IN THE COURT OF APPEAL OF NEW ZEALAND

CA811/2012
[2013] NZCA 291

	BETWEEN	RIDGECREST NEW ZEALAND LTD Appellant
	AND	IAG NEW ZEALAND Respondent

Hearing:	30 May 2013
Court:	O'Regan P, Arnold and Harrison JJ
Counsel:	C R Carruthers QC and P A Cowey for Appellant B D Gray QC and P M Smith for Respondent
Judgment:	10 July 2013 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed and the cross-appeal is allowed in part.

B The High Court Judge's answer in the negative to the preliminary question set out at [17] is confirmed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by O'Regan P)

[1] In 2010–2011 the Canterbury region experienced a series of earthquakes. Many buildings suffered damage of increasing significance after each earthquake. This appeal raises a question about the extent of an insurer's liability under a policy of insurance providing for replacement cover of a commercial building in

circumstances where the building suffered damage of increasing significance in four earthquakes, all of which occurred during the period of insurance. The building in question was located on Gloucester Street in Christchurch, and, as with many others in that city, was damaged by successive earthquakes and eventually damaged beyond repair.

[2] In broad terms the competing positions of the parties are as follows:

(a) the appellant, Ridgecrest NZ Ltd (Ridgecrest), the owner of the building and the insured under the policy, claims it is entitled to the estimated cost of all repairs that would have been necessary to restore the building to its pre-earthquake condition immediately after each of the four earthquakes.

(b) the respondent, IAG NZ Ltd (IAG), the insurer, says that its liability under the policy is limited to the cost of uncompleted repairs actually undertaken to remediate the damage caused by the earlier earthquakes and the maximum amount payable under the policy for any one "happening", being $1,984,000, reflecting that the building had become irreparable as a result of the third or fourth earthquake.

[3] Ridgecrest commenced proceedings against IAG in the High Court, and the parties agreed to seek a ruling from the High Court on a preliminary question. To provide context, they submitted to the Court a statement of agreed facts.

[4] In a judgment delivered on 8 November 2012, Dobson J answered the preliminary question in favour of IAG.[1] Ridgecrest now appeals and IAG cross-appeals against findings made in the judgment against it. The issues now before this Court are essentially the same as those before Dobson J.

[5] We will set out the terms of the policy, the statement of agreed facts and the text of the preliminary question for determination before turning to the issues now before us.

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1 *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2012] NZHC 2954.

The terms of the policy

[6] The policy is a State "Businesspack" policy covering "Business Assets". The building at 215 Gloucester Street, Christchurch (the building was known as Latimer View House) is particularised and is the "Business Asset" for which cover is provided under the policy.

[7] The operative clause of the policy provides:

> **A. YOU ARE INSURED FOR**
>
> Sudden and accidental loss of or damage to your Business Assets.

[8] Another provision of the policy provides:

> This Policy covers only those Parts for which a Limit is shown in the Schedule and the maximum amount you can claim under any Part in respect of any one happening (inclusive of fees and costs) is the current Limit for that Part.

[9] In the schedule, the section headed "Limits" prescribes a limit of $1,984,000 for "Buildings (Commercial Use Only)". Under the heading "Replacement Cover" the word "yes" appears, signalling that IAG has agreed to provide replacement cover under the policy.

[10] There is an exclusion in the policy for loss or damage directly or indirectly caused by earthquake, but this is cancelled out by an endorsement which provides that the insurance extends to such loss. There is no dispute that the earthquakes were each "happenings" in terms of the policy (the term "happening" is not defined in the policy).

[11] Part C of the Policy sets out the amount that can be claimed when there is sudden and accidental loss. The focus of the present case is on cls C1 and C2, which provide as follows:

> **C. THE AMOUNTS YOU CAN CLAIM**
>
> 1. This insurance will pay the amount of loss or damage or the estimated cost of restoring your Business Assets as nearly as possible to the same condition they were in immediately

before the loss or damage happened using current materials and methods.

2. Where Replacement cover has been agreed by us and specified in the Schedule and following loss or damage you restore or replace the lost or damaged Business Assets this insurance will pay

(a) for Buildings

(i) where repairable, the cost of restoration of damage to the same condition when new,

or

(ii) if unable to be repaired because of such damage, the cost of replacement by an equivalent building which meets your requirements at any site provided we shall not pay more than the cost of replacement at the Site stated in the Schedule.

Such restoration will use current materials and methods and include the cost of changes to meet the lawful requirements of any local authority or statute but not for work you have already been instructed to do prior to the loss or damage.

[12] Clause C1 provides for traditional indemnity cover, compensating for loss or damage so the property is restored (or replaced) to the standard it was in before the insured event. Clause C1 is also awkwardly worded: the cover for "loss or damage" is typical of indemnity provisions, but the addition of "or the estimated cost of restoring ..." is less clear. IAG says it does not add to the indemnity cover, but rather is a guide to quantification of loss or damage for which cover is provided under cl C1. Ridgecrest's argument is to the effect that cl C1 provides a separate head of liability for the insurer for the estimated cost of restoration as an alternative to the actual loss or damage suffered in indemnity cover terms. We find Ridgecrest's argument hard to reconcile with the nature of the cover provided under the operative clause set out at [7] above, but on the view we take of the case we do not need to resolve the point.

[13] As noted earlier, replacement cover was provided under the policy so cl C2 applied, provided that the insured reinstated or replaced the damaged property.

[14] The policy did not contain any provisions addressing the terms that would apply after a claim had been made during the period of insurance. There were no terms providing for a procedure for reinstatement of cover after a claim had been met. The insurer did however have the option of cancelling the policy in the event that circumstances material to the extent of risk changed.

Statement of agreed facts

[15] The statement of agreed facts submitted to the High Court is as follows:

> The following facts are agreed for the sole purpose of determining the preliminary question to be argued on 26 September 2012:
>
> 1. At material times, there was a policy of insurance between the parties whereby the Defendant provided replacement cover for the Plaintiff's commercial building situated at 215 Gloucester Street for events including earthquake damage, with a limit of $1.984m for each happening.
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> 2. As a result of an earthquake on 4 September 2010, the Plaintiff's building suffered damage.
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> 3. The cost to repair the building following the 4 September 2010 earthquake was assessed and estimated to be between $110,155.09 (inclusive of GST) and $196,352 (plus GST). The repairs had been commenced, but had not been completed by the time the earthquake described in paragraph 4 below occurred.
>
> 4. There was a second earthquake on 26 December 2010 that caused further, distinct damage to the building.
>
> 5. The cost to repair the damage to the building following the 26 December 2010 earthquake was assessed and estimated to be between $200,000 (inclusive of GST) and $377,056 (plus GST). The repairs had been commenced, but had not been completed by the time the earthquake described in paragraph 7 below occurred.
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> 6. The Defendant made payments for repairs to the building as a result of the first two earthquakes. The Defendant had paid the sum of not less than $125,609.83 for repairs, consultants and temporary works, by 22 February 2011. However the repair work had not been completed for the damage caused by either of the first two earthquakes prior to the earthquake described in paragraph 7 below.
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> 7. There was a third earthquake on 22 February 2011 that caused further, distinct damage to the building.
>
> 8. The Plaintiff's position is that the cost to repair the damage to the building caused by the 22 February 2011 earthquake was assessed and estimated to be $1.924m plus GST. The Defendant's position is

that as a result of the 22 February 2011 earthquake, the building was damaged beyond repair, or the cost of repairs exceeded the sum insured.

9. There was a fourth earthquake on 13 June 2011 that caused damage to the building. The plaintiff says there was 'further and distinct damage' but the defendant says the June earthquake only exacerbated the existing damage.

10. The Plaintiff's position is that the cost to repair the damage to the building caused by the 13 June 2011 earthquake has been assessed and will exceed $1.984m plus GST; and further that as a result of that earthquake, the building's structure and foundation were so damaged the building was rendered irreparable. The Defendant's position is that it had already paid the agreed sum insured for the building and so had performed its obligations under the policy. In addition, it says the building was already damaged beyond repair prior to the 13 June 2011 earthquake.

11. The Plaintiff's position is that the residual value of the building after each earthquake was greater than the cumulative cost of the incomplete repairs. The building therefore had residual value that was insured, until the damage suffered on 13 June 2011.

12. The Defendant has paid for repairs and other remedial work in the sum set out in the paragraph 6 above and in addition, has on 12 July 2012 paid the Plaintiff under the policy $1,984,000 plus GST (less the excess and less certain costs).

[16] As can be seen, the description of this document as a "statement of agreed facts" is something of a misnomer because it actually records a number of matters which are not agreed at all.

Preliminary question for determination

[17] The preliminary question for determination is as follows:

Where –

1. There have been four happenings within a period of insurance;

2. Each happening caused damage to the Plaintiff's building;

3. Subsequent to the first two happenings repairs were commenced but not completed by the time of the next happening;

4. Following the third or fourth happening, the building was damaged so that the cost of repair exceeded the sum insured;

5. The building has been damaged beyond repair as a result of either the third or fourth happening;

Then:

> 6. Is the Plaintiff entitled to be paid for the damage resulting from each happening up to the limit of the sum insured in each case?

The High Court judgment

[18] In the High Court, Dobson J's analysis proceeded under three headings: interpreting the terms of the policy, merger, and frustration.

[19] Under the first heading, interpretation of the terms of the policy, the Judge held that the terms of the policy stated that the limit of liability ($1,984,000) was available for Ridgecrest to claim in the event of a loss on as many occasions during the period of insurance as a relevant loss was suffered.

[20] Under the second heading, the Judge held that the doctrine of merger did not apply.

[21] However, under the third heading, the Judge determined that the contract constituted by the policy had been frustrated, as "the parties would have agreed that the scope of liability for subsequent happenings during the term of the insurance would not extend to require payment of sums greater than was necessary to effect repairs that were able to be undertaken before the building became irreparable".[2] In effect, he found the policy included an implied term to that effect. On this basis the Judge answered the preliminary question set out at [17] in the negative. The Judge held that IAG was not obliged to pay more than the sums necessary to effect the repairs that had been undertaken before the building became irreparable, plus the limit of its liability under the policy in respect of the final happening when the building became irreparable.

Issues for determination

[22] The principal issue for determination on the appeal is whether the policy, on a proper construction its terms, entitles Ridgecrest to payment of the aggregate value of the damage caused by each of the four earthquakes. The High Court Judge

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[2] At [75].

determined this issue in favour of Ridgecrest on the amount payable under the policy (up to the maximum amount payable) and his finding in that respect is challenged in IAG's cross-appeal.

[23] The other issues are:

(a) Whether, having regard to the terms of the policy, the doctrine of frustration applied so as to defeat Ridgecrest's claim. The High Court Judge found that it did. This is the focus of Ridgecrest's appeal.

(b) Whether, on the terms of the policy and on the agreed facts as to the separate damage caused by each earthquake, the doctrine of merger applied so as to defeat Ridgecrest's claim. The High Court Judge found that it did not and IAG challenges this in its cross-appeal.

(c) Whether, having regard to the express terms of the policy, a term could be implied into the policy to the effect that the insured cannot recover more than the value of its insured loss. The High Court Judge was prepared to imply such a term and Ridgecrest challenges this in its appeal.

[24] On the approach we take to the case, the first issue is at the heart of the appeal and will be the main focus of our analysis. We consider that, in order to resolve that issue, it is necessary to determine whether each claim made after each successive earthquake was a claim made under cl C1 or cl C2.

Were Ridgecrest's claims under cl C1 or under cl C2?

[25] It may be a consequence of the way the case was argued at first instance but the High Court judgment does not resolve this issue. Dobson J observed that Ridgecrest proceeded on the basis that it had a cl C2 claim until oral argument in the High Court, particularly in reply. Its counsel then argued that IAG's liability arose first under cl C1, and that IAG was therefore obliged to pay the estimated cost of repairing damage as soon as the happening (earthquake) occurred. Such a repair

would be on an "old for old" basis, that is to fix damage caused by the earthquake to restore the building to the state it was in immediately before the earthquake.

[26] However, Ridgecrest's counsel also argued that a claim under cl C1 left open the possibility of a later claim under cl C2, which would arise if Ridgecrest proceeded to restore the damage. He argued that if a later claim were made under cl C2, IAG would then be liable for the difference between the amount it had paid to Ridgecrest under cl C1 (for repairs on an old for old basis) and the cost of restoring the building to its state when it was new (a "new for old" basis).

[27] IAG argued in the High Court that cls C1 and C2 were mutually exclusive alternatives, so that if Ridgecrest had replacement cover (as it did) only cl C2 applied. Dobson J rejected that and IAG does not now challenge that finding. IAG's fallback position was that even if the claim was under cl C1, its liability was limited to the amount it had paid out. But that position depended on the application of the doctrine of merger of liabilities or the doctrine of frustration, rather than on the terms of the policy itself.

[28] These arguments suggest that in the High Court counsel did not draw what seems to us to be the critical distinction between the circumstances surrounding each particular claim. The four claims were apparently treated as a composite when in fact Ridgecrest made a separate claim against IAG after each happening or earthquake. It appears to be common ground that IAG accepted each claim and took steps to settle. The only issue for us is to identify the contractual provision under which each claim was made and accepted.

[29] As already mentioned, the Judge did not conclude whether Ridgecrest's claims were made and settled under cl C1 or cl C2. However, the Judge's conclusion that the limit of liability is available for the insured to claim in the event of a loss on as many occasions during the period of insurance as a relevant loss is suffered appears to be based on the claims relating to the first and second earthquakes being made under cl C1.[3]

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[3] At [34].

[30] Before us, counsel for Ridgecrest, Mr Carruthers QC, argued that the first two or three claims were cl C1 claims. He said such a claim triggered a liability on IAG's part as soon as the happening (earthquake) happened. The only formality required for a claim under cl C1 is provision of an estimate of the repair costs. As such estimates had been submitted by Ridgecrest in this case and were, he said, subject to negotiation with IAG, it must be that the claims were cl C1 claims. He argued that cl C1 required payment of the amount of the estimate – it was not necessary for Ridgecrest to repair the building with the claim proceeds and it did not need to suffer "loss or damage" – the trigger for the claim was "loss or damage" to the building, not to its owner.

[31] Counsel for IAG, Mr Gray QC, did not seek to differentiate claims made under cl C1 or under cl C2.

Ridgecrest's pleading

[32] We see the starting point for the analysis as the way in which Ridgecrest framed its claim in the High Court. In its statement of claim, it pleaded at paragraph 4.7 that IAG had agreed that, where replacement cover had been agreed, if following loss or damage Ridgecrest restored or replaced the lost or damaged business assets, IAG would make the payments required under cl C2. That pleading did not refer to IAG's obligations under cl C1 or allege that Ridgecrest's claims were made under cl C1.

[33] Pleadings in relation to the damage caused to the building in paragraphs 10–14 of the statement of claim refer to the damage caused by each earthquake and recite that the cost of repairing the damage is in each case, a specified figure.[4] This figure corresponds with the estimates made by Ridgecrest's advisors, but there is no reference to an "estimated cost" as would be the case where a claim was made under cl C1 nor to the fact that the "estimated cost" would be on an "old for old" basis (that is, any estimate would involve a deduction for betterment).

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[4] Paragraph 14 of the statement of claim refers to a fifth earthquake that occurred on 23 December 2011, but this earthquake is not mentioned in the statement of agreed facts.

[34] The prayer for relief appears in paragraphs 15–17 of the statement of claim. These paragraphs say:

> 15. After each of the happenings referred to in paragraphs 10 to 14 above, the Plaintiff:
>
> (a) Made a claim against the Defendant under the relevant insurance policy;
>
> (b) Did as much as it could to prevent further damage to the Building;
>
> (c) Advised the Defendant that further damage had occurred; and
>
> (d) Sought the Defendant's agreement with respect to expenditure in connection with the claim.
>
> 16. For each happening, the Defendant has failed or neglected to repair the building at 215 Gloucester Street *to the same condition as new* including the cost of changes to meet the lawful requirements of the Christchurch City Council and statute or to pay to the Plaintiff the cost of replacement pay the cost (sic) after each happening.
>
> 17. As a consequence of the Defendant's breach, the Plaintiff has suffered loss being the cost of repairing or replacing the building at 215 Gloucester Street after each happening.
>
> (Emphasis added.)

[35] These pleadings are all predicated on the basis of claims made under cl C2. The wording of paragraph 16 echoes the wording of cl C2, and is inconsistent with claims being made under cl C1.

[36] The fact that the statement of claim refers to cl C2 claims appears to fit in with the High Court Judge's observation that the written submissions made in the High Court also dealt with claims under cl C2. The allegation that the first two or three claims were, in fact, under cl C1 seems to have been developed only during the course of the High Court hearing, and has not found its way into Ridgecrest's pleading. The framing of the claims in terms of a breach of cl C2 represents the position taken by Ridgecrest at the time the claims were made and accepted by IAG. It would have defied commercial common sense for Ridgecrest to make a claim against IAG to repair its building on the old for old indemnity measure provided by cl C1 when replacement or new for old cover was available under cl C2.

Some more facts

[37] It is also necessary to determine whether the action taken by the parties in response to the claims made by Ridgecrest indicates a claim under cl C1 or under cl C2. Unfortunately, the statement of agreed facts does not provide complete information on that topic. However, it does recite that, after the first earthquake, repairs had been commenced but not completed, and also that after the second earthquake, repairs had been commenced but not completed. There is nothing indicating that repairs were commenced after the third earthquake, and IAG's position is that the building was damaged beyond repair after that earthquake. Given IAG's position, it seems unlikely that it would have acquiesced in further repairs being commenced at that point.

[38] What the statement of agreed facts does not say is that IAG arranged for the repairs to be commenced after the first earthquake and again after the second earthquake. In addition, IAG met the costs of the repairs on each occasion. We see these facts as significant because they are consistent with cl C2 being the basis of Ridgecrest's claims after each of the first two earthquakes and inconsistent with those claims being cl C1 claims. IAG's assumption of responsibility for arranging the repairs is consistent with its agreement with Ridgecrest to meet the cost of repairs. The repairs could not have been commenced without Ridgecrest's approval. The repairs were managed by Hawkins Construction, a contractor to IAG. Ridgecrest initially acquiesced in this approach to its claim for the first earthquake and some repair work was done. However, on 6 December 2010 (after the first earthquake but before the second earthquake), Ridgecrest wrote to IAG pointing out that Ridgecrest had become aware that it did not have to accept Hawkins as project manager for the repairs. The letter continued:

> Therefore we would like to finalize this claim with a cash settlement of $ 197500.00 +Gst which our excess would have to be deducted from and we understand this would be full and final settlement of this particular claim.

[39] Mr Carruthers relied on the fact that Ridgecrest had, once it realised that IAG was acting outside the terms of the policy, resisted IAG's assumption of responsibility for repairs as support for his argument that the claim for the first earthquake was a cl C1 claim. He also relied on the fact that Ridgecrest had

obtained estimates of the cost of repairs. But the letter of 6 December 2010 was sent well before Ridgecrest's statement of claim was formulated and, as already noted, the statement of claim made it clear that Ridgecrest's causes of action were based on its having made claims under cl C2.

[40] If the claims had been made under C1, one would have expected Ridgecrest to demand that it be paid the amount of its estimate as soon as it has made its claim, rather than acquiescing in IAG's arrangements to undertake repairs. We accept that what IAG did in taking control of the repair process was not strictly in accordance with cl C2 but it is indicative of an acceptance by IAG of a claim made under cl C2. It could be argued that IAG's agreement to fund the repairs, rather than insist on the strict observance of the wording of cl C2 (which, on its face, requires the insured to fund the repairs and claim the cost once they are done) was for the benefit of Ridgecrest as insured.[5] It is certainly not consistent with a claim made under cl C1.

[41] Mr Gray pointed out that the estimates that were obtained by Ridgecrest were estimates of the cost of repair on a "new for old" basis, because there was no allowance for any betterment (that is improving the building from its old state to its "as new" state). That would be consistent with cl C2 claims. Mr Gray's submission appears to be correct on the material provided to us. But, in the absence of explanation from the party that prepared the estimate, we do not think it would be appropriate for us to rely on that as a basis for finding that we are dealing with claims under cl C1 or C2.

[42] Mr Carruthers argued, as he had in the High Court, that payment of the amount of a claim under cl C1 would not necessarily resolve the insured party's claim. He said the payment of the estimated cost of repair under cl C1 could then be followed by a claim for any additional cost of repairs under cl C2, in the event that an "as new" repair was undertaken by the insured party.

[43] There is nothing in the wording of the policy to support that proposition. And if it were correct, the converse would also apply. If the insured party undertook the

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5 See John Birds, Ben Lynch and Simon Milnes *MacGillivray on Insurance Law* (12th ed, Sweet & Maxwell, London, 2012) at [20.022].

as new repairs and the cost was less than that paid under cl C1, presumably a refund would be payable. Mr Carruthers accepted that that would be so. That is a very unusual way of operating the policy, effectively creating an option on the part of the insured to undertake repairs on a "overs and unders" basis. It also affects the issue of what happens in circumstances where, as here, the repairs that Ridgecrest intended to undertake could not be undertaken because of the intervention of a further earthquake causing more damage.

[44] Mr Carruthers said the possibility of a refund would arise only where the repairs were actually undertaken and the cost of the repairs was less than the estimate. It did not arise in circumstances where the repairs could not be undertaken because of a supervening event such as a further earthquake. There is no particular logic to that position and it calls into question the concept of a provisional resolution of the claim under cl C1 followed by a top-up or refund under cl C2.

[45] While the statement of agreed facts does not provide full information about the making and settling of the claims, we conclude that the claims must have been made and accepted under cl C2. We see Ridgecrest's pleadings as consistent with that conclusion. The reference in the statement of agreed facts to the fact that repairs had commenced after the first and second earthquakes and the fact that these repairs were paid for by IAG also support that conclusion.

[46] We do not consider that it is now open to Ridgecrest to change the basis of its claims to bring them within cl C1.

[47] We therefore answer the preliminary question on the basis that Ridgecrest's claims were claims under cl C2.

Construction of the policy

[48] Once it is determined that the claims made by Ridgecrest were, as Ridgecrest pleaded in its statement of claim, claims under cl C2, the nature of IAG's liability under the policy in respect of the four claims becomes clear.

[49] In relation to claims relating to a damaged but repairable building, IAG is liable under cl C2(a)(i) in respect of each happening for the cost of restoration of damage to the building to the same condition as when it was new. The quantification of the liability depends on the repairs actually being made and the liability equates to the actual cost of those repairs. In the present case the cost of the repairs actually completed after the first earthquake is payable in respect of the claim resulting from the first earthquake. In addition, the cost of the repairs actually completed after the second earthquake is payable in respect of the claim resulting from the second earthquake. This is so even though in neither case was the building fully repaired before the next earthquake struck.

[50] In relation to the third earthquake, the position taken by IAG is that the building then became unrepairable, in which case cl C2(a)(ii) requires the cost of replacement of the building to be paid, subject to the maximum liability under the policy. We understand that the replacement cost exceeds that maximum, so the maximum amount becomes payable, less any deductions. IAG's position in respect of the claim resulting from the fourth earthquake is that there is no liability because the building was unrepairable before the fourth earthquake.

[51] On the view taken by Ridgecrest that the building remained repairable after the third earthquake, the liability in respect of the claim resulting from the third earthquake would be zero because no repairs have been undertaken and therefore no costs of repairs have been incurred by Ridgecrest for which a claim can be made. However, on Ridgecrest's view of the facts, the building became unrepairable after the fourth earthquake in which case the amount payable by IAG in relation to the claim resulting from the fourth earthquake is that required by cl C2(a)(ii) which, as indicated above is, in this case, the amount equal to the maximum liability under the policy.

[52] We conclude, therefore, that the answer to the preliminary question set out at [17] above is "no". As that is the same answer reached by the High Court Judge, albeit by a different route, we dismiss the appeal.

Other issues

[53] This conclusion means that it is not necessary for us to address the possible application of a doctrine of merger of liabilities or the doctrine of frustration. We do not express a view on the merger issue. It may, however, assist if we indicate that we would not have been prepared to uphold the High Court Judge's conclusion on the doctrine of frustration, based on his preparedness to imply a term into the contract of insurance of the kind described at [21] above. In our view, on the basis of the Judge's findings on the interpretation of the contract (which in turn appeared to be based on a claim be made under cl C1), the proposed implied term would have been a contradiction of the express terms of the contract. We do not consider that there would be any proper basis for implying a term which negatives the express terms of the contract of insurance and we do not believe that the policy required the implication of a term in order to give it business efficacy.

Result

[54] We dismiss the appeal and allow in part the cross-appeal.

[55] The High Court Judge's answer in the negative to the preliminary question set out at [17] is confirmed.

Costs

[56] The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.

Solicitors:
Parry Field Lawyers, Christchurch for Appellant
Fortune Manning, Auckland for Respondent