IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000841
[2016] NZHC 948

BETWEEN	FRANCIS LLEWELLYN GIDDEN AND BARBARA MAY GIDDEN Plaintiffs
AND	IAG NEW ZEALAND LTD Defendant

Hearing: 18 April 2016

Appearances: P J Woods for Plaintiffs/Applicants
I J Law for Defendant/Respondent

Judgment: 11 May 2016

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on plaintiffs' summary judgment application

Introduction

[1] The plaintiffs, Mr and Mrs Gidden (the Giddens), suffered damaged to their house (the house) in the Canterbury Earthquake sequence. The house was insured by the defendant (IAG) through its entity "State Insurance".[1] The parties have thus far failed to settle this claim. The plaintiffs have consequently brought proceedings in this Court pursuing three causes of action against the defendant. The plaintiffs make application for summary judgment.

Background

The undisputed factual background

[2] The operative policy is IAG's State Home Comprehensive policy (the policy).

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[1] Communications with the Giddens generally came from "State, a business division of IAG New Zealand Ltd". In this judgment I refer for convenience only to IAG.

[3] The policy contains terms whereby:

(a) The insured has the right to elect to rebuild the house in the event of total destruction; and

(b) The insured may rebuild the home at a different site, as long as IAG agrees (which agreement will not be unreasonably withheld). IAG will not pay more than IAG would have paid if the home was rebuilt to its original specification on the original site.

[4] The house was extensively damaged by the 4 September 2010 and 22 February 2011 earthquakes. The Giddens duly lodged a claim under the policy.

[5] IAG arranged inspection of the home and scoping of damage. From September 2011 to early 2014, the parties corresponded as to whether the home was a rebuild or repair. Kim Westwood of IAG was the "Customer Relationship Consultant" with whom the Giddens were dealing. By February 2014, IAG was taking the position that the home was capable of repair.

[6] Over a period of time, with increasing intensity in the first half of 2014, the Giddens became frustrated and (as they recorded in a 20 June 2014 email to Ms Westwood) "disgusted" with the IAG's procedures they had encountered.

[7] In June 2014, the Giddens requested that the assessment phase of the claim be put on hold as they had discussed with the Residential Advisory Service (the RAS) the possibility of a claim of estoppel against IAG.[2] Sarah Henderson was the solicitor provided by the RAS as an independent adviser to the Giddens.

[8] They set out their complaints in emails on 20 June 2014 and 9 July 2014. Following a review conducted by State's "DI Claims Operation Manager – Technical", on 23 July 2014that person wrote to the Giddens (spelt "Giddon" in the

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[2] The Residential Advisory Service was established in May 2013 as a service to provide free, independent advice to residential property owners in relation to the repair or rebuilding of their homes damaged in the Canterbury Earthquake sequence. The RAS provides independent advisors who are practising lawyers.

letter) expressing sorrow at hearing the Giddens were disgusted with IAG's procedures and stating:

> From my review, I can see there have been some misunderstandings regarding the assessments and processes and I would like to clarify so further progress can be made on your claim.

[9] The letter then identified progress on "the pricing phase", concluding that once the pricing information was available, Ms Westwood would discuss with the Giddens whether they would like to progress through the IAG/Hawkins (repair) programme or would consider a cash settlement.

[10] Ms Westwood had been the case manager handling the Giddens' claim up to this point. But it was Ms Tapp (who handles "technically challenging or complex claims" as part of IAG's complaints process) who assisted with the review of the claim which resulted in the State letter of 23 July 2014.

[11] Ms Tapp then took a leading role for IAG at the subsequent meeting on 9 October 2014.[3] It is evident that, going into that meeting, Ms Tapp had formed the view that the Giddens had indeed experienced frustrations through the IAG process so far. She, referring to that conclusion in a later 19 June 2015 email to Ms Henderson as part of the explanation why IAG was then able to agree that the home was a rebuild so that the parties could move forward, recorded:

> Andrew bought(sic) up the multi-party meeting and that I had agreed the property would be a rebuild due to State's handling of the claim prior to this. I can confirm that I agreed that due to the frustrations so far and considering the information we had at the time, State could agree that the home was rebuild so we could move forward; so long as we could agree the costs were fair and reasonable, we could then arrange settlement.

Ms Tapp's assessment of IAG's performance was also to be reflected in her initial statements at the 9 October 2014 meeting.

[12] Mr Gidden has deposed that "Ms Tapp made what appeared to be a very genuine and heartfelt apology to us for the way the claim had been handled and how we had been treated". Ms Henderson similarly deposed that "Ms Tapp made a very

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[3] See below at [15].

sincere apology to Mr and Mrs Gidden for the delay in resolving their claim and the way it had been handled".

[13] Neither Ms Tapp nor Ms Westwood has disputed the Giddens' evidence as to what she expressly recognised as the multi-party meeting. That is unsurprising given that Ms Tapp was to later record much the same in the 19 June 2014 email.

[14] On 15 September 2014, while the Giddens were awaiting advice from the RAS on an estoppel claim, IAG emailed them that the home had been deemed repairable by an engineer, that the repair costs were nearing the rebuild estimate, and that IAG would be able to offer the option of rebuilding the home through IAG's Hawkins managed rebuild programme (the 15 September 2015 email).

[15] The RAS arranged with the parties to facilitate a multi-party meeting on 9 October 2014 (the meeting). In setting up the meeting, the facilitator described the main purpose of the meeting as being, "to reach an understanding for [Mr and Mrs Gidden] as to what is meant in the [the IAG] email of 15 September to the Giddens". The facilitator continued that the main purpose of the meeting "is to gain a good and confident understanding of what the email content means, and to gain a corresponding understanding for the Giddens of the way forward from here".

[16] The parties signed an agreement dated 9 October 2014 in relation to the meeting (the multi-party meeting agreement).

[17] The multi-party meeting agreement contained in 12 numbered clauses detailed provisions for the meeting to occur that day. The plaintiffs in particular rely on the following sub-clauses:

> 4.4 Where a party chooses a representative to represent them in the process, the representative must be someone who:
>
> …
>
> (c) has authority to agree to settlement of the matter on behalf of the party; and
>
> …

> 4.5 The parties confirm what authority they have to settle what matter(s). It is expected that all participating parties have some relevant authority to settle. If that is not the case then they will tell the facilitator and the other parties before any meeting in the process begins.
>
> 4.6 Where a party is not attending the process in person, then by nominating a representative under clause 4.3, that party confirms to the other parties that his, her or its representative has full authority to settle the matter. If that is not the case then they must tell the facilitator and the other parties before any meeting in the process begins.
>
> …
>
> 8.2 The parties agree that there will be no settlement of any matter as a result of the process unless and until the terms of agreement/settlement are recorded in writing and have been signed by the parties. The parties agree that this clause 8.2 can be waived or amended only by a separate written and signed agreement between the parties.
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> 8.3 If the process does not result in a settlement/agreement, the parties remain free to pursue or defend legal proceedings relating to the matter. However, if the process does result in a settlement agreement, the terms of the settlement agreement reached between the parties will be binding and have legal effect as a contract.

[18] The parties appointed Joe McCarthy of the RAS as their meeting facilitator, to help them in their discussions and negotiations to resolve the matters referred to in Schedule 1 of the multi-party meeting agreement. The description of matters under that schedule was simply filled out with the address of the property.

[19] After the multi-party meeting agreement was signed the parties immediately proceeded with the meeting. It was attended by Mr and Mrs Gidden and a family member, supported by Ms Henderson. For IAG, the case manager, Ms Westwood, and the insurance claims technician, Ms Tapp, attended.

[20] The outcome of the meeting was a document hand-written by the facilitator and signed by the parties that day (the initial outcome agreement). It identified the principal issue to be resolved as "Clarity around proposal to Rebuild". The parties then set out five points of agreement under a heading "Accordingly the parties agree that".

[21] In the following days, the facilitator had the initial outcome agreement typed up. He took the opportunity to add some words to improve readability. He also added, at the request of IAG and with the Giddens' agreement, the additional words "appropriately qualified" in relation to the quantity surveyor the Giddens were to employ. The parties then (on 14 and 15 October 2014) signed the typed version (the outcome agreement).

[22] The parties recorded in the (typed) outcome agreement:

> **Principal issue to be resolved**
> Clarity around the proposal to rebuild the house at 247A Wainoni Road.
>
> **Result Arising**
> The parties reached an understanding and agreed a way forward.
>
> **Accordingly the parties agree as follows**
> 1. The parties will proceed in good faith on the basis of the house at 247A Wainoni Road being a rebuild
>
> 2. The Insured will engage an appropriately qualified Quantity Surveyor at the Insurer's cost to assess the cost of rebuilding the existing house at 247A Wainoni Road
>
> 3. The Insurer will review the result of 2 above and will work with the Insured to reach agreement on costs
>
> 4. On the basis of 3 above the Insurere will set out options for moving forward (e.g. Hawkins managed vs self managed vs cash settlement vs purchase other property)
>
> 5. The parties undertake to try to achieve Steps 2, 3 and 4 above in a time frame of 2 weeks for each Step

[23] The Giddens retained Harrisons as quantity surveyors to complete an assessment of the cost of rebuilding the home. Harrisons' "estimate summary" and supporting calculations are dated 5 December 2014. The Harrisons total was $774,343 (without provision for enhanced foundations). An estimate for enhanced foundations of $147,324 (inclusive of GST) was included. The Harrisons' report was promptly provided to IAG.

[24] IAG provided the Harrisons report to its quantity surveyor, Kingston Partners Ltd (Kingstons) for review. By a letter dated 28 January 2015, Kingstons reported to IAG on the basis of a "high level assessment". The Kingstons assessment

expressly excluded any allowance for the cost of enhanced foundations which Kingstons understood to be a matter for IAG assessment on a case by case basis. The Kingstons assessment for the remainder of the rebuild totalled $595,870 (including GST) (contrasted with the Harrisons' estimate of $774,343).

[25] On 28 January 2015, Ms Tapp of IAG sent an email to the Giddens. She noted that the Kingstons report had been received and was being reviewed, and that IAG was now awaiting a report on foundation costs. Ms Tapp attached a document entitled "cash settlement information and clarification" (IAG's Cash Settlement Information document). In her affidavit, Ms Tapp has drawn particular attention to a paragraph in the document which reads:

> **Cash Settlement Panel**
> As State is offering a settlement option that is not part of our contract or policy with you, any offer needs to be approved by the 'cash settlement panel' …

[26] In February 2015, IAG received a calculation as to a "foundation cash settlement estimate" which assessed the additional foundation costs (including GST) as $52,836. Ms Tapp explained that the calculation had been provided by "the Geo-tech and Quantity Surveying team".

[27] On 19 February 2015, Ms Tapp emailed to the Giddens the calculation print-out and attached updated cash settlement options. The options were that IAG would pay:

- Option 1 – if the Giddens managed the earthquake repairs themselves, $655,055.30;

- Option 2 – if the Giddens intended to reinstate on another site rather than rebuilding the home on site, $540,056.85; or

- Option 3 – if the Giddens were to buy an existing house elsewhere, $474,479.03.

The figures offered included a "stress payment" of $1,000 (which Ms Tapp explained

in subsequent correspondence to be a sum payable under the policy in the event of a total loss of the home).

[28] Email correspondence ensued between the Giddens and Ms Tapp. The Giddens advised Ms Tapp that they would "go with option 1" (cash settlement). They then corresponded as to various items and aspects of calculation.

[29] On 20 March 2015, Ms Tapp emailed an updated offer in relation to the Giddens' managing the earthquake repairs themselves. IAG's offer was increased to $673,904.19.

[30] With the assistance of Ms Henderson of the RAS, the Giddens immediately responded to the increased offer, noting a number of additional items which needed to be dealt with. By email and letter correspondence, Ms Tapp worked through those items, making additional offers in relation to project management fees ($10,190.65) and a dishwasher ($999).

[31] In a letter of 10 April 2015, Ms Tapp on behalf of IAG confirmed:

> …the property … is currently uneconomical to repair. The claim is nearing completion and State is negotiating a settlement based on the customer completing the reinstatement of the home (over and above the EQC settlement).

[32] Ms Tapp in the following days proceeded with finalising her assessment of the last items.

[33] On 21 April 2015, Ms Tapp emailed the Giddens as to updated costings for some additional elements and concluded:

> I need to completely review all our correspondence and provide an updated Cash Settlement offer to you, I aim to have this completed tomorrow and will send all documents as soon as I can.

[34] On 22 April 2015, Ms Tapp emailed a further "Cash Settlement Offer" which, including some additional items (but still excluding the figures she had arrived at for the dishwasher and project management fees), led to a "total settlement" of $694,776.69.

[35] Notwithstanding the wording of the document as a "Cash Settlement Offer", Ms Tapp in an email to Mrs Gidden and Ms Henderson stated:

> Good afternoon all,
>
> I have now completed the updated rebuild cash settlement.
>
> I have discussed this with our Cash Settlement Panel to show how the costs have been reached. We discussed the agreement 'to proceed in good faith that the home is a rebuild', I confirmed that it was discussed that the costs would still need to be fair and reasonable and that to consider options for cash settlement we had agreed to consider a Professional Quantity Surveyor (PQS) report.
>
> Our Cash Settlement Panel confirmed that this was an acceptable decision based on the costs we had at that time but due to the fact the rebuild costs are now double what the State engineered repair strategy and cost is, they cannot currently approve the settlement recommendation. They advised they will require confirmation of repair costs to be supplied by a Quantity Surveyor so that they can compare the current rebuild figure and confirm that this shows the rebuild cost is still economical, reasonable and in line with the policy entitlements.
>
> I have contacted Harrisons and asked if they could complete this for me to ensure that we are making a fair comparison with a consistent report. I expect that the Harrisons cost of repair will be significantly higher than the State cost but I do need to receive this to receive approval for my recommended settlement.
>
> I am sorry for any additional delay caused by this. I have asked Harrisons to complete this work with any urgency they can afford.
>
> Best regards,
>
> Sharon Tapp

[36] The Giddens took fresh advice from the RAS. On 7 May 2015, Ms Henderson wrote to IAG. She referred to the outcome agreement. She referred to the steps taken to implement that agreement. She stated that the additional steps IAG recorded it was taking (notified by IAG's email of 22 April 2015) did not accord with the terms of the outcome agreement. She asserted that IAG did not have the right to unilaterally vary the terms of the agreement simply because the costs of rebuilding the house had exceeded IAG's original rebuild estimate. She concluded that if there was no resolution through agreement on a cash settlement based on self-managed rebuild, the RAS would be advising the Giddens either to give the RAS instructions to write to the Insurance and Savings Ombudsman or to privately engage litigation counsel.

[37] On 4 June 2015, IAG (through Ms Tapp) responded by letter. The response contains a number of arguments as to why it would be unfair to proceed on the basis that the home is a rebuild and concluding that the outcome agreement did not override the contractual terms of the policy. The arguments advanced were generally of a legal nature and do not call for setting out in this judgment.

[38] Further communications took place between the Giddens' representatives and IAG, which did not lead to a resolution of issues between the parties. In the course of those discussions, Ms Tapp on 19 June 2015 dealt in a lengthy email with a number of matters advanced on behalf of the Giddens by their son-in-law, Andrew Buckley. On one of the matters raised, Ms Tapp recorded the following in her email:

> Andrew bought (sic) up the multi-party meeting and that I had agreed the property would be a rebuild due to State's handling of the claim prior to this. I can confirm that I agreed that due to the frustrations so far and considering the information we had at that time, State could agree that the home was rebuild so we could move forward; so long as we could agree that costs were fair and reasonable, we could then arrange settlement.
>
> At this time the repair costs were $437,354.33 and the rebuild costs were $456,992.63. Although the rebuild costs were expected to rise somewhat with a PQS the fact that the figure has doubled brings question over the policy entitlements and States (sic) liability. I need to advise in regards to this point that I have no authority to make decisions outside of the policy limitations such as deciding a property is a rebuild regardless of State's liability. I was confident at the time that the repair and rebuild figures were both so close – and both would be expected to rise with a QS costing that it was the right decision to make to try and get some traction on the Gidden's (sic) claim.

[39] In the absence of progress to settlement, the Giddens instructed Anthony Harper, solicitors. Mr Woods of that firm wrote a letter before action to IAG on 25 August 2015, requiring confirmation that the claim would be settled within 14 days. IAG then took advice from Mr Law's firm. On 21 October 2015, IAG wrote to Mr Woods. IAG recorded that it would be obtaining an expert opinion whether the property can be repaired. State recorded that it had taken legal advice. It regarded the outcome agreement as an "agreement to agree, void for uncertainty, unenforceable as a contract and void for uncertainty".

[40] Consequently, the Giddens commenced this proceeding. They now seek summary judgment on their first and third causes of action.

The statement of claim

[41] The Giddens claim that they reached an agreement on 9 October 2014 with IAG (the October agreement) whereby it was agreed that the house was "a rebuild". They claim that IAG is in breach of the agreement, IAG now looking at costs for a repair rather than a cash settlement on the basis of a rebuild. They seek declarations as to the binding nature of the October agreement and as to their entitlements under the IAG policy.

[42] The Giddens seek (in the alternative) the same declarations upon the basis of a promissory estoppel said to have been communicated "in 2011".

[43] They also seek judgment for $707,610.94 upon the basis that such sum is owing pursuant to the October agreement as a result of IAG's calculation of the rebuild costs together with other disbursements, but less payments received from the Earthquake Commission.

[44] These three causes of action appear in the Giddens' amended statement of claim dated 4 March 2016 (the ASOC). The ASOC replaced an original statement of claim dated 22 December 2015 which contained the same three causes of action.

The summary judgment application

[45] The Giddens accompanied their initial claim with a summary judgment application. They sought judgment in terms of the relief on all three causes of action. Mr Gidden deposed as to the correctness of the allegations in the (original) statement of claim and as to his belief that IAG had no defence to the allegations in the claim. His affidavit contained a detailed history of dealings with IAG.

[46] IAG, in early February 2016, filed a notice of opposition and supporting evidence.

[47] On 4 March 2016, the Giddens filed the ASOC. They accompanied it with an amended summary judgment application by which they again pursue summary judgment in terms of the relief identified on the first and third causes of action. The

ASOC introduced two additional paragraphs pleading further detail as to the multi-party meeting.

[48] The amended application was supported by a further affidavit of Mr Gidden. Mr Gidden deposed as to the correctness of the allegations contained in the ASOC. He also replied to IAG's affidavits in opposition.

[49] By the amended application, Mr Gidden no longer pursues summary judgment on the estoppel (second) cause of action.

What went wrong with the implementation of the outcome agreement?

[50] I have concluded that the Giddens are entitled to summary judgment. Before turning to a more detailed analysis of the respective arguments, I will summarise what the evidence establishes beyond argument.

[51] The process of implementing the terms of the outcome agreement has clearly derailed. The event which derailed the implementation of the outcome agreement, and which I come to below, is clearly identifiable by following the correspondence written on behalf of IAG.

[52] In mid-February 2015, Ms Tapp had received costing information from IAG's "GEO-tech and Quantity Surveying team". Ms Tapp observed in her 19 February 2015 email to the Giddens that the figure received was "significantly less" than the Harrisons' figure. But Ms Tapp at that point clearly did not perceive a derailment of process under the outcome agreement. Rather, she observed in her email that, "As I have said before, I want to make sure that the costs are fair and reasonable". This was clearly a reference to Ms Tapp implementing the provisions of the outcome agreement as to assessing and agreeing rebuild costs. It was in the same email that she went on, having referred to the role of the "Cash Settlement Panel", to observe:

> Having processed a number of these settlements, I am confident that the allowances I have made will be accepted so approval should come back fairly quickly …

[53] The email had attached to it IAG's "Cash Settlement Offer" document document containing the three options including "self-managed repairs".[4] The Giddens promptly indicated that they would "go with option 1 (cash settlement)". Through the following months they negotiated further allowances to the point that IAG increased its cash settlement offer calculation to $694,776.69.

[54] On 10 April 2015, the settlement based on a rebuild was still on the rails. In her letter that day on behalf of IAG, Ms Tapp recorded that the Giddens' property "is currently uneconomical to repair" and that the claim is "nearing completion and State is negotiating a settlement based on the customer completing the reinstatement of the home (over and above the EQC settlement)".

[55] On 21 April 2015, the rebuild settlement was still on the rails as Ms Tapp, in her email of that day, stated her aim to have to the Giddens an updated cash settlement (based on a rebuild).

[56] It was on the following day that the process of implementing the outcome agreement derailed. Instead of Ms Tapp on 22 April 2015 sending the Giddens a final Cash Settlement Offer her email (set out in full at [35] above) explained the outcome of her discussion with IAG's Cash Settlement Panel. From the contents of the email, it is clear what derailed the implementation of the outcome agreement. It was a view on the part of the "Cash Settlement Panel" expressed to Ms Tapp at some point on 22 April 2015.

[57] The Giddens immediately sought to put the implementation of the agreement back on the rails through correspondence of Ms Henderson of RAS to IAG. Those discussions made no progress as Ms Tapp repeated the IAG position that, "it would no longer be fair to proceed on the basis that the home is a rebuild".

[58] Thus, what had happened was this. From 9 October 2014 to 22 April 2015, Ms Tapp set about implementing the outcome agreement. With the costing of a few remaining items on 21 April 2015, she expected to provide to the Giddens the following day a finalised Cash Settlement Offer covering all figures. The Cash

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[4] Above at [27].

Settlement Panel of IAG then became involved. The Court has been given no information as to who they are and no evidence as to the documentation they had before them. IAG has not disclosed any record of their discussions or instructions. The panel denied Ms Tapp the opportunity to put to the Giddens the finalised Cash Settlement Offer in relation to the cash settlement option which the Giddens had elected.

[59] When IAG's Cash Settlement Panel came to consider Ms Tapp's recommendation on 22 April 2015, there is no suggestion that they had received any legal advice as to the status or terms of the agreement. They took a view of the agreement (which as subsequently relayed by Ms Tapp) was plainly wrong, by reason of the more detailed findings I now come to.

Plaintiff's summary judgment – the principles

[60] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[61] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.[5]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[6]

(c) The Court will not hesitate to decide questions of law where appropriate.[7]

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5 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].
6 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
7 *European Asian Bank AG v Punjab & Sind Bank* (No. 2) [1983] 1 WLR 642 (CA).

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[8]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[9]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[10]

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[11]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.[12]

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of

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8 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 (SC).
9 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).
10 *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).
11 *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].
12 *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).

the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.[13]

Issues for determination

[62] The Court has the benefit of IAG's pleading of its defence as IAG elected to file a statement of defence. Significantly, IAG accepts that the outcomes of the multi-party meeting were recorded in the (typed) outcome agreement.[14] IAG's statement of defence goes on to plead a number of legal matters and affirmative defences:

(a) the outcome agreement was "an agreement to agree" which is not sufficiently certain to be enforceable in law;

(b) if the outcome agreement is binding (denied) then:

(i) the outcome agreement was not intended to and did not supersede the terms and conditions of IAG's policy;

(ii) it was either [expressly] agreed before the initial outcome agreement was signed on 9 October 2014 or was an implied term of the outcome agreement that the costs of a rebuild would be "fair and reasonable" which meant that the costs of a rebuild would be "fair and reasonable" if the costs of repair exceeded 80 per cent of the costs of a rebuild;

(iii) it was a term of the settlement that the Giddens' claim under the policy and pursuant to the outcome agreement would require approval in accordance with IAG's normal process for the cash settlement earthquake claims.

[63] I will now examine the competing contentions. I will begin with the terms of the outcome agreement before examining IAG's unenforceability defence.

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13 *Pemberton v Chappell*, above n 8.
14 Set out at [24] above.

Determination

A requirement of "fair and reasonable" costs (preservation of a repair option)

[64] IAG's specific pleading is that the outcome agreement was subject to:

> A term which was agreed before the Agreement was signed on 9 October 2014 and/or was implied that the costs of a rebuild would be 'fair and reasonable' which meant that the costs of a rebuild would be fair and reasonable if the costs of repair exceeded 80% of the costs of a rebuild.

[65] Implicitly, IAG asserts that, by such a term, the outcome agreement preserved to IAG the right to revert to a repair of the home (if later assessment or repair costs came in at less than 80 per cent of assessed rebuild costs).

[66] The two IAG representatives involved in the 9 October 2014 meeting were Ms Westwood and Ms Tapp. As to the content of the meeting, Ms Tapp simply confirms Ms Westwood's account. For her part, Ms Westwood refers to the content of the meeting in three paragraphs:

> 32 I was present throughout the meeting which I recall took about an hour from 9am to 10am. After introductions, the plaintiffs explained their experience to date and their position. I responded to the points raised and confirmed the recent email/confirmation that State thought that the cost to repair the Home was very close to the cost to rebuild it and on that basis we could proceed with getting them into the 'programme'.
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> 33. The plaintiffs said that they would not want to go through the Hawkins programme and asked if they could use their own builder. Sharon Tapp confirmed that this would be an option, but that the claim would need to be cash settled to allow the plaintiffs to manage the rebuild themselves. It was agreed that to cash settle the claim it would be fair to arrange a PQS (professional quantity survey). Sharon offered to arrange a PQS, but the plaintiffs insisted on supplying their own report. Sharon confirmed this would be suitable and that State would pay for the fee. We discussed the fact that State would need to review the PQS and I confirmed that the rebuild report would need to be fair and reasonable. The plaintiffs stated said that they understood this and agreed with it, but they believed that the Home was a million dollar rebuild.
>
> 34. Mr McCarthy commented at this point that surely the claim could not be a rebuild regardless of the cost as that would be against the whole principle of insurance. Sharon and I agreed and confirmed that the costs would need to be compared to the appropriate cost of repair to ensure that the settlement would be fair and reasonable and within policy terms.

> 35. Mr McCarthy then wrote up the Record of Agreement which the parties signed at the meeting.

[67] A careful reading of Ms Westwood's paragraph 33 and 34 shows that they relate at least three (oral) topics.

[68] First, Ms Westwood refers (at paragraph 33 – final two sentences) to discussions which the parties then provided for in paragraph 2 and 3 of the outcome agreement (set out at [22] above). Those provisions identify the process by which the Giddens were to obtain a rebuild cost from a quantity surveyor, with that rebuild cost to then be reviewed by IAG. IAG after the meeting took the trouble to have the words "appropriately qualified" included in relation to the quantity surveyor to be retained by the Giddens. In his reply affidavit, Mr Gidden stated that he agreed with most of paragraph Ms Westwood's 33. He observed:

> We understood that our quantity surveyor's rebuild costing would need to be a fair and reasonable cost for a rebuild. I do not recall saying that the rebuild cost would be approximately $1 million.

[69] Accordingly, although the outcome of the recorded outcome agreement did not expressly refer to the requirement for the assessed rebuild costs to be a fair and reasonable assessment, it is common ground between the parties that such was required. That expectation of the parties is implicitly reflected in the scheme of paragraphs 2 and 3 of the outcome agreement. The review procedure would provide the check to ensure a fair and reasonable assessment. That this was exactly as Ms Tapp, as IAG's representative, understood it is reflected in her later, 19 June 2015 email.[15]

[70] Secondly, there is in Ms Westwood's paragraph 34, her reference to the exchange which she says she and Ms Tapp had with Mr McCarthy (the facilitator). At this point, Ms Westwood's evidence is that a fair and reasonable comparison was now being required between rebuild costs and repair costs. Such is a completely different concept from the rebuild costs assessment being in itself a fair and reasonable assessment. Ms Westwood's evidence at this point has the potential to confuse two different concepts.

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[15] Above at [38].

[71] I consider this part of Ms Westwood's evidence by reference to what, on the evidence, those involved in the meeting would have understood by a discussion as to a "fair and reasonable" comparison between rebuild and repair costs. The first point is that Ms Westwood does not allege that the Giddens were directly involved in the conversation she refers to. Her evidence is that she and Ms Tapp responded to a comment by Mr McCarthy, the facilitator. She does not allege that the Giddens in any way agreed with comments made in the discussion taking place between the IAG representatives and the facilitator. It is not suggested that the IAG representatives sought the agreement of the Giddens. On that basis alone, the express discussion recorded by Ms Westwood does not amount to an agreement between IAG and the Giddens, particularly when the parties elected to make no reference whatsoever to repair costs in their written agreement. IAG cannot point to evidence of an arguable, express agreement of the nature pleaded as an affirmative defence.

[72] I would also have found, if necessary, that a term of the nature deposed to by Ms Westwood would not meet the requirements of contractual certainty. There is no obvious reference point for the parties to have had a common understanding as to what level of difference between repair and rebuild costs would pass beyond fair and reasonable and become unfair and unreasonable. This point is highlighted by IAG's pleaded explanation of what "fair and reasonable" meant, "that the costs of a rebuild would be fair and reasonable if the costs of repair exceeded 80 per cent of the costs of a rebuild".

[73] Neither Ms Westwood nor Ms Tapp suggests there was any discussion in front of the Giddens at the meeting as to that particular view of "fair and reasonable". IAG may well have had a view at the time which involved some 80 per cent relationship. There had by that time been the recognition by Gendall J in *Rout v Southern Earthquake Services Ltd* that:[16]

> … the evidence has suggested that most insurance companies involved in Christchurch earthquake damage claims presently operate a rule of thumb that a house is only economic to repair if the actual repair costs are less than about 80% of a full rebuild estimate.

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16 *Rout v Southern Earthquake Services Ltd* [2013] NZHC 3262 at [25].

But IAG has not adduced evidence of a common understanding (as between IAG and the Giddens) of the meaning alleged in IAG's affirmative defence. For IAG, Mr Law was even unable to refer me to a document in evidence in which IAG recorded that 80 per cent relationship as its own view or practice.

[74] On that basis also, this particular affirmative defence would not be arguable.

[75] Mr Giddens', in reply, responded to Ms Westwood's paragraph 34, rejecting any suggestion that through discussions exchanged between the IAG representatives and the Giddens, IAG had preserved to itself an option to bring into account the costings on a repair basis. Mr Gidden deposed in relation to Ms Westwood's paragraph 34:

> Paragraph 34 – I do not recall these comments and do not believe they were made during the meeting. Possibly, Ms Tapp and Ms Westwood made these comments to Mr McCarthy privately. I am very confident they were not made in our presence as our main objective was to achieve an agreement that the house was a rebuild. Had we known that State intended to compare the rebuild costs with the repair costs, we would not have made any progress at the MPM at all and we would not have signed an Agreement that gave State that option.

[76] In the context of a summary judgment application, it would not normally be possible to prefer the evidence of one deponent to that of another if there was a direct conflict in the evidence. In this case, however, Ms Westwood left open whether the Giddens would inevitably have heard the content of Ms Westwood's and Ms Tapp's comments to the facilitator. There is an irresistible logic to Mr Gidden's reply evidence in which he expresses his confidence that Ms Westwood's comments were not made in the Giddens' presence. As Mr Gidden records it, the Giddens' main objective was to achieve an agreement that the house be rebuilt. Hence the introductory words of the outcome agreement: "Principal issue to be resolved: Clarity around the proposal to rebuild the house". Mr Giddens deposes that had the Giddens known that IAG had it in mind to compare rebuild costs with repair costs, the Giddens would not have viewed that as any progress at all and would not have signed an agreement containing such an option. There is a very strong case for concluding that any discussion could not arguably have taken place in the Giddens'

presence. Having regard to my other conclusions, it is unnecessary that I conclusively make that finding.

[77] My above conclusions apply equally to IAG's alternative pleading which alleges an implied term. The implication of a term which involves an 80 per cent relationship between rebuild and repair costs is not so obvious, even on an arguable level, that it goes without saying. It therefore fails the third point of the five point test laid down in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*[17]

[78] A third oral requirement asserted by Ms Westwood (in the last sentence of her paragraph 34) is that she and Ms Tapp agreed [in response to a comment by the facilitator] that the settlement would be "within policy terms".

[79] The reference to "within policy terms" appears to be the basis for the IAG pleading that:

> The Agreement was not intended to and did not supersede the terms and conditions of the plaintiffs' insurance policy with the defendant.

[80] The same issue as before arises in relation to any discussion which Ms Westwood and Ms Tapp may have had with the facilitator. It is not suggested in IAG's evidence that the agreement of the Giddens was sought to preserving all the terms of the policy alongside the outcome agreement. Furthermore, to the extent that Ms Westwood deposes that she referred to settlement being "within policy terms", she does not indicate that the facilitator had raised a particular issue as to the preservation of policy terms. This third suggested term of the outcome agreement is not arguable having regard to the absence of evidence that the Giddens accepted it.

[81] It is also not arguable as an implied term because to incorporate an implied term which would allow IAG to revisit the possibility of resolving the claim on a repair basis only would contradict the express terms of the outcome agreement. By the outcome agreement, the parties expressly agreed that the principal issue to be resolved was "clarity around the proposal to rebuild the house".

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[17] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 (HC) at 376, applied in *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA).

[82] In the terms of the outcome agreement, the issue to be resolved was "clarity around the proposal to rebuild the house".

[83] By paragraph 1 of the agreement the parties recorded the basis on which they were proceeding was "a rebuild". Subsequent provisions in the outcome agreement expressly addressed "the cost of rebuilding". An outcome based on IAG's right to explore a repair option would imply a term which contradicts the express terms of the outcome agreement. If is not permissible to imply such a term under the fifth limb of the five-point test in *BP Refinery*.[18]

A term preserving IAG's "normal process for the cash settlement of earthquake claims"

[84] The further term of the outcome agreement asserted as an affirmative defence is that there was:

> … a term that settlement of the plaintiffs' claim under the Policy and pursuant to the Agreement would require approval in accordance with the defendant's normal process for the cash settlement of earthquake claims.

[85] Both the pleading and grounds of opposition of IAG are bereft of particulars as to when and by whom such a term of settlement might have been agreed. The absence of such pleaded particulars becomes understandable when one reads the evidence of Ms Tapp which serves to explain the "normal process" upon which IAG apparently relies.

[86] Ms Tapp refers to the outcome agreement and the subsequent steps taken by the parties to implement the costing assessments. She then refers to her 28 January 2015 email when she provided the Giddens with the Cash Settlement Information document. She deposes correctly that, "The document clearly states that any offer needed to be approved by the "Cash Settlements Panel". She goes on to refer to further occasions on which she stated that offers were to be subject to the approval of that panel.

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[18] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, above n 18.

[87] None of that evidence as to events after the date of the outcome agreement can import terms into the agreement already reached, documented and signed.

[88] The highest that Mr Law could properly put it on behalf of IAG was in these terms in his written synopsis:

> The information which IAG forwarded to the plaintiffs in January, February and March 2015 contemplated formal documentation to settle the plaintiffs' claim under the Policy. The plaintiffs did not object to the process until May 2015 after the cash settlements panel declined to approve the settlement.

[89] The short answer to Mr Law's submission in favour of an implied term incorporating IAG's "normal process" is that IAG's subsequent references to pursuing such a process have no contractual status.

[90] Mr Gidden responsibly replied to Ms Tapp's evidence as to the January/February/March 2015 IAG correspondence. He deposed:

> I have no recollection of any reference to the offer needing to be approved by the "cash settlement panel" prior to that letter and certainly there was no mention of it at the [multi-party meeting], or in the Agreement…
>
> I thought that when the "cash settlement panel" was mentioned, it was an internal process and had no bearing on the Agreement we had reached at the MPM. I thought that everything was in hand to complete the process set out in the Agreement.

[91] On the basis of the documentary record, Mr Gidden's assumption was entirely understandable. IAG had at no point stipulated for a role on the part of some internal IAG body let alone obtained the Giddens' agreement to it.

The outcome agreement as an "agreement to agree"

[92] By its pleading, IAG asserts:

> The Agreement was an "agreement to agree" which was not sufficiently certain to be enforceable in law and accordingly the plaintiffs do not have a cause of action for the defendant's alleged breaches of the Agreement.

[93] This pleading was developed by Mr Law in his written synopsis in this way:

> IAG'S primary submission is that the Agreement is expressly and unambiguously an agreement to proceed in good faith and to try to agree on

> the costs of a rebuild. It is 'an agreement to agree' or 'a process agreement'. There is no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of the good faith obligation.

[94] Later in his submissions, Mr Law continued:

> The ostensible consensus under the Agreement is illusory. The Agreement is too uncertain to be enforceable and the plaintiffs do not have a cause of action in law for IAG's alleged breaches of the Agreement.

[95] Mr Law invokes observations of the Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington),* a case involving a process contract by which the Council's officers were expressly required to negotiate, in good faith, sales of the Council's leasehold interests to existing lessees.[19] I return to that decision at [106] below.

[96] Although Mr Law presented detailed submissions as to what he described as "the process nature of the outcome agreement", the agreement contains much more specific and substantive terms of agreement than IAG would have the Court accept.

[97] The background is also significant in this case and compelling. That the Giddens had experienced a lengthy period of frustrations while IAG went through its internal processes and consideration of rebuild or repair was a matter of fact recognised by Ms Tapp upon her frank review of the Giddens' complaints leading into the multi-party meeting in October 2015, at the meeting itself and in her later 19 June 2015 email. Ms Tapp recorded:

> I had agreed the property would be a rebuild due to State's handling of the claim prior to this. State could agree that the house was a rebuild so we could move forward.

[98] IAG's past performance, as recognised by Ms Tapp, warranted a commitment by IAG to the rebuild option. What was left for the parties to work through at the multi-party meeting was a means by which IAG could ensure that the rebuild costs were fair and reasonable.

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[19] *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at [30] – [35].

[99] The outcome agreement involved a commitment to finalise rebuild costing. It put to bed the Giddens' complaints as to IAG's delays in working through the rebuild/repair options to that date. Its purpose was, as the parties recorded, to provide "clarity around the proposal to rebuild the house".

[100] Three specific steps were agreed and recorded in the outcome agreement, so as to provide IAG with the ability to secure a rebuild cost that was "fair and reasonable". Paragraph 2 required the Giddens as a first step to obtain their quantity surveyor's assessment. Paragraph 3 then required IAG to conduct its review (and to then work with the Giddens to reach agreement on the costs figures). Paragraph 3 also provided for the next step which was (once the rebuild costing was agreed) to require IAG to set out the various options arising from the availability to the Giddens of rebuild costs.

[101] The tight timeframe which the parties agreed in paragraph 4 (two weeks for each of the three steps) indicated an apparent determination of the parties to have matters concluded before christmas 2014. The timetable precludes any suggestion that the parties' agreed the rebuild costing exercise might be cut across by IAG resuming investigations, costings, and negotiations concerning an entirely different approach, namely repair. A fundamental purpose of the multi-party agreement was to bring to an end IAG's unacceptable delay.

[102] Mr Law has in his submissions placed considerable emphasis upon the fact that the parties adopted the words "in good faith" in paragraph 1 of the outcome agreement, which I set out again for convenience, "The parties will proceed in good faith on the basis of the house … being a rebuild".

[103] The tenor was captured in the primary submission which I have quoted[20] in which Mr Law described the agreement as "an agreement to proceed in good faith and to try to agree on the costs of a rebuild".

[104] Mr Law's attempt to recast the terms of the parties's agreement is to be rejected. At no point did the parties record that they would "try to agree" on

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[20] Above at [93].

anything. The parties having agreed on a way forward which involved a rebuild, agreed on specific costing steps to be undertaken by each. The commitment of IAG, having conducted its review of costings, was that it "will work with the insured to reach agreement on costs". From the perspective of the parties who wanted conclusion of the process, that was clearly the wording of the required outcome ("to reach agreement on costs") and not of "trying" to reach an outcome.

[105] Put another way, the commitment which each gave to the other to proceed in good faith was a commitment to see agreement on rebuild costs reached and reached promptly so that the options available to the Giddens in utilising those rebuild costs could be identified and accepted by them in a timely way (approximately six weeks after the agreement).

[106] The present case involves an agreement of a type far removed from the commitment (in *Wellington City Council v Body Corporate 51702),*[21] whereby Council officers were to negotiate in good faith sales of the Council's leasehold interests. The *Wellington City Council* case involved, as the Court of Appeal found, an obligation which was left for future determination on a purely subjective basis. The Court cannot assist the parties to such arrangements which fail for want of sufficient certainty.[22] Tipping J contrasted the case which was before the Court of Appeal with another situation identified by the authors of Burrows, Finn and Todd, *Law of Contract in New Zealand.*[23] As Tipping J observed:[24]

> In the [said] work, the authors appropriately point out that when the parties intend that an essential obligation is to be determined by some objective criterion, the Court will supply the answer if the parties cannot agree and even if the agreed machinery proved defective.

His Honour went on to observe:[25]

> … an agreement to buy and sell at market or some other objectively ascertainable price will be enforceable, even if the Court is the only implicitly agreed or default arbiter of the price.

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21 Above at n 21.
22 At [29].
23 Burrows, Finn and Todd *Law of Contract in New Zealand* (2nd ed, Lexis Nexis, Wellington 2002) at [3.7.3].
24 At [29].
25 At [29].

Tipping J referred for these propositions to the judgments in *Attorney-General v Barker Bros Ltd,*[26] and *Money v Ven-Lu-Re Ltd.*[27]

[107] Pursuant to the outcome agreement, the objective criterion for assessment of the (fair and reasonable) rebuild costs was the application of quantity surveying principles. There is a close parallel with an agreement to buy and sell at a market price, being recognised by the Court of Appeal in *Wellington City Council* as an objectively ascertainable price.

[108] The outcome agreement was accordingly not an "agreement to agree". Rather, it was an agreement which allowed determination of outcome by objective criteria. The Court would be entitled to supply the answer on costings if the parties' mechanism for agreement failed.

[109] In the event, the Giddens have an entitlement under the outcome agreement to receive the finalised sum costed upon the basis of a rebuild. They are therefore entitled to the first declaration which they seek, namely that the outcome agreement is binding and enforceable. They are also entitled to the second declaration they seek recognising their right to elect to rebuild the home and, subject to IAG's agreement, to rebuild the home at a different site.

The rebuild costs

[110] The first two steps required by paragraph 2 and 3 the outcome agreement (Harrison's quantity survey assessment and the review by IAG) were completed in January 2015. The negotiation to finalise costs required by paragraph 3 of the outcome agreement ("IAG will work with the Giddens to reach agreement on costs") was conducted between Ms Tapp and the Giddens through a series of Cash Settlement Offer documents sent by IAG and responses from the Giddens.

[111] On 19 February 2015, Ms Tapp sent the Cash Settlement Offer to which I have referred which contained three options, including self-managed, reinstatement on another site and buying an existing home. The total offer for cash settlement

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[26] *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 (CA).
[27] *Money v Ven-Lu-Re Ltd* [1988] 2 NZLR 414 (CA), [1989] 3 NZLR 129 (PC).

(before deduction of EQC payments) was $885,183.55. It was in response to that offer that the Giddens elected option 1 (the cash settlement) on 26 February 2015 but identifying at the same time additional items to be dealt with. From that point of the Giddens' election, the negotiations proceeded on the basis of a Cash Settlement Offer.

[112] On 20 March 2015, Ms Tapp forwarded a further Cash Settlement Offer. She noted the adding of some additional items. The total offer was now $904,032.44. Ms Tapp identified one item yet to be finalised ("the fire/solar system").

[113] In reply, the Giddens identified some additional items beyond the fire/solar being a dishwasher and project management fees.

[114] Ms Tapp replied by email on 10 April 2015 recording that the figures of $999.00 (for which a quote on the dishwasher had been received) and a figure of $10,190.65 for project management (upon discussion with the loss adjuster) would be included in the Giddens' settlement.

[115] Accordingly, IAG's cash offer of 20 March 2015, adjusted to include IAG's confirmed figures of $999.00 and $10,190.65, would have totalled $915,222.09. After allowing for EQC payments (including excesses) the balance of settlement between IAG and Giddens would have been $707,610.94.

[116] Those figures represent IAG's own calculations of rebuild costs, following the negotiations via telephone conference which had been required under paragraph (c) of the outcome agreement.

[117] It is clear from the evidence that the only reason IAG did not then incorporate the final figures into a Cash Settlement Offer document was that IAG's Cash Settlement Panel decided on 22 April 2015 that they wished to compare the repair costs. But for that fact it is clear that the figure of $707,610.94 would have been incorporated in a Cash Settlement Offer properly put by IAG to the Giddens.

[118] The costs themselves having been agreed, it was a breach of the outcome agreement on the part of IAG then to refuse to effect the cash settlement which the Giddens had elected to take.

[119] IAG has no arguable defence to the Giddens' claim for judgment in the sum of $707,610.94.

[120] In addition, the Giddens by their statement of claim seek interest at the Judicature Act[28] rate from 9 October 2014 to the date of judgment. The Supreme Court in *Worldwide NZ LLC v NZ Venue and Event Management Ltd* said of the awarding of the Judicature Act interest[29]:

> [23] The rationale under s 87(1) for the awarding of interest is that the defendant has had the use of money which should have been available to the plaintiff for that period and that the plaintiff should be compensated for that.

[121] The point at which IAG ought to have offered the Giddens the cash settlement sum of $707,610.94 was 22 April 2015 (not the earlier date of the outcome agreement as sought by the plaintiffs). It is just that the plaintiffs have judgment for interest at the current Judicature Act rate for the period since 22 April 2015.

$707,610.94 x 5% x 386 days = $37,416.14

Costs

[122] Counsel addressed me on the issue of costs at the conclusion of their submissions. It was agreed that in the event that there is summary judgment for the plaintiffs, that it would be appropriate to award the plaintiffs costs on a 2B basis. I will be doing so.

Orders

[123] I order:

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[28] Judicature Act 1908, s 87; Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177).

[29] *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108 [2015] 1 NZLR 1.

(a) There is a declaration that the typed agreement of the plaintiffs and the defendant signed on 14 and 15 October 2014 is binding and enforceable;

(b) There is a declaration that pursuant to the terms of the defendant's Home Comprehensive Policy, the plaintiffs:

(i) had the right to elect to rebuild the home; and

(ii) subject to the defendant's agreement, to rebuild the home at a different site;

(c) there is judgment for the plaintiffs in the sum of $707,610.94 together with interest of $37,416.14.

(d) the defendant is to pay to the plaintiffs the costs of this proceeding on a 2B basis together with disbursements to be fixed by the Registrar. [30]

Associate Judge Osborne

Solicitors:
Anthony Harper, Christchurch
CLA Piper, Auckland

[30] High Court Rules, Category 2 under r 14.3(1) and band B under r 14.5(2).