QBE Insurance, Wild South, Marriott, Crystal Imports case summary

Court of Appeal Releases Judgment on Reinstatement Clauses
The Court of Appeal recently delivered a judgment in the joint appeals of:

a. *Wild South Holdings Limited v QBE Insurance (International) Limited* [2013] NZHC 2781
b. *Marriott v Vero Insurance New Zealand Limited* [2013] NZHC 3120*;* and
c. *Crystal Imports Limited v Certain Underwriters at Lloyds of London* [2013] NZHC 3513*.*

The insured parties in all three cases were commercial property owners whose buildings suffered damage from multiple events throughout the Canterbury earthquakes. All of the insured parties were insured under similarly worded insurance policies and all policies were subject to a maximum sum insured. Crucially, all three insurance policies contained automatic reinstatement clauses.

Reinstatement
The insured and insurers disputed whether cover reinstates as soon as an event causing loss happens, or when and to the extent that the insurer pays for that loss.

There are no material differences between the various clauses dealing with reinstatement. As an example, the clause in *Wild South* provides:

> *"In the absence of written notice by the Insurers or the Insured to the contrary, the amount of insurance cancelled by loss or damage is automatically reinstated as from the date of loss or damage. The Insured undertakes to pay such pro rata premium at the rate applicable to the item or items concerned as may be required for the reinstatement."*

The Court held that the wording of the policies was clear. The clauses all provided that an amount of insurance is cancelled "by loss" (or in *Wild South's* case, "by loss or damage"). The wording does not provide that cancellation happens on payment or that it is conditional on payment. References to the word "loss" meant physical loss.

The insured becomes indemnified up to their maximum sum insured immediately following a loss causing event. At the same time, the insured incurs a liability to pay any additional premium for which the policy provides.

The Court of Appeal further concluded that any notice from the insurers or insured that the automatic reinstatement clause did not apply following loss or damage can only operate prospectively. In other words, following a second loss causing event, an insurer cannot give retrospective notice that the reinstatement clause was cancelled after the first loss causing event.

Merger
The doctrine of merger finds its home in marine insurance law and no previous authority holds the doctrine applicable to fire and general policies. Broadly, merger (in an insurance sense) describes what happens when a total loss succeeds a partial loss and the parties never intended that the insurer should be liable for more than a total loss during the period of insurance.

The Court of Appeal noted that in the recent Supreme Court decision, *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117, the doctrine of merger was found to be flatly inconsistent with a policy in which the sum insured was reset after each happening. The Court of Appeal considered itself bound to follow that decision and rejected the application of merger to the present cases.

Destroyed
Although the issue of when a building may be deemed 'destroyed' was only an issue in *Marriott*, the Court of Appeal considered it an issue of wider application since many policies distinguish between 'destroyed' and 'damaged' and apply a different measure of indemnity to each.

In the case of the Vero policy in *Marriott*, the measure of destruction was the cost of rebuilding using "currently equivalent building materials and techniques". The measure of damage was "restoring the damaged portion of the property to a condition substantially the same as" its condition when new.

Since the effective cost of rebuilding or restoring the property may be significantly different, whether a building can be classified as 'destroyed' is significant. The Court of Appeal concluded that whether a building is 'destroyed' is a question of fact to be answered in all the circumstances.

Other issues
The Court of Appeal was also asked to determine whether a policy excess must be deducted from the estimated total amount of loss, or from the total sum insured. The Court cited passages from the High Court judgments in *Wild South* and *Marriott*, but declined to provide an answer. Instead, the issue was set aside and reserved for trial.

Crystal Imports contained an 'average clause' which treats the insurer and insured as co-insurers by providing that they will share any loss in proportion to the risk they have respectively assumed. The Court of Appeal confirmed the High Court Judgment that the insured may elect the basis on which the loss is valued (i.e. replacement, rebuild or repair).

Conclusion
Like the Supreme Court decision in *Ridgecrest*, the Court of Appeal has clarified the rights as between insurers and the insured, particularly in respect of commercial insurance policies containing reinstatement clauses.

For more information, or to find out whether this case or *Ridgecrest* apply to your insurance policy, please contact Jonathan Nicolle.