

***Kenneth Sutton Insurance Lecture:  
Rectification of Insurance Contracts***

**The Hon Justice James Stevenson\***

Second Annual Kenneth Sutton Insurance Lecture, Wednesday 12 September 2018

- 1 I am honoured to deliver this second annual insurance lecture, dedicated to the memory of Professor Sutton. It is difficult to think of an author who has been more influential in this field than Kenneth Sutton.
  
- 2 The first edition of Sutton’s *Insurance Law in Australia and New Zealand* was published in 1980, at a time when, as Professor Sutton observed in the preface to that edition, there was really “no suitable textbook on insurance law which dealt adequately with the general principles of the law as developed by Australian and New Zealand decisions”.<sup>1</sup> Professor Sutton more than achieved his aim to remedy that deficiency.
  
- 3 Sutton’s *Law of Insurance* has remained an iconic text. As the authors of the recently published fourth edition of the work acknowledge, it “has been the first port of call for insurance practitioners, judges and academics for the best part of 35 years”.<sup>2</sup>

**Rectification of Insurance Contracts**

- 4 Today I propose to consider rectification of insurance contracts and, like so many before me, I have looked first to Sutton’s work. I was interested to find this statement, at [10-350] of the latest edition:

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\* Judge of the Supreme Court of New South Wales. I acknowledge the considerable assistance I gained in preparing this report from Ms Alyssa Glass, the Equity Researcher.

<sup>1</sup> K C T Sutton, *Insurance Law in Australia and New Zealand* (Law Book Co, 1980), v–vi

<sup>2</sup> Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Law Book Co, 4<sup>th</sup> ed, 2015), ix.

In the field of insurance there is a presumption that the policy, which has been issued by the insurer and accepted by the insured, is the complete and final record of the contract between the parties, and there is a heavy onus on the person seeking rectification to establish otherwise.<sup>3</sup>

5 It has historically been the case that rectification as an equitable remedy is not granted freely by the courts, both in general and in the insurance context. An early example of the high threshold for rectification applied in the insurance context is *Henkle v Royal Exchange Assurance Co*, where the insured plaintiff sought rectification of a marine insurance policy. Lord Hardwicke LC stated that there ought to be the “strongest proof possible” to rectify the insurance contract, and took into account the fact that the policy had twice been reduced to writing in the same words (contrary to the plaintiff’s contention). The remedy was not granted.<sup>4</sup>

6 In the current version of David Kelly and Justice Michael Ball’s *Principles of Insurance Law in Australia and New Zealand*, the authors note, in relation to contracts in general, that although the courts used to exercise the power to rectify a contract with great caution, they are now less reluctant to exercise that power.<sup>5</sup> To some extent this may refer to the circumstance that a number of previous prerequisites for rectification are now no longer imposed: for example, it is no longer necessary for there to be an antecedent written

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<sup>3</sup> Ibid, [10-350].

<sup>4</sup> (1749) 27 ER 1055.

<sup>5</sup> David Kelly and Justice Michael Ball, *Principles of Insurance Law in Australia and New Zealand* (looseleaf), [5.0020].

contract predating the contract which is to be rectified;<sup>6</sup> nor is it necessary for there to be an outward expression of accord.<sup>7</sup>

7 For my part, I suspect that although some of the more rigid prerequisites to rectification have now been discarded, courts remain highly reluctant in the insurance context to grant rectification.

### **Insurance policies – just another commercial contract?**

8 Insurance contracts are, of course, commercial contracts.

9 But are they treated like other commercial contracts?

10 So far as concerns the construction of insurance contracts, the answer seems to be, “not quite”.

11 Thus in *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* [2018] NSWCA 100, Barrett AJA said (at [52]):

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<sup>6</sup> Kelly and Ball refer, in this regard, to: *Slee v Warke* (1949) 86 CLR 271 at 180–1; *Joscelyne v Nissen* [1970] 2 QB 86; [1970] 1 All ER 1213; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350; 1 ALR 169 at 178 (Mason J); *Pukallus v Cameron* (1982) 180 CLR 447 at 452; 43 ALR 243 at 247 (Wilson J); *Kiriacoulis Lines SA v Compagnie des Assurances Maritime, Aeriennes et Terrestres (CAMAT) (The Demetra K)* [2002] Lloyd's Rep IR 795 (CA); See also *Australian Provincial Assurance Co Ltd v Producers & Citizens' Co-op Assurance Co of Australia Ltd* (1932) 48 CLR 341 at 361 (Dixon J), 384–6 (McTiernan J); compare with 374–5 (Evatt J). Similar authorities are referred to in *Sutton on Insurance Law*.

<sup>7</sup> Again, relying on the authorities cited by Kelly and Ball (similar to those in *Sutton on Insurance Law*), see: *Joscelyne v Nissen* [1970] 2 QB 86 at 98; [1970] 1 All ER 1213; [1970] 2 WLR 509; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350; 1 ALR 169 at 178 per Mason J; *Pukallus v Cameron* (1982) 180 CLR 447 at 452; 43 ALR 243 at 247 (Wilson J); *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429 at 431 (Yeldham J); *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603; (2007) Aust Contract R 90-254; [2007] NSWCA 65 at [133]; *Towry Law plc v Chubb Insurance Co of Europe SA* (2009) 15 ANZ Ins Cas 61-790; [2008] NSWSC 1352. See also *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and Nai Superba)* [1984] 1 Lloyd's Rep 353; and *Encia Remediation Ltd v Canopus Managing Agents Ltd* [2008] Lloyd's Rep IR 79 at [196]. Even the deliberate use in the written contract of words that are inappropriate is no bar to rectification: *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) Aust Contract R 90-254; [2007] NSWCA 65.

“The general approach to be taken to the construction of insurance contracts is conveniently summarised in the recent judgment of Beach and McLeish JJA and Keogh AJA in *MLC Nominees Pty Ltd v Daffy* [2017] VSCA 110.<sup>8</sup> Drawing on earlier authority (particularly *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at [22] and *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]), their Honours said (at [66]):

‘As has been said before, a policy of insurance is a commercial contract and should be given a businesslike interpretation. Interpreting a policy of insurance (like any other commercial document) requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure. That said, it has been recognised that, in cases of ambiguity, a ‘liberal approach’ will generally be adopted in the construction of insurance contracts. This does not mean, however, that a court can attribute a different meaning to the words of a policy simply because the court regards the meaning as otherwise working a hardship on one of the parties.’ [citations omitted]”.

- 12 Is there a corresponding approach to rectifying insurance contracts?
- 13 On the face of it, as a matter of law, the same principles apply in the context of rectification of insurance contracts as in rectification of contracts generally. There is always a “heavy onus” on the person seeking rectification (and I will say more about this in a moment).
- 14 A situation where the courts may be more willing to grant rectification is where an insurance contract has been effected on the basis of an insurer’s standard form proposal, the insured being entitled in those circumstances to assume that the subsequent policy setting out the contract in formal terms accords in all material respects with the concluded agreement, in the absence of notification to the contrary.<sup>9</sup>
- 15 The early New Zealand decision of *Braund v Mutual Life & Citizens Assurance Co Ltd* illustrates that if the policy differs materially from the terms

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<sup>8</sup> See also *Chubb Insurance Company of Australia Ltd v Robinson* (2016) 239 FCR 300; [2016] FCAFC 17 at [42].

<sup>9</sup> Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Law Book Co, 4<sup>th</sup> ed, 2015), [10-350].

set out in the proposal, rectification of the contract to accord with the common intention of the parties may be granted.<sup>10</sup>

- 16 Other examples given in the latest edition of *Sutton* where rectification of a policy has been allowed by the courts include the insertion of a name of a beneficiary omitted by mistake from the policy, in *Cockell v Cockell & Mutual Life Assurance Co*,<sup>11</sup> and the substitution of the correct name of the insured which had been misstated in the original policy, in *Westland Transport Service Ltd v Phoenix Assurance Co Ltd of London*.<sup>12</sup>
- 17 However, what I wish to explore today is the courts' approach to rectification of insurance contracts in practice, so that we may assess whether there is, perhaps as a practical reality, rather than as a matter of any different principle, a heavier onus on the party seeking rectification of an insurance contract. In particular, I will examine three recent case-law examples where parties have sought rectification of insurance contracts.
- 18 Before I do so, however, it is useful briefly to state the basic principles which govern the equitable remedy of rectification generally.

### **The equitable remedy of rectification: basic principles**

- 19 What are the basic principles relevant to rectification?
- 20 The most recent authoritative consideration of the law of rectification in Australia is the 2016 High Court decision in *Simic v New South Wales Land and Housing Corporation*.<sup>13</sup> In their joint judgment in *Simic*,<sup>14</sup> Gageler, Nettle and Gordon JJ set out the essential principles as follows:

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<sup>10</sup> [1926] NZLR 529.

<sup>11</sup> [1944] 4 DLR 373.

<sup>12</sup> (1972) 32 DLR (3d) 357, affirmed (1973) 38 DLR (3d) 639.

<sup>13</sup> (2016) 260 CLR 85; [2016] HCA 47 ("*Simic*").

<sup>14</sup> *Ibid* at [103]–[104].

Rectification is an equitable remedy, the purpose of which is to make a written instrument 'conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately'. For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an 'agreement' between the parties in the sense that the parties had a 'common intention', and that the written instrument was to conform to that agreement. Critically, it must also be demonstrated that the written instrument does not reflect the 'agreement' because of a common mistake. Unless those elements are established, the 'hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties' cannot be displaced.

The issue may be approached by asking — what was the actual or true common intention of the parties? There is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party. [Citations omitted.]

- 21 In a separate judgment, with which French CJ agreed, Kiefel J (as her Honour then was) addressed the requirement for proof of common intention,<sup>15</sup> saying:

It has for some time been settled law that the existence of an antecedent agreement is not essential to the grant of relief by way of rectification and that rectification may be granted in cases where the instrument sought to be rectified is the only agreement between the parties. The focus of the courts turned to the common intention of the parties up to the time the relevant instrument was made. That intention must be proved by admissible evidence and proved to a high standard. In a passage from *Fowler v Fowler* [(1859) 4 De G & J 250 at 256; 45 ER 97 at 103], which has been cited with approval by this Court, Lord Chelmsford said that:

a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution.

What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention.

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[I]t may be said that the traditional approach of the courts, following cases such as *Fowler v Fowler*, is to grant rectification only if the instrument in question did not reflect the actual common intention of the parties. That intention is proved in the usual way, by admissible evidence to the requisite

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<sup>15</sup> Ibid at [41]–[42], [46].

standard. The assessment undertaken by the court may, in the sense referred to above, be described as an objective one. But the term ‘objective’ is apt to be misunderstood because it can be applied with respect to a quite different process, as the decision in *Chartbrook Ltd v Persimmon Homes Ltd* shows. [Citations omitted.]

- 22 Her Honour then proceeded to discuss Lord Hoffmann’s view expressed in *Chartbrook*,<sup>16</sup> that “in cases of rectification, ‘the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract’”. Her Honour observed that this approach “involves a departure from the traditional approach of the courts to rectification” and was “not necessary to the decision in *Chartbrook*”.<sup>17</sup> To similar effect, French CJ said that Lord Hoffmann’s objective test (that an objectively ascertained common intention is a prerequisite to rectification) “does not represent the common law of Australia as it presently stands”.<sup>18</sup>
- 23 Accordingly, in Australia, it is the subjective or actual intention of the parties, objectively ascertained, which is relevant to rectification.<sup>19</sup>

### **The applicable standard of proof**

- 24 I mentioned Kiefel J’s reference in *Simic* to a “high standard” of proof, there quoting Lord Chelmsford’s remarks in the 1859 decision of *Fowler v Fowler* that proof must be furnished in the “clearest and most satisfactory manner”. In the NSW Court of Appeal decision of *Newey v Westpac Banking Corporation*,<sup>20</sup> Gleeson JA explained the standard of proof in the following terms:

It is uncontroversial that the onus on the party seeking rectification is a heavy one. Various expressions have been used to describe the standard of proof

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<sup>16</sup> *Chartbook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; [2009] UKHL 38 (“*Chartbrook*”).

<sup>17</sup> *Simic* at [47]–[49] per Kiefel J.

<sup>18</sup> *Ibid* at [19] per French CJ.

<sup>19</sup> *SAMM Properties* at [114] per McColl JA; *Ryledar* at [262] per Campbell JA; see also *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 346 per Mason J (as his Honour then was); [1982] HCA 24.

<sup>20</sup> [2014] NSWCA 319 at [170] per Gleeson JA (Basten and Meagher JJA agreeing).

required to establish the parties' common intention. The common theme in the authorities is that the party seeking rectification must advance 'clear and convincing proof' that the written contract does not embody the final intention of the parties.

25 As to what this means for the decision-maker: in *Franklins Pty Ltd v Metcash Trading Ltd*,<sup>21</sup> Campbell JA quoted with approval the statement in the 1842 decision of *Mortimer v Shortall*<sup>22</sup> that:

I must be certain that there has been a mistake, and that the mistake is such as ought to be corrected. I do not mean to say, that the evidence must be all one way, or that there must not be any conflict: there must, however, be such a preponderance, as will satisfy my mind.

26 However, as the Court of Appeal pointed out in both *SAMM Properties* last year and in *Franklins*, whether there is proof of common intention justifying the grant of rectification is still a matter which, like all other matters in issue in civil proceedings, must be proved on the balance of probabilities.<sup>23</sup>

## Two other aspects

27 Two further matters should be mentioned.

28 The first is that in order for a document to be rectified, both parties must have intended that the exact terms of the alleged prior agreement or prior concurrent intention should be expressed in writing, and that this intention to the matters to writing must have continued unchanged up to the time where the instrument was executed.<sup>24</sup>

29 The second is that the effect of a successful claim for rectification is for the court to order that the document be amended as required and that the

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<sup>21</sup> At [454]; see also *SAMM Properties* at [117] per McColl JA.

<sup>22</sup> (1842) 2 Dr & War 363 at 371 per Sir Edward Sugden LC.

<sup>23</sup> *SAMM Properties* at [118] per McColl JA; *Franklins* at [458] per Campbell JA.

<sup>24</sup> *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 at [511] (Campbell JA).



rectified document is treated as having been in its rectified form as from inception.<sup>25</sup>

## **Application in the context of insurance contracts: recent experiences**

### ***My recent experience - Mobis Parts (No 7) – rectification refused***

- 30 In a case in which I delivered judgment towards the end of last year, *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321, the defendant insurer unsuccessfully sought rectification in order to incorporate into a local policy a hail limit which was included in a ‘master’ policy associated with its global insurance program. I should tell you at the outset that the case is currently under appeal, including on the rectification aspects. The appeal was heard recently. It occupied 5 days hearing time. but I propose to consider it nonetheless as a useful illustration of some of the factual and evidentiary matters which may be relevant when a court is considering whether to exercise its equitable jurisdiction to grant rectification.
- 31 The plaintiff was Mobis Parts Australia Pty Ltd, a wholly owned Australian subsidiary of Hyundai Mobis; the Korean motor car manufacturer.
- 32 Mobis owned a large warehouse at Eastern Creek. It was vast, equivalent to the size of several city blocks.
- 33 The warehouse collapsed in a severe hail storm on 25 April 2015.
- 34 Mobis sought indemnity in the order of \$62 million from the first defendant, XL Insurance Company SE, under a Property Damage and Business Interruption Policy. The parties referred to this as the “Local Policy”. Mobis claimed indemnity in respect of the loss it suffered as a result due to the collapse of its warehouse in the storm.<sup>26</sup>

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<sup>25</sup> *Issa v Berisha* [1981] 1 NSWLR 261 at 265 (Powell J).

<sup>26</sup> *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [1]-[5], [10] (“*Mobis*”).

- 35 The Local Policy was issued by XL as part of an International Program. Under that Program, XL (together with the second and third defendants) had earlier issued a Property Damage and Business Interruption Policy in the name of another wholly owned subsidiary of Mobis Korea, Mobis Slovakia s.r.o. The parties referred to that policy as the “Master Policy”.<sup>27</sup>
- 36 The Master Policy provided cover for all Mobis entities globally, in effect, in excess of that provided by the various local policies, including the Local Policy.
- 37 Mobis’s primary claim was against XL under the Local Policy. It only sought indemnity under the Master Policy only if, contrary to its case, and contrary to my findings, the Local Policy did not respond to its claim.<sup>28</sup>
- 38 Both the Local Policy and the Master Policy had a limit for “storm” damage of \$72,105,000 (EUR 50 million).
- 39 The Master Policy also had a limit of EUR 10 million for “hail”.
- 40 XL contended that the agreement of the parties was that there should be a corresponding hail limit in the Local Policy. No such limit appeared in the Local Policy wording; neither as originally written with effect from 1 January 2011, nor as renewed annually from 23 June each year until, and including, the relevant policy period (23 June 2014 to 23 June 2015).<sup>29</sup>
- 41 One issue (in a lengthy trial with many issues) was whether, as XL contended, the Local Policy should be rectified so as to incorporate the Hail Limit.
- 42 In the result, I found that, subject to a number of qualifications concerning the quantum of its claim, Mobis was entitled to indemnity under the Local Policy,

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<sup>27</sup> Ibid [6]-[7].

<sup>28</sup> Ibid [9].

<sup>29</sup> Ibid [13]-[17].

and on the rectification question, I concluded that the Local Policy should not be rectified so as to incorporate the Hail Limit.<sup>30</sup>

43 The case provides an interesting example of the kinds of evidentiary choices that may either bolster or imperil a case for rectification.

44 The event which (as I found) led to the issue of the Local Policy without the Hail Limit was an email that a Ms Hurtajova sent on 22 December 2010 to a colleague, Mr Hofmann. Ms Hurtajova was a program underwriter in Austrian and Central and Eastern European markets. She was responsible for the writing of the original Master Policy, and it was Ms Hurtajova who determined that the Hail Limit should be included in the Master Policy.<sup>31</sup>

45 Ms Hurtajova gave evidence that she was not involved in the drafting of the Local Policy and that, so far as she knew, at no time did anyone on behalf of Mobis Korea or Mobis request that a policy be issued without the Hail Limit. Ms Hurtajova said that she assumed and intended that the Local Policy would have the same limits as the Master Policy. Although in her affidavit, Ms Hurtajova said that the Local Policy “contained a mistake” in that it did not include the Hail Limit, she did not say that she made a mistake in her 22 December 2010 email (which she did not mention at all in her affidavit).<sup>32</sup>

46 XL’s procedures at the time required that a “Local Policy Instruction” or “LPI” be prepared in order to generate the wording of a local policy; the person responsible for creating the relevant LPI was Mr Hofmann, stationed in Zurich.<sup>33</sup>

47 Ms Hurtajova’s email of 22 December 2010 to Mr Hofmann specified sublimits for the preparation of the LPI with respect to the relevant Local Policy. However in that email the EUR 10 million sublimit was only expressed to be

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<sup>30</sup> Ibid [36], [38](4).

<sup>31</sup> Ibid [177]-[179].

<sup>32</sup> Ibid [182].

<sup>33</sup> Ibid [270]-[271].

for avalanche; landslide/subsidence; and snow pressure — no reference was made to any sublimit for hail.<sup>34</sup> Moreover, in her email Ms Hurtajova specified a number of sublimits that had no equivalent in the Master Policy, and conversely expressed lower sublimits for various perils as compared to the Master Policy.

48 With respect to this email, I said:

This suggests that Ms Hurtajova took great care with her email. She descended to a great deal of detail. But she did not, anywhere in her email, mention “hail”.

As I have mentioned, Ms Hurtajova’s evidence was that she was not “involved in drafting the local policy for Australia” but that she assumed and intended that the Local Policy would have the same limits as in the Master Policy.

But Ms Hurtajova’s email shows that she was “involved” in drafting the Local Policy in that she started the process whereby the Local Policy came to be created. She did that by sending her email of 22 December 2010 to Mr Hofmann. That email is expressed to contain a “summary of data” for “Mobis Slovakia expansion per 01.01.2011 Australia” that Mr Hofmann would need. That “data” comprised a lengthy and evidently comprehensive list of the limits and sub limits to go in the Local Policy.<sup>35</sup>

In those circumstances, one might have expected that if Ms Hurtajova’s position was that she mistakenly failed to mention any limit for hail in her email, she would have said so. But at no time has Ms Hurtajova said this.

49 I concluded that Ms Hurtajova’s communications suggested that there was no mistake; at the very least, they were inconsistent with and could not be reconciled with a conclusion that there was a mistake. This was fatal to XL’s case on rectification.<sup>36</sup> Moreover and in any event, I was not persuaded that Mobis intended the Local Policy to have the Hail Limit.<sup>37</sup>

***A New Zealand earthquake case –rectification would have been refused***

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<sup>34</sup> Ibid [276]-[280].

<sup>35</sup> Ibid [285]-[288].

<sup>36</sup> Ibid [379]-[380].

<sup>37</sup> Ibid [387].

- 50 A second example arises from the major earthquake which occurred in Christchurch in 2010.
- 51 This is the decision of Whata J sitting in the High Court of New Zealand in *Body Corporate 74246 v QBE Insurance International Ltd and Allianz Australia Insurance Ltd* [2017] NZHC 1473.
- 52 This year, on 5 July 2018, the New Zealand Court of Appeal delivered a unanimous judgment in *QBE Insurance (International) Ltd v Allianz Australia Insurance Ltd* [2018] NZCA 239, dismissing both QBE's appeal and Allianz's cross-appeal.
- 53 The Christchurch earthquake struck at 4.35am on 4 September 2010.
- 54 It caused significant damage to a commercial property owned by the insured, a Body Corporate.
- 55 The property was insured with QBE, under a policy due to expire at 4pm that same day.
- 56 About a month earlier, QBE had advised the Body Corporate's insurance broker that it did not want to renew the policy. The broker organised new cover with Allianz.
- 57 The policy schedule provided by Allianz stated that the effective period of insurance was "04/09/2010" to "4pm on 04/09/2011". The policy schedule did not specify when, on 4 September 2010 the policy incepted.
- 58 QBE accepted that it was liable for the earthquake damage under its policy, however sought a 50 per cent contribution from Allianz on the grounds that the Allianz policy incepted at midnight on 4 September 2010 and that, as at 4.35am, the property was insured by both companies and that, accordingly, there was double insurance.

- 59 Allianz disputed this. QBE commenced proceedings in the High Court of New Zealand. The issue, as you have probably gathered, was the start time of the Allianz policy, with QBE claiming that it commenced at 12 midnight on 4 September 2010, with the result that the property was doubly insured at the time of the earthquake.<sup>38</sup>
- 60 Whata J held that the question could be decided as a matter of construction of the policy. His Honour held that, properly construed, the Allianz policy commenced at 4pm (not at midnight) and therefore Allianz was not liable.<sup>39</sup> His Honour made contingent findings in response to Allianz’s alternative arguments concerning the implication of a term limiting the period of insurance cover or rectification of the policy.<sup>40</sup>
- 61 Whata J therefore did not need to deal with the rectification question. However, his Honour did so.
- 62 His Honour found that rectification would not have been available.
- 63 It was common ground at trial that at no stage did either the Body Corporate’s insurance broker, Mr James, or the relevant Allianz manager, Mr Lowe, specifically discuss the start time for the Allianz policy. It was also common ground that the Body Corporate (unsurprisingly) never instructed Mr James to obtain double insurance; nor did the broker, Mr James, ever ask Allianz to provide cover that overlapped with the QBE policy. Evidence was given that at the relevant time the Allianz computer system did not have a time field for the effective date and therefore it was not possible to type in a start time. It

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<sup>38</sup> *QBE Insurance (International) Ltd v Allianz Australia Insurance Ltd* [2018] NZCA 239 at [1]–[4] (“*QBE v Allianz*”).

<sup>39</sup> *Body Corporate 74246 v QBE Insurance (International) Ltd* [2017] NZHC 1473 at [42], [67] per Whata J.

<sup>40</sup> *Ibid* at [63]–[66].

was also noted that following the earthquake, the broker lodged a claim only with QBE.<sup>41</sup>

64 Whata J found that “4 pm” was not omitted by mistake but rather, as various witnesses had explained, to avoid any inadvertent gaps in cover – that is, the use of a start date was intentional to the extent that Mr James wanted to secure and Mr Lowe wanted to provide seamless cover and left the inception time out to secure that objective. His Honour held that it had only become necessary and efficacious to identify an inception time to expressly address a plainly unintended consequence, namely double insurance.<sup>42</sup>

***A Victorian case – rectification was granted***

65 In a decision of the Supreme Court of Victoria, *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493, Sloss J granted rectification.

66 Huon Corporation purchased the business of Nylex. Nylex had a number of employees who were to transfer their employment to Huon.

67 As part of that transaction, Huon procured that CBL Insurance issue a Financial Insurance Policy in favour of “Trustees” for the transferring employees. The trustees were named as “the Insured”. The names of the transferring employees were to be listed in a schedule to the policy.

68 Under the policy CBL agreed to provide an indemnity up to a limit of \$7 million in respect of a shortfall in employee entitlements in the event of the insolvency of Huon within the period of insurance, being one year from 16 December 2005. The cover was for employee entitlements “owed to” the employees listed in the schedule.

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<sup>41</sup> *QBE v Allianz* at [7]–[17].

<sup>42</sup> *Body Corporate 74246 v QBE Insurance (International) Ltd* [2017] NZHC 1473 at [63]–[64].

- 69 Within the period of insurance, Huon became insolvent. The trustees unsuccessfully sought to make claims for indemnity under the policy for the full insured amount of \$7 million
- 70 The trustees sought to have the policy rectified in two ways.
- 71 The first was to include two persons, transferring employees, whose names were omitted from the schedule. The question here was whether there was a continuing common intention that the policy would cover all employees of Nylex who transferred their employment to Huon.
- 72 The trustees submitted that CBL knew that the policy was intended to protect the entitlements of all former employees of the businesses whose employment was transferred to Huon. Huon's broker informed CBL at the outset that the employee entitlements of "approximately 700 employees" would be involved.
- 73 Sloss J was satisfied that CBL knew, from the outset that the policy was to operate alongside the contracts for the sale of the businesses to Huon and to cover or protect the entitlements of the employees, that is seemingly all of the employees who transferred from Nylex to Huon (in the event that Huon became insolvent).<sup>43</sup>
- 74 For some reason, the policy was executed twice on the same day.
- 75 The first version that was executed did not include some of the employees from one of the businesses and incorrectly stated the insured amount; at the request of Huon's solicitor.
- 76 The policy then corrected and re-executed.
- 77 When executed on behalf of CBL, there was no schedule with a list of employees attached. Mr Harris, who executed the policy for CBE, did not see

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<sup>43</sup> Ibid [148].



the schedule until CBL received the policy as signed by the trustees. It then attached a list of transferring employees. Mr Harris said he was not concerned with which particular Huon employees were named, considering this a matter for the two corporations and the unions to determine. Asked in cross-examination about what he expected was going to be put in the schedule, Mr Harris accepted that he “believed the list would be accurate” and “didn’t believe that there would be any employees omitted” from the list of transferring employees.<sup>44</sup>

78 CBL argued that this evidence was insufficient to make out a claim that the list should be rectified

79 Her Honour disagreed and held:

In my view, when Mr Harris’s evidence is viewed in the context of the re-execution of the policy and the reasons for doing so ... one gains the clear impression that CBL did not intend that any Transferring Employees of three businesses would be omitted. While Mr Harris believed that all former employees of the Nylex businesses whose employment would be transferred to Huon would be listed in Schedule 1, he was not concerned to see that listing prior to execution and did not raise any issue when he was notified that [certain] employees needed to be added in and the sum insured be increased. Further, by his conduct on 16 December 2005, he effectively communicated to Huon’s solicitors, and to the solicitors for the Trustee that he intended that the list should reflect the agreement they had reached and was amenable to accommodating the inclusion of those Transferring Employees who had been inadvertently omitted.<sup>45</sup>

80 Her Honour accordingly ordered that Schedule 1 to the policy be rectified by adding the names of the omitted transferring employees to the listing.<sup>46</sup>

81 The second was the trustees sought to have the policy rectified to include cover for employee benefits that had “accrued to” employees (which was not provided for in the words of the policy) in addition to benefits “owed to” them (was provided for). Those involved rectification of the definition of “insured loss”.

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<sup>44</sup> Ibid at [149]-[150].

<sup>45</sup> Ibid at [152].

<sup>46</sup> Ibid at [153].

82 As it turned, out, Sloss J had construed the policy in a way that meant this question did not arise.

83 However, her Honour held that, otherwise, she would have rectified the ‘Insured Loss’ definition.

84 As the trustees played no role in the negotiation of the policy, the question arose as to how they, and the insurer, could have had any common intention about this matter.

85 As CBL knew, the negotiations for the wording of the indemnity were taking place between Nylex, Huon and the relevant trade unions. CBR was content with this.

86 In those circumstances, Sloss J concluded:

“In the present case, it is clear that the policy was one that was entered into by the Trustees in their capacity ‘as trustees for the Transferring Employees’. In my view, in those circumstances, one must, in effect, ‘look through’ the Trustees to the beneficiaries and ascertain what was the intention manifested by those negotiating on behalf of the Transferring Employees for whom the benefits under the policy were negotiated”.<sup>47</sup>

87 The trustees called evidence about the negotiation of the policy from two employees of Nylex (the corporation from which Huon purchased the businesses) and two Union employees.

88 After considering the evidence given by those individuals and by the relevant employees of CBL, her Honour was satisfied that there was a continuing common intention which would have justified rectifying the relevant definition, had her Honour not construed it favourably to the insured.

89 A related issue did arise tangentially in *Mobis Parts*.

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<sup>47</sup> Ibid at [161].

- 90 I noted that where a contract is negotiated by a duly authorised agent, that agent's intention may be relevant for the purposes of rectification, referring to Brereton J's decision (as his Honour then was) in *Metlife Insurance v Visy Board Pty Ltd*<sup>48</sup> — his Honour there citing the High Court's decision in *Australian Gypsum Ltd v Hume Steel Ltd*.<sup>49</sup>
- 91 In *Fitzgerald v CBL*, however, the matter appears to have been taken somewhat further, as there was no finding that the specific persons negotiating did so as authorised agents for the trustees.

### **Connecting threads**

- 92 The three cases I have discussed provide, I hope, some points of contrast as to rectification of insurance contracts in practice.
- 93 The decision in *Fitzgerald v CBL* displays a much greater readiness to rectify an insurance contract, with perhaps less regard paid to the caution traditionally exercised in this area and the applicable high standard of clear and convincing proof.
- 94 On the other hand, the emphasis on the discretionary nature of the remedy in the New Zealand decision I mentioned illustrates the very high standards which continue in that jurisdiction.
- 95 The examples where the courts *have* granted rectification of insurance contracts are relatively rare, bearing out, in my view the caution to which the authors of *Sutton on Insurance Law* refer.
- 96 As in so many areas of equity, the principles governing this flexible and discretionary-based remedy will continue to be worked out on a case-by-case basis through the courts, both in the specific context of insurance contracts

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<sup>48</sup> [2007] NSWSC 1481 at [32].

<sup>49</sup> (1930) 45 CLR 54 at 67; [1930] HCA 38.

(and no doubt we can look forward to the Court of Appeal's decision in the *Mobis* appeal in this regard!) and in contract law more generally.