IN THE COURT OF APPEAL OF NEW ZEALAND

CA734/2013
[2015] NZCA 283

BETWEEN	HHR CHRISTCHURCH NTL LIMITED Appellant
AND	CRYSTAL IMPORTS LIMITED First Respondent
AND	ALLIANZ NEW ZEALAND LIMITED Second Respondent

Hearing:	25 February 2015
Court:	Harrison, Wild and White JJ
Counsel:	J B M Smith QC and J L W Wass for Appellant Z G Kennedy and I Rosic for First Respondent V S Cress for Second Respondent
Judgment:	2 July 2015 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS

Harrison and Wild JJ [1]
White J [66]

HARRISON AND WILD JJ

(Given by Harrison J)

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Introduction

[1] This appeal against a summary judgment entered in the High Court raises the issues of whether the parties to a contract of material damage insurance unarguably (1) intended that its terms should also insure a third party's interest in a hotel building destroyed in the Christchurch earthquake or (2) are estopped from denying that the third party's interest is insured.[1]

Background

[2] In 2006 Crystal Imports Ltd (Crystal) acquired a property in central Christchurch on which the four storey Warner's Building was located. The top three floors were used for hotel accommodation known as Warner's Hotel; the ground floor contained a bar known as Warner's Bar. Shortly after acquisition Crystal entered into a long term agreement to lease the land and Warner's Building to AAPC

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1 *Crystal Imports Ltd v Allianz NZ Ltd* [2013] NZHC 2566, (2013) 18 ANZ Insurance Cases ¶62-019 at [7].

NZ Pty Ltd (Accor) while retaining occupation of the ground floor. Accor then constructed the Novotel Tower on the balance of the land.

[3] Accor operated the Novotel and Warner's Hotel (excluding the bar) as an integrated entity under the Novotel brand. Shortly before the 22 February 2011 earthquake Accor sold the Novotel to HHR Christchurch NTL Ltd, part of the Host Group, and assigned its leasehold title to Warner's Hotel to the same party. In the result Host owned the Novotel; and Crystal retained ownership of the Warner's Building subject to Host's leasehold interest. As Venning J observed in the High Court, in practical terms Crystal only retained outright ownership of Warner's Bar.[2]

[4] Accor and Crystal initially maintained separate policies of material damage insurance for their respective ownership interests. Crystal insured the Warner's Building with NZI for full reinstatement value of $11.89 million while Accor extended its existing special risks policy for its New Zealand asset portfolio with Allianz to cover its leasehold interest in Warner's Hotel.

[5] In March 2009 Accor confirmed to Crystal that Warner's Hotel was covered under its policy for its full value and that the policy noted Crystal's interest as a lessor and interested party. Crystal arranged cover only for Warner's Bar with Lloyds for 2010 and 2011 but did not renew its own insurance with NZI for the Warner's Building.

[6] Allianz's policy for the period commencing 1 January 2011 insured Accor's interest in Warner's Hotel for full replacement value. Crystal was noted in the schedule of insured parties as a financier. The policy cover was expressly extended to Host following its acquisition in December 2010 of the Novotel and Warner's Hotel for $38.5 million. On 11 February 2011, just before the Christchurch earthquake, Allianz issued to Host's Australian solicitors a certificate that Crystal's interest was amongst those included under the policy. Host's solicitors forwarded a copy to Crystal.

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2 At [7].

[7] The Warner's Building was substantially damaged in the earthquake and later demolished. Crystal made a claim under the Allianz policy for the cost of reinstating the building. Allianz met Crystal's claim for demolition costs of $260,000 plus GST and consequential losses but declined to pay any further claims because Host disputed Crystal's right to indemnity. Host claims it is solely entitled to the settlement proceeds of a claim for the reinstatement value of Warner's Hotel. While Allianz supports Host's position, it adopts a neutral stance similar to a stakeholder pending determination of the competing claims for indemnity.

[8] Crystal successfully sought summary judgment in the High Court on two declaratory claims: first, that its interests as lessor and owner of Warner's Hotel were insured under Allianz's policy; and, second, that Host and Allianz were estopped by the insurance certificate from denying Crystal's interests in the hotel were insured. Host appeals against the entry of summary judgment on both claims.

[9] In this respect we record that counsel addressed full argument on both claims. We have assumed that Crystal will be content if it retains summary judgment on either claim. However, like counsel, we shall address both claims fully against the contingency that our assumption is wrong and that the parties' respective positions will be materially affected by our conclusions on each claim.

[10] A subsidiary dispute remains outstanding for trial about the nature and value of Crystal's interest and how the proceeds of settlement are to be divided if Crystal is entitled to claim an interest.

Principles

[11] It is unnecessary for us to rehearse again at appellate level the applicable principles of contractual interpretation applicable to Crystal's first claim based on Allianz's policy. In short, we must determine whether the plain words of the text of the policy disclose that Host and Allianz – the principal parties to the contract – unarguably agreed to insure Crystal's interests in Warner's Hotel.[3] The question is to be approached objectively by deciding what a reasonable person in possession of the

[3] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447, [2015] 2 NZLR 24 at [18].

background facts known to those two parties would have understood was their mutual intention as reflected by the words used.[4] Here the relevant context is found in the agreement to lease and to a lesser extent in correspondence passing between the parties.

[12] It is also unnecessary for us to rehearse the principles relating to entry of summary judgment. It is common ground that Venning J correctly required Crystal to prove that there was no arguable basis for Host's assertion that Crystal's interests in Warner's Hotel were not insured under the policy; and that Host and Allianz are unarguably estopped from denying that Crystal's interests were so insured. The question is whether the Judge erred when applying those principles.

Context

[13] The agreement to lease entered into between Accor and Crystal in September 2006 provides the contractual framework within which the respective insurance obligations of those parties must be assessed. Accordingly it is the appropriate starting point for our analysis.

[14] In particular we note that: (1) the lease was for an initial term of 52 years to expire on 1 September 2059 but if rights of renewal were exercised it would expire on 5 September 2083; (2) a premium of $3.75 million was payable plus an annual rental fixed according to a room occupancy rate formula at about 3.7 per cent of income; (3) Accor's obligation to pay outgoings was limited to rates, utilities, taxes and local body expenses and maintaining full reinstatement insurance for its improvements and public risk cover; and (4) in the event of damage or destruction to the hotel, Crystal was not obliged to repair or reinstate and Accor had no right to call for either result and there were no rights of re-entry or rent abatement.

[15] Mr Kennedy for Crystal accepted that the lease did not oblige Accor to insure the company's interests as owner or lessor of Warner's Hotel. Each party was responsible for insuring its separate interests. Both counsel accept that the agreement is akin to a ground lease. Crystal surrendered control of the hotel except

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[4] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].

for Warner's Bar and, apart from its entitlement to rent, its interest as owner was of a limited reversionary nature which was unlikely to be of significant value when the final renewed term expired.

[16] Venning J recited some of the extensive correspondence between Accor and Crystal, mainly for the purpose of setting the factual narrative. Allianz was not a party to the correspondence but it shows that Accor and Crystal were never in accord about responsibility for insurance arrangements. It appears that for an initial period Crystal arranged its own material damage cover for the Warner's Building with NZI; that Accor refused to meet Crystal's demand to pay a portion of the premium due under that policy; that Accor's view expressed to Crystal was that it was not obliged to insure Crystal's interest; and that from 2009 Accor arranged insurance with Crystal's interest noted as lessor.

[17] Venning J concluded from the exchanges of correspondence as follows:

> [45] … Both Crystal and Accor acknowledged the ambiguity in the existing lease as to whether Accor was obliged to maintain insurance for Crystal's interest in Warner's Hotel. They took differing views as to Accor's obligations under the lease regarding Crystal's interest. Accor flatly refused to pay insurance premium invoices submitted by Crystal to it. However Accor insured Warner's Hotel. In doing so, Accor and/or its brokers had, at times, noted Crystal as an interested party and communicated that to Crystal.

[18] In our judgment the correspondence is material in two other respects. First, it may assist in determining whether Accor and Crystal entered into an agreement collateral to the lease that the former would arrange insurance for the latter's interests in Warner's Hotel. A claim to this effect evolved into one of Mr Kennedy's primary arguments on appeal. However, Crystal has not sought relief against Accor or pleaded a collateral agreement or its breach. If it had taken this step, the company would face difficulties. For example, it would have to show consideration in the nature of an undertaking to contribute towards Accor's premium payments for Warner's Hotel.

[19] Second, the correspondence is relevant to Crystal's claim of estoppel based on Allianz's insurance certificate, the alternative ground for summary judgment which we shall address later.

(1) Policy Claim

(a) Relevant provisions

[20] It is appropriate to examine the text of the policy against this factual background on what is common ground that Allianz agreed to insure Warner's Hotel for its full replacement value. The issue is: whose interests did Allianz agree to insure?

[21] The policy recited that:

> WHEREAS the Insured named in the Schedule has paid or agreed to pay to the Insurer … the premium, the Insurer agrees … to indemnify the Insured as specified herein against loss …

[22] The Insured was described in the policy as "the Accor Group" including but not limited to a large number of named companies and those:

> **As more fully described in the schedule titled *APPENDIX 1* attaching to and forming part of the Policy.**
>
> Including owners of managed properties, owner operators of franchised properties, body corporate and/or subsidiary or controlled companies (where applicable) now or previously existing or hereafter formed or acquired.
>
> Including mortgagees, lessees and other interested parties for their respective rights and interests.
>
> **As more fully described in the schedule titled *APPENDIX 1* attaching to and forming part of the Policy.**

[23] The Schedule of Insureds in Appendix 1 listed five separate corporate groups within Accor and their subsidiaries and identified their interests in a number of specified hotels and accommodation providers, together with a miscellaneous category of hotels and companies within the group. Also specifically listed under the heading "Host group" were three HHR companies within that group together with hotels which they had acquired as follows:

APPENDIX 1
Schedule of Insured's

Hotel	*Owner/Lessee*	Operator / Operational Lessee	Head Lessee	*Financiers*
…				
HOST GROUP				
Novotel & Hotel Ibis Ellerslie	HHR Auckland Limited			
Novotel Christchurch Cathedral Square *Warner's Hotel*	HHR Christchurch NTL Limited			HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited, *Crystal Imports Pty Limited*, BNZ Bank as Mortgagee
Ibis Christchurch	HHR Christchurch IB Limited			HHR New Zealand Holdings Limited, HHR Christchurch IB Limited, BNZ Bank as Mortgagee
[Other Host-owned hotels follow]				

(Emphasis added.)

[24] Host's evidence is that as a term of its acquisition of Accor's New Zealand hotels Allianz allowed Host to participate as an insured party in Accor's policy. The relevant part of Appendix 1 must have been included after December 2010 on terms specified at Host's request.

(b) High Court

[25] In summary, Venning J concluded that Crystal's interest as lessor of Warner's Hotel was insured under Allianz's policy for these reasons:

(1) Crystal fell within the extended category of insured parties described as "owners of managed properties" because Accor managed Warner's Hotel, an insured property specifically listed in Appendix 1.[5]

(2) However, if Crystal did not fall within that category of insured parties, it was within the group separately described as "mortgagees, lessees and other interested parties for their respective rights and interests" because of its interest in the property as lessor.[6]

5 At [60]–[63].
6 At [61], [65] and [69].

(3) It did not matter that Appendix 1 did not record Crystal as owner of Warner's Hotel[7] because the reference within the definition of insured parties to those "as more fully described in the schedule titled Appendix 1" was a description of interests rather than a requirement for an express reference to a particular insured.[8]

(4) While a statement within a policy that it covers the interests of both the insured party and named third parties does not itself entitle the third party to enforce the policy or rely upon its terms, this was a composite policy. The instrument effectively created a bundle of separate contracts between the insurer and the insured including Crystal because Accor and Host had authority to arrange insurance for Warner's Hotel.[9]

(5) Allianz's certificate issued to Host, which was then passed on to Crystal's solicitors, recorded the latter's interests as being insured.[10] The certificate is consistent with the policy's identification of Crystal as an insured party.[11]

(c) Appeal

[26] Mr Smith QC for Host submitted that Venning J erred in a number of respects in entering summary judgment. In particular, he submitted that the Judge failed to have proper regard to the context and recognise that Crystal's application was not appropriate for summary judgment; focussed on particular words in the policy in isolation from the balance of the contractual terms; and misinterpreted the relationship between the general provision of the policy, which introduced the insured parties, and the specific schedule of insureds which identified those entities actually entitled to cover under the policy. In Mr Smith's submission Crystal did not fall within the generic words of the introductory clause and did not qualify as the "owner of a managed hotel"; and the Judge erred in effectively concluding that

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7 At [60] and [65].
8 At [65].
9 At [66]–[67].
10 At [72].
11 At [76] and [78].

Accor and Host acted as Crystal's agent with authority to arrange insurance on the latter's behalf.

[27] Mr Kennedy supported the judgment and its reasoning. In his submission we should give primary weight to the text of the policy. On this approach the language used, when construed in the context of the policy as a whole, has the ordinary and usual meaning for which Crystal contends. He relied upon Venning J's assessment of the relevant factual context and conclusion that the context begged the question of fact of whether Crystal's interest was insured.

(d) Decision

[28] As we shall explain, we agree with Mr Smith that Crystal's claim based on the policy was not suitable for summary judgment. We are satisfied that the policy is materially ambiguous or unclear and there are arguable differences between the parties on its construction which are likely to require factual findings. Thus we can state our reasons for respectfully differing from Venning J with reasonable brevity.

[29] Before doing so we repeat that the issue of whether the policy reflects an intention shared by Host and Allianz to insure Crystal's interests as lessor of Warner's Hotel must be considered against the relevant background. We are satisfied that the lease did not oblige Accor or its assignee, Host, to insure Crystal's interest in the property. Crystal was aware throughout that Accor denied its contention that it was bound to insure Crystal's interest. Within that context Accor consistently advised Crystal that its interest was noted on Accor's material damage policy only as a lessor. We accept, however, Mr Kennedy's distinction between the different roles played by Accor and Host which assume more significance on the estoppel claim.

[30] Our reasons for disagreeing with Venning J are as follows.

[31] First, in our judgment the plain purpose of the policy as ascertainable from its terms and structure is to limit indemnity to the interests of the Accor group of companies only subject to its express extension to Host and its subsidiaries as "owner/lessee" of various properties. While Warner's Hotel is listed as one of those properties, the policy cover is specifically limited to the named parties, Accor and

Host. Crystal was not identified anywhere within the defined category of insured parties or of owners or lessees of an insured property. It is referred to Schedule 1 in error as a financier.

[32] Arguably the reference to "owners of managed properties", again within this context, was to the leasehold ownership interest of companies such as Accor or Host. Crystal was not the owner of a "managed property" because it was the Warner Hotel that was managed and Host owned the leasehold interest in it. However, we agree with Mr Smith that, if Crystal was the owner of a managed property, that is not enough to necessarily bring it within the extended inclusionary meaning of "owners of managed properties". When that phrase is read within the context of the description of "the Insured", we are satisfied that the reference was arguably to the named parties which owned managed properties, whether nominated within the definition or within Schedule 1.

[33] In this respect we do not share Venning J's rejection of Mr Smith's emphasis on the policy's recital that "the Insured named in the Schedule has paid … the Insurer … the premium" and Allianz's agreement to indemnify in exchange. Orthodox principles of contractual formation apply to a contract of insurance. Mutual promises to pay a premium and to indemnify against a loss are at its heart. The policy reference suggests that cover is limited to parties who have contributed towards the premium, either directly or indirectly through the medium of a transaction including consideration passing from an assignment of ownership interests in insured property.

[34] Second, the description of "mortgagees, lessees and other interested parties for their respective rights and interests" does not necessarily assist Crystal. It was neither a mortgagee nor a lessee. And while Crystal had an interest in the hotel, it was not an interest that was "more fully described in the schedule". The fact of Crystal's financial interest in the hotel, which was incorrectly noted under the heading "Financiers", did not elevate it to the status of an insured party. Contrary to the Judge, we are satisfied that the phrase "as more fully described in the schedule titled Appendix 1" did require an express reference to a particular insured within the Accor or Host groups.

[35] Third, we agree with Venning J that this was a composite policy. The phrase "their respective rights and interests" is regularly used in such instruments to refer to the number of parties whose interests are combined interests under one policy for convenience.[12] However, that fact does not advance the inquiry into whether the policy includes a discrete contract between Allianz and an identified third party. On one arguable interpretation the policy does no more than note or record the existence of Crystal's interest in the property. But, as Mr Kennedy accepted, that does not render Crystal a co-insured party.

[36] We agree with Venning J that the mere fact that a policy states it covers the interests of both the insured and a named or identifiable third party does not of itself give the third party a right to enforce the contract or rely upon its terms. Such a right must arise, materially for these purposes, from the operation or rules of agency. We also agree with him that, relevantly, Host had authority to negotiate insurance for Crystal's interests in Warner's Hotel.

[37] However, that begs the question of whether Host did in fact arrange that cover. We shall address that issue more fully when considering Crystal's estoppel claim. But for these purposes the existence of Host's agency does not assist in determining whether the terms of the policy confirm its arrangement of insurance for Crystal as principal.

[38] Fourth, we accept Mr Smith's submission that the provision of Allianz's 2011 certificate does not assist in determining whether Crystal's interests were covered under the policy. As its name indicates, a certificate of insurance is intended to certify what is in the policy. It cannot therefore alter or extend the policy's terms, especially where as here the certificate was subject to the "terms, conditions, definitions, limitations and exceptions noted therein".[13] We shall revert to the certificate, because it is the basis for the estoppel claim.

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12 See *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc* [2015] NZSC 59 at [107]–[110].

13 See *Recreational Services Ltd v QBE (International) Ltd* HC Auckland CIV-2004-404-7111, 14 September 2005 at [26].

[39] Accordingly, we are satisfied that Venning J erred in entering summary judgment on Crystal's claim for declaratory relief under the policy. However, this conclusion is not determinative because we must now consider Crystal's alternative claim of estoppel.

(2) Estoppel Claim

(a) High Court

[40] Venning J separately found that Allianz and Host were estopped by Allianz's 2011 insurance certificate from denying that at the time of the earthquake Crystal's interest in Warner's Hotel was insured under the policy. The Judge relied on the factual background, starting with a letter of inquiry from Crystal's solicitors, Cavell Leitch, to Host's Australian solicitors on 10 February 2011. The letter advised:

> Could I also trouble you for a copy [of] the insurance Host will put in place for the Novotel and Ibis hotels.
>
> My client [Crystal] will be keen to see that there is a seamless transition during the assignment so that the properties are not uninsured at any time.

[41] On 11 February Accor's New Zealand based broker emailed its Australian counterpart, requesting a certificate for "landlord consent" to "make sure we have Crystal … as a named insured as they are part owners of the Hadley's pub that forms part of the Novotel Christchurch which we have as part of the overall placement". Shortly afterwards the broker requested Allianz to issue a certificate of insurance for the Novotel Christchurch, stating that:

> … the Insured name is to be as follows:
>
> Novotel Christchurch
>
> Named Insured: Accor Group and all other related subsidiaries, including … Crystal Imports Pty
>
> Interested party: BNZ Bank

[42] Later on 11 February Allianz issued a certificate to Accor's broker that its policy "is current for the period specified [1 January 2011 to 1 January 2012] and is issued in accordance with the terms, conditions, definitions and exceptions noted therein" and that the interests insured in the "Novotel Christchurch" included:

HHR New Zealand Holdings Ltd, HHR Christchurch NTL Ltd and Crystal Imports Pty Ltd.

[43] On 14 February Host's Australian solicitors provided Cavell Leitch with a copy of Allianz's certificate to Crystal. On 18 February Crystal, Accor and Host entered into the deed of assignment of lease.

[44] Venning J correctly identified the elements which Crystal had to prove to establish an estoppel by representation were that:[14] (1) Accor and Host had created a belief or expectation through some action or representation that Crystal's interests in Warner's Hotel was insured; (2) Crystal's belief or expectation was reasonably relied on; (3) Crystal would suffer detriment if the belief or expectation were departed from; and (4) it would be unconscionable for Accor and Host to be allowed to depart from that belief or expectation.

[45] Venning J was satisfied that Crystal had proved all of these elements beyond argument. In his judgment Allianz's issue of the certificate and Host's passing it on to Crystal constituted a representation by Allianz to Crystal.[15] The certificate confirmed on its face that Crystal was an insured party and Allianz should have been aware it would or could have been provided to Crystal as a named insured. The certificate went further than simply confirming the currency of the insurance by expressly identifying Crystal as an insured party.[16] It was also reasonable for Crystal to rely on the certificate provided in response to its inquiry.[17] Furthermore, Crystal did in fact rely on the certificate.[18] And unarguably Crystal would suffer loss or detriment if the other parties were permitted to depart from the representation, which would also be unconscionable.[19]

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14 At [83].
15 At [92].
16 At [92].
17 At [92].
18 At [93].
19 At [94]–[95].

(b) Further factual narrative

[46] Mr Smith challenged all steps in the Judge's reasoning. However, before addressing his submission we must refer to some further correspondence preceding 10 February, Venning J's starting point. Otherwise the picture is incomplete.

[47] On 24 January 2011, in answer to Accor's request for consent to its proposed assignment to Host, Cavell Leitch advised that Crystal would consent only if the lease was varied. The firm sought to impose an express obligation on Accor as lessor and Host as assignee to maintain full reinstatement insurance on Warner's Hotel excluding the ground floor. A draft amending provision to this effect was included.

[48] However, on 26 January Cavell Leitch wrote again, advising of its revised opinion that an amendment was not now required. On Cavell Leitch's construction of the lease Accor was legally responsible for insuring Warner's Hotel. In response Accor advised that it was content to leave issues as they were and for any differences of construction of the lease to be decided if necessary at a later date.

[49] On 8 February Cavell Leitch wrote again to Accor. The firm advised that Crystal would not consent to the assignment unless and until Accor paid Crystal's demands for its apportioned share of the insurance arranged for the Warner's Building with NZI for periods dating back to July 2008. In summarising previous correspondence, the firm recited Accor's opinion that it "may have insured the existing building in the past but is not obligated to do so". Crystal was demanding $10,720.24 plus GST for the period ending on 5 March 2009 on the premise that beforehand Accor failed to meet its insuring obligations for the Warner's Building. On that date, Cavell Leitch asserted, Accor had provided a copy of its material damage policy to Crystal confirming compliance with its obligation.

[50] Accor immediately responded, disagreeing with Cavell Leitch's construction of the lease. Accor denied an obligation to insure Warner's Building but stated it *had* nevertheless so insured it "since the date possession was provided under the lease". Accor alleged that Crystal's refusal to consent to the assignment was unreasonable

and gave notice that it would hold Crystal liable for any losses and claims suffered on transactions involving $190 million.

[51] The next day, 9 February, Cavell Leitch advised Accor that Crystal would execute the assignment documents "leav[ing] the insurance issues to the side". The firm stated that it required Accor to sign an amendment to the lease different from the one previously proposed before Crystal would formally consent.

[52] Host then entered the picture. Its involvement started with Cavell Leitch's letter on 10 February, on which Venning J placed reliance, which opened with a request to Host's Australian solicitors for "a copy of the insurance Host will put in place for the Novotel … Hotel".

(c) Decision

(i) Representation

[53] We must analyse Host's appeal against the background of this expanded factual narrative. As Mr Kennedy emphasised, Crystal's separate dealings were with two different parties, each with different legal consequences. Crystal's communications with Accor about consenting to the lease to Host reaffirmed the parties' long standing impasse about insurance obligations. It also reaffirmed Crystal's mistaken view that Accor was bound to insure Crystal's interest in Warner's Hotel; and that from 5 March 2009 it was in fact insured under Accor's policy with Allianz when the policy confirmed only that Crystal's interest was noted, and that it was not a co-insured party.

[54] However, Crystal's communications with Host from 10 February gave rise to different legal consequences. Crystal was by then dealing with the assignee of Accor's new interests, a contracting party, for the purpose of securing its agreement to insure Crystal's interest. The exchange opened with Crystal's request for Host's unequivocal confirmation that it would agree to insure all Crystal's separate interests in Warner's Hotel. In accordance with this request, Accor at Host's request arranged for Allianz to provide a certificate. In turn Host provided a copy to Crystal.

[55] In these circumstances we agree with Venning J that Allianz's certificate was an unequivocal representation from both the insurer and Host that Crystal's interest in Warner's Hotel was insured. We reject Mr Smith's submission that the certificate did not amount to a representation because it was addressed to Accor, not to Crystal. The correspondence made plain beyond argument that Host through Accor required Allianz's certificate for provision to Crystal to secure the latter's consent to the assignment.

[56] Also, we reject Mr Smith's submission that Crystal is unable to prove that by forwarding Allianz's certificate Host adopted and endorsed Allianz's interpretation of the policy. By specifically sending a copy of the certificate to Cavell Leitch on 14 February 2011, Host's Australian solicitors undoubtedly adopted its terms. The fact that on our construction of the policy Crystal was not an insured party is, as Venning J found, irrelevant in this context.[20] Crystal's estoppel argument is based on the certificate and not the policy wording. The certificate was an unambiguous representation not just that the policy was current but that Crystal's interest was covered as well.

(ii) Reliance

[57] The only possibly contestable elements of Crystal's claim are whether it did in fact rely on Allianz's certificate and, if so, whether its reliance was reasonable. First, Mr Smith submitted that Venning J was wrong to find Crystal's actual reliance. He emphasised that the company had allowed its material damage insurance with NZI to lapse in March 2009 (on the apparently erroneous assumption it was covered by Allianz's policy) and did not take any later steps to reinstate its cover. In his submission that was the operative act of reliance. Whatever was done by Accor or Host in February 2011 could not possibly have had any operative effect on that continuum of Crystal's default.

[58] We reject that submission. Allianz's provision of the certificate was generated by Cavell Leitch's express advice that Crystal's objective was to ensure that "the properties are not uninsured at any time" after Accor's interest was assigned

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[20] At [86].

to Host. This concern set in train the steps which culminated in Host's confirmation, based on Allianz's certificate, that Crystal's interest was covered. Host specifically requested cover in Crystal's name. The only inference available from these circumstances is that if Allianz had correctly advised Crystal was not covered the company would have taken immediate steps to rectify this default. And Crystal's later 19 August 2011 email asking for the detail of Host's cover for the hotel's three floors is consistent with Crystal's reliance on the certificate.

(iii) Reasonableness

[59] Mr Smith also submitted that Venning J erred in finding that it was reasonable for Crystal to rely on Allianz's certificate. He pointed to the fact that the certificate confirmed the policy's currency in accordance with its terms and definitions. Crystal did not act reasonably in relying on the certificate to protect its interests: it should not have accepted the certificate at face value but instead requested a copy of the policy to confirm whether it was in fact insured.

[60] We reject this argument also. Host's undeniable purpose in obtaining the certificate was to satisfy Crystal's inquiry; and by providing it to secure the consequential benefit of Crystal's consent to the assignment. It is not now open to Host to submit that Crystal acted unreasonably in relying on the certificate for the very purpose for which Host had provided it.

[61] In this respect Mr Smith also submitted that the certificate cannot possibly sustain a construction that Host had arranged to insure Crystal's interest as lessor and owner of Warner's Hotel; and to the extent that Crystal relied on that interpretation it acted unreasonably. Again, this submission is contrary to the unequivocal representation contained in the certificate that Crystal's interest was in fact insured.

[62] Mr Smith made a general submission about the fact that the insurance question had been a point of contention between the parties for some time and that Host had adopted the same approach as Accor. Again that submission is contrary to the factual narrative. Host's position was very different from that taken by Accor. It agreed without question to arrange Allianz's confirmation that Crystal was covered. Accor's broker and Allianz itself also participated without question in the process

initiated by Host. Allianz and Host must bear the financial responsibility for their apparent disinterest in verifying whether Host was bound to arrange insurance for Crystal's interest and whether Allianz's certificate correctly represented the policy's terms and conditions.

[63] It follows that we agree with Venning J that Crystal has established that Host and Allianz are unarguably estopped by the insurance certificate issued by Allianz from denying Crystal's interests in the hotel were insured.

Result

[64] Host's appeal against the entry of summary judgment is dismissed.

[65] Host is to pay Crystal costs for a standard appeal on a band A basis and usual disbursements.

WHITE J

[66] I agree with the judgment of the majority that Crystal's claim based on the policy was not suitable for summary judgment, but I do not agree with the majority that Crystal's estoppel claim based on the certificate was suitable for summary judgment. I would have allowed the appeal on both grounds and made an order for costs in favour of Host.

[67] I agree with the majority on the first ground for the reasons they have given at [28]–[39]. I endorse in particular the following aspects of those reasons because in my view they are also relevant to the determination of the second ground:

(a) Crystal was aware throughout that Accor denied its contention that it was bound to insure Crystal's interest.[21]

(b) The policy cover was specifically limited to the named parties, Accor and Host, and did not identify Crystal as an insured party.[22]

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[21] Above at [29].
[22] Above at [31].

(c) To the extent that Crystal was mentioned in error as a financier in Schedule 1, there may have been an ambiguity requiring factual findings.[23]

(d) Allianz's 2011 certificate did not assist in determining whether Crystal's interests were covered under the policy.[24]

[68] I disagree with the majority on the second ground because I do not accept that Crystal established an unarguable estoppel by representation against Host in order to justify entry of summary judgment.

[69] The starting point is to note that the elements of estoppel by representation which Crystal was required to establish were:[25]

(a) a representation that Crystal's interest was insured;

(b) Crystal relied on the representation;

(c) it was reasonable for Crystal to do so;

(d) Crystal would suffer detriment if the representation was not enforced against Host and Allianz; and

(e) it would be unconscionable for Host to be able to avoid the representation.

[70] The next point to note is that a disputed allegation of estoppel by representation will normally require to be resolved at trial because issues of fact

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23 Above at [34].

24 Above at [38].

25 *Gillies v Keogh* [1989] 2 NZLR 327 (CA) at 346; *Goldstar Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86; *Burbery Mortgage Finance and Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361; *Wilson Parking New Zealand v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44]; *Hansard v Hansard* [2014] NZCA 562, [2015] 2 NZLR 158 at [5]; Piers Feltham, Daniel Hochberg and Tom Leech *Spencer Bower on Estoppel by Representation* (4th ed, LexisNexis, London, 2004) at [II.8.1]; and James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [19.2].

relating to reliance, reasonableness, detriment and unconscionability are inevitably likely to be involved. As this Court recognised in *Bay of Plenty Energy Ltd v Natural Gas Co Energy Ltd*, unless an estoppel is clear and the evidence that there is no tenable defence is overwhelming, the question whether an estoppel exists is not ordinarily suitable for summary judgment.[26]

[71] Close examination of the evidence in this summary judgment proceeding relating to each of the requisite elements of estoppel by representation does not satisfy me that Crystal has established an unarguable case or that Host has no tenable defence.

[72] First, the alleged representation in the Allianz certificate of 11 February 2011 must be read in the context of the certificate as a whole which states:

> THIS IS TO CERTIFY THAT
>
> The undernoted Industrial Special Risks Policy (incorporating Material Damage & Business Interruption) is current for the period specified and is issued in accordance with the terms, conditions, definitions, limitations and exceptions noted therein:
>
> | | |
> |---|---|
> | NAMED INSURED: | Accor Group and all other related subsidiaries |
> | ... | |
> | INTERESTS INSURED: | HHR New Zealand Holdings Limited, HHR Christchurch NTL Limited & Crystal Imports Pty Ltd
Novotel Christchurch
50 Cathedral Square,
Christchurch NZ |
>
> …

[73] The certificate does not name Crystal as an "insured" or define the nature of the "interests insured". To ascertain those interests it would be necessary to read the terms and conditions of the policy itself because the certificate itself states it is "issued in accordance with" those terms. As we have held at [38] of the majority decision, the certificate cannot alter or extend the terms of the policy. This means that on the face of the certificate itself all that is certified is that Crystal had some

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[26] *Bay of Plenty Energy Ltd v Natural Gas Co Energy Ltd* [2002] 1 NZLR 173 (CA) at [28]–[29] and [44].

undefined and uncertain insured interest which will be subject to the terms and conditions of the policy.

[74] In my view it is therefore not correct to read the certificate as a representation by Allianz that Crystal was an insured party with a specific and certain insured interest. I do not agree with the majority at [56] and [61] that the certificate constituted an unambiguous and unequivocal representation.

[75] Second, while there was some evidence from Mr Chamberlain, director of Crystal, that he had relied on the certificate, his evidence was, at least arguably, inconsistent with his email of 19 August 2011 seeking to clarify the effect of the cover.[27] As Mr Smith submitted, the email showed that Crystal did not know whether or to what extent its interest was insured and therefore Crystal had not relied on the representation. This is a factual dispute which should be resolved at trial.

[76] Third, even if it is accepted that Crystal did in fact rely on the alleged representation, the disputed question whether that reliance was reasonable involves several factual issues which are not able to be resolved at this stage. At the outset the focus should be on two emails in particular:

(a) The email of 10 February 2011 from Crystal's lawyer to Host's lawyer which read:

> Could I also trouble you for a copy [of] the insurance Host will put in place for the Novotel and Ibis hotels.
>
> My client will be keen to see that there is a seamless transition during the assignment so that the properties are not uninsured at any time.

(b) The reply email of 14 February 2011 which read:

> Please find attached the property insurance certificates for Ibis Christchurch and Novotel Christchurch.

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[27] *Crystal Imports*, above n 1, at [93].

[77] It is apparent from this email exchange that Crystal's request did not relate specifically to its own insured interest and, as I have already noted,[28] the certificate provided in response did not name Crystal as an insured party or define Crystal's interest which was in any event subject to the terms and conditions of the policy.

[78] In considering the reasonableness of Crystal's reliance on the certificate following this email exchange between the two lawyers, I do not agree with the majority at [54] and [58] that the email exchanges between Host's lawyer and representatives of Allianz, to which Crystal's lawyer was not a party, have any relevance. On the contrary, in my view it is necessary to ask whether it was reasonable for Crystal to have accepted the certificate without further inquiry. In particular, was it reasonable not to have asked for a copy of the policy referred to in the certificate which would have disclosed that Crystal was not insured? There is no evidence from Crystal or its lawyer explaining why there was no request to see the policy.

[79] In the absence of such evidence, I would not be prepared to find that Crystal's alleged reliance on the certificate was reasonable.

[80] Finally, in my view, in the circumstances of this case the issue of unconscionability is not able to be determined without a trial. In a case involving sophisticated commercial parties communicating through their lawyers, I do not consider that it can safely be concluded without a trial whether unconscionability on the part of Host has been established or whether it is Crystal which, aware throughout that Accor denied it was bound to insure Crystal's interest, is seeking to take advantage of a mistake by Allianz in issuing the certificate.[29] Either way this is not a case where it can be said the evidence that there is no tenable defence is overwhelming.

Solicitors:
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Minter Ellison Rudd Watts, Auckland, for First Respondent
DLA Piper, Auckland for Second Respondent

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28 Above at [73].

29 Compare *Travel Agents Association of New Zealand Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553 (HC) at 555; and *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (NSWCA) at 585–586.