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New Year Legal Snapshot

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Pre-existing damage: *Sadat v Tower Insurance Ltd & Earthquake Commission* [2017] NZHC 1550

- Any impact on the value of the property will not be relevant in determining whether there has been material damage, because a home insurance policy does not cover pure economic loss.
- Whether or not the home is habitable is not the test as to whether there has been damage covered by the policy.
- The Tower policy has to be interpreted and applied having regard to the context in which the insurance contract was entered into. That purpose was to provide cover for damage as a result of sudden and unforeseen accidental physical loss, damage or such arising out of a natural disaster such as an earthquake. It would not be consistent with the intended meaning of this insurance policy for the court to find that any damage suffered in the September 2010 earthquake was material where such damage required no more to be done than would have been necessary before the September 2010 earthquake.

Pre-existing damage: *He v Earthquake Commission & ors*

- For damage to have occurred, there needs to be both a physical change to the building that is more than de minimis, and an impairment to its value and usefulness.
- Pre- existing damage is not a barrier to a claim for earthquake damage. However, it may be so pronounced or extensive that minor additional damage may make no material difference to the utility of value of the property. Such an assessment is not to be approached in a niggardly fashion. However, equally, an insurer should not be required to repair or reinstate something to its condition when new when, assessed objectively, there has been no discernible change to the value, amenity or utility of the insured property caused by the natural disaster.

Myall v Tower Insurance Ltd [2017] NZCA 561 – Background Facts

- 'Riverlaw' Homestead, a 799 square metre house.
- Originally built in 1852 with major alterations between 1885 and 1905.
- Registered with the Historic Places Trust as a historic place.
- Triple brick construction, with eight bedrooms and six bathrooms.
- Mr Myall purchased in 2003 and had spent $600k on renovations.
- Insured with Tower under a 'Super Maxi Policy' (full replacement).
- Demolished in 2012 following earthquake damage.
- Underinsurance – Mr Myall insured Riverlaw for 650 square metres.
- In dispute was the meaning and measure of 'full replacement value' under the policy – about a $2 million difference in scope.
- Not disputed that Tower had elected to pay, rather than replace.

Myall – Definitions

Full replacement value:

"…the costs actually incurred to rebuild, replace or repair your house to the same condition and extent as when new and up to the same area as shown in the certificate of insurance, plus any decks, undeveloped basements, carports and detached domestic buildings, with no limit to the sum insured."

Policy goes on to state:

"We are not bound to:

- *Repair or reinstate your house, contents or personal effects exactly to their previous condition;*
- *Pay the cost of replacement or repair beyond what is reasonable, practical or comparable with the original."*

Myall – Underinsurance

- Mr Myall sought to argue that in scaling back the size of the house regard had to be had to the number of rooms.
- Court rejected this and found that because of the extent of underinsurance and the size of the house it was reasonable for Dunningham J to conclude that an assessment of full replacement value to 650 metres squared would include fewer rooms and bathrooms.
- Court noted the reduction in area was substantial at around 20% - approach may be different in the case of a smaller house (as indicated in the High Court decision).
- Approach may be different where area initially correct, but now incorrect following alterations.

Myall – Additional Points

- Rejected that hand waxing interior timber surfaces was in common use and found that polyurethane was an adequate substitute.
- Concrete block with brick veneer vs. timber framing with brick veneer:
  - HC rejected timber framing would result in loss of thermal or acoustic properties, or any functional disadvantage.
  - CA rejected that there was an aesthetic advantage to concrete block.
  - Held advantages of concrete block modest. Would cost another $150k and impact the foundations. Potential benefit of concrete block disproportionate to additional cost.

Myall – Additional Points

- While fires were operational before earthquakes, held that lightweight non-functional structure designed to replicate look was sufficient as regional government rules now prohibit use of open fires. Was also a computer-controlled heating system which Tower allowed to replace.
- Tiles:
  - Tower's estimate used cost of tiles shown in invoices from 2004 renovations and added an allowance for labour and inflation.
  - Mr Myall's estimate based on "usual local rates".
  - Court held Mr Myall's estimate more accurate. Used current supply rates and those rates were unchallenged by Tower. Additional $110k awarded.

Myall – Additional Points

- Court preferred "risk analysis" approach for professional fees (rather than allowing 15% across entire estimate) because the Court is not making a preliminary estimate that will be adjusted as the project evolves – the Court is fixing what the insurer will pay.
- Correct to characterise 10% as the standard allowance for contingencies and appropriate in the circumstances.

Doig v Tower Insurance Ltd [2017] NZHC 2997

- Mr Doig saw an advertisement for the sale of the property:

  "…the vendors' firm intention to pass the baton in allowing new purchasers to pursue and profit from a potential rebuild (Tower Insurance)… EQ damage will not affect your enjoyment now, vendors walking away and willing to let forward thinking purchasers reap the rewards and benefits of a full replacement potential rebuild…."

- After entering into the sale and purchase agreement but before settlement of the purchase, the Doigs' solicitors made enquiries of Tower. The key email exchanges are as follows.

Doig

An email on 2 October from the Doigs' solicitor to Tower:

"On behalf of our client, could you please advise as follows:

…

2. *If [the EQC repairs end up over cap], would Tower cover the damage under its existing full replacement cover, i.e. any repair work required over and above the EQC caps would be covered fully by Tower as per the current full replacement policy held by the vendor.*

3. *With the regard to the three existing Tower insurance claims:*

   a) *Does Tower agree to the three claims being assigned to our client (providing the purchaser is confirmed).*

   b) *Upon assignment of the claims, will Tower agree to complete all required work under the claims on 'full replacement terms' as per the terms of the current policy with the vendors."*

Doig

A claims handler employed by Tower responded:

"…I can confirm that if the EQC repairs are deemed over cap, it is TOWER's liability to repair the dwelling. The new owners would not be required to lodge an additional claim as the damages to the property were incurred under the previous owners policy and these claims will remain open until the damages in relation to those earthquake events are rectified. This is why we require a deed of assignment which confirms that the old owners agree to sign any right to the open claims over to the new. All settlement will be based on the previous owners policy including their policy cover and excess.

As stated above, I cannot agree to the claims being transferred to your client until we receive a deed of assignment. However, supposing we do receive the deed of assignment, all settlement is based on the previous owners policy details as this is the policy which was in place at the time of the earthquakes. If there is another earthquake event, those damages would be lodged under the new owners policy and progressed according to their policy type."

Doig

After authorisation from the vendors to release information was received, Tower sent a further email:

"…If , as you suggested, it is discovered that the cost to repair the house is more than initially thought as a result of the verdict on the land, then TOWER will regain responsibility of the repair if the caps are breached.

…The current owner's policy is a full replacement policy with an excess of $250 which is applicable for each claim lodged. Once a deed of assignment is received, any settlement decisions will be negotiated with the new owners."

On 20 November, Mr Doig instructed his solicitors to confirm the sale and purchase agreement. Settlement was completed and a deed of assignment signed.

Doig

Estoppel

The elements:

1. a belief or expectation by [A] has been created and encouraged by words or conduct by [B];
2. to the extent an express representation is relied upon, it is clearly and unequivocally expressed;
3. [A] reasonably relied to its detriment on the representation; and
4. it would be unconscionable for [B] to depart from the belief or expectation.

C & S Kelly v EQC & Southern Response [2017] NZHC 1583

- ***"The burden of proof lies with insured. The insured must establish that an insured peril has occurred, that it has occurred within the period of cover and that the event for which the claim is made was a proximate cause of the insured's loss."***
- ***"An insured is required to prove on the balance of probabilities, every material fact in respect of their cause of action. The material facts to be proved are the occurrence of an insured event and the damage alleged to arise from the insured event, together with quantum."***
- Noted the following propositions from the *Jarden* decision:
    1. Open to insurer to suggest and seek to prove a cause of loss other than the insured risk, but no obligation to do so. If it chooses to do so, no obligation to prove, even on BoP, the truth of its alternative cause.
    2. Open to the Court to conclude that the cause of loss remains in doubt. Consequence is the insured fails to discharge the burden of proof.

C & S Kelly

- Emphasised that a repair strategy should *"restore the functionality, aesthetic quality and amenity value of the house."*
- NZS 3604 of *"limited relevance"* because:
    1. Relates to "good ground" only; and
    2. Difficult to impose a 2017 standard on an early 1900's house
- In the specific circumstances, ***"special engineering designs, with emphasis on practicality over strict adherence to recently developed guidelines, are required to repair the house to a current "as new" standard."***
- Reinforced 10% contingency appropriate.

Fund Managers Canterbury Ltd & ors AIG Insurance NZ Ltd [2017] NZCA 325

- Fund Managers Canterbury, as manager, entered into a Trust Deed with Trustees Executors as trustee for unit holder investors, to manage a contributory mortgage investment fund on their behalf. Fund Managers was obliged to invest the fund in authorised investments in accordance with an investment policy and agreed mortgage investment guidelines.
- Fund Managers Canterbury was obliged to provide Trustees Executors with quarterly certificates, signed by two of its directors on behalf of all of the directors, certifying various matters including whether or not Fund Managers Canterbury had complied with all of the terms of the Trust Deed during the relevant quarter.
- Following substantial losses to the fund, Trustees Executors pursued various claims against a number of parties, including claims against Fund Managers Canterbury and also the directors of Fund Managers Canterbury.
- There were three causes of action against the directors – negligence in preparing the quarterly directors certificates; negligence in preparing and providing directors' confirmations to Trustees Executors that each new mortgage investment met stipulated lending criteria; breach of s9 of the Fair Trading Act (based solely on the directors' certificates and the directors' confirmations).

Fund Managers Canterbury Ltd

- The issue: did the D&O liability policy or the PI policy respond to the claim by Trustees Executors against the directors? The D & O policy had significantly greater cover.
- AIG relied on an endorsement to the D&O policy that the policy did not provide payment for loss in connection with any claim made against the insured for *"an Insured's performance of professional services for others for a fee, or any alleged act, error or omission relating thereto…"*
- There was no contest that the claims against the directors arising out of their allegedly negligently prepared director's certificate and confirmations were covered under either the PI or the D&O policy.
- **The preliminary question was whether the giving of the certificates and confirmations by the directors constituted "the performance of professional services for others for a fee, or any alleged act, error or omission".**
- AIG contended that the endorsement in the D&O policy applied because the claim against the directors arise out of, are based upon, or are attributable to Fund Managers Canterbury's performance of professional services for Trustees Executors for a fee.

Fund Managers Canterbury Ltd

- AIG submitted that because the directors' certificates and confirmations were an integral part of the professional services Fund Managers Canterbury provided to Trustees Executors for a fee, they were excluded by the endorsement in the D&O Policy and the directors were covered under the PI policy instead.
- The High Court answered the preliminary question "yes" and decided that the claim was covered under the PI policy and not the D&O policy.
- In providing the certificates to Fund Managers Canterbury, the directors were not themselves providing professional services to Trustees Executors, nor did they receive a fee for doing so. However, the Judge concluded that the endorsement operates to exclude the claim from cover under the D&O policy because the provision of the certificates and confirmations were "adjuncts" to the provision of professional services by Fund Managers Canterbury to Trustees Executor and it was paid a fee for these services.

Fund Managers Canterbury Ltd

The Court of Appeal allowed the appeal and concluded that the endorsement did not exclude cover under the D&O policy.

The Court of Appeal concluded that the endorsement in the D&O policy did not exclude cover for the claims against the directors, whereas the standard exclusion in the PI policy (excluding cover for all claims against an insured acting as a director) did exclude cover.

The Court of Appeal did not consider that the Trustee's claims arose out of, or were based upon, or were attributable to the company's performance and professional services for a fee. The directors' certificates and confirmations are not themselves acts of performance of services by the company, rather they are statements about the quality of its past performance. The company's only role in relation to the certificates and confirmations was to procure them from the directors and provide them to Trustees Executors. The claim arising out of the certificates and confirmations was not that the company failed to meet its obligations to provide them, but that these were negligently prepared by the directors. The company faced separate claims relating to its performance as manager of the fund.

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