Cover to Cover

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MinterEllisonRuddWatts.

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Welcome to our first edition of *Cover to Cover* for 2024, our publication for New Zealand insurance professionals.

In this edition, we discuss the re-emergence of the most important development in New Zealand's insurance law in a century, the Insurance Contracts Bill, which had fallen off the Government's legislative agenda but was fortuitously drawn from the private members' ballot last month and has now been adopted, with some changes, as a renamed Contracts of Insurance Bill. Developed further from the exposure draft released by the Ministry of Business, Innovation and Employment in 2022, it proposes fundamental and long overdue changes to New Zealand's insurance law, including significant changes to the policyholder's duty of disclosure.

We discuss an important decision of the High Court issuing guidance to the Canterbury Earthquakes Insurance Tribunal, which confirms that specialist tribunals are required to apply recognised principles of insurance law. The Court overturned a decision of the Tribunal that would have required the insurer to pay repair costs up front as well overturning a finding that the insurer owed a general duty to assess damage and scope repairs, and confirmed the traditional principle that the obligation to prove loss rests with the policyholder.

We also discuss the recent decision of the Supreme Court in *Smith v Fonterra & Ors*, which allowed a claim by a climate change activist against some of New Zealand's largest companies to proceed to trial, and what the decision means for insurers. We also discuss the outcome of the Whakaari White Island health and safety prosecutions.

Finally, we report on two interesting cases, one in which an insurer was found to have a duty to bring a change in policy terms to a policyholder's attention, and another in which a fraudulent claim had a dramatic impact upon an insured.

We hope you find this edition interesting and informative.

Insurance contracts back on Parliament's agenda

Authored by Andrew Horne, Partner

We reported on MBIE's exposure draft of the Insurance Contracts Bill in Issue 24 of Cover to Cover, back in March 2022. The draft Bill proposed to make fundamental and long-overdue changes to New Zealand's insurance law, including significant changes to policyholders' duties of disclosure to insurers.

The Bill was not introduced into Parliament's legislative programme before the end of the term, but life was breathed back into it with its selection as a private member's Bill in March of this year, and its recent adoption as a Government Bill, with some changes. This article was prepared just as the renamed Contracts of Insurance Bill was released and does not reflect all of its changes

Changes to the duty of disclosure

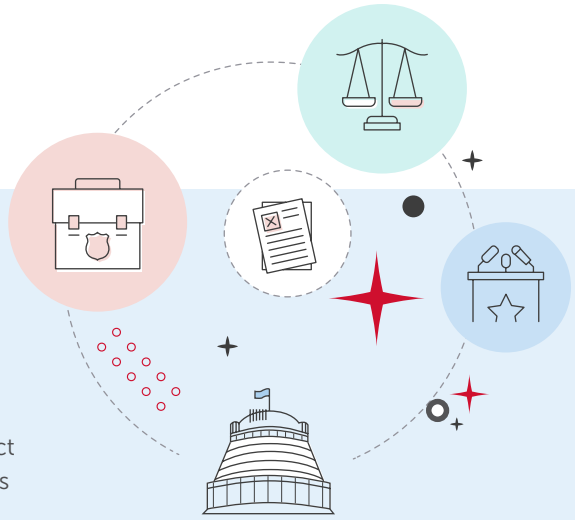
Probably the most significant change proposed in the exposure draft of the Bill was a fundamental change to the insured's duty of disclosure. Under the current law, before a contract of insurance is entered into or renewed, a policyholder must disclose to the insurer all information that could influence the judgement of a reasonable insurer in assessing the risk they are assuming by providing the insurance, regardless of whether the insurer explicitly asked for the information or not. This must be done in accordance with the common law duty of "utmost good faith", which is a very high standard.

The Bill would replace that duty with separate levels of disclosure duty for consumers and non-consumers.

Proposed key changes to current law

The Bill in its new form features some changes from the 2022 exposure draft. To recap, the key changes to the current law that were proposed in the exposure draft were the following:

- Fundamental changes to the insured's duty of disclosure and the consequences of a breach.
- The Bill in private member's form would have opened up insurance contracts to the unfair contract terms regime in the Fair Trading Act 1986, but this has now been changed.
- Introduce new obligations upon insurers in relation to the presentation of consumer insurance policies.
- Improve the ability of third parties to make claims upon the liability insurance of persons they are suing, including broad new powers to request information.
- Consolidate New Zealand's disparate insurance legislative regime into (nearly) a single statute.



Consumer policyholder

Policyholders who take out insurance for personal, domestic, or household purposes would have a new duty to "take reasonable care not to make a misrepresentation to the insurer" taking into account all relevant circumstances. Relevant circumstances would include: the type of insurance product, how clear and specific the questions asked by the insurer were, how clearly the insurer communicated the importance of disclosure and whether the consumer received financial advice.

An insurer would no longer have the right to "avoid" an insurance contract (i.e. declare it void from the outset) where there is material non-disclosure by the policyholder. The Bill provides that where the policyholder has breached the duty to take reasonable care, the insurer will have proportional remedies available based on how the insurer would have responded to the information and whether the policyholder's nondisclosure was intentional or reckless. Remedies would range from reducing the amount paid on a claim (where the insurer would have entered the contract on different terms) to avoidance of the policy (where the nondisclosure is deliberate or reckless, or where the insurer would not have entered into the contract on any terms).

The Bill includes a further clause which provides that an insurer cannot rely upon a misrepresentation by a policyholder who is a consumer, where the insurer was not misled by it, or the misrepresentation did not affect the insurer's underwriting decision.

For life insurance, the exposure draft of the Bill proposed to carry over the prohibition on life insurers in the Insurance Law Reform Act 1977 from avoiding a contract of insurance for misrepresentation unless it was made in certain circumstances. The revised Bill provides that where an insured under a life policy makes a misrepresentation, the insurer may only reduce the cover to that which a reasonable insurer would have provided had the true position been known. There are exceptions, however, where the misrepresentation was fraudulent, or it was made within three years before the death of the person whose life is insured or the date on which the insurer wishes to avoid the policy for the misrepresentation. This provides insurers with some protection against insureds who knowingly mislead insurers or who do so innocently but in relation to an issue that is presumably sufficiently serious to result in their making a claim.

Non-consumer policyholder

A policy that is not a consumer insurance contract will normally be taken out for business purposes. Such policyholders would have a new duty to make a "fair representation of the risk". The Bill details what a "fair representation" of risk means, which in summary, is that the policyholder must disclose material circumstances that they know or ought to have known, in which every representation made is substantially correct.

Where there is a breach of this duty, the Bill provides (similarly to the provision for consumer policyholders) that an insurer will have a proportionate remedy available.

Effect of these changes

These would be fundamental changes, as they would mark an important move away from the present requirement for policyholders to put themselves in the shoes of an insurer and disclose what a reasonable insurer would consider relevant, to a requirement upon insurers to ask necessary questions of consumer policyholders and a duty of fair presentation upon non-consumer policyholders. Also important would be the removal of the insurer's right to avoid policies and decline to pay claims where there has been a material non-disclosure or misrepresentation in every case, replaced with 'proportionate' remedies that may in some cases result in partial payments to policyholders who would otherwise have had no entitlement at all.

This would create challenges for insurers, who will have to calculate premiums on an assumption that policyholders who misdescribe their risks may nevertheless be entitled to a partial indemnity. This is likely to result in an increase in premiums for careful and honest policyholders who present their risks accurately as well as those who do not. It may however remove some unfairness for insureds who act honestly but who make mistakes.

Unfair Contract Terms regime

As we reported in March 2022, the exposure draft of the Bill proposed two options for applying the unfair contract terms regime to insurance policies: "Option A", which would apply the regime to all policy terms other than those that define the subject matter of the policy, the sum insured and the excess, and "Option B", which would limit its application to a narrower range of policy terms. The private members Bill was amended along the lines of Option A, meaning that for most purposes the unfair contract terms regime would have applied.

This would have provided an increased level of protection for policyholders, but open insurance policies up to a fairness review by the courts, which may result in significant uncertainty for insurers. Having said that, most other consumer facing industries have moved to a point at which the need to comply with unfair terms legislation is an accepted part of doing business. The Government Bill now amends this approach to any event and limits it to terms that are not insurance specific.

Other proposed changes

The exposure draft of the Bill also proposed to introduce new duties on insurers to:

- inform all policyholders of their disclosure duty and its consequences before they take out a policy; and
- where an insurer seeks permission to access medical or other third-party records, the insurer must inform consumer policyholders of the information the insurer will likely access.

The revised Bill now includes additional proposed changes which appear to be intended to further protect consumers' interests.

The revised Bill now provides for a new express duty on an insurer to accept or reject, assess and settle a claim within a reasonable time. The courts have recognised similar duties already, however.

There are also new provisions for interest on claims. For life insurance contract claims, the revised draft of the Bill reduces the time after which the insurer is liable to pay interest from the current timeframe of 91 days under the Life Insurance Act 1908 to 30 days.

Next steps

We await developments in the Government's legislative programme. It is not yet clear whether the Bill will be amended further. The Bill was drawn from he ballot as a private member's bill from an opposition MP, Dr Duncan Webb, and the Commerce and Consumer Affairs Minister, Andrew Bayley, responded to its selection with a statement that he is reviewing insurance contract law and intended to seek Cabinet approval shortly to proposed amendments. The Bill has now been adopted as a Government Bill.

There will now be an opportunity for insurers and other industry participants to make submissions upon the revised Bill or any replacement, with some changes.

IAG v Degen:

The CEIT and fundamental principles of insurance law

Authored by Jonathan de Jongh, Solicitor

IAG New Zealand Ltd v Degen[1] is a case in which the High Court heard an appeal from a decision of the Canterbury Earthquakes Insurance Tribunal (CEIT), which was set up to resolve disputed Canterbury Earthquake insurance claims not yet settled by agreement or by the courts. The decision is a reminder of the importance of fundamental principles of insurance law, and that there are limits upon the flexibility of the approach afforded to tribunals such as the CEIT.

The case involves a dispute regarding earthquake damage to a house. The CEIT found against the insured, Mr Degen, on the issue of whether the house could be repaired, deciding that IAG's proposed repair strategy was sufficient to restore the house to the policy standard. However, the CEIT made other findings in Mr Degen's favour, with potentially significant implications for the insurance sector. IAG appealed those findings to the High Court. The challenged findings were the following:

- That IAG should be required to pay repair costs upfront upon the building contract being concluded, not pay costs as they were incurred.
- That IAG should reimburse professional fees incurred by Mr Degen, on the basis that IAG breached a duty to adequately assess the damage and adequately scope the necessary repair strategy.

In its decision, the High Court reiterated the importance of fundamental legal principles in interpreting insurance contracts. The Court confirmed that, absent specific terms, insurers are not required to pay repair costs upfront, but only as they are incurred and as invoices from builders and other providers are received. Most importantly, there is also no general duty on insurers to assess the damage and scope the necessary repairs; the obligation to prove loss remains with the insured.

Costs are payable as incurred

The High Court set aside the CEIT's decision on the first issue, finding that IAG was obliged to pay repair costs as they were incurred by Mr Degen, not upfront. The CEIT's finding to the contrary was in fundamental conflict with established principles relating to insurance contracts, which recognise that the insured must incur legal liability for costs before an insurer is obliged to cover them. This assists in preventing any misuse of funds received from the insurer, which would undermine the intent of the insurance policy. As such, that obligation to indemnify does not arise when the contract is entered into, contrary to the CEIT's finding.

In making this finding, the High Court followed the approach of the Court of Appeal in *Medical Assurance Society of New Zealand Ltd v East:*[2] an insurer's promise to cover costs of repair is synonymous with a promise to indemnify the insured, which means paying the costs of repair as they are incurred.

The Court held that to require an upfront payment would ignore the realities of the building process, which involves fluctuating costs in an uncertain market. This would create uncertainty, as the actual cost of repair will not be known until the work is completed and invoices are submitted to the insured and subsequently claimed from the insurer.

1 *IAG New Zealand Ltd v Degen* [2024] NZHC 397.

2 *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074. Disclosure – MinterEllisonRuddWatts acted for the insurer in this case.

No duty to assess and scope the repair

The Court found that the CEIT had also erred in finding that IAG owed and breached a duty to assess the damage and scope the necessary repair adequately.

The Court held that such a duty would conflict with the fundamental principle that the insured bears the burden of proving its loss. Imposing the suggested duty would reverse this burden and require the insurer to assess the full loss and scope a repair strategy instead. The Court confirmed the traditional view that the insurer's role is to indemnify the insured based on evidence of insured loss provided to it, not undertake these inquiries itself.

Fair Insurance Code does not impose relevant duties

The insured argued that the Fair Insurance Code imposed additional relevant duties that were enforceable in the CEIT.

The High Court was careful to note that the Fair Insurance Code, despite setting out various voluntary obligations in respect of handling claims, did not impose a duty at law on insurers to adequately assess damage and scope repair works. The Code only requires insurers to process valid claims in a timely manner, which aligns with the obligations placed on insurers under the duty of good faith developed in decisions such as *Young v Tower Insurance Ltd*[3] Such a duty, whether under the Code or case law, does not include an obligation on insurers to conduct independent assessments of damage for insureds.

The High Court also held that it would be an over-reach to determine that such a novel duty existed without sufficient submissions or evidence before it, so this finding was set aside.

A return to fundamental principles

The High Court's decision should be of comfort to insurers, as it affirms long-standing, established principles of contract and insurance law which must apply in a specialist tribunal determining insurance claims. While the CEIT has a strong focus on allowing insureds to exercise their rights to be heard, the High Court emphasised that traditional legal principles remain determinative.

This case also serves as an important reminder that insurers who are unsuccessful in the CEIT have recourse to the Court. Under section 53 of the Canterbury Earthquakes Insurance Tribunal Act 2019, the CEIT also has a discretion to refer questions of law to the High Court for determination before the full matter is heard at the CEIT. The CEIT will be bound by the High Court's determination on those questions. As this is discretionary, however, options of appeal to the High Court and other appellate Courts will likely be the primary remedy for insurers.

With the Government's interest in potentially cheaper and more streamlined court processes in the face of increasing backlogs, we may see new specialist tribunals created in the consumer context along the lines of the CEIT. The decision in Degen sends a clear message to any other tribunals that their decisions must be grounded in traditional legal principles.

The decision should reassure insurers, as it serves as a strong reminder of the primacy of traditional insurance law concepts, which support certainty and predictability.

3 *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291.

Climate change litigation:

What the Supreme Court judgment in *Smith v Fonterra* means for insurers

Authored by Andrew Horne, Partner and Siobhan Pike, Solicitor

For insurers, new opportunities for litigation mean new types of risk. One developing area of litigation is the increasing number of court proceedings brought in an attempt to meet the global challenge of climate change.

Activists are increasingly turning to the courts to hold to account those perceived as directly or indirectly contributing to climate change. Actions are increasingly brought against national or state governments to challenge carbon reduction targets as inadequate or seeking to set aside specific decisions such as permits for new gas exploration or coal mines. There is an increasing risk of regulatory action against businesses accused of so-called "greenwashing" or making misleading statements about their climate credentials. More recently, there has been increasing shareholder activism and other forms of activist litigation against private companies.

New Zealand was recently the forum for a ground-breaking decision in the last of these categories. In February 2024, the Supreme Court issued its decision in *Smith v Fonterra & Ors*, a landmark judgment of international significance to large corporations and, by extension, their insurers.

The decision is important because it marks a rare success – albeit only at an interlocutory stage – by an activist litigant against a private, corporate defendant in a climate change case in a common law jurisdiction. It is likely to encourage activist litigation against corporate defendants relating to their carbon emissions or other aspects of their operations that may have an adverse

environmental or social effect. Attempts in other common law jurisdictions to bring similar cases have been struck out on the basis that they are legally flawed and have no prospect of success. This was initially the fate of the Smith case in the High Court (for two of three causes of action) and in the Court of Appeal (for all causes of action), until the Supreme Court overturned the latter decision and allowed the case to proceed to trial.

While such claims may not have much prospect of success at trial, the decision means that it will be more difficult for corporates to use the summary strike-out procedure to bring them to an end quickly and efficiently.

What the case is about

The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu and a well-known political activist. He claims that coastal land to which he has a traditional connection in Māori tikanga is threatened by the effects of climate change. His claim pleads causes of actions in the common law torts of public nuisance, negligence and a proposed new tort relating specifically to climate change. The defendants are seven private companies in the dairy, steel, petroleum and coal industries which Mr Smith claims are major contributors to greenhouse gas emissions. He seeks declarations that they are breaching duties they owe to him and orders that they make substantial reductions to the emissions he says they cause or contribute to.

The Court's decision to allow the case to proceed to trial does not mean that it is a strong case. A strike-out application under New Zealand law can only be made on the basis that even if the plaintiff was able to prove each fact alleged, the claim cannot succeed because it is legally untenable. Normally, claims are struck out because the facts alleged do not constitute a breach of a legal duty. The Supreme Court allowed the Smith claim to proceed on the basis that the defendants could not surmount the very high bar of showing that the claim could not possibly succeed even if all the facts alleged were proved. Nor does this mean that a legal duty of care on the facts pleaded exists – the Court found that this should be decided at trial once all the facts were known.

The judgment identified some likely challenges for Mr Smith at trial. One of these is a finding that the claims could only succeed if he proves that the defendants' actions amounted to a "substantial and unreasonable" infringement of his rights, which is a "significant threshold" only some emitters will cross. Those who merely drive cars or heat their homes, for instance, will not be caught. This creates an interesting distinction between those who drive cars or heat their homes and those who supply them with the fuel that enables them to do so, albeit the end result is the same. In any event, the Court held that whether the defendants' conduct exceeded this threshold could only be determined at trial.

A second challenge is that any remedies granted may be limited, even if a plaintiff could prove a breach of a legal duty. The Court indicated that the case might be legally untenable if Mr Smith had claimed money damages to compensate him for loss, as a "more conventional" approach might then be taken to the requirement for proof of causation. The declarations sought were a possible remedy, although his claim for injunctions also faced obstacles and the Court would tailor any injunctions with a view to their impact.

The fact that the claim has been allowed to proceed is significant, however, because it means that the defendants will now have to defend it in a High Court trial. The nature of the proceeding and the number of parties means that the trial could potentially be lengthy and costly to defend, as well as being high profile. Political activists – many of which are incorporated societies with no or limited assets – are not commonly in a position to pay defendants' legal costs if their claims fail.

In deciding to allow the claims to proceed to trial, the Supreme Court addressed some key issues that have implications for insurers.

> This ruling may encourage other activist litigants to bring novel climate change claims – and indeed other types of novel claims seeking political ends – even where the prospects of success may appear slim.

Novel activist claims may be harder to strike out

The Court ruled that the novel nature of the claims and the significance of the alleged harm was a factor counting against striking the claims out without a full trial. The Court reasoned that a full trial would mean that a decision could be made with the benefit of evidence and full argument.

This ruling may encourage other activist litigants to bring novel climate change claims – and indeed other types of novel claims seeking political ends – even where the prospects of success may appear slim. Novel claims are by their very nature attractive to political activists, who aim to change the status quo. The Court's reluctance to strike out the Smith claim because of its novelty may have a broader effect by encouraging litigants to believe that strike outs in political cases will be more difficult for defendants to achieve. As a result, insurers may be faced with funding defendants' legal costs in circumstances where claims might previously have been struck out at an early stage.

Compliance with regulatory schemes not a bar to activist claims

In *Smith v Fonterra & Ors,* the defendants argued that the courts should not recognise a possible duty in tort where Parliament had enacted a comprehensive regulatory regime for precisely the same thing. They relied upon the legislative regime for emissions and carbon credits in the Climate Change Response (Zero Carbon) Amendment Act as well as the regime for granting permission for uses of land under the Resource Management Act. The Court ruled, however, that a person who has been granted permission to engage in regulated conduct may nevertheless be challenged by a person who claims that the same conduct constitutes a breach of a private law duty of care. This may encourage activists who view legislative consenting regimes as inadequate and wish to challenge them.

Other possible claims

Some claims may be brought along the same lines as those in the Smith case, as claims in tort against companies and other entities that activists perceive as responsible for climate change or other effects that are viewed as undesirable. Others may be brought as shareholder derivative actions or on other legal grounds. We may even see attempts to bring private prosecutions alleging breaches of regulatory prohibitions such as those against 'greenwashing', although regulators are increasingly active – ASIC in Australia has issued three proceedings for alleged greenwashing by superannuation funds.[1]

In England, two climate activist cases were brought against company directors last year, alleging that they had breached their directors' duties by failing to address sufficiently the risks of climate change through the companies' operations: *ClientEarth v Shell plc*[2] and *McGaughey v Universities Superannuation Scheme Ltd*.[3] While neither succeeded, they illustrate the willingness of activists to bring novel actions. A director's duty to act in the best interests of the company in the Companies Act 2006 (UK) now includes mandatory ESG considerations, which underpinned these claims. New Zealand's new equivalent duty in the Companies Act 1993 does not go this far, only making ESG considerations voluntary, but there is scope for ambiguity in how much attention must be paid to these considerations.

Similar claims have been brought in Australia. In *Abrahams v Commonwealth Bank of Australia*,[4] the Federal Court of Australia granted orders permitting a shareholder access to internal documents to assess the bank's compliance with its environmental policies and commitments. In *McVeigh v Retail Employees Superannuation Trust*,[5] a pension fund member claimed that a superannuation trust had failed to disclose information about climate change-related business risks and plans to address them. The claim was withdrawn only after the trust agreed to implement climate targets and report its progress.

Considerations for insurers

Climate change litigation and other activist litigation is increasing. The rapidly evolving and unpredictable landscape poses challenges for insurers. This is particularly so where insureds are engaging in activities that have expressly been permitted but are claimed to be unlawful at common law. The re-purposing of traditional causes of action and novel claims and proceedings seems likely to continue as activists draw inspiration and learn lessons from litigation around the world.

Several types of liability insurance may be relevant. Classes of insurance likely to face heightened risk include public liability insurance, professional indemnity insurance and directors and officers or D&O insurance.

Insurers may consider introducing new exclusions relating to activist litigation. More significantly, they may review their coverage of companies that are viewed as likely to be subject to claims that are unpredictable. Insurance practitioners will need to stay abreast of developments in climate science, policy and law.

1 Mercer Superannuation (Australia) Limited, Vanguard Investments Australia and LGSS Pty Limited (ActiveSuper).

2 *ClientEarth v Shell plc* [2023] EWHC 1137 (Ch); *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch); and *ClientEarth v Shell plc* [2023] EWHC 2182 (Ch).

3 *McGaughey v Universities Superannuation Scheme Ltd* [2023] EWCA Civ 873, [2023] Bus LR 1614.

4 *Abrahams v Commonwealth Bank of Australia FCA* SD864/2021, 4 November 2021.

5 *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14; and *McVeigh v Retail Employees Superannuation Pty Ltd* [2020] FCA 1698.

Disclosure: MinterEllisonRuddWatts' Auckland and Wellington litigation teams separately represent two of the seven defendants in the *Smith v Fonterra* proceeding.

Lessons for insurers from the Whakaari White Island health and safety prosecutions

Authored by Amber Kim, Solicitor

The eruption of Whakaari White Island on 9 December 2019 was a shocking tragedy that resulted in the deaths of 22 people and life-changing injuries to another 25. Following the event, WorkSafe brought charges against 13 persons and companies under the Health and Safety at Work Act 2015. The last of the prosecutions concluded on 31 October 2023,[1] with sentencing of the guilty parties delivered in a judgment of 1 March 2024.[2]

Now that judgment has been delivered, we may reflect upon the lessons for insurers from the proceedings. Health and safety prosecutions impose increasing risks upon businesses and by extension, their insurers. The case highlights the financial risks associated with non-compliance, including substantial fines, potential reparations and defence costs. Furthermore, the successful defence of the charges by around half of the defendants may encourage businesses to defend WorkSafe prosecutions, potentially increasing defence costs for insurers. There are potential conflicts of interest to navigate.

1 *WorkSafe New Zealand v Whakaari Management Limited* [2023] NZDC 23224.

2 *Worksafe New Zealand V Whakaari Management Limited* [2024] NZDC 4119.

The decisions

WorkSafe brought charges against 13 defendants, including tour operators and the operator and owners of the island. By the end of the trial, Whakaari Management Limited (WML), the operator of the island on behalf of its owners, was the only party left in the proceeding, with six other defendants pleading guilty and six others having had their charges dismissed.

WML defended charges brought against it under sections 36 and 37 of the Act, which impose the following requirements:

- Section 36 requires employers to ensure, as far as is reasonably practicable, the health and safety of their employees.
- Section 37 requires an employer to take all reasonably practicable steps to ensure the safety of anyone who enters a workplace controlled by the employer, whether they work for the employer or not.

WML succeeded in having the charge under section 36 dismissed. Judge Thomas held that section 36 is applicable only to the employer's business activities and that WML did not carry out its business on the island – it authorised others to do so. Section 36 is generally only relevant to an employer's premises or premises where its employees are working.

However, Judge Thomas found that WML breached its duty under section 37 of the Act by not conducting a risk assessment before allowing tours to commence on the island. This was deemed a "reasonably practicable" step that could have informed WML of the risks of permitting tour activities and other steps that could be taken to manage the health and safety risk. The Judge emphasised that risk assessments should not only be conducted at the outset but also revisited and reviewed periodically.

WML argued that it had engaged with GNS Science, which monitors volcanic activity in New Zealand, and had received information about the island. Judge Thomas rejected this argument, finding that the section 37 duty remains with the person in charge of a business or undertaking or 'PCBU' and cannot be transferred. The information provided by GNS did not relieve WML of its obligation to conduct a risk assessment.

Judge Thomas imposed a fine of $1.04 million upon WML (less significant for insurers as health and safety fines cannot be insured in New Zealand) as well as reparation orders totalling $4.88 million (which is more significant to insurers as these can be insured). As the latter figure illustrates, health and safety reparations orders can be very substantial.

WorkSafe also charged WML's directors, who are also the owners of the island, under section 44 for failing to exercise due diligence to ensure that WML complied with its obligations.[3] These charges were dismissed due to lack of evidence about the individual roles and responsibilities of each director.

3 *WorkSafe New Zealand v Andrew Buttle and James Buttle and Peter Buttle* [2023] NZDC 18939.

Key takeaways for insurers

The "reasonably practicable" standard

The Court's explanation of the "reasonably practicable" standard in the context of a number of different parties with a variety of involvements is one of the key takeaways from the case. The Court found that the defendants could have taken additional steps to prevent harm, even though they had put safety measures in place. While this is a development of existing law, and whether a defendant took all reasonably practicable steps will depend upon the circumstances of each case, the judgment indicates that the courts will take an exacting approach to parties that claim to have taken all reasonably practicable steps.

For insurers, this means that insured businesses must undertake comprehensive and thorough risk assessments. It will not be sufficient merely to have safety measures in place; they must do everything that is reasonably practicable. This will include taking the necessary steps to identify everything that can reasonably be done and by putting all such safety measures in place, along with regularly reviewing and updating these measures. Insurers may wish to take a proactive approach to ensure that insured businesses are taking these necessary steps.

Reparations

The Whakaari White Island proceedings serve as a reminder of the potential for insured financial liabilities associated with breaches of health and safety regulations.

While the fines imposed by the Court were substantial, that is not a direct risk for insurers, as fines under the Act are not insurable. Of more significance were the substantial reparations orders, as liabilities for reparations are commonly insured. The Court ordered reparations totalling more than $10 million.

White Island Tours had insurance cover for up to $5 million for reparations, so Judge Thomas increased its share of the overall reparation liability to $5 million, noting that the insurance cover was the most reliable source of funds for victims and should be maximised. This results in the somewhat curious outcome that reparations orders were made not solely by reference to culpability but also by reference to ability to pay. It is difficult to see what, if anything, insurers can do to reduce the risk that their insureds may be found liable for increased amounts by reason only that other liable parties are not so well insured. That is also the outcome in tort claims where joint tortfeasors contribute to a loss, so insurers will be familiar with a similar principle.

Costs of defended health and safety trials

The Whakaari White Island case was noteworthy for the relatively high degree of success by the defendants. Defendants in health and safety prosecution often enter early guilty pleas and pay fines and reparations for commercial reasons and to achieve sentencing discounts (i.e. reduced fines). Prosecutions are seldom fully defended. However, the defendants in the Whakaari White Island case achieved an unusual degree of success, with the dismissal of charges against nearly half of them. This may encourage defendants in similar proceedings to defend charges brought against them, where the same considerations apply.

Health and safety prosecutions can be expensive to defend, particularly when they arise from incidents involving multiple parties and significant harm, such as in the Whakaari White Island case. Such cases often require extensive investigation, expert evidence and legal representation, all of which contribute to defence costs. Insurance policies typically provide cover for these defence costs, while not providing cover for fines.

This has the potential to create a divergence of interests between insurers and insureds. While insurers can be expected to defend cases on a principled basis, insureds will be conscious of who will be paying the relevant costs and liabilities. It may be in insurers' interests to settle a case quickly and avoid incurring insured defence costs, when the outcome will be that the insured will pay an agreed fine which is uninsured. Insureds may have the opposite motivation, however – they may be motivated to defend cases if they may be defendable, as their insurers will pay their defence costs but will not cover liabilities for fines. Where reparations liabilities are concerned, however, insurers have a reason to defend claims for reparations where they may be able to do so, as reparations liabilities are commonly insured.

The Whakaari White Island case also raises a further complication, which is that the courts may prefer to impose larger reparations costs where defendants are insured, rather than impose fines that are not insured. It is conceivable that insurers may baulk at proposed agreed penalties that appear to inflate reparations liabilities to the benefit of reducing fines, where the former are insured and the latter are not. Insurers may wish to be vigilant against arrangements of this nature if they do not appear to be principled.

Case study

A flood and a dishonest insured

Authored by Craig Hallett, Solicitor

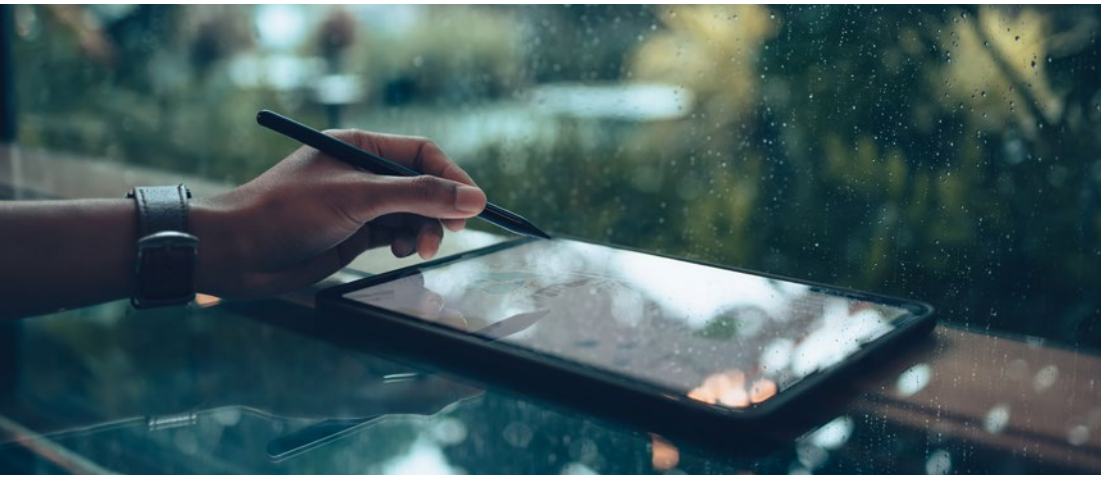
In the wake of the severe flooding event in Auckland on 27 January 2023, an insured whom the Insurance and Financial Services Ombudsman (IFSO) has decided to call "Mikey" (not their real name), made a fraudulent claim. Mikey's car needed repair to remedy the effects of wear and tear. After the flood, he made a claim upon his insurer for his mechanic's quoted costs, claiming – falsely – that the repairs were required to remedy flood damage.

Unfortunately for Mikey, he was found out. The insurer declared the car a total loss and advised that it would be notifying Waka Kotahi NZ Transport Agency to deregister it. Hearing this, the insured asked to withdraw his claim, saying that he did not believe there was internal water damage and that he thought the car, which he needed for work, could be repaired.

At this stage, it would have been open to the insurer to allow Mikey to withdraw the claim, but it smelled a rat and investigated further. The investigation uncovered an obvious discrepancy with the claim. The mechanic's assessment was dated 13 January 2023, which predated the flooding event. Furthermore, upon reviewing the assessment, it was evident that the damage was inconsistent with flood damage and more likely resulted from wear and tear.

The insurer declined the claim and advised Mikey that the outcome would be noted on the Insurance Claims Register (ICR). This was a disaster for him, because the ICR flag caused his home and contents insurer, which was a different insurer, to cancel his home and contents policy. Matters then went from bad to worse. In an attempt to get the flag removed, Mikey admitted that he had lied about his car being damaged in the flood. Unsurprisingly, instead of removing the flag, his insurer updated it, noting that the reason for the claim being declined was fraud. This would essentially bar Mikey from taking insurance in the future, as all major insurance providers in New Zealand are members of the ICR scheme and flagged claims remain on it indefinitely.

Case study:
A flood and a dishonest insured



Mikey lodged a complaint with the IFSO, complaining that he could not obtain insurance for his house and arguing that his insurer lacked empathy. The IFSO rejected the complaint, finding that Mikey's deliberate misleading of his insurer justified it declining the claim and that the IFSO could not prevent the insurer from placing a flag on the ICR.

Insurers will no doubt take the view that this case is a useful example of the ICR doing precisely what it is intended to do and that Mikey was the author of his own misfortune. The case does, however, highlight several considerations that insurers may want to bear in mind.

An ICR notification may have dire consequences, so insurers must be sure of their ground. While Mikey admitted fraud, other circumstances may be less clear. Insurers must be confident before placing a flag on the ICR and must be absolutely factual in doing so. Incorrectly flagging a claim or doing so in terms that cannot be substantiated – or even in terms that raise an implication that cannot be substantiated – may risk an aggrieved policyholder bringing a claim in defamation for resulting loss or damage. While there are defences for statements made in an honest belief or for a proper purpose, these depend on the specific circumstances. Losses could be substantial if an insured holds or requires other policies such as a house policy or business insurance to obtain or retain finance.

Policyholders may have other remedies: Privacy rights and obligations are becoming increasingly important and penalties for misusing private information are increasing. As the ICR contains information "about" policyholders, it is subject to the Privacy Act 1993. Policyholders are entitled to request and, if necessary, correct their ICR records. Insurers may also be liable for any use of the ICR that constitutes a breach of the Act.

ICR flags require consent in policy wordings: The consequences of a fraud flag on the ICR, while potentially disastrous for policyholders, are legitimate provided that the insured consents to their claims information being listed on the ICR. Insurers should ensure that their policy wordings contain appropriate ICR consent clauses.

Policyholders should be made aware of the ICR and its consequences for them. It is in insurers' interests that the existence of the ICR and the consequences of fraudulent or even dubious claims are widely known. Insureds may be less inclined to risk making a less than truthful or even a downright fraudulent claim if they are aware that this may prevent them from raising funds to purchase a house or other property for which insurance will be required. While 'boilerplate' ICR consent clauses are commonplace in insurance policies, many policyholders may be unaware of the ICR and the potential consequences of misleading their insurer. Ensuring policyholders are informed of these risks could be an effective deterrent against fraudulent claims.

Case study

IFSO upholds a complaint based on an insurer's failure to notify

Authored by Charlotte Wong, Solicitor

The Insurance and Financial Services Ombudsman (IFSO) has upheld a complaint against an insurer made on the basis that the insurer failed to do enough to bring an important change to a policy term to the insured's attention upon renewal. The decision is an important reminder to insurers that they cannot rely upon changing policy terms upon renewal unless they take reasonable steps to bring important changes to their insured's attention.

What happened

A couple returned home from holiday to find that their house had been broken into and a number of items stolen. They made a claim on their house contents policy, but the insurer declined the claim. This was because of a condition in the policy which required the house to be securely locked when unattended. The insureds had not complied with the condition, because while they had been on holiday, they had left a window open, albeit partially secured by security stays.

However, this was a new condition. The insureds' original policy had not included it. In May 2020, their policy had migrated to a new policy which included the new condition. At that time, the insurer had provided them with a renewal notification which contained a policy comparison table, but the table did not mention the addition of this condition.

What the IFSO said

The IFSO noted that the starting point for policy interpretation is that it is generally up to the insured to read and understand the terms and conditions of their policy. However, in this case, the condition was unusual amongst insurers, and other insurers tended to cover claims where the insured had unintentionally left a window unsecured. The condition was therefore unusual and onerous.

The IFSO decided that, when inserting such a condition into a policy, there is a duty on the insurer to notify the insured of its existence. The steps the insurer had taken – providing an updated policy schedule in May 2020 but otherwise not drawing the condition to the insureds' attention – was not adequate notification. The insurer was therefore not entitled to rely on the insureds' failure to observe this condition to decline the claim.

Lesson for insurers

This decision is a useful reminder for insurers of the importance of notifying insureds as clearly as possible of any material changes to the terms of their cover. Insurers should be mindful of the duty of notification when adding conditions to policies that exclude or limit cover.

These could be relevant, for instance, in recent changes that insurers have made, such as introducing new exclusions for communicable diseases or cyber-attacks. The COVID-19 pandemic saw many insurers introduce communicable disease exclusions into their business interruption policies. Similarly, a recent rise in cyber-attacks has prompted insurers to limit coverage for such attacks by introducing increasingly complex conditions, such as the need for multi-factor authentication.

The IFSO indicates that the duty operates on a sliding scale – the more onerous and/or unusual the proposed condition, the more extensive the duty to bring it to an insured's attention. Providing insureds with a document summarising any changes, their significance and possible impact, accompanied by the wording of the new provision, will be a prudent step. Naturally, any such summaries must include all important changes and must not omit any upon which the insurer may wish to rely.

Trustees' liabilities:

The risks of trading trusts

Authored by Tayla Robinson, Solicitor

A recent decision of the High Court has identified a little-known risk for professional trustees. Trustees and their insurers will be well advised to consider the activities of the underlying trusts as a result of this judgment.

Most professional or independent trustees accept appointments to trusts that exist to hold and administer portfolios of assets. These trusts do not operate businesses directly, but hold shares in companies that operate businesses, or hold other assets such as shares or real property. The primary work of the trustees of these investment trusts is to ensure that the assets are invested and managed in the best interests of beneficiaries.

Some trusts, however, are so-called 'trading trusts' which operate businesses directly. Where this is the case, the trustees undertake wider obligations than trustees of investment trusts, as they are more directly responsible for the activities of the businesses.

Worksafe v RH & Jury Trust

The risks to which trustees of trading trusts are exposed were recently illustrated by the decision of the High Court in *Worksafe v RH & Jury Trust,* released in late December last year. The case involved a tragic incident

in which a child was fatally injured after his clothing became entangled in a piece of farm machinery. The farm was owned by the trustees of the RH & Jury Trust, and farming operations were carried out in the trust's name. One of the trustees was a professional trustee firm, Perpetual Guardian.

Worksafe, having investigated the tragedy, charged both the Trust and the individual trustees with health and safety offences under sections 37(1), 48(1), and 48(2)(c) of the Health and Safety at Work Act (Act). In the initial proceedings in the District Court, the Judge dismissed the charges, ruling that a Trust was not a 'person' within the context of the Act and that the trustees could not be charged as a single "person in charge of a business or undertaking" or PCBU. Worksafe appealed this finding to the High Court, having taken the view that the relevant failings were governance deficiencies that sat with the Trust rather than with the individual trustees. The High Court confirmed that the Trust was not a "person" and could not therefore be charged, but found that, contrary to the decision of the District Court, the individual trustees as a collective were a "body of persons...unincorporate" and were therefore a "person" for the purposes of the Act and could be charged as such.

The effect of this decision was that trustees of a trading trust could be charged jointly as a PCBU and thereby held liable for fines and reparations for workplace accidents. The Court held that a breach would be the trustees' collective responsibility so that criminal liability would be apportioned jointly to each of them. This is a significant concern to professional trustees who are not well placed to monitor health and safety compliance within businesses.

Fortunately for the trustees, the High Court also held that they were not barred from claiming upon their trustees' indemnity from the trust assets for fines imposed upon them. They were not affected by the statutory prohibition upon indemnities for fines imposed under the Act, in section 29 of the Act. This was because the prohibition applies only to indemnities given by a "person", and a trust has no separate legal existence and is not therefore a "person" for the purposes of the Act. The Court observed, however, that whether a trustee will be indemnified will depend on the specific facts, the trust deed and the general law of trustee indemnity.

What this means for trustees and insurers

This decision may have far-reaching implications for trustees of trusts that operate businesses, particularly in sectors where health and safety risks are significant. It confirms that businesses cannot avoid their health and safety liabilities by structuring their operations to be run through trusts that have no separate legal existence from their trustees.

Professional trustees may wish to consider carefully whether they wish to become exposed to the obligations and potential liabilities that accrue to those who operate businesses essentially in their own names, albeit with recourse to the trust assets. Some professional trustees may prefer not to accept appointment to trading trusts.

This decision also carries implications for trustees' insurers. Insurers may wish to consider whether they request more detailed information from trustees who seek trustees' insurance or other liability insurance as to the nature of the trusts to which they are appointed. It should also be noted that the decision also confirmed that trustees face a maximum fine of $1.5 million, which is much larger than the maximum fines available for individuals ($150,000 for persons who are not PCBUs and $300,000 for PCBUs).

The High Court observed that one of the purposes of the Act is to secure compliance with it through effective enforcement. The Judge accepted that, as a matter of policy, trusts should be capable of being prosecuted as they are commonly used to run businesses and that prosecuting trusts would reflect the collective nature of trustees' decision-making. While His Honour considered that this argument had merit, he noted that it would need to accord with the text of the Act, and it did not.

This decision paves the way for potential liabilities and resulting liability insurance claims that were previously not considered. As a result, it may be necessary for trustees and their insurers to consider the nature of the trusts of which they are trustees and to review and consider insurance policies to align with the implications of this case. Trustees of trading trusts should be fully aware of their responsibilities and the potential liabilities that could arise.

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