EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CIV-2021-092-000699
[2022] NZDC 9003

BETWEEN	KAREN DORIS KATHLEEN SHAW Plaintiff
AND	IAG NEW ZEALAND LIMITED Defendant

Hearing: 22 April 2022

Appearances: N Woods for the Plaintiff
R S Hargreaves and T Kim for the Defendant

Judgment: 9 June 2022

RESERVED JUDGMENT OF JUDGE D J CLARK

Introduction

[1] The plaintiff applies for a summary judgment against IAG New Zealand Limited (IAG). She does so in her capacity as the Administrator of the late Stanley James Norris. Letters of Administration as to Intestacy of Mr Norris in the name of Ms Shaw were granted by the High Court at Wellington, sealed and dated on 28 August 2019.[1]

[2] At issue is the declination by IAG to respond to a claim under a policy of insurance which covered an Isuzu (1988) FSR Motorhome (the motorhome policy). Ms Shaw says the motorhome has been "lost" for the definition purposes contained

[1] Letters of Administration on Intestacy High Court CIV-2018-485-611926 Wellington Registry 28 August 2019.

within the motorhome policy. As such the motorhome policy should respond by paying out the full agreed indemnity value of $80,000.

[3] IAG says the motorhome has not been lost. Indeed, the whereabouts of the motorhome is known, and the motorhome is recoverable. It is a matter for Ms Shaw to take the appropriate steps and recover the motorhome.

Factual Background

[4] Ms Shaw and Mr Norris first met in 2011 when Mr Norris was a boarder of Ms Shaw. A de facto relationship commenced in 2013 until Mr Norris' death on 10 January 2018.

[5] In 2013 Mr Norris purchased the motorhome costing $62,500. The couple travelled extensively throughout New Zealand between 2012 to 2015. They eventually arrived at "Seadown" near Timaru. In May 2016, whilst the couple were still in Timaru, Mr Norris suffered a major stroke and was left paralysed down his right side. He was admitted to hospital and required full medical treatment and 24-hour monitoring. He continued to receive treatment for about nine weeks without any improvement. It was decided that he should be transferred from Timaru Hospital to Torbet Park Rest Home.

[6] After three weeks in the rest home, and in consultation with the rest home's medical staff, Ms Shaw informed Mr Norris' family of Mr Norris' condition.[2] Mr Norris had been married twice previously and from those relationships had five children. Ms Shaw deposes Mr Norris did not want to inform his family and needed considerable persuasion to do so.

[7] An angry meeting followed Ms Shaw contacting the Norris children. Particularly unhappy were Steven, Brian and Mark Norris. At a meeting approximately two weeks after the children had been notified, Ms Shaw took Steven and Brian Norris to the motorhome where they asked to look through several documents. This included Mr Norris' wallet and cellphone, which were given to them.

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[2] First affidavit of Karen Doris Kathleen Shaw, sworn 22 February 2021.

Ms Shaw says she was told by Steven and Brian the documents and items were needed because as far as they were concerned, they did not know who Ms Shaw was to Mr Norris.

[8] After residing at Torbet Rest Home for approximately three months, Mr Norris was moved to Radius Arran Court in Auckland. This occurred in October 2016. He remained there until his death on 10 January 2018. Mr Norris died intestate.

[9] Ms Shaw arranged for the motorhome to be returned to Auckland in October 2016. She deposes[3] she considered the motorhome to be her home and by moving it to Auckland it enabled her to be closer to Mr Norris.

[10] The motorhome was based on Podges Place in Mercer. Ms Shaw was receiving [medical treatment] and by having the motorhome based at this address meant that she was close to her daughter who provided her with support and comfort during her treatment.

[11] Mr Norris' funeral was held on 16 January 2018. Ms Shaw was not included in any of the arrangements regarding the funeral. Between Mr Norris' passing away on 10 January and the funeral on 16 January, Ms Shaw received numerous text messages and phone calls from Mr Norris' family requesting the return of the motorhome and all property. Her response to the texts was to say, to Steven Norris in particular, that she was not able to make any decisions and wanted time to grieve.

[12] On 22 January 2018 Ms Shaw received a message from Mr Semple, the owner of Podges Place, that the motorhome had been removed from Podges Place by Mr Norris' "family".

[13] Ms Shaw laid a complaint with the police.[4] The complaint was filed at the Pokeno Police Station and following the complaint some of Ms Shaw's sentimental and personal items from the motorhome were returned to her by Steven and Brian

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[3] Ibid at para 24.
[4] New Zealand Police Statement 28 February 2018.

Norris. The motorhome was not returned. Ms Shaw believes Mark and Brian Norris were the persons who had removed the motorhome.

[14] The Police have not prosecuted Ms Shaw's complaint. It would appear they consider the issue to be a civil matter until the issue of ownership of the motorhome has been determined.[5]

[15] Demands of Stephen, Mark and Brian Norris that they return the motorhome have been made at various times by Ms Shaw personally, through a private investigator[6] and through her lawyers. The motorhome has not been returned on the basis that they claim ownership of the motorhome remains at issue.

The Motorhome Policy of Insurance

[16] On 5 July 2017 Mr Norris took out the motorhome policy under what is known as the Covi Insurance NZMCA Motor Caravan Scheme. The motorhome policy is underwritten by Lumley General Insurance (NZ) Limited which is a business division of IAG. For ease of reference I will refer to Covi/Lumley as IAG.

[17] The motorhome policy covered the relevant period 5 July 2017 until 5 July 2018. In addition to the motorhome a 1996 Suzuki Escudo was also covered for a combined indemnity value of $85,000. It is an agreed position by the parties that the motorhome is covered for $80,000 and the Suzuki covered for $5,000.

[18] On 28 June 2018, Ms Shaw notified IAG the motorhome had been stolen. In and around the same time Ms Shaw advised IAG her lawyers were applying for letters of administration for the estate although the finalisation of the sealing of the Order did not happen until the following year.

[19] On 6 September 2019, Ms Shaw's then lawyers Blackwood Williams, wrote to IAG and confirmed that the letters of administration in Ms Shaw name had been granted. They also reiterated the claim the motorhome had been stolen and were of

[5] Exhibit MN-2 Affidavit of Mark Norris sworn 11 June 2021.
[6] Mr Jacob Toreson – see his affidavit sworn 27 August 2021.

the understanding a pay-out under the motorhome policy had been approved. They sought payment accordingly.

[20] On 10 September 2019 IAG replied and advised Ms Shaw's claim had not been accepted and the file had been closed given there had been a lack of information. Furthermore, despite the police complaint no action had been taken by the police.

[21] In October 2019, IAG undertook its own investigation. It received from Steven Norris a copy of a "Will letter" and a photograph of the motorhome. Mr Steven Norris confirmed to IAG he and his brothers had taken the motorhome because they believed their father, pursuant to the Will letter, wanted Mark Norris to have all of Mr Norris' assets.

[22] The Will letter stated:

> I Stanley James Norris wish for my son Mark Bruce Norris of Perth, Australia to be the sole beneficiary of all and any assets of whitch (sic) I may have. This includes any monies that may be in my bank account at the time of my death. My bank account is with Westpac. My account no. being 4943-1000-5059-2021. My son's Brian and Steven have been well considered in the family trust which I am no longer a trustee. That trust has assets of approximately $600,000.
>
> S.J. Norris [signature]
>
> 3 September 2012

[23] On 16 December 2019 IAG wrote to Ms Shaw advising it did not consider the motorhome to have been stolen but rather, was the subject of a family dispute. It recommended Ms Shaw should request the police to recover the vehicle rather than claim it as stolen under the policy.

[24] On 9 March 2020 Blackwood Legal requested a copy of the Will letter. Nothing further happened until Ms Shaw filed a complaint with the Insurance and Financial Services Ombudsman on 17 June 2020.

[25] On 2 July 2020, IAG sent a letter formally declining Ms Shaw's claim. The declination of the cover was based on a review undertaken by Mr Troulson, a Complaints Resolution Officer for IAG. In his letter to Ms Shaw, Mr Troulson

confirmed he had treated the claim as one made on the behalf of the estate of Mr Norris. After reviewing the background, he stated:

> On 10 September 2019, Lumley advised your solicitors that the claim was not accepted and had been closed due to a lack of information or police charges against any of the Stanley's children.
>
> In October 2019 Lumley initiated further investigations in the circumstances surrounding the motorhome.
>
> During this investigation, Lumley learned of the existence of a handwritten note dated 3 September 2012, it is recorded that Mr Norris gifted the Vehicle to one of his sons, Mark Norris. I stress however, that Lumley was unable to ascertain the whereabouts of the vehicle and that Mark refused to disclose this information.
>
> Following this investigation Lumley concluded the claim amounted to a dispute amongst family members. On 16 December 2019 Lumley advised you that the claim was unable to be accepted. The recommendation was made to reclaim the Vehicle, instead of claiming it as theft under the policy. …
>
> There is an ongoing dispute between you and Mr Norris' children as to the ownership of the Vehicle. This means that it cannot be shown to be an event that constitutes a "loss" under the policy. Stanley appears to have gifted the Vehicle to his son, Mark. As the ownership of the Vehicle is uncertain, it cannot be established that you or the Estate, have necessarily suffered a "loss" for the policy to cover. I acknowledge that the letters of Administration grant you the right to Stanley's Estate, unfortunately, it is not clear whether the Vehicle is part of the Estate, due to the note from 2012.

[26] On 4 November 2020, Ms Shaw received a response from the Insurance and Financial Services Ombudsmen Scheme. The Ombudsmen declined to resolve the matter on the basis that it accepted a dispute existed regarding ownership of the motorhome.

[27] Ms Shaw then engaged her current solicitors Rice Craig and correspondence continued with IAG and then Duncan Cotterill who IAG engaged as solicitors.

[28] The position adopted by the parties in the correspondence is consistent with the arguments which are the subject of the summary judgment application. Namely, for Ms Shaw, Mr Norris died intestate and pursuant to the grant of the letters of Administration, all assets of Mr Norris' estate vest in her name and, she became responsible to call in those assets.[7] Furthermore, as Mr Norris' de facto partner and

[7] Section 24 Administration Act 1969.

therefore beneficiary under Mr Norris' estate, she became entitled to the first $155,000 of the estate.[8]

[29] As there had not been any application to challenge the Order for the Grant of Letters of Administration on Intestacy, nor any proceedings issued under the Wills Act 2007, the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949 by any of Mr Norris' children, there was no credibility to their claim the motorhome belonged to Mark Norris. Effectively they had stolen the motorhome. As such the motorhome was "lost" and the motorhome policy had to respond.

[30] IAG's July 2020 position was repeated by Duncan Cotterill. The motorhome was the subject of an ownership dispute which meant it had not been lost. Its whereabouts were known in that it was in the possession of one of Mr Norris' sons. Steps needed to be taken by Ms Shaw to collect the motorhome rather than claiming against the policy.

The Involvement of the Norris Brothers in these Proceedings

[31] One of IAG's key grounds of opposition to Ms Shaw's application is the allegation that there is a genuine dispute over the ownership of the motorhome. In support of this position IAG has sought and obtained from Steven Norris and Mark Norris several affidavits which set out the claimed ownership to the motorhome. The thrust of the affidavits contend the Will letter should be upheld to the extent that the motorhome belongs to Mark Norris.

[32] I will return to these affidavits.

Summary Judgment Principles

[33] The principles regarding summary judgment applications are well settled.[9] Rule 12.2 of the District Court Rules 2014 allows for summary judgment to be granted

[8] Section 77 Administration Act 1969.
[9] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26].

where the plaintiff satisfies the Court the defendant has "no defence to a cause of action in the statement of claim or to any particular part of such cause of action".[10]

[34] A plaintiff must demonstrate there is an absence of any real question to be tried.[11] The Court needs "to be confident, sure, convinced, persuaded to the point of belief, left without real doubt or uncertainty" before the plaintiff can succeed.[12] Notwithstanding this threshold, a Court in a summary judgment application is able to deal with difficult legal questions and adopt a robust attitude where appropriate.[13]

[35] In terms of evidentiary issues, as stated by Associate Judge Sussock in *Hebi Hunaneg Industrial Development Co Limited v Shi*:[14]

> [12] While the onus is ultimately on the plaintiff to demonstrate that the defendant has no defence to a claim, the circumstances of a case may be such that the evidentiary onus will shift to the defendant to demonstrate that they have a tenable defence. The defendant may adduce evidence directed to show that they do have a defence. It is appropriate for the Court to stand back and to consider whether the defence advanced could realistically succeed at trial.
>
> (citations omitted)

[36] In the recent case of *SHK Trustee Co Ltd v NZDMG Ltd*[15] Associate Judge Bell stated:

> [7] I add this about applications for summary judgment. A shorthand way of thinking about a summary judgment application is that if a Judge is to give summary judgment, he or she must be satisfied that no useful purpose will be served by allowing the matter to go to trial, because everything can be decided now. That means that there would be no need for witnesses to give evidence and be cross-examined, and there would be no need for discovery or any other normal interlocutory steps. As well, in some proceedings the court gives a decision which is based on an evaluation of a number of factors. For a final decision, the court may have a range of orders it may make. Sometimes they are matters of jury assessment, such as assessing damages, particularly in respect of future losses. Those cases are not normally susceptible to summary judgment treatment. If the court is to give summary judgment, it has to be satisfied that there is only one possible answer – and the plaintiff has to show the court that all other possible answers have been ruled out.

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[10] *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at paras [3] and [4].
[11] Ibid at para [3].
[12] Ibid at para [4].
[13] *Zurich Australian Insurance Limited v Cognition Education Limited* [2014] NZSC 188, [2015] 1 NZLR 383 at [37] and *Bilbie Dymock Corp Limited v Patel* (1987) 1 PRNZ 84 (CA).
[14] *Hebi Hunaneg Industrial Development Co Limited v Shi* [2021] NZHC 2687.
[15] *SHK Trustee Co Ltd v NZDMG Ltd* [2021] NZHC 1895 at [7].

What does the Motorhome Policy say?

[37] The relevant terms of the motorhome policy are as follows:

> A. Cover
>
> Lumley will indemnify the insured for accidental loss to an insured vehicle during the period of insurance.
>
> …
>
> B. Basis of Settlement
>
> 1. Lumley will, at its option, settle the claim in one of the following ways
>
> …
>
> (e) pay the insured vehicle's Agreed value at the time of the loss if Agreed Value applies to that vehicle.[16]

[38] Within the Interpretation Definition Section, 'Accident' and 'Loss' are defined:

> Accident: a happening or event occurring in New Zealand that is unintended and unexpected by the insured.
>
> Loss: sudden physical loss, sudden physical damage or sudden physical destruction.

[39] Because of the nature of the Motor Vehicle Scheme Package the following terms are also provided:

> **Basis of Settlement**
>
> In the case of a total loss, Lumley may add its option, repair, reinstate or replace such motor vehicle or may settle the amount of the loss in cash but not exceeding the Agreed or Market Value shown above.
>
> Agreed Value is arranged on the full purchase price or on the production of a written valuation from an approved valuer and is valid for five years from the date of purchase or valuation.
>
> Market Value applies on Motor Caravans purchased more than five years ago, where no certified valuation has been provided, or where the Motor Caravan is currently under construction/conversion.

[40] The primary issue in terms of the motorhome policy is whether it responds to Ms Shaw's claim. That determination depends on an interpretation argument which

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[16] It is accepted by the parties if the policy responds it is on an Agreed Value basis at $80,000: see [17] above.

is the second key point of IAG's argument. IAG says there has not been a loss of the motorhome which is a prerequisite to cover being available under the motorhome policy. The motorhome is in the possession of one of Mr Norris' sons and it cannot therefore be lost. The issue over the ownership needs to be determined first and only once that has been determined, Ms Shaw's claim can then be addressed at a full hearing if there was anything left to be adjudicated upon.[17]

Discussion and Analysis

[41] I reject that there is a valid issue over the ownership of the motorhome. The motorhome belongs to the estate of Mr Norris. Whomever is the Administrator of his estate is the legal owner of the motorhome as all assets of the estate vest into the name of the Administrator.[18] As Ms Shaw has taken the steps to become the Administrator of Mr Norris estate and has been recognised as such by a High Court Order, then she is the owner.

[42] As I have noted above Mr Norris' sons have filed several affidavits prepared by IAG purporting to question the validity of the grant of Administration, the relationship Ms Shaw had with Mr Norris and, they have claimed ownership of the motorhome through the Will letter.

[43] Unless and until the Will letter is recognised at law as having any validity, then it has no status at all. Until Mr Norris' sons take the step of issuing any proceedings[19] under the enactments I have detailed above, then they have no claim at all to the assets of Mr Norris' estate[20] or how it is administered. The motorhome should have been returned when it was demanded.

[44] The whereabouts of the motorhome has never been disclosed and in my view, it was unlawfully removed and has been unlawfully detained from the rightful owner, that being Ms Shaw as Administrator. Because Mr Norris' sons are not a party to this

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[17] Mr Hargraves synopsis at para 9.
[18] Section 24 Administration Act 1969.
[19] It is possible by now that such proceedings cannot now be issued (or leave is needed) given the lapse of time since Mr Norris' death and/or the Grant of Administration.
[20] Other than under s 77 of the Administration Act.

proceeding, I cannot make any orders against them.[21] Therefore I proceed on the basis there is no dispute over the ownership, whether that is a position asserted by Mr Norris' sons (the evidence of which I have found unhelpful) or indeed IAG.

[45] Before I leave this issue, I do note that a letter dated 20 April 2022 (ie: shortly before the hearing of this matter) was sent to Rice Craig by a firm called C S Law, the lawyers acting on behalf of Mark Norris. This letter was exhibited in an affidavit produced by Duncan Cotterill just before this hearing (a copy of the letter from C S Law had been sent to Duncan Cotterill).

[46] The letter purports to once again relitigate the issues as to Ms Shaw's bona fides when making the application for the grant of the letters of administration. It is critical of her seeking to obtain a benefit from Mr Norris' estate and once again, suggests that a legitimate claim on behalf of Mark Norris is available.

[47] The letter then changes tack and suggests Mark Norris will make the motorhome available to be collected by Ms Shaw. It concludes:

> Mr Norris has therefore instructed us that he has arranged for the motorhome to be made available to be collected by Ms Shaw at her earliest convenience. It was not lost to the Estate, and never has been.
>
> Please contact us to discuss how she wishes to do that. Once the motorhome has been made available to the Estate, Mr Norris will consider the matter closed.

[48] At the conclusion of the hearing, I asked counsel to advise if the motorhome was returned and to file memoranda on that issue. I have received no memoranda which I assume means the motorhome has not been returned.

[49] If it is not already clear, I take a dim view of the actions of Mr Norris' sons in this matter. The letter above appears to be nothing more than an attempt to influence the outcome of this hearing by suggesting the motorhome is available to be collected and has never been "lost". This is so even though up until the letter was received, it was clear from the correspondence the motorhome was never going to be returned.

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[21] That does not mean the Police should not have continued their investigation or should now continue the investigation.

Confirmation of this stance is recorded in an email sent by C S Law to Mr Hargreaves on 11 April 2022. In that email Mr McKenzie from the firm claims an application to "challenge" the grant of administration is to be filed.

[50] As far as I am aware no such application has been filed or indeed will be filed. Furthermore, despite what was said in the letter of 20 April 2022 the motorhome has still not been returned.

[51] I reject then any suggestion the motorhome has not been lost to the estate. There remains an ongoing refusal of Mr Norris' sons to return the motorhome. That position has not changed despite the letter of 20 April 2022.

[52] The alleged ownership dispute of the motorhome was not a ground to reject Ms Shaw's claim for the sole reason Ms Shaw, by Order of the High Court is the appointed Administrator and therefore the legal owner of all assets of Mr Norris' estate. That status should never have been in issue. It was wrong for IAG in its letter of 2 July 2020 to reject Ms Shaw's claim on the basis there was a dispute over ownership.

[53] The real issue is whether the loss of the motorhome falls within the loss definition expressed in the motorhome policy. While Mr Hargreaves submissions focused heavily on the issue of disputed ownership, the issue of the definition of loss, is also relied on. I accept this is the strongest argument for IAG.

Has there been a "Loss" as Defined in the Motorhome Policy?

[54] Counsel agree the starting point in determining whether there is a loss of the motorhome is an interpretation of the relevant clauses within the motorhome policy.

[55] The approach to contractual interpretation has been set out in *Vector Gas Limited v Bay of Plenty Energy Ltd,*[22] *Firm PI 1 Ltd v Zurich Australasian Insurance Ltd,*[23] and more recently in *Bathurst Resources Limited and Buller Coal Limited v*

[22] *Vector Gas Limited v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
[23] *Firm PI 1 Ltd v Zurich Australasian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 342.

L & M Coal Holdings Limited.[24] In *Bathurst Resources Limited* the Supreme Court citing *Firm PI* stated as follows:[25]

> [43] …This Court's decision in *Firm PI* can be regarded as setting the general approach to contractual interpretation. McGrath, Glazebrook and Arnold JJ summarised the approach in this way:
>
> > [60] … The proper approach is an objective one, the aim being to ascertain "the meaning which the document will convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were at the time with contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole in any relevant background informed meaning.
> >
> > [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties as a reflection of the fact that contractual language, like all language, must be interpreted within the overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however as has been confirmed that a purposive for contextual interpretation is not dependent of there being an ambiguity in the contractual language.
> >
> > …
> >
> > [63] While context is a necessary element of the interpretative process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, there will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
> >
> > (footnotes omitted)

[56] However, where there is a natural and ordinary meaning to the terms in issue, departing from it for reasons of commercial common sense should only occur, "in the most obvious and extreme cases".[26]

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[24] *Bathurst Resources Limited and Buller Coal Limited v L & M Coal Holdings Limited* [2021] NZSC 85. See also *The Malthouse Limited v Rangatira Limited* [2019] NZCA 621 at 24.
[25] Ibid at [43].
[26] *Firm PI* at 93.

[57] Adopting the approach as set out in the above authorities, an objective interpretation of the wording in the motorhome policy must be that the motorhome policy will respond to a claim if there is an event which is unintended or unexpected which has caused the sudden physical loss of the motorhome.

[58] Mr Hargraves submits that the interpretation of "loss" can only be viewed in the context as to whether there has been a "physical loss". It is not a loss where the insured is deprived of the motorhome. To this end he cites Colinvaux's Law of Insurance in New Zealand[27] which states:

> If the assureds goods are seized and there is some prospect that they will be returned, there may be a constructive total loss for marine insurance purposes, but there will be no loss at all under a non-marine policy unless they are irrecoverable in all probability or until the goods are finally put beyond the assureds reach. Should the goods be restored to the assured following their seizure and before the insurer has agreed to treat them as loss, there is plainly no loss at all. If the assured's goods are stolen they are generally to be regarded as lost.[28]
>
> (citations omitted)

[59] Furthermore, for a physical loss to occur, Mr Hargreaves submits it must be a loss that "requires a physical alteration to the motorhome (rather than just its loss of use or loss of access to it). Consequently, the contested ownership of the motorhome can never be *sudden physical loss* under the policy".[29]

[60] In support of the submission, Mr Hargraves relies on several authorities where the loss of use of the insured assets has occurred, but no physical damage has occurred. The first is the Court of Appeal case of *Kraal v Earthquake Commission and Allianz New Zealand Limited.*[30] In this case, the insured's property was situated in Sumner. The house was adjacent to a steep face of Richmond Hill, which is part of the Port Hills. As a result of the earthquakes, a number of boulders rolled down the hills, destroying some of the Ms Kraal's neighbours' houses but only causing some

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[27] Colinvaux's Law of Insurance in New Zealand (2nd ed.) Thomson Reuters, Wellington 2007 at 8.1 and 8.1.4.

[28] *Supra* at 8.12: See also *Moore v Evans* [1980] ACA 185 where a temporary deprivation of the property or where goods are known but cannot be accessed for a period was held not to constitute loss. This case involved pearls which were unable to be accessed because of the outbreak of World War II.

[29] Para 27, Mr Hargraves submissions.

[30] *Kraal v Earthquake Commission and Allianz New Zealand Limited* [2015] NZCA 13.

structural damage to Ms Kraal's house including its foundations. It was accepted that the damage was repairable.

[61] Christchurch City Council issued notices under s 124 of the Building Act 2004 which restricted entry into a building if the Territory Authority was satisfied the building was dangerous, affected, earthquake prone or an unsanitary building. Understandably, the concern was the building could be exposed to further rock falls.

[62] The s 124 notice was issued on 13 July 2011 and further extended to beyond 2016. Ms Kraal abandoned any hope of returning to the house and purchased another property.

[63] EQC and Allianz both declined to indemnify Ms Kraal, EQC under the statutory provisions of the Earthquake Commission Act 1993 (EQCA) and Allianz under the relevant Replacement House Policy (the Allianz policy).

[64] In the High Court and the Court of Appeal it was held EQC and Allianz were not required to indemnify Ms Kraal on the basis that the property had not suffered "natural disaster damage". Natural disaster damage was defined as "physical loss or damage to the property" which required physical disturbance to the property and did not extend to claims for losses (such as loss of the right to occupy) which did not arise from a physical disturbance.[31]

[65] It was argued for Ms Kraal that the inability to access and enjoy the property equated to a "physical loss". That submission was rejected by the Court of Appeal on the basis that s 2 of the EQCA defined natural disaster damage as physical loss to the building occurring as a direct result of the natural disaster. There needed to be a physical loss or damage to the property triggered by a natural disaster which has occurred.

[66] Applying the natural and ordinary meaning of the words the Court stated:

> [38] The words "loss" has a broader meaning than the word "damage". When used as a noun its dictionary definition normally associated with the

[31] *Ibid* at 77.

> word "to" (although it can be) but is often coupled with "of". It carries as a particular meaning the concept of deprivation of a thing. The word "loss" is broad enough to cover conceptually what has happened to Ms Kraal, in the sense that she had suffered a loss, namely the ability the use her property, and other associated losses. However, the definition refers to loss "to the property" and not loss to the insured person. …
>
> [39] … thus, if a house or land is swept away in a tsunami or lahar flow it is physically "lost". In our view the word "loss" in the context of the definition can be seen as adding to the concept of damage, the concept of total destruction. Both involve a physical event happening to the building.[32]

[67] It is clear then the Court of Appeal viewed the definition of loss based on the wording of the ECQA as loss or damage to the property and not loss or damage to the insured person. Deprivation loss was not then considered to be loss in that context.[33]

[68] Mr Hargraves also relied on the authorities of *Re Mining Technologies Australia Pty Ltd*[34] and *R and B Directional Drilling Pty Ltd (in liq) v C G U Insurance Limited.*[35] In *Re Mining*, mining machine equipment had been trapped by a collapse but not damaged. It was held that physical damage having a deleterious effect on the equipment had to be present to constitute damage to the property. No physical alteration to that equipment had occurred notwithstanding the insured was unable to use the same.

[69] In *R and B Directional Drilling* the Federal Court of Australia agreed with *Kraal* and held where insured property was not physically damaged and the only loss was a temporary loss of use, not caused by physical injury, this was not a "loss" covered by the relevant policy.

[70] Mr Hargraves concludes then the motorhome has not been physically lost. One of the Norris brothers has it. Deprivation loss is not a loss covered by the motorhome policy but, in any event, because Ms Shaw knows the Norris sons has the motorhome, proceedings need to be issued by Ms Shaw for its recovery before the policy could respond.

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[32] Ibid at 38 and 39.

[33] The Allianz policy would only respond when ECQ accepted the claim. However the Court of Appeal did note given the plain meaning of the statutory text the policy would only respond to physical loss or damage to the property was envisaged. Ibid at 81.

[34] *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60 (QCA).

[35] *R and B Directional Drilling Pty Ltd (in liq) v C G U Insurance Limited (No. 2)* [2019] FCR 458.

[71] Mr Woods rejects the authorities relied upon by Mr Hargraves. He cites as a leading authority in support of Ms Shaw's claim *Technologies Holdings Limited v IAG New Zealand Limited.*[36] In this case, EFTPOS terminals were stored in a basement which was flooded. The terminals were not damaged, but the manufacturer withdrew its warranty for their use and the network operator refused to allow the terminals to be used on the network.

[72] Woodhouse J found:

> "Loss … to the property" when construed in context was intended to mean "loss of the property" and this means "disappearance or physical deprivation by some means or no longer having possession of the property".[37]

[73] Mr Woods also cites in support the following passage from Insurance Claims in New Zealand:[38]

> Recovery is given against "loss of the property", the policy clearly gives cover where the property in question is missing.
>
> …
>
> The principal example would be misplacement or theft of the removable property. The insured would not necessarily know whether or not the insured property has been harmed or destroyed. The missing property might well be in good condition.
>
> …
>
> For this reason, all risks property cover of this type is written expressly to include "loss", in order to emphasise that it does not matter that the insured cannot prove damage or destruction. Cover applies where the property is simply "lost" as far as the insured is concerned.

[74] Finally, Mr Woods argues that IAG's position is misconceived. IAG has adopted a "wait and see" approach in order to see what will eventuate in terms of the resolution of the ownership of the motorhome. This position is untenable in that Ms Shaw is the legal owner of the motorhome and is under no obligation to issue proceedings. Indeed, the steps she has taken in laying a complaint with the police,

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[36] *Technologies Holdings Limited v IAG New Zealand Limited* HC Auckland CIV 2005-404-3450, August 2008, Woodhouse J, unreported.
[37] Ibid at 22 and 24.
[38] *Boys & Michalik Insurance Claims in New Zeland 2015* at Chapter 6.2.

sending a private investigator to Mr Norris' sons to make demand for the motorhome, or corresponding with Mr Norris sons' lawyers is more than what was necessary.

[75] Ms Shaw has been unable to recover the motorhome and there is an ongoing refusal to return the motorhome or disclose its whereabouts. It is therefore lost to the estate. This is not a situation such as in *Moore v Evans*[39] where there had been a temporary deprivation of the property or where goods are known but cannot be accessed for a period. This is a situation where a deliberate and intentional removal of the motorhome has occurred.

Summary of Findings

[76] In determining whether there has been a loss under the motorhome policy, each of the authorities cited by counsel have, as their starting point, a requirement that a natural and ordinary interpretation of the words in the policy should apply. Departing from their natural and ordinary meaning even in a commercial context is rare. I take this to also mean a strained interpretation of the wording is undesirable.

[77] In my view the wording of the motorhome policy is straightforward. As I have already noted it will respond to a claim if there is "an event which is unintended or unexpected which has caused the sudden physical loss[40] of the motorhome".

[78] I have already determined there is no dispute over the ownership of the motorhome. The actions by Mr Norris' sons to seize the motorhome and refuse to return it would have been unintended and/or unexpected. Ms Shaw in her capacity as Administrator would not have expected that to happen.

[79] The action of seizing and taking possession of the motorhome caused a physical loss of the motorhome in the sense the estate or, Ms Shaw as the legal owner, is no longer in the physical possession of the motorhome. In these circumstances I

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[39] *Moore v Evans* [1980] ACA 185.

[40] The definition of Loss under the motorhome policy includes cover for physical damage and physical destruction. There is no evidence that either has occurred and Ms Shaw's primary contention is there has been a sudden physical loss.

accept there is an element of deprivation of the use of the motorhome. However, the wording of the motorhome policy contemplates loss in this sense.

[80] Unlike in the present situation, the cases of *Kraal, Re Mining Technologies Australia Pty Ltd,* and *R and B Directional Drilling Pty Ltd (in liq)* dealt with either a statutory framework or an insurance policy which on their interpretation expressly required physical damage to the insured asset before the policy would respond. Deprivation loss was not covered because of the express requirement damage to the asset had to occur.

[81] The motorhome policy requires the physical loss of the motorhome. However, physical loss does not require damage to the asset (unlike in *Kraal*) as "physical damage" and "physical destruction" is separately covered as a definition of "Loss".

[82] It follows then I do not accept Mr Hargreaves submission that for there to be a physical loss there must be a loss that requires the physical alteration to the motorhome rather than just its "loss of use or loss of access to it". The definition of physical loss in this context must include where the legal owner is deprived of its use: ie it is stolen.

[83] Mr Hargraves contends the motorhome has not been stolen as one of Mr Norris' sons have it. However, the Oxford Dictionary definition of "to steal" or "to stole" is "to (take another person's property) without permission or legal right and without intending to return it". In my view this is exactly what has happened.

[84] Furthermore, I disagree there is an obligation on Ms Shaw to issue proceedings against Mr Norris' sons to recover the motorhome. IAG is bound by the express terms of its motorhome policy and nowhere within the motorhome policy does it state there is an obligation for the insured to attempt to recover an asset before the motorhome policy responds. While there is a general duty to mitigate[41] that does not equate to a party having to issue legal proceedings to reduce (or remove) any claim for damages.[42]

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[41] *Bain v Fothergill* (1874) LR HL.
[42] *Pilkington v Wood* [1953] Ch 770, [1953] All ER 810; *Warren and Mahoney v Dynes* CA49/88 26 October 1988 and *Burrows, Finn and Todd on the Law of Contract in New Zealand* 6th Ed at 21.2.4.

[85] The motorhome has been taken by Mr Norris' sons who have no legal claim over it without the permission of the legal owner (Ms Shaw in her capacity as the Administrator) and without any intention to return it. It has been four years since this occurred and despite demands the motorhome has not been returned.

[86] If there was a genuine intention to return it, it would have already been returned. On that basis and in my view, Ms Shaw's claim squarely fits within the definition of the motorhome policy and the motorhome policy must respond.

Conclusion

[87] For the reasons set out Ms Shaw has proven that the motorhome policy should respond by virtue of the definitions contained within the motorhome policy. IAG has failed to respond to the Ms Shaw's claim and therefore summary judgment for the sum of $80,000 is entered in favour of Ms Shaw against IAG.

[88] Ms Shaw also seeks interest which I grant pursuant to s 10 of the Interest on Money Claims Act 2016, which I grant from the date of the filing of these proceedings until the date that payment is made.

[89] Ms Shaw is also entitled to costs and disbursements. I will hear from counsel in respect of costs although I am of the view that costs on a 2B basis is appropriate. Mr Woods is to file a memorandum within seven days of the date of this judgment if Ms Shaw seeks costs different to the scale basis I have indicated, and Mr Hargraves can file memorandum seven days thereafter. I will then deal with the issue of costs on the papers.

Signed at Auckland this 9th day of May 2022 at 1.20 pm

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 09/06/2022