IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000847
[2017] NZHC 706

BETWEEN	ANNEX DEVELOPMENTS LIMITED Plaintiff
AND	IAG NEW ZEALAND LIMITED First Defendant
AND	PETER J TAYLOR & ASSOCIATES LIMITED Second Defendant

Hearing: 28 March 2017

Appearances: S D Munro and A L Davidson for Plaintiff
C J Hlavac for First Defendant
K A Muir for Second Defendant

Judgment: 11 April 2017

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] The plaintiff, Annex Developments Limited (Annex) owns a property in Woolston, Christchurch. Prior to the sequence of earthquakes which struck the Canterbury region in 2010 there were numerous buildings on the site, let to some 50 tenants. Some of the buildings were up to 120 years old, though some had been constructed more recently. Significant damage was caused by the earthquake sequence, and particularly by the substantial earthquakes on 4 September 2010, 26 December 2010, 22 February 2011 and 13 June 2011.

[2] Annex held insurance cover on the buildings with the first defendant, IAG New Zealand Limited (IAG), which it had arranged through its broker the second defendant, Peter Taylor & Associates Limited (Peter Taylor). IAG had issued

policies for material damage (MD) to the property, and for business interruption (BI). Both policies had been renewed on 29 July 2010 and provided cover for a one year period to 29 July 2011.

[3] Annex made claims under the MD policy in respect of damage incurred as a result of the earthquakes on each of the above dates. Annex carried out temporary and emergency repairs to some of the buildings and lodged interim claims. The sum of $170,388.05, was paid by IAG. A further claim for temporary or emergency repairs carried out after the 22 February 2011 earthquake for the sum of $145,696.19 was made in June 2011, but was not paid at the time.

[4] A claim under the BI policy for loss of rent was made in the sum of $59,358.12, and paid by IAG. A further claim for $394,030.17 was made but not paid before the parties entered a settlement agreement.

[5] In February 2012 settlement was reached between Annex and IAG. This provided for a cash payment to Annex of $9,430,000 in full settlement and by way of discharge of all claims to the date of settlement under both the MD and BI policies, in respect of loss or damage by earthquake events up to the date of settlement. In the release document Annex acknowledged receipt of progress payments totalling $229,746.35. It is accepted that this figure represents the two progress payments referred to above, though they do not add to precisely this sum. Payment of the settlement sum was made on 8 February 2012.

Summary of Annex's claim in this proceeding

[6] Annex seeks an order under the Contractual Mistakes Act 1977. It says that the settlement agreement was entered under a mutual mistake about the extent of cover under the two policies. Central to the claim is the following clause in each policy:

> After **we** have paid a claim under this policy, **we** will reinstate **your** sum insured. **We** may ask **you** to pay an additional premium for this. If **we** do, **you** must pay the additional premium.

[7] Annex maintains that when it and IAG entered the settlement agreement they both believed that the maximum liability of IAG under the MD and BI policies was the total cover stated in the Policy Schedule for each category of cover, but both Annex and IAG were mistaken in that belief, a mistake which influenced their respective decisions to enter the settlement agreement. It says the correct position is that as each of the payments referred to above was made by IAG ($170,388.05 and $59,358.12), the full maximum sum payable under each policy was reinstated for future events.

[8] It further says that the maximum sum payable was also reinstated on unspecified dates by payments IAG ought to have made, but did not make. I will describe these as notional payments. These are, first, notional payment of the unpaid interim claims referred to above (a total of $539,726.36) and, secondly, notional payment of the indemnity value of the whole property once that was assessed on behalf of IAG. This was the sum of $4,795,000 plus GST as assessed by Ford Baker, registered valuers, on 27 April 2011.

[9] Annex says that if the full sum insured were reinstated by these sums for cover in respect of the June 2011 earthquake, and it had known that this was the position under the policies at the time that it negotiated with IAG, it would have negotiated settlement on the basis of IAG having liability for claims in a sum materially higher than the stated maximum sum in each of the policies. A precise figure was not given, but by adding to the maximum sums stated in the policies the three sums Annex says it should have been paid, it appears that it would be in the order of $15,000,000 - $16,000,000. Annex maintains that it has reinstated the property in terms of the policy, at a cost of over $19,000,000.

[10] Annex says that the mutual mistake over the extent of cover under the MD and BI policies therefore resulted in an agreement being entered for a substantially unequal exchange of values in terms of s 6 of the Contractual Mistakes Act, and relief should be granted accordingly. The relief it would seek, though not pleaded, would be an order setting aside the settlement agreement, thereby opening the way for it to claim what it sees as its full entitlement under the policy, the actual incurred cost of reinstatement.

[11] In a second cause of action Annex alleges that IAG has failed in its contractual obligation to reinstate the property. A third cause of action is brought against Peter Taylor alleging breach of a duty of care to carry out its brokerage services with all reasonable skill, care and diligence, in that it incorrectly advised Annex in relation to its entitlement under the policies, or failed to obtain alternative expert advice on that point. It is accepted that Annex must succeed on its first cause of action against IAG to have a prospect of succeeding on the second, as the present settlement agreement is a bar to the latter. If the first cause of action does not succeed, the basis for the third cause of action also fails. For that reason the second defendant appeared in support of the first defendant on this application.

The application before the Court

[12] IAG applies for summary judgment against Annex. It accepts that both Annex and IAG believed, when they entered the settlement agreement, that IAG's liability was no more than the maximum sum insured stipulated in the policy schedule for the 12 month period of cover during which each of the four earthquakes occurred which gave rise to claims by Annex. It accepts, therefore, that neither of the two payments actually made by IAG to Annex was to be taken into account as a deduction from these maxima when assessing the liability of IAG for the four unsettled claims, as the amount of each was reinstated into the cover, on payment, for the next event. But it says that the settlement actually reached with Annex expressly allowed for these payments to be retained in addition to the negotiated settlement sum, so in effect the settlement was reached on the basis that the full maximum sum under each policy had been reinstated once these payments were made.

[13] In relation to the balance of the argument for Annex, IAG's response is this. First, it says that its obligations under the policies do not extend to reinstatement of the maximum sum insured on the basis of payments which ought to have been made, but were not made, so the effect of the mutual mistake was only to the extent of the two payments actually made. Secondly, it says that if it is wrong in that, the only payments that, arguably, it ought to have made are those for further recompense of temporary repairs and for loss of rents, which had been claimed, in the sums of

$145,696.19 and $394,030.17, a total of $539,726.36. In respect of this sum it says that the mistake did not lead to a substantially unequal exchange of values, in the negotiated settlement agreement. It also says that Annex included these sums in the amount it sought in the settlement negotiations, so the total was included in the amount Annex accepted. Thirdly, IAG says that it was not under any obligation to make a payment to Annex of the indemnity value of the entire property as assessed for IAG on 27 April 2011 at any time prior to the fourth earthquake event in respect of which a claim was made, on 13 June 2011. Consequently, this was not a notional payment which, in terms of the argument for Annex, was one which ought to have been made.

Summary judgment

[14] Summary judgment may be entered for a defendant under r 12.2 of the High Court Rules if it satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. As with an application for summary judgment by a plaintiff the onus of establishing its position lies at all times on the applicant, and an applicant will not succeed in obtaining summary judgment if there are material disputes on material factual issues which cannot be resolved on evidence given by way of affidavit.

[15] In *Auckett v Falvey*, the Court said:[1]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[16] On an application for summary judgment by a defendant, the same principle applies.

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1 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2.

The policy

[17] Peter Taylor is an insurance broker. On 22 July 2010 it issued a policy schedule on behalf of IAG to Annex renewing a Commercial Package Insurance Policy for Annex for the period from 29 July 2010 to 29 July 2011. The Commercial Package comprised two policies, a material damage policy and a business interruption policy. Both are printed on NZI stationery.[2] The policy schedule issued by Peter Taylor states that it contains a summary of the insurances which were renewed, and cross-refers to the insurer's standard terms and conditions contained in the policy documents. The following details are set out:

MATERIAL DAMAGE	
Buildings – Replacement Value	$8706824.00
Landlords Chattels – Replacement Value	$120000.00
Earthquake	
Excess: $2500, Earthquake 2.5% of Loss/Min $2500	
Valuation completed by Ford Baker July 2009	
BUSINESS INTERRUPTION (Total $783,368)	
Loss of Rents	$723368.00
Additional Increased Costs of Working	$50000.00
Claims Preparation Costs	$10000.00
Earthquake	
Indemnity Period 12 Months	
Excess: Nil	

[18] The schedule also provides for public liability cover, and contains an endorsement and an extension of no present relevance.

The issues to be decided

[19] There are four issues which are raised by this application:

(a) Do the policies provide that the maximum cover is reinstated when a payment of an interim nature ought to have been made, but was not?

(b) If the answer to issue (a) is yes, was IAG obliged to pay to Annex the indemnity value of the insured property assessed by Ford Baker on

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[2] NZI is a trading division of IAG which deals predominantly with insurance cover placed through a broker or other intermediary, as in this case.

27 April 2011 between receipt of that assessment and the earthquake on 13 June 2011?

(c) If the answer to issue (a) is yes:

(i) Was IAG obliged to pay the two sums claimed by Annex totalling $539,726.36 within a reasonable time of those claims being made?

(ii) If so, was there a substantially unequal exchange of values when the settlement agreement was made, in terms of s 6(1)(b)(i) of the Contractual Mistakes Act?

(d) Were the sums actually paid by IAG ($170,388.05 and $59,358.12 under the MO and BI policies respectively) taken into account in the settlement?

First issue: Do the policies provide that the maximum cover is reinstated when a payment of an interim nature ought to have been made, but was not?

[20] Clause E of the Basis of Settlement provisions of the MD policy provides for reinstatement and has been set out at [6] above, but is set out again here as its interpretation is at the heart of this issue:

> After **we** have paid a claim under this policy, **we** will reinstate **your** sum insured. **We** may ask **you** to pay an additional premium for this. If **we** do, **you** must pay the additional premium.

[21] Clause F of the Basis Of Settlement provisions of the BI policy is in identical terms to Clause E in the MD policy. It is common ground that the making of an interim payment will trigger reinstatement.

[22] Clause J of the Basis of Settlement provisions of the MD policy provides:

> **We** will make interim payments provided **you** produce evidence to **our** satisfaction of a claim covered by this policy.

[23] It was pursuant to this clause that the interim payment of $170,388.05 for material damage was made. The interim payment of $59,538.12 for loss of rent was made under the BI policy.

[24] For simplicity (in discussion) I will refer only to Clause E and not also to Clause F of the BI policy.

[25] On its face the plain meaning of Clause E is that IAG will reinstate the sum insured after it has paid a claim under the policy. If and when it does so it may ask for payment of an additional premium and if it does, Annex must pay it. IAG did not argue, and indeed could not argue, that the policy was not reinstated in respect of each of the payments that were actually made. I refer to this point further, below (fourth issue).

[26] Notwithstanding the clear wording and self-evident plain meaning of Clause E, Mr Munro argues that it should be interpreted in such a way that in effect the opening portion reads:

> After **we** have paid *or ought to have paid* a claim under this policy, **we** will reinstate …

[27] Mr Munro advances the following argument in support of this proposition. First, he says that the policy placed an obligation on IAG to pay to Annex the indemnity value of the property when Annex incurred its loss. I leave to one side, for the present, discussion of the argument advanced in support of that proposition, and accept for the purposes of analysis of the first issue that subject to the terms of the policy being complied with, this is so.[3]

[28] Secondly, Mr Munro says that an interpretation of Clause E by which IAG is not obliged to reinstate the policy at a point when it ought to have made a payment would allow IAG to take advantage of its own wrongdoing in not making an indemnity or other interim payment, contrary to the equitable principle that a party may not take advantage of its own wrongdoing, which applies in a commercial

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[3] See [33] – [34] below.

context. In support of this proposition he relies on a passage from *Telecom New Zealand Ltd v Sintel-Com Ltd* where Hammond J said:[4]

> It seems to us that the fundamental principle contended for by Mr Billington [for Sintel-Com] must be correct: equity will not allow a party to take advantage of its own wrongdoing (if such it proves to be).

[29] Thirdly, responding to a submission made by counsel for Peter Taylor that the obligation for which Annex contends could not arise as a matter of interpretation, but would need to be the subject of an implied term, Mr Munro says that given the breadth of the tests for such an implication in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[5] this would require evidence to be given at trial and could not be decided on affidavit evidence presented on an application for summary judgment.

[30] Fourthly, Mr Munro says that the contract of insurance does not work unless interpreted the way he contends it should be, because the reinstatement provided for in Clause E would not occur if, as he put it, an insurer simply failed to pay what it is required to pay, thus depriving the policy holder of its right to reinstatement.

Discussion

[31] The starting point is to consider the wording of Clause E. In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court said:[6]

> 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.

[32] Under the MD policy Annex was insured for reinstatement of the insured property.[7] The right to reinstatement of the property does not apply if the insured does not reinstate, if reinstatement is not started within a reasonable period of time, or if repair is not permissible under any regulations or because of the undamaged

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4 *Telecom New Zealand Ltd v Sintel-Com Ltd* [2007] NZCA 499, [2008] 1 NZLR 780 at [44].
5 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363.
6 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [63].
7 Clause A on page 15 of the policy.

portion of the property. It does not apply, either, until the actual costs of reinstatement have been incurred.[8] At no point prior to Annex and IAG settling the claims was a position reached where reinstatement was available to Annex, because the actual costs of reinstatement had not at that point been incurred.

[33] On page 17 of the policy there is a clause which, though printed as part of Clause A6, does not logically appear to be part of it. It relates to payment of a sum by way of indemnity. It provides (to the extent relevant):

> If **reinstatement** cover does not apply, **we** will indemnify **you** by whichever of the following options **we** choose. **We** will:
>
> (a) …
>
> (b) …
>
> (c) pay an amount equal to the indemnity value of the **insured property**.

[34] Because at all material times during 2011 reinstatement did not apply for the reason given, IAG was obliged to indemnify Annex, but entitled to choose the means, from a list of three options, by which it did so. It is common ground that the only one of relevance was the third. This does not mean, however, that IAG was under an obligation to establish the indemnity value of Annex's property. Rather, even though IAG had an obligation to indemnify Annex, an obligation on Annex to establish the indemnity value stood in the way of indemnity value being paid. Clause J on page 18 of the policy states:

> **We** will make interim payments provided **you** produce evidence to **our** satisfaction of a claim covered by this policy.

[35] These provisions do not provide a context for interpretation of Clause E to provide that IAG would reinstate the sum insured when it ought to have paid a claim under the policy. Rather the contextual provisions of the policy give a straightforward and logical sequence to the events which should take place in order to ensure that the cover under the policy is uplifted, thus:

(a) When the circumstances in which a reinstatement payment is to be made do not apply, the insurer is obliged to indemnify.

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[8] Clause A4 on page 16 of the policy.

(b) Before it is obliged to pay indemnity, the insured must produce evidence to the satisfaction of the insurer of a claim for indemnity, under Clause J.

(c) The insurer would then be obliged to pay an amount equal to the indemnity value of the insured property. There is nothing in the policy to suggest that the insurer must accept the assessment of indemnity value provided by the insured; the obligation to make an interim payment of an indemnity value under a reinstatement policy is subject to the proviso that the insured produce evidence to the insurer's satisfaction.

(d) While this process is being followed, the insured would be making a decision and if necessary taking steps in relation to a claim for reinstatement. Under Clause A4, the decision might be to not reinstate. Equally it may be to reinstate, a process which necessarily will take a considerable period of time and not commence until some time has passed. There is no obligation on the insurer to pay reinstatement until the actual cost has been incurred, and the opportunity may be lost if reinstatement is not started within a reasonable period of time. But once reinstatement is complete, IAG must pay Annex the cost of reinstatement on the terms in Clause A. Unless the right to reinstatement is lost for one of the reasons in Clause A4, a payment of reinstatement will be made and any payment of indemnity value before that will be an interim payment, to which Clause A6 applies.

[36] In the context of these provisions in the MD policy there is no support for the proposition that the words "or ought to have paid" should be read into the wording in Clause E, by way of interpretation.

[37] There is some evidence before the Court in relation to the wider context of the formation of the contract of insurance. First, it is a standard form contract printed by NZI, and applies without alteration. This alone suggests that there was no negotiation about its terms. Secondly, Mr Cassells, the director of Annex, confirms this in his affidavit. He says:

> The Policies were renewed on an annual basis. I did not negotiate the terms of the Policies and the terms were whatever Mr Taylor put to me which I understand was NZI's standard policy wording.

[38] It follows that in accordance with the principles of interpretation enunciated by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[9] Clause E should be accorded the plain meaning which it bears on its face.

[39] I also accept Mr Hlavac's submission that application of the policy would be unworkable if the interpretation contended for by Mr Munro were accepted. In order for there to be certainty, the date on which reinstatement of the maximum amount of cover occurs must be readily ascertainable, and it would not be if an enquiry had to be undertaken to establish the date on which payment of indemnity value ought to have been made.

[40] There is scope for debate between an insurer and an insured on how much indemnity value is, not only because of the possibility of different assessments of market value as a basis for indemnity, but also because the quantum of indemnity might also be assessed as the depreciated replacement cost of the property, which is a different exercise from the assessment of market value. On this, too, there is scope for divergence of opinion. Arriving at a situation where either there is agreement on the sum to be paid, or one where the insurer should elect to make a payment in any event, will take an incalculable period of time from the date on which the loss was incurred. There would be uncertainty on when reinstatement of the maximum cover took place because of the difficulty in establishing a date on which payment of indemnity value ought to have incurred. Conversely, reinstatement on payment as provided for in the policy is clear and certain.

[41] So far as the BI policy is concerned, again there is no context within the policy which suggests that the full amount of cover is reinstated when a claimed sum ought to have been paid. Under this policy cover is held for loss of insured profit, loss of rent, loss of revenue, payroll wages, redundancy pay, claim preparation costs, book debts, rewriting of records and increased costs of working. Preparation of a claim under each of these headings is an exercise of considerable complexity and

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9 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 6.

once a claim is made, an insurer is entitled to scrutinise each element of the claim made. It would, in my opinion, be completely unworkable for there to be interpretation of the reinstatement provision in Clause F of the Basis of Settlement portion of the policy to provide for reinstatement when a claim ought to have been paid, because of the manifest uncertainty that would surround establishing that date and, therefore, uncertainty over the maximum sum insured. As with the MD policy, Annex and IAG elected to contract with each other on the terms provided by IAG which are clear and workable and there is no contextual reason to interpret Clause F other than in accordance with its plain and unambiguous meaning.

[42] I turn now to Mr Munro's argument that an interpretation of Clause E by which IAG would not be obliged to reinstate the maximum sum insured until an interim payment is actually made would allow IAG to take advantage of its own wrongdoing in not making a payment it was obliged to make.

[43] In my opinion, the equitable principle recognised in a commercial context in *Telecom New Zealand Ltd v Sintel-Com Ltd* cannot be applied as an aid to contractual interpretation.[10] The principles of equity are directed at the conscience of a party whose conduct is called into question. It might apply, therefore, if the conduct of IAG in undertaking its contractual obligations were called into question on the basis of events which had occurred or were predicted to occur. This is well demonstrated by two cases. In *Telecom*, Sintel-Com sought to set aside a settlement agreement it had entered with Telecom. The passage relied on by Mr Munro appears in the judgment in support of the Court's view that a cause of action alleging that when the agreement was entered, Telecom had misrepresented material facts, should not be struck out. To do so might have resulted in Telecom being able to take advantage of its own misrepresentation.

[44] In similar vein, though relating to a different principle, the Supreme Court in *Gustav & Co Ltd v Macfield Ltd* examined the circumstances in which a court of equity would intervene in relation to an unconscionable bargain. It said:[11]

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10 *Telecom New Zealand Ltd v Sintel-Com Ltd*, above n 4.

11 *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [6].

> Equity will intervene when one party in entering a transaction unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware that the weaker party is unable adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances. The remedy is conscience-based and, in qualifying cases, the Court intervenes and says that the stronger party may not take advantage of the rights acquired under the transaction because it would be contrary to good conscience to do so. The conscience of the stronger party must be so affected that equity will restrain that party from exercising its rights at law.

[45] In both cases, the unconscionability of certain action is sharply in focus. In the present case the pleaded causes of action by Annex do not call in question the conduct of IAG in entering the settlement agreement beyond alleging that it entered the agreement relying on a mistake it made in common with Annex. Specifically, it is not pleaded that in entering the agreement it was taking advantage of its own wrongdoing in that it had not made payments it should have made, and thereby took advantage of its own wrongdoing.

[46] I find therefore that consideration of the equitable principle relied on for Annex does not assist the plaintiff's case.

[47] For the sake of completeness, as Mr Munro did not expressly argue that the words "or ought to have paid" should be implied into the provision in Clause E of the insurance contract, I do not consider that this would meet the criteria in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*. In that case the Privy Council said:[12]

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[48] Implication of the suggested words would not meet the second of these criteria, for the reasons just explained, nor in my opinion the third. It would not

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[12] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, above at n 5, at 376.

meet the fifth as it would be contradictory to the specific timing for reinstatement of the maximum sum insured which is set out in Clause E. The same applies in relation to Clause F of the BI policy.

[49] In *Attorney General of Belize v Belize Telecom Ltd*,[13] Lord Hoffman said that the criteria in *BP Refinery* should not be seen as a series of independent tests which must be met, but:[14]

> … rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means or in which they have explained why they did not think that it did so.

[50] Viewing the matter that way, I do not consider there is any sound basis on which to conclude that implication of the words in question would spell out what the contract means. In my view, for the reasons given, I am satisfied the contract means what it says.

[51] Quite apart from the issues just discussed, the claim by Annex that the maximum sum insured should have been reinstated by the amount of a market valuation obtained by IAG founders on the wording of Clause J. At no relevant point did Annex produce evidence of a claim for indemnity value, so under the policy a right to an interim payment of indemnity value did not at any relevant time arise. Therefore, in this case no date has been established or can be established when it could be said that Annex ought to have been paid indemnity value.

[52] Finally, and if contrary to my finding the policy can be interpreted to provide that the maximum sum was reinstated when payment ought to have been made, it is necessary to consider the effect of IAG not paying the two invoices it had received, totalling $539,726.36.[15]

[53] This sum constitutes 5.72 per cent of the settlement sum. For the reasons discussed in paragraph [60] – [62] below, I would have found that this would not have constituted a substantially unequal exchange of values. And quite apart from

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13 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [17].
14 At [27].
15 Paragraphs [4] – [8] above.

that, the loss of rent portion of this sum, $394,030.17 would not have taken claims under the BI policy over its maximum sum so there was scope for it to be paid in full irrespective of reinstatement.

[54] For these reasons I reject the contention on behalf of Annex that any reinstatement of the insured sums incurred at any point apart from the dates on which payments were made by IAG under the two policies. The extent of those reinstatements were, respectively, in the amounts of each payment made.

Second and third issues

[55] Given the decision reached in relation to the first issue, the second and third issues do not arise for determination.

Fourth issue: Were the sums actually paid by IAG ($170,388.05 and $59,358.12 under the MO and BI policies respectively) taken into account in the settlement?

[56] The settlement agreement reached between Annex and NZI is recorded in a document titled "Release" in the following terms (to the extent relevant):

> Subject to NZI, a business division of IAG New Zealand Limited, agreeing to pay the sum of $9,430,000.00 including GST (NZD) in full and final settlement, We/I, as a duly authorised representative of Annex Developments Ltd of 150-200 Cumnor Terrace, Christchurch, agree that such payment will constitute full settlement and discharge of all claims to date under Material Damage and Business Interruption policies and extensions applicable thereto made or to be made on the said NZI in respect of loss or damage by Earthquake events to date at 150-200 Cumnor Terrace, Christchurch including events on or about, 4 September 2010 and 22nd February 2012.
>
> I acknowledge receipt of progress payments made under the policies to date totalling $229,746.35 (inclusive of GST), and agree that on receipt of the final payment referred to above all of NZI's obligations and liabilities to Annex Developments Ltd are satisfied.

[57] In my opinion it is clear from this document that the settlement sum of $9,430,000 including GST was in addition to the progress payments totalling $229,746.35 including GST and that this sum is not part of the sum of $9,430,000.

[58] Therefore, although both Annex and IAG entered the settlement agreement in the mistaken belief that the maximum sum for which IAG could be liable under each

policy was as stated in the policy schedule issued by Peter Taylor, the settlement was actually reached on the basis that the sums IAG had paid were in addition to the maximum sums. This had the same effect as proceeding to settlement on the basis of the policies having been reinstated for those sums. In terms of s 6(1)(b)(i), there was not, therefore, a substantially unequal exchange of values as a result of the mistake. In fact there was no inequality in the exchange of values.

[59] If I am wrong in that conclusion, the difference in value would be $229,746.35, in a settlement of $9,430,000, in both cases inclusive of GST, a difference of 2.436 per cent.

[60] In three cases, courts have found materially greater percentages not to constitute a substantially unequal exchange of value. In *Janus Nominees Ltd v Fairhall*,[16] the percentage difference was 6.5 per cent. In *McKinlay Hendry Ltd v Tonkin & Taylor*,[17] the difference was 4.5 – 6 per cent. In *Westerman Realty Ltd v McKinstry*,[18] the difference was 7.67 – 7.95 per cent.

[61] In *Westerman* the Court referred to a rough benchmark of 10 – 15 per cent difference in value in order to constitute a substantially unequal exchange of values in terms of s 6.[19]

[62] Whilst these cases provide some guidance on how the Court should interpret the difference in value in this case, they are not of course authority for the proposition that percentages in the order of those quoted are insufficient to cause an exchange of values of sufficient substance to satisfy the section. The Court must find, however, that there is a substantially unequal exchange of values, not merely an unequal exchange of values. In my opinion, in the context of a claim settled for $9,430,000, the sum of $229,746.35 cannot be regarded as within the ambit of a substantially unequal exchange of values. In the context of the claim under these policies it is a comparatively small sum.

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16 *Janus Nominees Ltd v Fairhall* (2008) 23 NZTC 21,978 (HC).
17 *McKinlay Hendry Ltd v Tonkin & Taylor* HC Wellington CIV-1999-485-78, 22 March 2004.
18 *Westerman Realty Ltd v McKinstry* (2007) 8 NZCPR 553 (HC).
19 At [5].

Outcome

[63] The first defendant has satisfied the Court that the plaintiff cannot succeed on its first cause of action and that as a consequence it cannot succeed on its second cause of action. Accordingly I enter summary judgment for the first defendant against the plaintiff.

[64] The plaintiff's claim against the second defendant is adjourned to a case management conference which will be organised by the Case Officer.

[65] Costs are reserved. If costs cannot be agreed, memoranda are to be filed by the first and second defendants within six working days, and by the plaintiff in response within a further four working days. Memoranda are not to exceed three pages in length.

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J G Matthews
Associate Judge

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