IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-000486
[2023] NZHC 943

BETWEEN	THE FLETCHER CONSTRUCTION COMPANY LIMITED Plaintiff
AND	CHUBB INSURANCE NEW ZEALAND LIMITED First Defendant
	BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY Second Defendant

Hearing:	26 October 2022
Appearances:	J E Hodder KC / J Q Wilson / S R Hiebendaal for the Plaintiff A S Ross KC / J W H Little / H P Short for the Defendants
Judgment:	31 May 2023

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 31 May 2023 at 4.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

Solicitors:

Bell Gully, Auckland
Clyde & Co, Sydney

J Hodder KC, Auckland
A S Ross KC, Auckland
J W H Little, Auckland

Introduction

[1] In October 2019, a fire ignited on the roof of the New Zealand International Convention Centre (**NZICC)** being built by SkyCity Entertainment Group Ltd (**SkyCity**). Fanned by strong gusting winds, the fire burned through the waterproof membrane, the roof layers and spread rapidly through the upper levels of the building. The roof structure, its water resistance, its height, and the winds made extinguishing the fire difficult. It burned for 10 days. Water from the fire-fighting efforts reached all levels of the building, damaging 600 car parks in the basement levels and delaying completion of another 624.

[2] SkyCity had an agreement with MPF Parking NZ Ltd[1] (**Macquarie**) to deliver the car parks by a certain date for Macquarie to operate as a commercial car park. Under that agreement if the car parks were partially destroyed before delivery, SkyCity

[1] Originally Macquarie Group Holdings No. 3 Pty Ltd, subsequently novated to Macquarie.

could terminate the agreement, or elect to reinstate the car parks and pay Macquarie a daily sum per car park until they were delivered. SkyCity elected to reinstate and pay the daily sum. By March 2022, Macquarie had charged SkyCity around $22 million for the late delivery of the car parks.

[3] Fletcher Construction Ltd (**FCC**) is the head contractor on the NZICC project. SkyCity demands that FCC indemnify it under the building works contract for SkyCity's liability to Macquarie.

[4] FCC is insured against third party liability in relation to the convention centre project under a policy (**the TPL Policy**) with the defendants (**the Insurers**). SkyCity and its subsidiary NZICC Ltd who is the principal under the construction contract are also insured under the TPL Policy, as are Fletcher Construction's subcontractors.

[5] FCC sought cover from the Insurers for its liability to SkyCity for SkyCity's liability to Macquarie. The Insurers confirmed cover for SkyCity's claim in relation to the 600 completed car parks. They declined to confirm cover for SkyCity's claim for the remaining 624 car parks (**the Second Tranche Claim**). Their reason was that those car parks were still under construction when the fire occurred and, therefore, were not third party property. The Insurers have agreed to pay FCC's reasonable defence costs to defend the Second Tranche Claim, without prejudice to their position on coverage.

[6] FCC has filed a claim asking the Court to declare that the TPL Policy covers any liability it has to SkyCity for the Second Tranche Claim. It applies for this declaratory relief by way of summary judgment. The Insurers oppose summary judgment, saying that any liability of FCC for the Second Tranche Claim is not covered by the Insuring Clause or is specifically excluded. The Insurers say that the Court should not interpret the policy without further background context. Further, that no Court could ever make the declaration sought, even at full trial, because that involves making factual assumptions about the Second Tranche Claim that may prove to be incorrect.

[7] The essential issue to decide in the summary judgment application is whether the Insurers have no defence to the claim for a declaration. The Insurers raise a range of defences. Ultimately the summary judgment application turns on whether:

(a) the Insurers' interpretation of the policy is reasonably arguable; and

(b) whether the meaning of the policy can be resolved without further background context.

[8] If summary judgment is declined, the issue is whether the statement of claim should be struck out because the Court could not ever, without further facts about the Second Tranche Claim, make the declaration sought.

Background facts

The building works contract

[9] NZICC Ltd engaged FCC to construct the NZICC under a building works contract dated 11 November 2015 (**the BWC**). The convention centre site is owned by NZICC Ltd's parent, SkyCity. SkyCity is also a party to the BWC, as is Fletcher Building Ltd, the parent company of FCC.

[10] In addition to the convention centre itself, the Contract Works under the BWC include 1224 car parks to be completed in two tranches, the first tranche as part of "Separable Portion 1" and the second tranche with the balance of the convention centre at the end of the project.[2] The original date for completion of Separable Portion 1 was 10 February 2018; and was 10 January 2019 for the balance of the Contract Works.[3]

[11] Clause 7.1.1 of the General Conditions provided:

> Except as otherwise provided in the Contract the Contractor shall indemnify the Principal against:
>
> (a) Any loss suffered by the Principal which may arise out of, or in consequence of the design or construction of, or remedying of defects in, the Contract Works;

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2 Clauses 6.1–6.3 of Appendix B to the Special Conditions of the BWC.
3 Clause 7 Appendix B to the Special Conditions of the BWC.

(b) Any liability incurred by the Principal in respect of injuries to Persons or damage to property which may arise out of, or in consequence of the design or construction of, or remedying of defects in the Contract Works; and

(c) Any Costs the Principal may incur in respect of that loss or liability.

[12] Clause 17.3.2 of the General Conditions provided:

> Where the Contractor agrees to indemnify the Principal under this Contract, such indemnity shall extend to all companies within the SKYCITY Group, and all officers, employees and agents of each of the Principal and all such companies.

[13] Clause 17.3.3 of the General Conditions provided:

> The benefit of 17.3.2 is intended to extend to all companies within the SKYCITY Group, and all officers, employees and agents of each of the Principal and such companies and be enforceable by each of them pursuant to the Contracts (Privity) Act 1982.

Separable Portion 1 completed

[14] FCC achieved Practical Completion of Separable Portion 1 of the Contract Works, which included the first tranche of 600 car parks, and handed over that Separable Portion to NZICC Ltd on or about 21 December 2018.

The Concession Agreement

[15] On 3 April 2019, SkyCity, SkyCity Auckland Limited, and Macquarie entered into a Concession Agreement.

[16] Under the Concession Agreement, SkyCity licensed the "NZICC Car Park" to Macquarie to operate as a commercial car parking business. The NZICC Car Park is defined to include the "Initial NZICC Car Parks" (being the first tranche of 600 car parks) and the second tranche of 624 that were to be constructed.

[17] The first tranche of 600 car parks were to be made available to Macquarie from the "Commencement Date", which was subject to a "waterfall" definition, being the later of 31 May 2019 or certain dates following completion of conditions or variations under the Concession Agreement.

[18] The second tranche of 624 car parks were to be made available on the "NZICC Car Park Commencement Date", which was defined to mean a date to be notified by SkyCity in writing or, if later, the "Commencement Date". FCC says that SkyCity has advised that it nominated 31 December 2020 to be the NZICC Car Park Commencement Date for the second tranche car parks.

The fire

[19] On 22 October 2019, a fire ignited at the convention centre. The fire originated in the gutter on the western side of the level 7 roof. It spread rapidly across the roof and burned out of control between the roof and level 5 of the partially completed convention centre.

[20] To bring the fire under control, Fire and Emergency New Zealand inundated the Contract Works with water and fire-retardant chemicals. The fire was eventually fully extinguished on 1 November 2019.

SkyCity's election to reinstate and compensate Macquarie

[21] The Commencement Date for the first tranche of 600 car parks had passed by the date of the fire, so Macquarie was in possession of those car parks.

[22] On 19 December 2019, SkyCity elected to reinstate the car parks under cl 30.3(f) of the Concession Agreement and gave written notice of its election to Macquarie. SkyCity recorded that it would pay to Macquarie $29.79 plus GST per "Compromised Parking Space" per day according to the agreement. It confirmed that it would pay these amounts for the 600 first tranche car parks from the date of the fire (22 October 2019) until their delivery. SkyCity acknowledged that it might also be required to pay the daily charge for the 624 Second Tranche car parks from 1 January 2021 if they were not delivered by that date.

[23] On 10 August 2020, SkyCity demanded that FCC indemnify it under cl 7.1 of the BWC, as extended to benefit SkyCity by cls 17.3.2 and 17.3.3, for the amounts SkyCity was required to pay Macquarie under the Concession Agreement in relation to the "Compromised Parking Spaces". SkyCity claimed that the damage caused by

the fire had made the 600 existing car parks unavailable for use and appeared likely to delay completion of the remaining car parks beyond 31 December 2020. SkyCity demanded that FCC reimburse it the $5,076,216.00 excluding GST it had already paid Macquarie and said it would pass through future amounts as they were invoiced by Macquarie.

[24] On 17 August 2020, FCC notified the Insurers of SkyCity's claim for its liability to Macquarie for the first tranche of car parks (**the SP 1 Claim**), and the Second Tranche Claim, and sought cover via its broker. The Insurers accepted cover for the SP 1 Claim and related defence costs. The Insurers declined to confirm cover in relation to the Second Tranche Claim but subsequently agreed to pay FCC's defence costs on a without prejudice basis.

SUMMARY JUDGMENT

Legal principles

[25] Rule 12.2(1) of the High Court Rules 2016 provides:

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[26] The relevant principles governing a summary judgment application are well established:[4]

> The question … is whether the defendant has no defence to the claim; that is, that there is no real question to be tried. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated. The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it.
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> (footnotes omitted)

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4 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

The Insurers' defences

[27] The Insurers' defences fall into two categories. The first category concerns the interpretation of the TPL Policy. The Insurers' say that, properly interpreted, the policy does not cover an Insured's liability for economic loss arising from a voluntarily assumed contractual obligation. Further, that any liability originating in damage to the Contract Works is excluded from cover. The second category concerns the nature of the declaration sought by FCC. The Insurers say that the declaration is too open-ended and, essentially, the Court could not ever make such a declaration without further facts about the Second Tranche Claim and without the involvement of SkyCity.

[28] In deciding the summary judgment application, I first deal with the Insurers' defences concerning interpretation of the policy.

Interpreting the TPL Policy

[29] FCC and the Insurers each advance different interpretations of the TPL Policy. Under the Insurers' interpretation, FCC's liability to SkyCity for the Second Tranche Claim does not fall within the Insuring Clause; and/or is excluded by Exclusion 6. Under FCC's interpretation, the Insuring Clause covers FCC's liability to SkyCity for the Second Tranche Claim; and Exclusion 6 does not apply. (The TPL Policy, including the Insuring Clause and Exclusion 6 is detailed below at [35]–[40]).

[30] Additionally, they each promote different approaches to interpreting the TPL Policy. FCC maintains that the meaning of the Insuring Clause and Exclusion 6 can be discerned from the language of the policy itself, applying the established principle that insuring clauses should be given a liberal interpretation and exclusion clauses should be strictly construed.[5] FCC emphasises that the words of the policy have primacy,[6] and says that it is not necessary, in this case, for the Court to have regard to extrinsic evidence of the wider contractual context.

[31] The Insurers' maintain that the Court must interpret these provisions in their background context, referring to authorities that have cautioned against interpreting

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5 *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2022] NZCA 422 at [68].
6 *Napier City Council*, above n 5 at [41].

insurance policies in a contextual, factual vacuum.[7] They say that the lack of extrinsic evidence before the Court means that summary judgment should be declined.

[32] Without prejudice to that position, the Insurers have filed affidavits from two people who purport to give context for the TPL Policy: Mark Downes, the underwriter who negotiated the TPL Policy with the broker acting for SkyCity, Willis; and Neil Bovington, an experienced insurance broker of 25 years from Australia. FCC objects to this evidence on the grounds that it is inadmissible. Besides specific objections, FCC says that the evidence is not relevant or of probative value. I return to this evidence and these objections later.

[33] In *Bathurst Resources Ltd v L&M Co Holdings Ltd* the Supreme Court confirmed that its decision in *Firm PI* should be regarded as settling the general approach to contractual interpretation.[8] McGrath, Glazebrook and Arnold JJ summarised the approach in this way:

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
>
> [63] 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

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7 *Trustees Executors v QBE Insurance (International) Ltd* [2010] NZCA 608; *Local Government Mutual Funds Trustees Ltd v Napier City Council* [2019] NZCA 444.

8 *Bathurst Resources Ltd v L&M Co Holdings Ltd* [2021] NZSC 85 at [40] citing *Firm PI No.1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63], [77]–[79], [84] and [88]–[93], per McGrath, Glazebrook and Arnold JJ (Elias CJ and William Young J reserving their positions).

> 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.

[34] Consistent with that approach, I turn to the words of the TPL Policy, and the competing interpretations advanced by FCC and the Insurers.

The words of the policy

[35] The most relevant parts of the TPL Policy are the Insuring Clause and Exclusion 6. The Insurers originally declined to confirm cover because FCC's liability to SkyCity is excluded by Exclusion 6. They now also contend that the liability is not covered by the Insuring Clause in the first place.

The Insuring Clause

[36] Clause 1 of the TPL Policy provides:

> The Insurer(s) hereby agree, subject to the limitations, Exclusions, terms and Conditions hereinafter mentioned, that they will:
>
> pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensation in respect of or consequent upon:
>
> (a) Personal Injury; or
>
> (b) Property Damage; or
>
> (c) interference with traffic or to property or the enjoyment of use thereof by obstruction, trespass, loss of amenities, nuisance,
>
> happening or consequent upon an Occurrence during the Period of Insurance and arising out of connection with the Project; ...

[37] The 'Project' is the NZICC including the Hobson Street Hotel.

[38] 'Property Damage' is defined to mean:

> loss of and/or damage to and/or destruction of tangible property including the Loss of Use of tangible property, whether or not that tangible property has been lost and/or damaged and/or destroyed.

[39] 'Loss of Use' is defined as:

> Loss of Use means economic loss suffered by any person or party consequent upon Property Damage of or to any other person's or party's tangible property.

Exclusion 6

[40] Exclusion 6 excludes cover for:

> liability for loss or damage to the Project or any permanent or temporary works erected or in the course of erection by or on behalf of the Insured in connection with the Project.
>
> However this exclusion shall not apply to:
>
> loss or damage to any part of the Project that has achieved practical completion and handed over, where loss or damage is caused during completion of the remainder of the Project.

Meaning of the Insuring Clause

[41] FCC submits that the word "compensation" encompasses compensatory damages in both tort and contract and is therefore wide enough to cover any liability FCC has to SkyCity under the BWC. Further, that the natural and ordinary meaning of the phrase "in respect of" is broad and "of the widest import" and requires only a "discernible and rational link" between the two subject matters to which the words refer.[9]

[42] FCC says that there is at least a "discernible and rational link" between any liability that FCC has to SkyCity for the Second Tranche Claim and "Property Damage". The term "Property Damage", it says, encompasses damage to, or loss of use of property, including the NZICC and the car parks under construction. Any liability of FCC to SkyCity is rationally linked to physical damage to property, with the Macquarie liability being a consequential loss suffered by SkyCity, arising from delayed completion.

[43] In contrast, the Insurers submit that in the words of the Insuring Clause, a *purely* contractual obligation to pay a sum will not be "compensation" "in respect of or consequent upon" property damage. They say that the clause only responds to sums payable to compensate damage (and no more), which corresponds to the measure of

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[9] *Body Corporate 200012 v Eden Village Ltd (in liq)* HC Auckland, CIV-2006-404-1931, 14 November 2011, at [16]; *Galbraith v Alderson Logistics Ltd* [2013] NZHC 3102 at [18].

damage in tort. They say that the words "in respect of or consequent upon" reflect the standard recovery in tort: recovery of the cost of reinstating/repairing the damaged property ("in respect of"), and economic loss consequent upon the damage. The Insurers concede that the indemnity can extend to concurrent liability in contract and tort; but say that a third-party liability policy does not generally cover voluntary assumed liabilities—i.e., liabilities for which the insured would only be liable in contract, and not tort, unless specific provision is made.[10]

[44] In my view, the relevant question is whether the Insuring Clause was intended to cover the Insured(s) for a liability they have voluntarily assumed, such as an obligation to indemnify a contractual counterparty, rather than a liability imposed by law to pay compensatory damages.

[45] The Insuring Clause states that the Insurers will pay for the Insured sums which the Insured "shall become legally obligated to pay as compensation in respect of or consequent upon (a) Personal Injury; or (b) Property Damage; or (c) interference with…property…arising out of or in connection with the Project." The three categories of liability identified at (a) to (c) correspond with the familiar classes of liability in tort, namely interference with a third party's person, property, or property rights. Plainly, if the Insured is found liable at law in one of these classes of tort, the Insurers are obliged to indemnify them.

[46] Additionally, it is common ground that the policy covers concurrent tortious and contractual liability i.e., a liability to pay compensatory damages where there is a tortious parallel. I accept that the plain meaning of the word "compensation" could encompass compensatory damages for breach of contract.[11]

[47] But what of an Insured's liability to a third party that arises purely through contract? I am not convinced that the natural and ordinary meaning of the phrase "legally obligated to pay as compensation" encompasses an obligation the Insured has

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10 *Tesco Stores Ltd v Constable* [2008] EWCA, CIV-362 at [14]–[20]; and Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [16.1.3(1)].

11 See Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington) at [21.2.2].

voluntarily assumed in a contract to indemnify the counterparty for their losses and liabilities, as opposed to a liability at law to pay compensatory damages.

[48] A leading New Zealand insurance textbook states:[12]

> The true position would seem to be that a liability policy covers contractual liabilities if they have a tortious parallel, and that a liability policy will not – in the absence of clear wording – extend to pure contractual liability. The two forms of liability are indeed quite different: liability in tort is concerning primarily with compensating for physical loss, whereas liability in contract compensates for loss of expectation of profit. It is admittedly the case that most liability policies do specifically exclude liability for contractual claims with no tortious counterpart, by adopting an exclusion for liability voluntarily incurred, although it may be that this form of exclusion would generally be implicit, and if there is to be cover for contract claims this would normally be spelt out.

[49] To my mind it makes sense that a third-party liability policy would not insure against liabilities assumed under a contract unless specifically provided. It would be impossible for an insurer to assess their potential exposure if they were required to indemnify the insured against any liability the insured assumed to a third party for that party's liabilities or losses.

[50] Significantly, in the TPL Policy, under the heading "Contract" within "Endorsements" the Insurers agree to indemnify the Insured for "liability assumed by agreement" in the TVNZ Tolerances Control Contract (Endorsement 6):

> **Contract**
>
> Insurers agreed to indemnify the Insured in accordance with insuring clauses 1, 2 and 3 for liability *assumed by agreement* in the TVNZ Tolerances Control Contract.

[51] In my view this endorsement supports the Insurers' position that the TPL Policy was not intended to insure against liabilities voluntarily assumed by the Insured in a contract unless specifically provided. Endorsement 6 would be unnecessary if the Insuring Clause covered liabilities assumed by agreement. There is no comparable specific provision in the policy for the liability FCC assumed to SkyCity under cls 7.1.1, 17.3.2 and 17.3.3 of the BWC.

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12 Merkin and Nicoll, above n 10, at [16.1.3(1)].

[52] FCC makes two main responses. First, it emphasises that SkyCity's Second Tranche Claim is advanced concurrently in tort (negligence) and contract. And that there is ample authority that a third party liability policy can extend to concurrent liability for damages in tort and contract.

[53] But SkyCity does not in fact advance concurrent claims for compensatory damages for breach of contract and negligence. SkyCity claims indemnification under the BWC for the sums it has paid Macquarie, and (potentially) damages for negligence.

[54] The distinction between the different forms of liability is evident from FCC's own claim against its subcontractors. FCC advances a cause of action for indemnification under a contractual indemnity; a separate cause of action for breach of contract; and a separate cause of action for negligence. The relief sought under indemnity cause of action is a declaration that the subcontractors are liable to indemnify FCC for its losses. The relief sought under the breach of contract and negligence causes of action is, as one would expect, an award of compensatory damages.

[55] Second, FCC points to Exclusion 8 in the TPL Policy which excludes "liability arising solely from fines or from penalties or liquidated damages of any kind and description in any contract or agreement entered into by the Insured." FCC says that this exclusion would be unnecessary if the Insuring Clause did not respond to contractual liabilities in the first place.

[56] I see the exclusion differently. Liquidated damages are agreed damages that will be recoverable in the event of breach of the contract. A penalty or fine is also an agreed sum to be paid following breach. This exclusion could therefore be intended to have the effect that the Insured is only indemnified for any liability to pay *compensatory* damages for breach of contract determined by the court rather than any liquidated damages or penalty previously agreed by the contractual parties. Interpreted in this way, the exclusion is not inconsistent with the premise that the Insuring Clause responds to a liability to pay compensatory damages for tort, or breach of contract and tort concurrently. I acknowledge that without contextual evidence as

to how the various parts of the policy are intended to work together it is impossible to be sure.

[57] For these reasons, based on the text, it is at least reasonably arguable that the Insurers and SkyCity (who negotiated the policy) did not intend that the Insured(s) would be indemnified against any liabilities to third parties which they assumed under a contract for indemnity, unless the indemnity was specified in the TPL Policy.

Meaning of Exclusion 6

[58] Exclusion 6 excludes cover for "liability for loss or damage to the Project" or "any permanent or temporary works erected…in connection with the Project". Loss or damage to any part of the Project that has achieved practical completion and been handed over to the principal (NZICC Ltd) is not excluded.

[59] FCC and the Insurers agree that the Second Tranche car parks were, at the time of the fire, Contract Works under construction. Therefore, the damage to the car parks was "damage to the Project".

[60] The Insurers say that if it is wrong on the Insuring Clause, FCC's liability to SkyCity is excluded by Exclusion 6 because it is a liability "for loss or damage to the Project". The Insurers say that Exclusion 6 is a typical "damage to works" exclusion which excludes liability for loss of damage to the work before practical completion or handover to the principal. Before handover, the works are treated as the Insured's own property rather than that of the principal or other third party for the purposes of the policy.

[61] FCC says the Insurers are wrong. It says that the word "for" affords a narrower degree of connection than the phrase "in respect of" or "arising from". It says that FCC's liability for the Second Tranche Claim is not "for" loss or damage to the NZICC, but rather for SkyCity's liability for late completion and delivery of the Second Tranche car parks to Macquarie. That liability, FCC says, is in substance a liability for loss of use of those car parks.

[62] FCC submits that this interpretation is consistent with the purpose of Exclusion 6, as derived from the text of the TPL Policy and the available factual matrix, which is to exclude cover for liability for *direct* loss or damage to the Contract Works. Such cover is provided by a separate Contract Works policy, which comprises both material damage cover (in favour of the principal owner) and liability for material damage (in favour of contractors, subcontractors, and related parties).[13]

[63] In my view FCC's submission overlooks that the TPL Policy is concerned with liability to third parties. The policy is not concerned with the principal's risk of loss or damage to the Contract Works, or with the head contractor's liability to the principal for loss or damage to the Contract Works. The relationship between the head contractor and principal in relation to the Contract Works is governed by the BWC. If FCC damages the Contract Works during construction, it is liable to the principal to reinstate the works, according to the terms of the BWC. It is insured against that liability by separate Contracts Work insurance. This liability to reinstate is not within the scope of the TPL Policy – SkyCity is not a third party when talking about the Contract Works.

[64] So, it makes no sense that Exclusion 6 would exclude a liability that was never within the scope of the policy in the first place – FCC's liability to the principal to reinstate the Contract Works in the event of loss or damage to the Contract Works during construction.[14]

[65] The alternative interpretation posed by the Insurers is that Exclusion 6 excludes any liability *to a third party* for their economic loss originating from loss or damage to the Contract Works. I find that interpretation more compelling. It is certainly reasonably arguable.

Contextual evidence to resolve meaning

[66] I have concluded that it is reasonably arguable on the words of the policy that the Insuring Clause was not intended to extend to liabilities assumed by an insured

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13 Clause 8.8.1 of the BWC.

14 Condition 13 of the TPL Policy provides that cover under the TPL Policy is expressly in excess of cover under the Contract Works Policy.

under a contract for indemnity for economic losses sustained by a third party. I have also found that it is reasonably arguable that the parties intended to exclude liability to third parties for economic losses originating from loss or damage to the Contract Works. However, based on the above exercise I also conclude that the meaning of these provisions cannot be resolved without further factual context.

[67] The Supreme Court emphasised in *Firm PI* that the context proved by the contract as a whole and the relevant background informs the meaning of the contract. The relevant background is background knowledge reasonably available to the parties at the time they agreed the contract. It is unnecessary for there to be ambiguity in the wording of a contract before a Court can resort to background and context.[15] In any case, there is ambiguity here.

[68] In terms of FCC's submission that the policy can be interpreted on its words without extrinsic evidence by applying the principle that an insuring clause should be given a liberal interpretation and exclusion clauses should be strictly construed, I note that the Court in the judgment relied on also said:[16]

> …ambiguity often can be resolved by reference to context and purpose. It is only where ambiguity proves intractable that recourse need be had to the contra proferentem rule.

[69] The *Bathurst* Court observed that material extrinsic to the written contract admitted into evidence to assist in contractual interpretation typically falls into three categories: the commercial context and the purpose of the contract, evidence of prior negotiations, and evidence of subsequent conduct.[17] Whether evidence will be admitted in a particular case depends on whether it tends to prove or disprove anything of consequence to determining the meaning the contract would convey to a reasonable person having all the background knowledge available to the parties at the time of the contract.[18]

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15 *Bathurst*, above n 8, at [44], referring to *Firm PI*, above n 8, at [89].
16 *Napier City Council*, above n 5 at [69].
17 *Bathurst*, above n 8, at [40].
18 At [62].

[70] The *Bathurst* Court also observed that evidence has been admitted by the New Zealand courts to show that it is the practice within a particular profession, trade, industry, or locality to give a word a specialised meaning.[19] The question again is whether this evidence tends to prove anything relevant to the notional reasonable person tasked with interpreting the contract.

[71] Applying these principles, extrinsic evidence that could be relevant to resolving the meaning of the Insuring Clause and Exclusion 6 includes evidence from the Insurers and the broker who negotiated the policy for SkyCity on the commercial context, including the standard group of insurance policies that a principal involved in a large-scale construction contract typically procures, the general purpose of a third party liability policy in that context, the types of risk a policy of that kind is designed to cover, other policies put in place for the NZICC project and the risks those policies were intended to insure against. As the policy was negotiated by professionals, evidence of any special meaning given to words or phrases in the policy by the insurance industry may be relevant.

[72] In this respect I agree with the Court in *Little v IAG New Zealand*, that insurance policies differ from other kinds of contract, and are more akin to a product designed to provide insurance cover for a particular kind of risk.[20] In that case the Court admitted evidence of the commercial purpose of the policy, the risks normally covered by it, and what other suitable policy might be available.

[73] Further, evidence of negotiations between SkyCity's broker and the Insurers may be relevant to the extent these negotiations would affect the way the language adopted is interpreted.[21] Thus, if evidence shows what a party intended the words to mean, and that this was communicated, it may tend to show a common mutual understanding as to the meaning of the contract.[22]

[74] Naturally, the words of the policy always retain primacy.

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19 At [82] referring to, for example, *Firm PI*, above n 8, at [84]–[87], and *Zeus Tradition Marine Ltd v Bell (V "Zeus V")* [1999] 1 Lloyd's Rep 703(QB) at [706]–[707] and [713].

20 *Little v IAG New Zealand Ltd,* HC Auckland, CIV-2010-404-729, 18 June 2001 at [27]–[34].

21 At [48], referring to cases at footnote 45.

22 At [76].

[75] I return now to the purported contextual evidence filed by the Insurers. As noted, FCC says that this evidence is irrelevant and inadmissible.

Evidence of Mr Downes and Mr Bovington

[76] Mr Downes has 30 years' experience working in the insurance industry in broking, underwriting and managerial roles in New Zealand and the United Kingdom (UK). At the time he negotiated the TPL Policy with SkyCity he was leader of Ace Insurance (New Zealand)'s construction practice group which merged with Chubb shortly after executing the TPL Policy.

[77] I accept that Mr Downes' subjective declarations as to what the policy means are irrelevant and inadmissible. He exhibits emails and various drafts of the policy he exchanged with the broker for SkyCity. He concedes that this is not a complete record and for that reason I do not consider this evidence to be a reliable indicator of the common understanding of the negotiating parties. I also agree with FCC that internal correspondence within Ace Insurance he exhibits is irrelevant as it does not tend to show a mutual understanding as to the meaning of the policy.

[78] However, I find that his evidence on the standard group of insurance policies that a principal involved in a construction contract may like to have in place provides helpful context.[23] Therefore, I find his evidence that contract works policies cover for accidental damage to the contract works, being the cost to reinstate the works, to be admissible. I also find his evidence that contract works policies sometimes include an add-on for delay in start-up, where damage to the contract works delays completion of the project causing business losses such as lost profit, to be relevant and probative. So too his evidence that a general liability/third party liability policy typically indemnifies an insured against legal liability it may incur to third parties because of damage to that third party's property or person. For instance, if the principal's contractor causes damage to a neighbouring restaurant and the neighbour sues the principal or contractor for its losses, such as the cost to repair or lost revenue.

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[23] Affidavit Downes' at [10].

[79] Mr Downes' evidence includes the proposal for insurance sent out by Willis. The Insurers placed considerable emphasis on the fact that under the heading "General Liability" Willis identifies third party properties near to the NZICC site. This is objective material produced by Willis for SkyCity and received by the Insured. As such, it provides relevant context for the negotiation that ensued and is admissible.

[80] Finally, Mr Downes exhibits a series of emails between himself, his colleague and a Mr Seto at Willis concerning a possible delayed start-up add-on to the Contract Works policy. Mr Downes deposes that SkyCity did not ultimately purchase this add-on. There is no evidence from FCC/SkyCity/Willis on this topic. The emails pre-date the Concession Agreement with Macquarie. It appears that the add-on would have insured SkyCity for lost revenue from the NZICC car parks in the event of delay. It is unclear whether it would have covered SkyCity's liability to a third party arising out of delayed delivery. As I am unclear on the relevance of this material, I have decided not to have any regard to it.

[81] As for the expert evidence of Mr Bovington, I do not accept FCC's objection to his expertise because he is based in Australia. Rather, I accept his explanation that insurance for large construction projects in New Zealand does not look different from similar projects in Australia, the UK, and elsewhere, as the placing of insurance and re-insurance is an international business.[24]

[82] Mr Bovington's general explanation of the types of insurance policies encountered on construction projects[25] provides helpful context and is admissible. This evidence accords with that of Mr Downes. I do not need to reach a view on the balance of his evidence, some of which I agree is inadmissible, including where he strays into opining on the question before the Court, namely whether a third-party liability policy can ever cover liabilities that are voluntarily assumed by the insured.[26]

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24 Affidavit of Neil Bovington at [5].
25 At paragraphs 13(a), (b) (first paragraph only) (c) and 14.
26 Paragraph 13(b).

Conclusion

[83] The evidence filed by the Insurers described above only reinforces that it would be wrong to try to resolve the meaning of the policy in a summary hearing without the complete contextual information that was available to the contracting parties at the time. The Court has part of the picture, with evidence from the Insurers' broker who negotiated the policy, but no evidence from the Willis broker who was responsible for negotiating the TPL Policy for SkyCity, NZICC, FCC and the subcontractors. The Insurers have produced expert evidence on market practice, but there is no comparable evidence from FCC.

[84] The Insurers have advanced an interpretation of the policy that is, on its words, reasonably arguable. The Insuring Clause and Exclusion 6 should be interpreted at a full trial with the benefit of more complete extrinsic evidence on the context and background to the policy.

[85] That disposes of FCC's application for summary judgment. I have not addressed the second category of the Insurers' grounds for opposing summary judgment, concerning the terms of the declaration sought by FCC. I consider those arguments in the context of the Insurers' application to strike out, next.

STRIKE-OUT

Legal principles

[86] The Court's power to strike out a cause of action is provided by r 15.1(1) of the High Court Rules 2016. The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[87] There is no disagreement about the well-established principles applying to strike out applications involving no reasonably arguable cause of action:[27]

(a) Pleaded facts are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable. The court must be satisfied that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The court should be particularly slow to strike out a claim in any developing area of the law.

[88] The Court may have regard to whether a cause of action can be re-pleaded. However, where possible amendments would make the claim significantly different to that as originally pleaded, the pleading should be struck out. A strike out will be appropriate where a pleading is so deficient that it requires a de novo start rather than amendment.[28]

Insurers' grounds for strike-out

[89] In their application the Insurers claim that FCC's proceeding is premature and inappropriate as the cause of action pleaded (indemnity against the Insurers) has not accrued; and any declaration by the Court as to the interpretation of the TPL policy and its application to liabilities by the insured parties to third parties in respect of the Second Tranche Claim (whether FCC to SkyCity, or the subcontractors to FCC) is properly made with the participation of all parties who would be affected by such a declaration, including FCC, the Insurers, and the subcontractors.

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27 *Couch v Attorney-General* [2008] NZSC 45 at [33] and *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

28 *Marshall Futures (in liq) v Marshall* [1992] 1 NZLR 316 at 324 per Tipping J; *Optimiser HQ Ltd v Bank of New Zealand* [2020] NZHC 1253 at [36].

[90] By the hearing, the Insurers' case had evolved somewhat. They made four main submissions as to why the claim should be struck out.

[91] First, that no cause of action has accrued as (a) no liability to SkyCity has been established; and (b) the Insurers have agreed to and are paying the FCC's defence costs. They submit that it is clear law that an insured under a liability policy may only pursue a claim for indemnity against the insurer when its liability to the third party is ascertained and determined to exist.[29]

[92] Second, that permitting the action to proceed will impose significant and unreasonable cost and other prejudice on the defendants, all to defend an action in respect of a hypothetical claim by SkyCity that has not been pursued in the more than two years since it was raised and may never be pursued.

[93] Third, that the declaration sought depends on assumptions, including factual ones, that may prove incorrect and cannot finally be determined in the absence of SkyCity. Those assumptions include:

(a) that FCC is liable to SkyCity, and in the quantum pleaded (i.e., a daily accruing liquidated sum, agreed between SkyCity and Macquarie, from 1 January 2021 onwards, a date chosen by SkyCity);

(b) that such liability in such quantum will ultimately be established to be of a type that falls within the TPL Policy; and

(c) that nothing will happen that breaks the required connection between Property Damage in terms of the Insurance Clause and the liability to SkyCity.

[94] Fourth, that there are more effective and appropriate ways for FCC to have the coverage issue resolved, including, if SkyCity issues a proceeding against FCC and establishes a claim, coverage proceedings against the Insurers. Alternatively, FCC

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[29] For example, Merkin and Nicoll, above n 10, at [16.1.8] and *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 WLR 709 (EWCA) at 714.

could seek to join the Insurers to any claim SkyCity files against FCC and seek a declaration that the Insurers are liable to indemnify it should SkyCity's claim succeed.

FCC's response

[95] FCC responds that they do not seek an order for payment for liability to SkyCity. Rather, FCC seeks a declaration as to the meaning of the Insuring Clause and Exclusion 6 of the TPL Policy, and a consequential declaration that the Insurers are liable to indemnify FCC for any sums it is liable to pay SkyCity for the Second Tranche Claim.

[96] FCC points out that the Insurers' submission that a declaration should not be granted because a claim by SkyCity is merely hypothetical is belied by the fact that they have already confirmed cover for SkyCity's parallel claim in respect of the first tranche of car parks.

[97] FCC submits that none of the three assumptions relied upon by the Insurers are necessary and that the Court now has all relevant facts and evidence it needs to make the declaration sought:

(a) It is not necessary to assume that FCC is liable to SkyCity, and in the quantum pleaded, given that FCC seeks a declaration to the effect that the Insurers are liable to indemnify FCC for any sums *that FCC becomes liable to pay SkyCity*.

(b) The Court is not asked to assume that such liability, in such quantum, will ultimately be established to be of a type that falls within the TPL Policy. FCC says that this is the very question it asks the Court to determine: that the Second Tranche Claim is a liability of a type that falls within the TPL Policy as a matter of proper interpretation of the TPL Policy.

(c) The Court is not being asked to assume that nothing will happen that breaks the required connection between the Property Damage, in terms of the Insuring Clause, and the liability to SkyCity. FCC says that this

> is a quantum argument. It says that potential quantum issues that may or may not arise in the future have no bearing on whether the Second Tranche Claim is a claim that falls within the Insuring Clause.

[98] FCC acknowledges that the underlying claim in respect of which cover is sought must be sufficiently defined and realistic before a Court will grant declarations as to cover. They acknowledge that this will be the case where proceedings have been issued against the insured but submit that proceedings against the insured are not a precondition to the exercise of the Court's declaratory jurisdiction.

A declaration of cover involves assumptions

[99] Of the grounds advanced by the Insurers, the most compelling is that the declaration sought requires the Court to make factual assumptions that may prove to be incorrect.

[100] It is common ground that the Court will not deal with mixed questions of fact and law on an application for a declaration. In the leading case of *New Zealand Insurance Co v Prudential Insurance Co* McCarthy P said:[30]

> The jurisdiction to make orders under the Declaratory Judgments Act is wholly discretionary. The cases defining the attitude of the courts in the exercise of that discretion are numerous … and they establish certain guidelines which will generally be followed. The Court will not answer purely abstract questions in anticipation of an actual controversy. It will not deal with mixed questions of fact and law. The procedure is designed to provide a speedy and inexpensive method of obtaining a judicial interpretation where the matter in dispute cannot conveniently be brought before the Court in its ordinary jurisdiction, and where a declaratory judgment would be appropriate relief.

[101] In *Mandic v Cornwall Park Trust Board (Inc)* the Supreme Court affirmed that an "application for declaratory order is inappropriate when there are questions of fact to be determined (as is implicit in the terms of s 3 [of the Declaratory Judgments Act])".[31] FCC appears to apply for the declaration under the Court's inherent jurisdiction, but there was no dispute that this principle still applies.

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30 *New Zealand Insurance Co Ltd v Prudential Insurance Co Ltd* [1976] 1 NZLR 84 (CA) at [85], and [92]–[93].

31 *Mandic v Cornwall Park Trust Board (Inc)* [2011] NZSC 135 at [5] and [82].

[102] In my view, the declaration sought by FCC is problematic in that it requires the Court not just to interpret the TPL Policy, but to interpret the BWC indemnity and apply it to the Second Tranche Claim, without critical facts about the claim and in the absence of the claimant, SkyCity.

[103] The declaration sought is that:[32]

> A declaration that the Insurers are liable to indemnify FCC under the TPL policy for the Second Tranche Claim.

[104] The "Second Tranche Claim" is defined at paragraph [34] of the statement of claim:

> On 12 July 2021, SkyCity wrote to FCC and alleged that FCC is liable under clause 7.1.1 of the BWC and in tort to indemnify or compensate SkyCity for the losses SkyCity has incurred under the Concession Agreement to Macquarie in relation to the 624 car parks (**Second Tranche Claim**).

[105] So, FCC seeks a declaration that the TPL Policy covers the Second Tranche Claim, being the claim alleged by SkyCity in its letter to FCC on 12 July 2021. That claim is alleged to exist under cl 7.1.1 of the BWC and in tort for negligence.

[106] In response to the Insurers' application and submissions, FCC clarifies that it seeks a declaration that the Insurers are liable to indemnify FCC *for any sums that FCC becomes liable to pay SkyCity* for the Second Tranche Claim.

[107] Even with the clarification, FCC's claim faces difficulties.

[108] Refocusing on the Second Tranche Claim, it is SkyCity's claim for the daily sum it has been paying Macquarie under the Concession Agreement since 1 January 2021 in respect of the 624 Second Tranche car parks.

[109] The relevant cl of the Concession Agreement is cl 30.3(f):

> . . . if prior to the NZICC Car Park Commencement Date, the NZICC or access to and egress from that Car Park is destroyed or damaged to an extent that does not constitute an NZICC Pre-Delivery Destruction (Partial Pre-NZICC Delivery Destruction), SKYCITY may elect to either:

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32 Statement of Claim at [53](a).

(i) terminate this Agreement, in which case clause 30.3(e) shall apply (as if references to NZICC Pre-Delivery Destruction were references to Partial Pre-NZICC Delivery Destruction); or

(ii) reinstate the NZICC Car Park or access to and egress from that Car Park (as applicable) giving to the Concession Holder notice in writing within two months after the date upon which the damage occurs, and: . . .

(B) SKYCITY will pay to the Concession Holder an amount equal to $29.79 plus GST per Compromised Parking Space per day (where a Compromised Parking Space is a Parking Space in the NZICC Car Park that is not available for use by the Concession Holder in accordance with this Agreement whether as a consequence of the Partial Pre-NZICC Delivery Destruction or as a consequence of a Parking Space in the Second Tranche NZICC Car Parks having not yet been delivered because the NZICC Car Park Commencement Date has been delayed by the Partial Pre-NZICC Delivery Destruction); . ..

(D) payment of the above amounts is the Concession Holder's sole remedy in connection with the Partial Pre-NZICC Delivery Destruction.

[110] After the fire, on 19 December 2019 SkyCity elected to reinstate the 600 completed car parks under cl 30.3(f) of the Concession Agreement. In its written notice of election to Macquarie, SkyCity recorded that it would pay to Macquarie $29.79 plus GST per "Compromised Parking Space" per day pursuant to cl 30.3(f)(ii) and in connection with that:

(i) SkyCity confirms that, as at the date of this notice, there are 600 Compromised Parking Spaces and that *it will pay this required amount in respect of each Compromised Parking Space each day* with effect from the time of the fire on 22 October 2019 until, in respect of any particular Parking Space, that parking Space is no longer a Compromised Parking Space within the meaning of the CA;

(ii) *SkyCity acknowledges that the number of Compromised Parking Spaces may from and including 1 January 2021 include a further 624 Compromised Parking Spaces as a consequence of a Parking Space in the Second Tranche NZICC Car Parks having not yet been delivered because the NZICC Car Park Commencement Date has been delayed by the Partial Pre-NZICC Delivery Destruction*;

(emphasis added)

[111] On 20 August 2020, SkyCity made demand on FCC for the losses that SkyCity had incurred to Macquarie under the Concession Agreement under cl 7.1.1 of the BWC:

3. At commencement (and at the date of the fire) the concession required the existing 600 carparks within the NZICC carpark that had already been handed

over by FCC to be made available for use by Macquarie. *This increases to a minimum of 1,224 from 31 December 2020.*

4. The fire damaged the NZICC carpark. It has made the 600 existing carparks unavailable for use for the time being and *appears very likely to delay the completion of the remaining carparks beyond 31 December 2020*.

5. Clause 30.3(f) of the concession agreement provides that if the NZICC carpark is damaged, SkyCity may within two months of the damage elect either to terminate the concession or to reinstate the carpark. SkyCity elected to reinstate on 19 December 2019. *SkyCity must pay Macquarie $29.79 plus GST per compromised parking space per day from the date of the damage until each parking space is no longer compromised*. Copies of the concession agreement and the election notice are enclosed.

6. *The amounts payable to Macquarie are liabilities of SkyCity recoverable by SkyCity from FCC under the indemnity in clause 7.1 of the BWC, as extended to benefit SkyCity by clauses 17.3.2 and 17.3.3.*

7. The amounts payable to date are $5,076,216.00, excluding GST.

…

8. SkyCity accordingly claims $5,076,216.00, excluding GST from FCC for the amounts invoiced to date. SkyCity has paid the December 2019 to June 2020 invoices and will pay the July 2020 invoice in accordance with its payment terms on 18 August.

SkyCity will pass through future amounts as they are invoiced by Macquarie. SkyCity's preference is that going forward FCC put it in funds to meet Macquarie's invoices as and when they are due so there is no funding cost to SkyCity. If this is not achieved SkyCity reserves the right to recover interest from FCC.

(emphasis added)

[112] Ralph Simpson, FCC's General Counsel, deposes that SkyCity has repeated its demands on FCC on an almost monthly basis. He has put in evidence the (then) most recent demand from SkyCity dated 1 March 2022. This is an email from SkyCity attaching copies of SkyCity's most recent invoices for "the Macquarie carpark losses". The invoices relate to both the first and second tranches of car parks. Also attached is a statement for each tranche of car parks. The statement reveals that SkyCity has been demanding that FCC pay Macquarie's charges for the second tranche of car parks from 1 January 2021 at a monthly charge of $576,257.76, with interest. The total monthly charges said to be outstanding at March 2022 was $7,448,763.38.

[113] The problem with FCC's claim is that to make the declaration sought, the Court will need to be satisfied that the application of cl 7.1.1 to SkyCity's claim from FCC

will result in substantially the same outcome in terms of liability and quantum as the application of the Insuring Clause to FCC's claim for indemnity from the Insurers. That does not necessarily follow, as the terms of cl 7.1.1 are similar to, but not the same as the Insuring Clause.

[114] One potentially significant difference between cl 7.1.1 and the Insuring Clause is that under cl 7.1.1(b) FCC indemnifies SkyCity for "*[a]ny liability incurred by* [SkyCity] in respect of injuries to Persons or damage to property…". The word "liability" is defined broadly in the BWC to include:

> any debt, obligation, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation, charge or liability of any kind, actual, prospective or contingent and whether or not currently ascertainable and whether arising under or for breach of contract, in tort (including negligence) restitution, pursuant to statute (including, to the extent permitted by law, statutory fines, penalties and criminal liability) or otherwise at law or in equity.

[115] Contrast that with the Insuring Clause by which the Insurers agree to indemnify FCC for "all sums which the Insured *shall become legally obligated to pay as compensation* in respect of or consequent upon … Personal Injury or Property Damage." As discussed earlier, the type of liability covered by the Insuring Clause is confined to a liability to pay a third party "compensation". This is but one of the forms of liability indemnified under the BWC.

[116] In the same way that the meaning of the Insuring Clause must be ascertained with reference to the policy as a whole and the background available to the Insurers, SkyCity and its broker at the time; the meaning of cl 7.1.1 of the BWC must be ascertained in the context of the full BWC and with the background knowledge available to the contracting parties at the time they entered into the contract. On their words, the two indemnities potentially involve different sources of liability.

[117] A further problem relates to the Insurers' submission that the declaration requires the Court to make factual assumptions that may prove to be incorrect. First, that but for the property damage caused by the fire, all 624 car parks would have been delivered by 31 December 2020. And second, as the "Second Tranche Claim" is for a daily charge for each car park until it is completed, that any ongoing delay in delivery,

is, for each car park for each day, "in respect of or consequent upon" property damage caused by the fire, as opposed to other factors such as delay restarting the project after the fire and COVID-19, prioritisation decisions by FCC, actions taken by FCC or subcontractors or by SkyCity.

[118] FCC's response is to say that these are issues of quantum not liability, and that issues of quantum can be resolved later.

[119] I am not persuaded by that submission. As noted, SkyCity's claim is for the total charges it has been paying Macquarie since 1 January 2021. In electing to reinstate the car parks, SkyCity acknowledged to Macquarie that delivery of all 624 car parks was delayed from 31 December 2020 *because of the fire.* Therefore, each of the 624 car parks is classified a "Compromised Parking Space" under the Concession Agreement from that date and SkyCity must pay the daily charge per car park until the car park is completed and delivered. The daily charge is payable irrespective of whether all the car parks would have been delivered on time but for the fire, and irrespective of whether the ongoing delay is attributable to damage caused by the fire or to other factors.

[120] The extent of FCC's liability to SkyCity for the sums SkyCity has paid to Macquarie will be determined by applying the terms of clause 7.1.1 of the BWC. Namely, whether SkyCity's payments are a liability incurred "in respect of …damage to property which may arise out of, or in consequence of the …construction of...the Contract Works."

[121] Whereas the extent of the Insurers indemnity of FCC is determined by whether FCC's liability to SkyCity is for compensation "in respect of consequent upon…property damage…consequent upon [the fire] …arising out of or in connection with the [NZICC] Project".

[122] The indemnity clauses in the TPL Policy and the BWC are subtly but potentially significantly different. Therefore, it does not follow automatically that the Insurers are liable to indemnify FCC for any sums it is found to be liable to SkyCity under the BWC indemnity. Rather, the Court will need to determine how cl 7.1.1,

properly interpreted, applies to SkyCity's claim for the total sum it has paid Macquarie, to determine whether it follows from FCC being found liable to SkyCity, that the Insurers are liable to FCC for the same sum under the Insuring Clause.

[123] The point is that by asking the Court to declare that FCC is indemnified for any sums it is found to be liable to SkyCity for under cl 7.1.1 of the BWC, FCC is not just asking the Court to interpret the TPL Policy. FCC is also asking the Court to interpret cl 7.1.1 and apply that clause to the Second Tranche Claim. This is because to declare that any liability of FCC to SkyCity under the BWC indemnity is covered by the TPL Policy, the Court must find that the scope of the BWC indemnity is no wider than that of the TPL Policy.

[124] I do not consider that the Court could appropriately interpret the meaning of cl 7.1.1 and consider its application to the Second Tranche Claim in isolation from any evidence on the context for that clause and, critically, without the involvement of the claimant, SkyCity.

[125] FCC's response to the issues raised about the declaration as it concerns its liability under the BWC indemnity is that the claim by SkyCity also encompasses a claim in negligence. That does not help FCC. It is plain from the letter of demand from SkyCity set out above that SkyCity seeks to recover its losses first and foremost under cl.7.1.1 of the BWC.

[126] Consistently, SkyCity's lawyers explain the legal basis for the claim against FCC in terms of the BWC indemnity:

> We understand that you have recently requested an explanation as to the legal basis of SkyCity's claim against Fletchers for the compensation SkyCity has been paying to Macquarie since 1 January 2021 in respect of the second tranche of NZICC car parks. In particular, we understand you seek an explanation as to why SkyCity's claim is not subject to the Delay LD cap in the NZICC Building Works Contract.
>
> SkyCity's liability to Macquarie
>
> 2. As you know, SkyCity's liability to Macquarie arises under the Concession Agreement, dated 3 April 2019, pursuant to which SkyCity granted Macquarie an concession to carry out parking operations on the main site carpark and the NZICC carpark from 31 May 2019. The NZICC carparks were split into an initial tranche of 600 parks, to be available at the commencement of the

Concession Agreement, and a second tranche (the Second Tranche car parks) of at least 624 car parks, to be available no later than 31 December 2020.

…

4. In mitigation of its losses, SkyCity elected (by letter dated 19 December 2019) to reinstate and pay compensation. It is common ground between SkyCity and Macquarie that the Second Tranche car parks were to be considered Compromised Parking Spaces from 31 December 2020 and, accordingly, compensation payable from 1 January 2021.

5. The compensation payable under clause 30.3(f) is $29.79 plus GST per Compromised Parking Space. The daily amount payable by SkyCity to Macquarie for the 624 Second Tranche car parks is approximately $557,688.80 plus GST per month from 1 January 2021. …

6. The contractual basis for the claim against Fletchers in respect of the Tranche 2 car park losses is as follows:

a. Fletchers has general obligations to "care for" and "take all steps necessary to prevent damage to" the Contract Works: clause 5.6.1 of the BWC;

b. Fletchers is responsible for all acts, defaults, omissions, and neglects of any Subcontractors and their agents and employees as if they were acts, defaults, omissions or neglects of Fletchers: clause 4.3.1 and 4.3.2;

c. Fletchers indemnifies NZICC Ltd for any liability incurred by NZICC Ltd in respect of damage to property arising out of, or in consequence of, the construction of the Contract Works: clause 7.1.1 (b);

d. Fletchers' indemnity extends to SkyCity under clause 17.3.2.

7. Each of those elements is satisfied. The damage to the Contract Works was caused by (among other things) Fletchers' breach of its obligations under cl 5.6.1 (including acts, defaults, omissions and neglects of any Subcontractors and their agents and employees for which Fletchers is responsible). (We apprehend you do not require an explanation of the breaches, given the present focus on the Delay LD Cap.) *The compensation due to Macquarie is a "liability" of SkyCity for the purposes of clauses 7.1.1 (b) and 17.3.2. SkyCity is therefore entitled to be indemnified by Fletchers for its liability to Macquarie*.

8. Fletchers is also liable to SkyCity in negligence (as is any negligent subcontractor).

[127] Additionally, the declaration sought by FCC is not limited to a declaration that, to the extent it is liable to SkyCity in negligence, the TPL Policy applies. The declaration as currently drafted concerns the "Second Tranche Claim", which is defined to mean the claim alleged by SkyCity under both the BWC and in tort set out in SkyCity's correspondence to FCC.

[128] I conclude that no Court could declare, on the facts before it and without the involvement of SkyCity, that the Insurers are liable to indemnify FCC under the TPL Policy for any sums it is liable to pay SkyCity for the Second Tranche Claim. As such, the statement of claim as it stands does not disclose an arguable cause of action.

[129] However, I decline to strike out the statement of claim at this stage. To my mind, the Court could reasonably be asked to make a declaration that is confined to the proper meaning of the TPL Policy. For example, the Court could be asked to declare the meaning of the Insuring Clause and/or Exclusion Clause 6 with reference to the specific points of difference between the parties that were the focus of their summary judgment submissions. A declaration of this kind may still have practical utility by providing clarity as to the correct meaning of the policy, whilst avoiding the problems involved in asking the Court to both declare the meaning of the policy and apply it to SkyCity's Second Tranche Claim.

Result

[130] I order:

(a) FCC's interlocutory application for summary judgment is dismissed.

(b) The Insurers' interlocutory application to strike out is dismissed.

(c) FCC is to replead its statement of claim within **25 working days**.

[131] In terms of costs, my preliminary view is that:

(a) Costs on the summary judgment application should be reserved in accordance with the principle in *NZI Bank Ltd v Philpott*.[33]

(b) The Insurers should be awarded their costs on the strike-out application because, despite dismissing the application, I have accepted their

[33] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).

argument that the statement of claim as presently pleaded discloses no arguable case of action.

[132] I invite the parties to agree costs, failing which they may file submissions of not more than five pages within **25 working days**.

_____
Associate Judge Gardiner