Finding a way: a look at some recent NZ insurance cases

AMI v Legg

Young v Tower

Xu & Diamantina Trust v IAG

Firm PI 1 Ltd v Zurich Australian

AMI v Legg [2017] NZCA 321

- The Leggs own a lifestyle block between Hornby and Springston.
- On about 16 December 2012, they light a burn heap on the property. The heap is a mixture of green waste from the lifestyle block itself and the Leggs' landscaping business, Evolving Landscapes Ltd (ELL).
- The heap burns out after about a day – or at least appears to.
- On 10 January 2013, the burn heap reignites in a nor'wester. A large fire ensues causing widespread damage.
- The New Zealand Fire Service Commission and Selwyn District Council sue the Leggs and ELL for the cost of putting the fire out. Both admit responsibility.
- Both the Leggs and ELL are insured for legal liability. The insurers, AMI and Lumley, decline indemnity. Lumley's defences of no merit.

AMI v Legg

The AMI insuring clause:

"We will cover, unless excluded by this policy, your legal liability, arising from or in connection with your farming operation, for accidental damage to other people's property occurring anywhere in New Zealand."

The AMI exclusion clause:

"There is no cover for legal liability arising out of or *in connection with* any retail shop, (except a shop on your farm property selling your farm produce), café, restaurant, tourist operation or any profession, *business* or trade not directly connected with your farming operation." (emphasis added)

- At first instance, Nation J held that the exclusion clause did not apply. It could not be shown that ELL material had had any causal link to the 10 January fire. The Leggs were entitled to indemnity from AMI: see [2016] 3 NZLR 685

AMI v Legg

The Court of Appeal (per Miller J):

- Nation J was correct in his interpretation of the words 'in connection with' - they require a causal connection, albeit something less than a proximate causal connection.

- But, contrary to Nation J, on the evidence there was a sufficient causal connection in this case, so the exclusion applies.

- The *Wayne Tank* principle applies – the insured is not relieved from the effect of the exclusion because the loss was also (concurrently) caused by something to which the exclusion does not apply.

Dirksen v 539938 Ontario Ltd (Supreme Court of Canada, 2001)

Rejects the *Wayne Tank* principle:

"[T]here is no compelling reason to favour exclusion of coverage where there are two concurrent causes, one of which is excluded from coverage."

Young v Tower [2016] NZHC 2956

- Quake damaged house on a hillside.
- Gendall J held that it's a rebuild. So Mr Young got his primary remedy.
- No way he's going to get exemplary damages.
- No award of general damages for breach of contract either.
- But…Gendall J awarded general damages against Tower for breach of an implied duty of utmost good faith (in particular, the withholding of a relevant report).

Thus we sense the influence, 250 years on, of this fellow:

Carter v Boehm (1766)

- Carter was the governor of Fort Marlborough, a British outpost on Sumatra, Indonesia (now known as Bengkulu).
- The French were about to attack, and the Fort was going to be too weak to resist. Carter, knowing these things, took out insurance against hostile attack with Boehm, a London underwriter.
- Carter did not tell Boehm about the weakness of the Fort or the likelihood of a strike by the French.
- The attack happened, the Fort was lost, Carter escaped and Boehm sought to avoid liability.
- Lord Mansfield confirmed that there was a pre-contract duty of disclosure.
- In prefacing this, Mansfield made it clear that it was a matter of **good faith** and applied to **both parties**.

Section 17

Marine Insurance Act 1906, s 17:

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by the either party, the contract may be avoided by the other party."

- This is the main basis upon which the DUGF has been seen as applying both pre- and post-contract.

- Not replicated in NZ's MIA (1908), but it's clear that NZ law has remained broadly consistent with the UK position over the years.

Young v Tower

The quadrants of "good faith" in NZ insurance law:

	Insured	Insurer
Pre-contract	**Disclosure** **of what the insured knows or ought to know.**	**Disclosure** **of what the insurer knows or ought to know.**
Post-contract	**Disclosure** **An honest attempt at disclosure at claim time.** **Other developments** **Eg: *UEB Packaging v QBE* (HC, 1996) – notification of third party proceedings.**	**???** **Well, now we have *Young v Tower*!**

Young v Tower

Gendall J at [163]:

"[A] duty of good faith on the part of the insurer is implied in every insurance contract.

…

While the full scope and limits of the duty can be left for another day, I find, as a bare minimum, that the duty requires the insurer to:

(a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;

(b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and

(c) process the claim in a reasonable time."

Xu & Diamantina Trust v IAG [2017] NZHC 1964

Can the full benefit of a replacement cost policy be assigned to a subsequent purchaser of the insured property without the insurer's consent?

(ie, was *Bryant v Primary Industries Insurance* [1990] 2 NZLR 142 (CA) correctly decided ?)

- The plaintiffs accepted that *Bryant* was binding on the High Court (but reserved the right to challenge *Bryant* on appeal).

- Plaintiffs argued that, in the present case, the policy (by "condition 2") authorised the assignment which had occurred, and therefore *Bryant* did not apply.

Xu & Diamantina Trust v IAG [2017] NZHC 1964

Condition 2 said:

*"**Insurance during sale and purchase***

2. Where a contract of sale and purchase of your Home has been entered into the purchaser shall be entitled to the benefit of this Section but to get this benefit the purchaser must

(a) Comply with all the Conditions of the Policy, and

(b) Claim under any other insurance that has been arranged before claiming under this Policy."

- Nation J held that condition 2 did not have the effect the plaintiffs said it had. The heading of the condition was a relevant aid to interpretation. It was limited to the period between unconditional sale and settlement.

- The relevant event in this case had already occurred before this period. Accordingly, *Bryant* applied.

Xu & Diamantina Trust v IAG

IAG's arguments:

- If the insured does not reinstate the property to its full replacement value then s/he is only entitled to recover indemnity value. Without suffering a loss that exceeds indemnity value, the insured has no right to the replacement cost benefit, and so cannot assign such a right to a new insured. Thus the only person who can access the replacement cost benefit is the original insured.

- Under a replacement cost policy there is a heightened risk that the insured will deliberately cause a loss, or misrepresent the magnitude of a genuine loss. If the full benefit of the policy is to be assigned, the insurer will want to assess these risks. The parties can therefore be taken to have agreed (at least impliedly) that there will be no assignment of the replacement cost benefit without the insurer's consent.

Firm PI 1 Ltd v Zurich Australian (2014) 18 ANZ Insurance Cases 62-044

- An under-insured apartment block damaged beyond repair in the earthquakes.

- Was the insurer liable for:
  - the full sum insured ($12.95 million)?

  or
  - the amount required on top of EQC's liability to bring the insured's recovery up to the sum insured ($6.15 million)?

The case raises questions about:

- The Courts' approach to interpretation of contracts;
- How the general principles of contractual interpretation play out in the insurance context.

On a personal note:

- Thank you to NZILA for inviting me to speak.
- I'm still very much a student of insurance law.
- I am on leave from lecturing duties at the university until June 2018, primarily to work on my PhD.
- If anyone would like to share thoughts about EQC and how it performed post-Canterbury, please get in touch.

henry.holderness@canterbury.ac.nz