IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV-2023-009-002320
[2024] NZDC 13585

BETWEEN	NEIL GEORGE CAMERON ANGELA MARY CAMERON Appellant
AND	PETER LINDSAY RANDLE Respondent

Hearing:	23 January 2024
Appearances:	R Norris for the Appellants M Borcoski for the Respondent
Judgment:	13 June 2024

RESERVED JUDGMENT OF JUDGE P R KELLAR

Introduction

[1] Mr and Mrs Cameron appeal against an order of the Tenancy Tribunal that they pay Mr Randle $52,943 in rent arrears. The key question is whether the Tribunal was wrong to find that there was a tenancy agreement between Mr and Mrs Cameron, as the tenants, and Mr Randle, as the landlord, in which Mr and Mrs Cameron were liable to pay $800 per week in rent throughout the time Mr and Mrs Cameron lived in Mr Randle's property.

[2] Mr and Mrs Cameron contend that although Mr Randle was entitled to receive weekly rental of that sum they were not liable to pay the rent. Instead, the rent was to be paid out insurance proceeds and they did not agree to pay rent when and if insurance money ran out before repairs to their unit were completed. Mr Randle contends that

Mr and Mrs Cameron were bound to pay rent of $800 per week regardless of whether insurance was sufficient to cover the rent.

The Tenancy Tribunal decision - the facts as the Tribunal found them to be

[3] The Tenancy Tribunal found the facts to be as follows. At the material time, the parties owned unit titles comprising adjoining townhouses on Harts Creek Lane at the Clearwater Resort near Christchurch which are part of a Body Corporate. Mr Randle, at the time, owned number 37 (also known as unit 16). Mr and Mrs Cameron own number 35 (also known as unit 15).

[4] The units were damaged in the Canterbury earthquakes and needed repairs. The units were insured by IAG New Zealand Ltd (IAG) under a body corporate policy. Mr and Mrs Cameron had their own contents insurance policy with AMI. Mr and Mrs Cameron bought the unit well after the Canterbury earthquakes sequence.

[5] Wentworth Thompson Ltd (WTL) were the management company of the body corporate who, amongst other tasks, project managed the repairs. Unit number 37 was the first unit to be repaired as something of a test case. When the time came to repair unit number 35, Mr and Mrs Cameron needed somewhere else to live while the work was carried out for the expected duration of the work.

[6] There was no formal written tenancy agreement. Mr and Mrs Cameron contended in the hearing before the Tenancy Tribunal that there was no tenancy agreement at all for the purposes of the Residential Tenancies Act (the Act). If that was so, the Tenancy Tribunal would have no jurisdiction to determine the dispute.

[7] At one stage, it was hoped there would be cover for the cost of alternative accommodation through Mr and Mrs Cameron's insurance policy with AMI. There was also cover under the IAG policy up to $25,000.

[8] WTL was involved with arranging Mr and Mrs Cameron's occupation of unit number 37 for a weekly rent of $800 for a period of approximately six months. Because the payment of rent was coming from the Body Corporate's insurance, the

payments went from IAG to the Body Corporate and then to Mr Randle without passing through Mr and Mrs Cameron's hands.

[9] Problems arose with the earthquake repairs of unit number 35. The main issue concerned the aluminium joinery. Mr and Mrs Cameron believed that the joinery needed to be replaced. The work was not included in the scope of work which became an obstacle to progressing and completing the work.

[10] The Tenancy Tribunal noted that after Mr and Mrs Cameron had been in unit number 37 for 26 weeks, TWL wrote to them asking them to start paying rent themselves because the insurance money had run out. The claim was for $5,400 for the further time that Mr and Mrs Cameron were expected to remain living in unit number 37 while the repairs to their unit were carried out. Mr and Mrs Cameron said they would pay $4,800 in full and final settlement. There was no response to that offer and no money was paid at the time. However, the sum of $4800 was later deducted from insurance money due to Mr and Mrs Cameron. The money, and some money from Mr Randle, was paid to the Body Corporate which had paid out more than was intended by IAG.

[11] The work was not completed until July 2020. Mr and Mrs Cameron remained living in unit number 37 until the works were completed. They paid no rent themselves during that time. Mr Randle did not make any demand for payment of the rent. Mr Randle filed an application in the Tenancy Tribunal on 10 January 2023 well over two years after Mr and Mrs Cameron had vacated unit number 37.

The Tenancy Tribunal's analysis and decision

[12] The Adjudicator found that there was an agreement in which Mr and Mrs Cameron were granted the right to occupy unit number 37. Mr Randle owned the premises and Mr and Mrs Cameron were aware of that. The adjudicator stated that regardless of who else was involved in making the arrangements, it was Mr Randle who granted Mr and Mrs Cameron the right to occupy the premises. No one else had the right to do so. The adjudicator also found that the parties understood Mr Randle would receive rent for the occupation of the premises. He found they understood that the rent was $800 per week. The adjudicator concluded that Mr Randle granted

Mr and Mrs Cameron the right to occupy the premises for consideration of the payment of rent.

[13] The Adjudicator noted that the rent was coming from IAG under the body corporate insurance policy which Mr and Mrs Cameron were entitled to the benefit of if they incurred liability to pay rent. The Adjudicator found that Mr and Mrs Cameron confirmed that TWL would arrange payment direct to Mr Randle. The Adjudicator held that the fact the money bypassed Mr and Mrs Cameron and was paid directly or indirectly to Mr Randle did not alter the fact that they were entitled to the benefit of the money. Had Mr and Mrs Cameron paid Mr Randle from their own funds, the Adjudicator held they would have been entitled to receive the insurance money by way of indemnity.

[14] The Adjudicator held that Mr and Mrs Cameron were liable to pay the rent and did in fact pay it, albeit indirectly. Hence, as a matter of law, they were paying the rent. The Adjudicator concluded that there was a tenancy agreement between the parties for an indeterminate term (therefore a periodic tenancy under the Act) at a weekly rent of $800. The adjudicator determined that Mr and Mrs Cameron were obliged to pay the rent for the duration of the tenancy.

[15] The Adjudicator addressed Mr and Mrs Cameron's argument that they were not liable to pay rent because the agreement was that the insurers would pay the rent. The Adjudicator found that everyone concerned was aware that the alternative accommodation benefit under the IAG body corporate insurance policy had a limit of $25,000 which was reached after 31 weeks. The Adjudicator found that Mr and Mrs Cameron's argument that they were not liable for the payment of rent after the insurance money ran out was a surprising proposition because it would mean that Mr Randle was bound to allow them to occupy the premises rent-free for an indeterminate time.

[16] The Adjudicator held that Mr and Mrs Cameron's argument was undermined to some extent by the fact that they offered to pay and did pay some rent from their own pockets. In October 2018 they wrote that they were prepared to "contribute to the rental costs". After the work was completed, they agreed to a deduction from their

insurance moneys to be paid to the body corporate to help to repay an overpayment of rent. The Adjudicator did not accept Mr and Mrs Cameron's explanation of the payment that it was for a period when they were overseas and repair work was put on hold. The Adjudicator found it coincided with the expected time to complete beyond the insurance cover. He considered that to be a more likely reason which was consistent with Mr and Mrs Cameron's messages at the time.

[17] The Adjudicator held that a message from Mr and Mrs Cameron on 24 May 2019 to the effect that they would not be paying rent storage costs did not say that they had no liability for rent. The Adjudicator drew a distinction between saying they would not pay and saying they had no liability to pay. It was clear to the Adjudicator that Mr and Mrs Cameron held others responsible "for the predicament they were in". The Adjudicator held that his view was supported by Mr and Mrs Cameron's message to TWL on 21 June 2019 in which they inquired as to who would be paying the ongoing rent. The Adjudicator noted that it was known there was no insurance cover available for the rent and so Mr and Mrs Cameron must have understood they had the legal obligation to pay the rent, although they believed there were others who should indemnify them.

[18] There was a meeting at the offices of Chapman Tripp prior to 5 November 2019 in which Mr Randle told Mr and Mrs Cameron not to worry and that an insurer somewhere would pay the rent. The Adjudicator held that Mr Randle was not agreeing that Mr and Mrs Cameron had no personal liability for payment of rent. He also held that nor was it evidence of any such agreement. Instead, the Adjudicator considered it to be no more than a hopeful remark that no reasonable person would place any reliance.

[19] The Adjudicator also considered Mr and Mrs Cameron's argument that Mr Randle did not consider they had any liability to pay rent because he did not demand rent from them or take any steps to enforce payment of rent until filing his application in the Tenancy Tribunal some three years after rent stopped being paid and over two years after Mr and Mrs Cameron vacated unit number 37. He held that in some situations that argument might "tip the balance in a tenant's favour". However, the Adjudicator concluded that there was an agreement that Mr and Mrs Cameron

would pay rent for the occupation of unit number 37 and the fact that they offered to pay, and did ultimately pay, rent from their own pocket supported that conclusion. He held that there would need to have been clear evidence that Mr Randle, as the landlord, agreed no rent would be payable after March 2019 when the insurance money had run out.

[20] The Adjudicator also addressed Mr and Mrs Cameron's argument that their offer to pay $4800 in full and final settlement was accepted when Mr Randle agreed that the money should be paid to the body corporate in reduction of his liability to the body corporate for overpaid rent. The Adjudicator considered whether the words "in full and final settlement" should be read as meaning "full and final settlement of [Mr and Mrs Cameron's] liability to pay rent for [their] occupation of 37 for as long as [they] remain in occupation of it". The Adjudicator considered there was another interpretation which meant in full and final settlement of rent due for the seven weeks after the initial 31 weeks. The Adjudicator noted there had been request for payment of $5400, which is the equivalent of 6.75 weeks, which would make it up to a total of 38 weeks rent paid. The Adjudicator noted that Mr and Mrs Cameron were expecting to move back into unit number 35 after 33 weeks. Therefore, one could infer that Mr and Mrs Cameron were not contemplating any liability for rent after that. The Adjudicator held that an offer to pay $4800 for the right to occupy the premises for an unlimited time "is extremely unlikely".

[21] The Adjudicator held that the offer was not accepted at the time. Instead, it was an agreement much later for the money to be deducted from insurance monies due to Mr and Mrs Cameron to which there were no terms attached. The Adjudicator held that it would be "a considerable stretch" to say that the earlier offer attached to the much later arrangement. The Adjudicator also held that Mr and Mrs Cameron's argument had an obstacle because the principle of accord and satisfaction does not apply to liquidated claims. Instead, it applies only where there is a genuine dispute between the parties. In the Adjudicator's view there was no genuine dispute over the payment of rent when it was agreed that the $4800 would be paid to Mr Randle from insurance monies to which Mr and Mrs Cameron were entitled.

Legal principles – appeals to the District Court from the Tenancy Tribunal

[22] Appeals to the District Court are provided by s 117 of the Act. Section 117(4) provides:

> The provisions of s 85 with necessary modifications, shall apply in respect of the hearing and determination by the District Court of an appeal brought under this section.

[23] Section 85 of the Act provides:

> The Tribunal shall determine each dispute according to the general principles of law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

Mr & Mrs Cameron's (the appellants) submissions

[24] The key issue before the Tenancy Tribunal and on this appeal is whether there was a "tenancy agreement" between Mr and Mrs Cameron and Mr Randle as defined by the Residential Tenancies Act 1986 ("the Act"). And, if there was a tenancy agreement between the parties, what were the terms of the tenancy agreement and what is the outstanding rent.

[25] If there was a tenancy agreement between the parties in which Mr and Mrs Cameron agreed to pay weekly rent of $800 then further issues arise as follows:

- Whether there was an agreement reached between the parties that a payment by Mr and Mrs Cameron of $4800 was in full settlement of outstanding rent.

- Whether the IAG Settlement Agreement was a full and final settlement of outstanding rent.

- Whether Mr Randle is estopped from claiming some or all the outstanding rent.

[26] The following definitions in the Act are relevant to the issues on appeal:

[27] **Tenancy -** In relation to any residential premises, means the right to occupy the premises (whether exclusively or otherwise) in consideration for rent; and includes any tenancy of residential premises implied or created by any enactment; and, where appropriate, also includes a former tenancy.

[28] **Tenancy agreement -** In relation to any residential premises, means any express or implied agreement under which any person, for rent, grants or agrees to grant to any other person tenancy of the premises; and, where appropriate, includes a former tenancy agreement and any variation of tenancy agreement.

[29] **Fixed-term tenancy -** A tenancy for a fixed term but … does not include such a tenancy that is terminable by notice.

[30] **Periodic tenancy -** A residential tenancy other than a fixed-term tenancy.

[31] **Rent** - Any money, goods, services, or other valuable consideration in the nature of rent to be paid or supplied under a tenancy agreement by the tenant; but does not include any sum of money payable paid by way of bond.

[32] There was no formal written tenancy agreement. Section 13C of the Act states that no tenancy agreement shall be unenforceable on the grounds that it is not in writing.

[33] Mr Randle contends that in or around June/July 2018 he and Mr and Mrs Cameron reached an agreement that the Camerons would reside in his property at unit number 37 in consideration for him being paid rent of $800 per week. His case is that the terms of the Tenancy Agreement were reached by discussions between him and Mr and Mrs Cameron and that the agreed terms were subsequently referred to in correspondence in writing. His case is that the terms of the Tenancy Agreement were that:

- Mr and Mrs Cameron would rent unit number 37 while work was being carried out to their unit.

- The tenancy would commence on 20 July 2018 and last for a period estimated to be about six months, being the estimated timeframe for the repair to unit number 35.

- The rent was $800 per week including GST.

[34] Mr Randle states that the parties performed the Tenancy Agreement and that Mr and Mrs Cameron moved into unit number 37 on 20 July 2018 and he was initially paid $800 per week via the body corporate from insurance alternative accommodation cover. Due to delays in the work to unit number 35 and a dispute regarding the scope of the repairs, namely whether the joinery at unit number 35 was damaged by the earthquake and should be replaced by the insurer, the amount of the Alternative Accommodation Allowance for unit number 35 was fully exhausted before the tenancy ended. The tenancy finally ended on 15 January 2020.

[35] An objective analysis is required to be made of the documents which Mr Randle asserts created and formed the terms of the tenancy agreement. The first document is a letter from TWL to Cunningham Lindsey New Zealand Limited dated 2 July 2018. Cunningham Lindsey were the loss adjusters for the body corporate insurance, IAG. IAG were the insurer of the body corporate. They were not Mr and Mrs Cameron's insurers. The letter is not addressed either to Mr Randle or the Camerons. TWL were project managing the repairs to Mr and Mrs Cameron's home and determined when the repairs and accommodation would start. TWL controlled the repair process and were in control of the duration of the repairs and hence how long accommodation would be required. Neither Mr Randle nor the Camerons were in control of that process.

[36] IAG were providing the funds to pay for the alternative accommodation. The letter variously describes the arrangement as a "tenancy" and "lease" "for a term of six months (more or less)". The letter also states that:

> The owners of [unit number 35] to fund the above tenancy arrangement via making a claim against their Contents Insurer (with any top up required from the Body Corporates Material Damage extension).

The letter does not state that Mr and Mrs Cameron would pay for any rent themselves but that it would be funded by a contents insurer with any top up required from the Body Corporates Material Damage extension.

[37] The second document is an email from TWL to the body corporate dated 25 June 2018. It does not specify terms of any tenancy agreement between the parties. TWL stated:

> A couple of you have made it clear in fairly direct terms during the last couple of days that you require expeditious advancement of the subject repair programme.

It was essential that TWL expeditiously advanced the repair programme that they were project managing. That was necessary because the alternative accommodation was being funded by insurance and there were limits on the amounts available for alternative accommodation.

[38] The third document is an email from Mr Cameron to Anthony Robertson of TWL dated 1 July 2018 which was copied to Mr Randle. The email shows the Camerons' dealings relating to the agreement were with TWL. The email stated that TWL would provide written confirmation about temporary accommodation amongst other things. It states:

> This letter to confirm cost and duration temp accommodation given the conditions of the policy; what are the rules?

[39] The email also sought confirmation regarding the commencement date. It also sought confirmation that TWL would arrange payments to Mr Randle directly. It stated:

> If an extension to temporary accommodation is required due to shipping of materials from overseas, we will not be responsible for this and insurers will cover the costs within reason.

[40] There was no written response to these matters. TWL did, however, advise of a commencement date four days prior to the Camerons having to move in on 20 July 2018. TWL, acting as the body corporate manager, made the payments to Mr Randle which came out of the Body Corporate's Material Damage extension.

[41] The fourth document is an email from Anthony Robertson of TWL to "All" dated 4 July 2018. The reference to "All" is likely to be all members of the body corporate. The email does not contain any terms of the agreement but it evidences the body corporate having an interest in what was going on.

[42] The fifth document is an email from Mr Cameron to TWL dated 5 July 2018 which was copied to Mr Randle. It asked for confirmation of "rental rate" for unit number 37. Mr Cameron states:

> I only ask as this will determine how long we can stay while AMI are paying. We had the situation with our flood and do not want to be caught again.

[43] The rental rate was important to calculate how long the insurance funds for alternative accommodation would last while the repairs were carried out.

[44] The sixth and final document was an email from TWL to Mr Cameron dated 9 July 2008 which states:

> I understand from Peter the rental discussed with you previously is $800 per week. To enable this to be integrated into and confirmed with your Contents Insurer (AMI) in an overall Temporary Accommodation Cost Claim Application, can I ask you to complete the attached drafted correspondence/instruction to AMI covering off the claim details and confirming with you and Angela, as owners of the subject AMI policy, are comfortable with [TWL] to coordinate the application on your behalf.

[45] Mr and Mrs Cameron submit that the above documents show that TWL negotiated and concluded the terms of the alternative accommodation agreement. They submit that the Tenancy Tribunal was wrong to characterise TWL as being "involved with the arranging the tenants' occupation of 37". They submit that TWL's role was more instrumental than merely facilitating the agreement. They submit that TWL must have been acting as agent for Mr Randle in that they negotiated and corresponded with Mr Randle's authority.

[46] Regardless of whether TWL was acting as Mr Randle's agent (contrary to the funding of the Tenancy Tribunal), the focus should be on whether the documents referred to above constitute a tenancy agreement in which Mr and Mrs Cameron agreed to pay weekly rental of $800 per week irrespective of whether the rental would be covered by insurance. The Camerons' position is that they only agreed to enter the

alternative accommodation agreement on the condition that the costs of the alternative accommodation would be fully funded by insurance and paid by TWL to Mr Randle.

[47] Mr and Mrs Cameron submit that the term of the alternative accommodation agreement was entirely dependent upon and dictated by the time it would take to complete the repair works to the Camerons' property. TWL had estimated that period to be "6 months more less". TWL was the project manager of the works and based that estimate on the previous works it had already completed at unit numbers 37 and 39. Hence, it was an informed assessment of the estimated duration of the remedial work. The Camerons submit that had the joinery issue been addressed at the time of the initial repairs as they requested, the period of the alternative accommodation agreement and funding for it would have been sufficient.

[48] TWL was also responsible for managing the funding of the alternative accommodation agreement by dealing directly with the insurers. At the time of entering into the alternative accommodation agreement documents show that the primary policy under consideration was the Camerons' AMI contents policy which had potential available cover of $95,000 subject to a 12 month maximum.

[49] At $800 per week, the AMI policy was anticipated to provide cover of 52 weeks. The intention of the parties was that insurance would meet the cost of the alternative accommodation agreement is reflected in the letter from TWL, dated 2 July 2018, to the loss adjusters for the body corporate insurance, IAG, which states:

> The owners of [unit number 35] to fund the above tenancy arrangement via making a claim against their Contents Insurer (within the top-up required from the Body Corporate's Material Damage extension.

[50] As mentioned above, there is no provision that the Camerons would pay rent themselves.

[51] The other policy was the material damage extension under the body corporate's own insurance policy with IAG. Mr Randle regarded the IAG policy as a "fallback option". It did not become apparent until around three months after the alternative accommodation agreement had been entered into that the AMI policy would not respond and that the funds would need to come from the IAG policy. The Camerons

were not named as insureds under the IAG policy. Hence, the body corporate would have to make any claim against that policy. TWL made the claim in their capacity as body corporate manager. TWL also made payments from that insurance directly to Mr Randle out of body corporate funds.

[52] There was $25,000 cover for alternative accommodation under the IAG policy. At $800 per week the IAG policy was anticipated to provide cover of 31.25 weeks, a little under eight months, meaning that the funds would become exhausted by early March 2019 at the latest. With an estimated time for repairs to be "6 months more or less", it was anticipated that the IAG policy would fully fund the alternative accommodation agreement.

[53] As late as October 2018, some three months after the alternative accommodation agreement had been made, the Camerons remained under the impression that it was the AMI policy and not the IAG policy which was responding to the alternative accommodation costs. In his claim, Mr Randle stated that *"the rent was to be paid from [Mr and Mrs Cameron's] $25,000 accommodation allowance covered by the Body Corporate's insurance policy".* That was incorrect because it was the AMI policy which was initially anticipated to respond at the time the alternative accommodation agreement was entered by the parties. This position only changed in about October 2018 when it became apparent the AMI policy could not be used. It is clear from the July 2018 correspondence referred to above that Mr Randle, the Camerons and TWL anticipated that the cost of the alternative accommodation agreement be met from the proceeds of the AMI policy. The expectation of the parties appears to be that the cost of the alternative accommodation agreement would be covered by insurance.

[54] The problem was that the repair works took significantly longer to remedy than was anticipated when the alternative accommodation agreement was entered, and it appears there was no agreement between the parties as to how the ongoing cost of that agreement would be meet in that eventuality. Mr and Mrs Cameron lay the blame for the delay squarely with TWL in its capacity as project manager.

[55] The Camerons brought a claim against TWL in the Disputes Tribunal in which TWL admitted that they knew the aluminium joinery was badly damaged and should have been inspected and then replaced. The problem was that TWL had not assessed whether replacement was necessary. They assumed a repair would remediate the joinery but without first carrying out any assessment to make that determination.

[56] Mr Randle suggested that the Camerons were responsible for the delay by, amongst other things, unreasonably refusing to accept the view of IAG that the damage to the aluminium joinery was not earthquake related. However, the Body Corporate's own expert, Mr Hadley, concluded that the damage was, indeed, caused by the earthquakes. The Disputes Tribunal determined that TWL acted in breach of duty to the Camerons and was causative of their loss. I note that decision was not available until after the Tenancy Tribunal decision.

[57] Irrespective of who paid to replace the joinery, the fact was that TWL was duty-bound to determine whether replacement or repair was the most appropriate way to remediate the damage.

[58] At the beginning of October 2018, TWL advised Mr and Mrs Cameron that their alternative accommodation would expire after six months, meaning they would have two vacate unit number 37 around 20 January 2019 while they were overseas in the United States. On 3 October 2018, Mr Cameron sent an email to TWL, copied to Mr Randle, in which he stated:

> We had a maximum of $95,000 available for temporary accommodation under our policy and that gave you some comfort. Today's threat of expulsion at the end of November is neither as per your letter, nor in keeping with the flexibility we demanded given our immovable departure in December.

[59] In exchanges with TWL and Mr Randle, the Camerons indicated a willingness to offer a contribution to the accommodation costs as they did not wish to shift their belongings out of unit number 37 before they headed to the United States in December 2018. At this time it was discovered that, in fact, the $25,000 of cover under the IAG policy would not expire in January 2019 as TWL had advised but would take them through to early March 2019. There was still some hope that the AMI policy would respond. Mr Randle described the IAG policy as the "fallback option".

[60] It was not until the email dated 21 March 2019 that TWL confirmed not only that the AMI policy would not respond, but also that the $25,000 of cover under the IAG policy had also been exhausted. The Camerons returned from their trip to the United States and discovered that the aluminium joinery had not been repaired or replaced. Instead, water had got into the premises. It was apparent by 10 April 2019 that there was going to be further delay due to the issue concerning the proper remediation of the joinery.

[61] On 6 May 2019 Mr Cameron sent an email to TWL, copied to Mr Randle, stating:

> We also need in writing from you, that we are not liable for any rent or storage costs due to the hold up with the doors.

The Camerons did not receive a reply.

[62] On 13 May 2019 Mr Cameron followed up to chase the timing for the joinery and confirmed that he would not be paying for the delays. The next day Mr Cameron sent an email to Mr Randle expressing frustration over the joinery issue. In his email, he stated:

> The money wasted on storage and rent is madness. On that front, I wanted to ask you are you still happy for us to be in your house at [unit number 37]? This has gone on way longer than we agreed. Please let us know.

Mr Randle was aware of the issues surrounding the remediation of the joinery. He did not require rent to be paid as a condition of the Camerons remaining in his property.

[63] Notwithstanding that the IAG insurance money had been exhausted in March 2019, TWL continued to pay $800 per week to Mr Randle out of the body corporate funds. Mr and Mrs Cameron contend that this is consistent with the arrangement agreed at the outset that TWL would pay Mr Randle directly without them being called on personally to pay the cost of the alternative accommodation. The payments to Mr Randle from the body corporate came to an end on 22 May 2019 by which time the body corporate had paid Mr Randle the sum of $35,200. Mr Randle, the body corporate and TWL had not made any demand on the Camerons for payment of the cost of the alternative accommodation.

[64] On 24 May 2019 the body corporate met to discuss the issue. After the meeting, Mr Cameron sent an email to TWL, copied to Mr Randle, in which he wrote:

> … They are totally the loss adjuster/inspector/insurer/TWL or other liability.
>
> From the correspondence, the $25k rental cover ran out 1 Feb. We were, of course, under the illusion that we have $90k cover under our AMI policy. We were only advised very late in piece that the BC cover was being used and had a $25K limit…
>
> Sam's email of 21 March outlines the expected owner 'overage' until we would move back into the home expected on 17 April. We are happy to pay this amount in this amount only. We will pay this immediately on request, as full and final settlement.

[65] The Camerons had made it clear that they did not regard themselves as being liable for any accommodation costs. Mr Randle knew he had been overpaid accommodation costs by TWL from body corporate funds. He also knew that there were no more insurance funds to be called upon.

[66] On 21 June 2019 Mr Cameron sent an email to TWL, with a copy to Mr Randle, stating:

> Who is paying the ongoing rent for Pete's house while IAG piss around again? Not me and not the BC. Needs to be sorted.

[67] At the AGM in July 2019 the Camerons once again raised the issues as the minutes note. The minutes record that the Camerons would defend any claim from TWL for additional rents regarding their tenancy in unit 16. The minutes also record that the issue was solely due to TWL's poor management of the joinery and that TWL should fund any amounts over and above the alternative accommodation agreement funding.

[68] The minutes from an AGM in June 2020 record, amongst other things, Mr Randle confirming there was $50,000 plus in lost opportunity rental income. The minutes appeared to confirm that Mr Cameron did not consider that the Camerons had any liability for any "back rent". Mr Randle was proposing to pay the Camerons $3,333 as his contribution to settle the Camerons' joinery claim. He did not suggest setting that sum off against the "lost opportunity rental income". Mr and Mrs Cameron submit that it was strange for Mr Randle to describe the $50,000 as "lost opportunity

rental income" if he considered the Camerons had a liability to him. The Camerons submit that it was disingenuous of Mr Randle to confirm that the payment of $3,333 to them was not contingent on payment of his "back rent".

[69] Mr and Mrs Cameron moved out of unit number 37 on 15 July 2020. On 23 July 2020, Mr Randle sent them an email in which he said that *"the [unit] looks very clean and tidy. Thank you"*. There was no reference to there being arrears of rent.

[70] By an email dated 8 October 2020, Mr Randle sent various documents relating to settlement of the insurance claim, including the IAG Settlement Agreement and the draft settlement agreement in relation to the Camerons' joinery claim. The Owner Settlement Statement attached to the email showed that $12,302 for storage costs and $4,800 for alternative accommodation costs as being levied or deducted from the Camerons' allocation of the insurance proceeds. There was no other reference to alternative accommodation costs.

[71] The statement also confirmed that Mr Randle would be refunding $5,400 of the overpayment he had received from the body corporate. The Camerons submit that his payment should have been limited to $25,000 from the body corporate equating to the IAG policy limit for alternative accommodation whereas he had received $35,200. Mr Randle did not request the Camerons to pay all the $10,200 overpayment, only the sum they had previously offered in full and final settlement.

[72] The Camerons were agreeable to having the $4,800 deducted from the insurance proceeds on the basis that it was accepted in full and final settlement as they had previously offered. The Camerons submit that the offer of $4,800 in full and final settlement must have been accepted by Mr Randle because he accepted that the payment from the Camerons was not directly made by them but through the sum being deducted from their share of the insurance proceeds.

[73] Mr and Mrs Cameron also contend that the terms of the IAG Settlement Agreement preclude Mr Randle from making any claim against the payment of the

cost of alternative accommodation. Clause 7 of the IAG Settlement Agreement provides:

> Each of the parties to this agreement undertakes not to pursue any claim whatsoever against any other party or any other person or entity in relation to or arising in any way, directly or indirectly, out of the events and connected in any way with the property, the claims and the policy. This agreement may be pleaded as a bar and is an absolute defence to any action or proceedings which may at any time hereafter be instituted by a party to this agreement or by any party claiming under or through a party to this agreement in relation to work in any way directly or indirectly connected with the property, the claims and the policy.

[74] The IAG Settlement Agreement was between the body corporate, the various owners, including Mr Randle and the Camerons, and IAG. The joinery settlement agreement was between the owners, TWL and the Camerons. Mr and Mrs Cameron submit that the terms of the settlement agreement were deliberately wide because the agreement was intended to cover two interrelated purposes. The first being to settle the insurance claim with IAG and the second being how the settlement monies would be divided between the owners. The settlement with IAG was only completed when the owners' allocation of funds was finalised. They submit that the terms of the agreement are sufficiently broad to capture claims between the parties to the agreement, such as Mr Randle's claim against the Camerons. There was also correspondence between the Camerons' solicitors and Mr Randle's solicitors in which the Camerons made it clear they would not be paying for additional rent other than that already agreed and/or storage costs. Hence, the Camerons submit there can be no doubt that Mr Randle and his solicitors were fully aware that they had consistently and repeatedly confirmed that they were not liable for any rental arrears for reasons which were well known to them.

[75] The Camerons contend that Mr Randle's claim is estopped by reason of the delay in bringing the claim and Mr Randle's silence. The key facts are:

- The Camerons moved into unit number 37 on 20 July 2018.
- In October 2018 Mr Randle was aware that the AMI policy was unlikely to respond to fund the alternative accommodation costs.

- By March 2019 funding for the alternative accommodation costs under the IAG policy were exhausted.

- On 22 May 2019 Mr Randle received his last payment from TWL out of body corporate funds. Two days later, on 24 May 2019, Mr Cameron made his offer in full and final settlement.

- On 15 July 2020 Mr and Mrs Cameron moved out of unit number 37. Mr Randle thanked them for looking after his property.

- In October 2020 the settlement agreements provided by Mr Randle and arrangements to receive the IAG insurance funds.

- On 2 November 2022, the Camerons' claim against TWL was initially dismissed in the Disputes Tribunal.

- On 10 January 2023 Mr Randle issued his claim in the Tenancy Tribunal.

- On 13 July 2023, the Camerons were successful in their claim against TWL at a rehearing in the Disputes Tribunal.

[76] At no point did Mr Randle demand that the Camerons pay rent personally. He did not follow any of the prescribed processes under the Act for collecting unpaid rent. It was almost 4 years between receipt of his last payment in May 2019 and issuing the claim. Mr Randle could have taken steps in 2018, and certainly in 2019, to assert that he considered the Camerons were personally liable to him for rent. He took no such step and remained silent in the face of the Camerons repeatedly telling him that they would not be liable. The Camerons submit that Mr Randle's failure to inform the Camerons that he considered them to be personally liable for payment of the rent beyond available insurance cover was not merely "indolent" as the Tenancy Tribunal described but rather because he did not consider that the Camerons were liable to him.

[77] In *Wilson Parking New Zealand Limited v Fanshawe* the Court of Appeal confirmed the following elements are required to establish estoppel:[1]

- A belief or expectation by [A] has been created or encouraged by words or conduct by [B].
- To the extent an express representation is relied upon, it is clearly and unequivocally expressed.
- [A] reasonably relied, to their detriment, on the representation; and
- It would be unconscionable for [B] to depart from the belief expectation.

[78] The Camerons submit that by his words and/or conduct, including his silence, Mr Randle created the expectation that he did not hold the Camerons liable for any arrears of rent. In reliance on that expectation, the Camerons did not pursue any claim for rental arrears against any other party such as TWL. They did pursue TWL for, amongst other things, storage costs by making a claim in the Disputes Tribunal. It was only after their initial claim against TWL was unsuccessful in late 2022 that Mr Randle filed his claim in the Tenancy Tribunal.

[79] The Camerons submit that had they known Mr Randle held them personally liable for payment of rent they would have taken steps to protect the interests some years ago including bringing a claim against TWL. They submit it is unconscionable for Mr Randle to bring his claim in those circumstances. The Camerons submit that, by reason of the circumstances referred to above, the "substantial merits and justice of the case" as provided in s 85(2) of the Act favour Mr Randle being is estopped from bringing his claim against them.

The respondent's (Mr Randle's) submissions

[80] Mr Randle's position essentially is that there was a tenancy agreement between him and the Camerons in which it was agreed that the Camerons would occupy and

[1] *Wilson Parking New Zealand Limited v Fanshawe* [2014] NZCA 407.

rent his property while work was being carried out to the Camerons' property. The tenancy would commence on 20 July 2018 and last for a period estimated to be about six months. The rent would be $800 per week. His case is that the parties performed the tenancy agreement by the Camerons moving into his property and he initially being paid $800 per week via the body corporate from insurance alternative accommodation cover. His position is that due to delays in the work to the Camerons' unit and a dispute raised by them regarding the scope of the repair work, the amount of insurance alternative accommodation cover was fully exhausted before the tenancy ended on 15 July 2020. As such, Mr Randle asserts that the Camerons breached the tenancy agreement by failing to pay rent for the entire period of the tenancy.

[81] Mr Randle submits that given the definition of "rent" in the Act as including "consideration in the nature of rent to be paid", the payments of $800 per week were "rent" in terms of that definition. Mr Randle submits that it does not matter how the Camerons funded the rent, namely that the Camerons applied funds from the insurer under the Alternative Accommodation Allowance under an insurance policy to pay some of the rent. His case is that the payment of that money to him was a payment from the Camerons regardless of how the payments were structured in practical terms.

[82] Mr Randle submits further that the Camerons did agree to pay rent personally for a period after they understood the funds available under the Alternative Accommodation Allowance had been exhausted. Mr Randle notes that the Camerons accepted that it has never been the case that he was not due payment for use of his property. Rather, their position is that payment was never due from them. He also considers that the email from TWL to Mr Cameron on 9 July 2018 refers to Mr Randle and Mr Cameron directly negotiating that the rent would be $800 per week.

[83] Mr Randle's evidence was that while it was expected that the Alternative Accommodation Allowance would be sufficient to cover the rent for the period in which the work to unit number 35 was carried out, he and the Camerons did not agree that the $800 per week rent was only payable from their alternative accommodation insurance allowance or that no rent would be payable once that allowance was exhausted. Mr Randle states that he would never have agreed to that as he would be

out of pocket if there were delays in the repair work being completed, over which he had no control. This issue goes to the very heart of this appeal.

[84] Mr Randle relies on the contents of Mr Cameron's email to Anthony Robertson and Mr Randle dated 3 October 2018 in which he referred to TWL's letter of 2 July 2018 to the brokers. It is helpful to set out the material portions of the 2 July 2018 letter:

> - The owners of 37… (hereafter called the Landlord) will enter into a tenancy agreement with the owners of 35… (hereafter called the Tenant) from 20 July 2018, whereby Landlord will lease to the Tenant the property that is 37… for a term of six months (more or less), enabling the Tenant to vacate the property at 35….
>
> - The owners of 35 … to fund the above tenancy arrangement via making a claim against the Contents Insurer (with any top up required from the Body Corporate's Material Damage extension).

[85] Mr Randle submits that Mr Cameron's email to Anthony Robertson in reference to the 2 July 2018 letter show that Mr Cameron relied on TWL's letter of 2 July 2018 as evidence that they were entitled to occupy unit number 37 until about 20 January 2019 when the repair work to unit number 35 was expected to finish. And, that the Camerons knew that the responsibility for funding the agreement lay with them.

[86] Mr Randle also relies on Mr Cameron's email to him and Anthony Robertson of 17 October 2018 in which he wrote:

> Given the 'agreement' we had re rental of 37 … 6 months (more or less), Angela and I are prepared to contribute to the rental costs. We believe a contribution of 5 weeks is fair given the 'agreement' in place.

Mr Cameron's email was written in the context of them noting that they would not be able to move back in before departing for the United States on 15 December. He noted that they would depart the United States on 28 February and would arrive back in Christchurch on 2 March. Hence they could move on 3 March.

[87] In October 2018, Mr Randle and the Camerons exchanged email correspondence. The correspondence was directly between Mr Randle and Mr Cameron. On 22 October 2018, Mr Cameron sent an email to Mr Randle asking

whether he agreed to extend the rental period until "early March" with the Camerons "paying 5 weeks rental contribution". On 24 October 2018, Mr Randle responded agreeing to extend the rental period and in relation to the financial aspects of the extension Mr Randle noted:

> Financial: Will a contribution from you be required? I am checking, but maybe not. I will know sometime next week.
>
> As you are aware there are 2 policies that we can look to for your alternate accommodation cover and either way there is enough cover to take you to the early March.
>
> Your owners contents policy. While this policy has plenty of coverage ($90k), they should decline a claim because you moved 5 yrs after the quakes. We are asking them anyway.
>
> The BC Material Damage extension. This is our fallback option and has coverage to pay the current rent until mid-March.
>
> In the next week or so I expect Anthony and the loss adjuster to finalise the claim.

[88] Mr Cameron replied by email dated 24 October 2018 in which he stated: *"on the rental, that sounds great thank you"*. He also stated he understood that TWL had approval from AMI for the repair rental costs and that there was no 5-year limitation in the policy's terms. Mr Randle then stated that the relevant wording was *"during the period of cover"* and that the Camerons *"did not have cover with this residence on this policy at the time of the quakes"* to which Mr Cameron replied *"Cheers"*. Mr Randle's position, therefore, is that the Camerons continued to occupy unit number 37 with full knowledge that insurance would not cover the rent of $800 per week. They could have moved out in mid-March but they chose to remain in occupation.

[89] Mr Randle does not accept that the claim for rental was fully and finally settled by a payment of $4,800 which the Camerons made "to avoid a dispute about liability for rental arrears". As noted above, Mr Cameron made the offer in an email of 24 May 2019 and asserts that the offer was accepted by deduction of $4,800 from their share of the insurance funds received pursuant to the IAG Settlement Agreement.

[90] In an email on 24 May 2019, Mr Cameron states:

> Confirming we will not be paying either directly, or through the BC, toward the non-agreed rental/storage costs. We believe they are totally the loss

> adjuster/inspector/insurer/TWL or other liability. If TWL are the first port of call as the project managers, they must sort who was responsible. But it is not the BC or us.
>
> Sam's email of 21 March outlines the expected 'overage' until we would move back into the home expected on 17 April. We are happy to pay this amount and this amount only. We will pay this immediately on request, as full and final settlement.

[91] The 21 March 2019 email Mr Cameron refers to in his email of 24 May 2019 includes a table, the heading on which refers to Mr Randle as the "landlord" and the Camerons as the "tenant" and records the rental at $800 per week and the commencement date as 20 July 2018. The table forecasts the amount of rent payable up to 17 April, being the additional five weeks that Mr Cameron states in an earlier email in the email chain on 10 March 2019 by which he believes the work can be finished, as $30,400. It shows the owner top-up as $5,400. The note underneath states:

> Owner of Unit 15 to fund the difference between the Insurance Policy Allowance ($25k) and forecast total noting owners schedule return to NZ is mid-April.

[92] Mr Randle submits that the correspondence reflects the agreement reached between the parties, namely a tenancy with Mr Randle as the landlord and the Camerons as the tenant, with the agreed rental of $800 per week. Further, Mr Cameron did not take issue with this description of the agreement between them. He submits that it also shows that the Camerons recognised that, to the extent they continued to occupy unit number 37 for a period of time greater than what would be covered by their alternative accommodation insurance allowance, they would be liable to pay the rent of $800 per week themselves. Furthermore, Mr Randle submits that the Camerons were refusing to pay any non-agreed rent or storage because they considered that other parties were liable for the delays and the repairs, not because they considered they were not contractually liable.

[93] The offer on 24 May 2019 by Mr Cameron was to pay the expected "overage" as set out in Sam's email on 21 March 2019. The amount stated in that email is the top-up required by the Camerons was $5,400 not $4,800 which was the amount that was subsequently deducted from the Cameron's share of the insurance pay-out. Mr Randle submits the offer made by Mr Cameron was to pay $5,400 "as full and final

settlement". He submits the offer was never accepted and the Camerons never paid $5,400 to him.

[94] Mr Randle submits that subsequently the Camerons agreed to a deduction of $4,800 to be made from their share of the insurance settlement funds received by the body corporate pursuant to the IAG Settlement Agreement. He submits this is a different amount to the "offer" made on 24 May 2019. Mr Randle's fundamental submission is that there is no evidence the $4,800 was agreed to be paid in full and final settlement of the outstanding rent.

[95] The minutes of the owner meeting held on 24 July 2019 records that there were current rental arrears now approaching 20 weeks, with a further 12 weeks likely before occupation following the joinery repairs. The minutes record that the Camerons stated the issue was solely due to TWL's poor management of the joinery repairs and that TWL should fund any amounts over and above the alternative accommodation funding and their contribution of five weeks rental. Mr Randle submits this shows the Camerons recognised that rent still needed to be paid to Mr Randle.

[96] The Randle's solicitors wrote to the Camerons' solicitors on 10 November 2020. Paragraph 18 to that letter stated:

> You will see in the AGM minutes that the only matter discussed in relation to the settlement with your clients was rent. There is no reference in the minute to storage costs being raised by clients.

[97] Mr Randle submits that it is clear from reading the AGM minutes that the "settlement" referred to in the correspondence was a different settlement. The letter refers to the minutes of the 2020 AGM in which there is discussion about the Camerons' claim for damages to retrospectively remediate the joinery which was estimated, at the March 2020 meeting, to cost in excess of $100,000. The minutes record that at the March 2020 meeting the Camerons reserved their legal rights to pursue the insurer, the body corporate and TWL for damages and that they would proceed to install the new aluminium joinery using their own funds in the meantime.

[98] The minutes also record that a settlement was reached at the AGM whereby $40,000 would be paid to the Camerons in full and final settlement of the threatened

claim by them to take legal action in relation to the joinery damages claim and on the basis that the Camerons would support the proposed resolutions for the cash settlement with IAG.

[99] The minutes also record that Mr Cameron was asked what his intentions were regarding paying any the back rent to Mr Randle to which Mr Cameron replied that his previously stated position had not changed – the delays were not his fault and that he had no intention to pay any rent other than the weeks he had previously agreed to. Mr Cameron was asked if the settlement offer from the body corporate and TWL was contingent upon paying back rent and Mr Cameron advised that it was not.

[100] Mr Randle submits that the reference to the settlement offer is clearly a reference to the $40,000 settlement offer made to the Camerons by the other owners of the body corporate and TWL. The minutes record that Mr Cameron was asking if the settlement offer was contingent upon him paying his back rent. Mr Cameron was seeking confirmation it would not be a condition of them receiving the $40,000 settlement payment from the other owners of the body corporate and TWL that the Camerons paid or agreed to pay the outstanding rent. Mr Cameron submits it is clear from the minutes that the letter of 10 November 2020 is not an acknowledgement of the settlement in relation to the rent. It is a reference to the settlement agreement between the other body corporate owners/TWL and the Camerons.

[101] Mr Randle submits that the minutes of the AGM show that the Camerons knew they were liable to Mr Randle for the rent arrears; they knew that the rent arrears had not been fully and finally settled; and they were aware that Mr Randle considered they were liable for the rent arrears.

[102] Mr Randle does not accept that the IAG Settlement Agreement fully settled his claim for rent arrears against Mr and Mrs Cameron. He submits that the IAG Settlement Agreement was a settlement between IAG of its obligations under the insurance policy with the body corporate in relation to earthquake damage. The claim by Mr Randle against the Camerons is pursuant to the tenancy agreement which is separate to the claim under the insurance policy between the body corporate and IAG. Mr Randle submits it is clear from the terms of the settlement agreement that it does

not settle any claims between Mr Randle and the Camerons in relation to the outstanding rental. It simply settled the insurance claim with IAG. Clause 7 of the settlement agreement refers to "the claims" which is defined as claims under the policy with IAG for loss or damage to the property suffered in connection with the earthquakes. Mr Randle submits that his claim is not a claim under the policy with IAG. It is a claim under the tenancy agreement. Further, settlement with IAG occurred once the settlement payment was made by IAG not when the owners' allocation of funds was finalised.

[103] Mr Randle also submits there is an apparent contradiction with the Camerons' claims in that, on the one hand, they assert that they were not obliged to pay rent beyond the alternative accommodation insurance allowance yet, on the other hand, they claim that there was nothing to settle in relation to the tenancy agreement when the IAG Settlement Agreement was signed. Mr Randle submits that if the IAG Settlement Agreement fully and finally settled the Camerons' obligations to pay rent to Mr Randle, their argument that the $4,800 subsequently deducted from the allocation of the settlement funds to the Camerons was a full and final settlement of the outstanding rent is inconsistent with their argument.

[104] As to the Camerons' claim that Mr Randle is estopped from claiming rent, Mr Randle correctly submits this was not raised in the Tenancy Tribunal. Mr Randle gave evidence about the reasons for the delay in bringing the claim. Counsel for the Camerons did not cross-examine Mr Randle on that issue. In any event, Mr Randle denies that there was any belief or expectation created or encouraged by words or conduct on his part that the Camerons would not be liable for the outstanding rent. Mr Randle also refers to correspondence and documents where the issue of outstanding rent was raised. He also contends there was no clear and unequivocal express representation by him that the Camerons were not liable for the outstanding rent. Nor could the Camerons have reasonably relied on any representation or conduct by Mr Randle to the detriment.

[105] Mr Randle does not accept that the Camerons could not have brought a claim against TWL. The final Disputes Tribunal hearing was held after Mr Randle had filed his claim in the Tenancy Tribunal – in fact after the Tenancy Tribunal hearing.

Therefore, the Camerons had an opportunity to pursue a claim against TWL for the outstanding rent but they did not do so.

Analysis

[106] At one level this appeal is a simple, not uncommon case (in post-earthquake Christchurch) of parties entering into an agreement in which one party occupies another party's premises and agrees to pay rent while earthquake repairs are carried out where insurance covers part or all of the cost of the alternative accommodation. Sometimes, in fact often, the repairs take longer than anticipated and the insurance accommodation cover runs out before the repairs are completed. In that situation, the tenant must meet the uninsured cost of the accommodation.

[107] At another level, this case is difficult because the agreement between the parties contemplates that the cost of the alternative accommodation would always be met by insurance and not by the Camerons personally. Instead, the case deals with the difficult situation of an eventuality having occurred that neither party contemplated or was responsible for when they entered the agreement. Due to no fault on either the Camerons or Mr Randle's part the repairs to unit number 35 took inordinately longer than expected.

[108] TWL had a significant part to play in all of this. They were the body corporate manager; they were the project managers of the earthquake repair work; and they were responsible for arranging the funding of the Alternative Accommodation Agreement by dealing directly with the insurers. However, there is no need for me to deal with whether TWL were acting as Mr Randle's agent because there is no issue that the terms of the agreement are contained within the documents analysed above. Mr Randle does not assert otherwise. Although, Mr Randle referred to verbal negotiations he did not provide any detail. Nor did he suggest that the verbal negotiations were inconsistent with what is contained in the documents.

[109] I agree with the Camerons' submission that an objective analysis of those documents is required to ascertain the terms of the agreement. What each party may have intended is irrelevant.

[110] The term (as in length of the term) and the insurance cover available to meet the cost of the alternative accommodation are integral to construction of the agreement. The letter from TWL to the loss adjusters of 2 July 2018 variously describes the arrangement as a 'tenancy' and a 'lease' "for a term of six months (more or less)". The next sentence is critical. It states:

> [the Camerons] to fund the above tenancy arrangement via making a claim against the Contents Insurer (with any top up required from the Body Corporate's Material Damage extension).

The letter does not state that the Camerons would pay for any rent themselves but that it would be funded by insurance. That is perhaps not altogether surprising because the letter is between TWL and the loss adjusters for the body corporate insurers, IAG. Nonetheless, it makes it clear that the term would be six months more or less and that the cost of the alternative accommodation would be funded by insurance.

[111] The email from TWL to the body corporate dated 25 June 2018 does not specify the terms of any tenancy but notes:

> A couple of you have made it clear in fairly direct terms during the last couple of days that you require expeditious advancement of the subject repair programme.

[112] It was an essential part of the agreement that TWL would expeditiously advance the repair programme that they were project managing. That was necessary because the alternative accommodation was being funded by insurance and there were limits on the amounts available alternative accommodation. Those that had to vacate their homes during repairs obviously wanted to get back into the homes as quickly as possible.

[113] Mr Cameron's email to Anthony Robertson of TWL, dated 1 July 2018, copied to Mr Randle, stated that TWL would provide written confirmation about temporary accommodation amongst other things. It states:

> This letter to confirm cost and duration for temp accommodation given the conditions of policy; what are the rules?.

No written confirmation was provided.

[114] The email sought confirmation regarding the commencement date and that TWL would arrange payments to Mr Randle directly. This is not a case where the insurer provided monies to the Camerons who passed the payments on to Mr Randle. Importantly, Mr Cameron stated:

> If an extension to temporary accommodation is required due to shipping of materials from overseas, we will not be responsible for this and insurers will cover the costs within reason.

[115] The email from Mr Cameron to TWL dated 5 July 2018, again copied to Mr Randle asked for confirmation of the "rental rate". Importantly, Mr Cameron states: "*I only ask as that will determine how long we can stay while AMI are paying. We had the situation with our flood and do not want to be caught again"*. The rental rate was important to calculate how long the insurance funds for alternative accommodation would last while the repairs were carried out. Of note, it is Mr Cameron who asks TWL what the "rental rate" was. There is an inextricable link between the estimated duration of the repairs; the term of the tenancy; and the available insurance cover for alternative accommodation.

[116] In the email from TWL to Mr Cameron, dated 9 July 2018, TWL states:

> I understand from Peter the rental discussed with you previously is $800 per week. To enable this to be integrated into and confirmed with your Contents Insurer AMI in an overall Temporary Accommodation Cost Claim Application, can I ask you to complete the attached drafted correspondence/instruction to AMI covering off the claim details and confirming you and Angela as the owners of the subject AMI policy are comfortable with Thompson Wentworth to coordinate the application on your behalf.

[117] An objective analysis of these documents shows that TWL was the central party that brokered and organised the Alternative Accommodation Agreement. This was not surprising because TWL dealt with project managers organising and coordinating the various aspects of the project. Further, TWL dealt with both the intended insurers, namely IAG and AMI, to ensure the accommodation was funded. TWL dealt with both Mr Randle and the Camerons to facilitate the agreement. The emails were between TWL and the Camerons, some of which were copied to Mr Randle. There was no direct communication by Mr Randle to the Camerons. None of the documents provide that the Camerons would be responsible for paying any

rental payments personally. Moreover, those documents do not provide what would happen if there was a problem with the repair process or the insurers would not pay. Both of those matters were beyond the control of Mr Randle and the Camerons.

[118] As late as October 2018, some three months after the Alternative Accommodation Agreement had been entered, the Camerons were still under the impression that it was the AMI policy and not the IAG policy which was responding to the alternative accommodation costs. It was not surprising that they were unconcerned about delay given the belief that the AMI policy provided up to $95,000 in funding.

[119] An objective interpretation of the alternative accommodation agreement is that the costs (namely the rent) would be fully funded by insurance cover without the Camerons being called upon personally to make payment. This is not simply a situation where the parties have entered into a tenancy agreement with rental to be paid regardless of the extent (if any) of insurance cover to meet the rental costs. In those situations the landlord is not directly interested or involved in the extent of insurance cover to meet payment of the rent. The tenant is liable to pay rent regardless of what insurance cover is available. This case is different because it was plain that everyone intended that the alternative accommodation costs would be covered by insurance.

[120] The difficulty with this case is that there was no provision in the Alternative Accommodation Agreement for what would happen if there was a problem with the repair process (as came to pass) or the insurers would not pay. Nor was there any subsequent agreement about how the rent was to be paid when it became apparent that available insurance monies were exhausted. Mr Randle did not say to Mr and Mrs Cameron that they should start paying rent personally once the insurance monies ran out. On the other hand, Mr and Mrs Cameron, knowing that the insurance monies covering the alternative accommodation costs had been exhausted, remained in the premises. Their position is not entirely unreasonable because the delay in completing the repairs was attributable to TWL and not them, or Mr Randle for that matter.

[121] Hence, this is a case where the agreement the parties entered made no provision for what eventuated, namely insurance cover ran out long before the repairs were completed, when the agreement only provided for the cost of alternative accommodation to be funded by insurance.

[122] I agree with the Adjudicator that there was a tenancy agreement between the Camerons and Mr Randle in which Mr and Mrs Cameron would occupy the premises while repairs were being caried out to their unit at a weekly rental of $800. However, there was more to it than that. This was not the usual rental agreement where earthquake repairs are carried out with an insurer providing the insured tenant with a sum covering or contributing to the cost. Analysis of the documents forming the agreement reveal that there was never any agreement that the Camerons would have a liability to pay rent if insurance proceeds were exhausted before the repair work was completed. The agreement is silent as to that. This is not a case where a term can be implied into the agreement that the Camerons would pay rent once insurance moneys were no longer available.

[123] However, Mr and Mrs Cameron occupied the premises rent free for some time after insurance was no longer available. It was never their position that Mr Randle not being entitled to rent. Their position simply is that they were not personally liable to pay it.

[124] The difficulty in this case is that neither party clearly communicated with the other as to what would happen once insurance moneys ran out. To that extent they must share responsibility for the situation that has eventuated. This is a case where it is appropriate to determine the appeal in accordance with the substantial merits and justice of the case in which it is fair for the parties to share equally the liability for outstanding rent. The appeal is allowed to this extent: The order of the Tenancy Tribunal that Mr and Mrs Cameron pay Mr Randle the sum of $52,943 is quashed. Instead, Mr and Mrs Cameron are to pay Mr Randle $26,471.50 being one-half of the rental.

[125] The appropriate course is for costs to lie where they fall. However, should either party seek costs they should file succinct memoranda within four weeks of the delivery of this judgment.

____

Judge P R Kellar
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhenga: 13/06/2024