RDT claims. He submitted there was no evidence RDT ever informed Interact of issues with the membrane and referred to Mr Watson's affidavit stating there was nothing to indicate there were concerns with Interact's performance. In his submission, it was neither surprising nor unusual to change a product and, in any event, Mr Watson said in his affidavit he was not aware the warranty did not comply. A change of product was not sufficient to lead to an inference of liability, in Mr Bierre's submission. He pointed out that, in April 2015, RDT had put the roofing contractor on notice but it did not do the same to Interact and did not inform Interact that notice to the contractor had occurred.

[52] Mr Bierre noted Mr Watson heard nothing further from RDT, so followed up with them because he had been told RDT would send him a draft of the letter it proposed to send to the main contractor. RDT's response did not indicate there was any issue with Interact's services and appeared to inform Interact that the Ministry of Education's legal team had taken no action to date. In Mr Bierre's submission, when RDT informed Mr Watson the matter was with the Ministry's legal team, that had to be read in the context of RDT's previous advice that it was putting together a letter to go to the main contractor. He suggested the mention of the Ministry legal team was, therefore, reasonably taken to be a reference to the letter and the main contractor.

[53] In any event, there was no further response from RDT to Mr Watson's request that RDT let him know if there were any legal action pending. Nothing further was heard until 25 August 2017, when RDT's lawyers wrote to the Insurers.

[54] In Mr Bierre's submission, at no time during the correspondence in March and May 2015 did Interact have any knowledge that its architectural services in relation to the Works were being called into question. Without that, there could not be circumstances which, viewed objectively, could be considered as giving rise to a claim against Interact.

[55] In my assessment, Interact's position was:

(a) although not specified in RDT's affidavit, Interact was clearly aware there was an issue with the roofing at the Correspondence School;

(b) RDT provided Interact with a copy of the Instruction which changed the roofing membrane to Epispan;

(c) Mr Watson confirmed Interact had retained electronic files and he was to review them "to see if there are any relating to the roof membrane";

(d) Mr Watson then confirmed he had seen the Warranty and could not see any correspondence approving a change of product from Epispan to something else;

(e) Mr Watson's follow up email in May 2015 indicated he was alive to the possibility of an issue;

(f) the fact Mr Watson asked if "any" legal action was pending clearly showed he was alive to the possibility of a claim. This counteracts any suggestion that Mr Watson was simply concerned about the draft letter to be written to the main contractor; and

(g) Interact knew the Ministry of Education's legal team was considering the problems with the roofing.

[56] A reasonable person in Interact's position would, in my assessment, consider there was a real possibility of a claim. Interact's contractual role of observing the Works and recording changes, coupled with effective notice that a different product had been used from that approved in the Instruction, was sufficient to put Interact on notice that there was a potential problem with Interact's performance under the Interact Contract. Even though Mr Watson might not personally have been involved in the Works, Interact can be taken to know the terms of the Interact Contract (which was based on a standard form agreement), including its obligation to check the warranties. Interact knew the Ministry's legal team was considering the roofing problems. It could

not infer legal action would not be taken simply because RDT had not advised it of any such by November 2015 when the Policy came to an end.

[57] In those circumstances, a reasonable person in Interact's position would consider that a claim was a definite risk or a real possibility, as opposed to a remote possibility. Interact's knowledge of potential liability was considerably more than general knowledge of a product defect or class action in respect of a defective product. The information before Interact was project and contract-specific, having the effect of identifying a breach of its contractual obligations. The prospect of a claim clearly sprang to Mr Watson's mind, leading him to enquire about legal action.

[58] In those circumstances, Interact ought to have notified the Insurers. Its knowledge came during the time covered by the Policy. In those circumstances, and given the Insurers do not claim prejudice, s 9(1) of the Insurance Law Reform Act 1977 applies.

Result

[59] For the reasons given, leave is granted to RDT to commence proceedings against the Insurers pursuant to s 9 of the Act.

[60] RDT does not seek costs.

[61] I make the following directions:

(a) RDT's statement of claim is to be filed and served by Wednesday 6 June 2018;

(b) any statement of defence is to be filed and served by 25 working days after – 4 July 2018; and

(c) all counsel are to file a joint memorandum by 25 July 2018 advising the Court of progress and proposing further directions or seeking a teleconference.

Thomas J

Solicitors:
Meredith Connell, Auckland for Plaintiffs
Wotton Kearney, Auckland for Third Defendant
Morgan Coakle, Auckland for Proposed Firth Third Party