IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-007271

BETWEEN	ANZ NATIONAL BANK LIMITED First Plaintiff
AND	ING (NZ) LIMITED Second Plaintiff
AND	TOWER INSURANCE LIMITED Defendant
AND	VERO INSURANCE NEW ZEALAND LIMITED Counterclaim Defendant

Hearing: 9, 10, 11 and 12 February 2009

Appearances: J E Hodder SC and S A Patel for the First and Second Plaintiffs
C T Walker and M C Smith for the Defendant
S A Armstrong for the Counterclaim Defendant

Judgment: 11 March 2009 at 4:45pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 11 March 2009 at 4:45pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
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Introduction

[1] These proceedings concern the parties' rights under and consequent to various agreements entered into between the plaintiffs and the defendant. The principal agreements are as follows:

a) a master insurance agency agreement between the defendant, Tower Insurance Limited ("Tower") and The National Bank of New Zealand Limited dated 1 October 1999; and

b) a master agency agreement between the Tower and ANZ Banking Group Limited dated 1 October 2000.

The obligations contained in these principal agreements have been varied. In June 2004 the ANZ Bank and The National Bank amalgamated to form the first plaintiff, ANZ National Bank Limited ("ANZN"). It succeeded to the Banks' rights and obligations under the two agreements. Further, on 30 September 2005 ANZN entered into a joint venture agreement whereby it sourced all insurance and managed fund products through the second plaintiff, ING (NZ) Limited ("INGNZ"). To recognise the situation ANZN, INGNZ and Tower entered into deeds of novation. Those deeds also amended the principal agreements in some respects. Details of the deeds are as follows:

c) In the case of the National Bank agreement, the deed of novation and amendment is dated 2 December 2005.

d) In the case of the ANZ agreement, the deed of novation and amendment is dated 24 May 2006.

[2] In broad terms the agreements provide for the promotion and sale of a number of different types of general insurance policies underwritten by Tower to ANZN customers. The policies bear bank logos. ANZN has proprietary rights in the names by which some of the policies are known. Those names have been used

by Tower pursuant to the agreements between the parties. The policies are referred to by the parties as "bank branded" policies. A substantial number of such policies have been sold over the years. There are some 110,000 policy holders and some 196,000 policies in place.

[3] ANZN and INGNZ claim that they terminated all agreements with Tower by notice dated 7 August 2008. Tower disputes that the agreements have been validly terminated. The parties also disagree about what should happen after termination if the agreements have been validly terminated.

[4] The principal matters in issue for present purposes are as follows:

a) Has ANZN validly terminated the agreements?

b) If the agreements have been validly terminated, is Tower entitled to offer, sell, renew or offer to renew any ANZN branded policies of insurance?

c) If Tower is entitled to renew ANZN branded policies of insurance following termination, is ANZN able to compete with Tower for renewals?

d) What entitlement does ANZN have to information held by Tower about ANZN branded policies and policy holders?

e) If ANZN is entitled to information held by Tower, is ANZN entitled to pass on that information to the counterclaim defendant, Vero Insurance New Zealand Limited ("Vero")?

[5] Vero is the replacement underwriter who will be taking over from Tower. It was chosen after ANZN and INGNZ issued a "Request for Proposals" document in February 2008. The request invited responses for the supply of general insurance products to ANZN customers. Both Tower and Vero responded and Vero was successful in obtaining the business.

[6] Tower has filed a counterclaim against ANZN and INGNZ and joined Vero to the proceedings as a counterclaim defendant. Tower alleges that ANZN and INGNZ entered into a confidentiality deed with it in February 2008, and that they have breached that deed in various ways. Tower also alleges breach of various clauses in the National Bank and ANZ agreements which it says prohibit the disclosure of information acquired through the business relationship created by the agreements, and it alleges breach of confidence by ANZN and INGNZ. Tower asserts breach of confidence by Vero, alleging that Vero knew or ought to have known that information it received from ANZN/INGNZ was confidential, and that Vero has used that information for the purposes of purchasing or acquiring from either or both ANZN and INGNZ rights to exploit the portfolio of insurance policies sold by Tower pursuant to the National Bank and ANZ agreements.

[7] By consent the hearing before me which commenced on 9 February 2009 was confined to Tower's liability in terms of ANZN's and INGNZ's statement of claim, and whether those parties are entitled to the various non monetary remedies they seek. Issues of quantum, assuming liability by Tower, are to be dealt with at a later date. Similarly Tower's counterclaim is to be dealt with at a later date.

[8] I now turn to consider each of the principal matters in dispute.

Termination

[9] ANZN and INGNZ seek a declaration that they have given valid notice of termination of the National Bank and ANZ agreements and that, with effect from 1 March 2009, those agreements are at an end.

The agreements

[10] Both agreements provide for termination in various situations. For example, each agreement could be terminated for cause if there was a breach by either party, and each agreement could be terminated if certain specified events occurred (e.g. insolvency or a scheme of arrangement).

[11] ANZN/INGNZ have purported to terminate the National Bank agreement pursuant to clause 10.5 of that document. It reads as follows:

> This Agreement as a whole is intended to remain in effect between the Parties for an indefinite term, provided that there may be earlier termination notice given in respect of individual National Bank products in accordance with the relevant termination provisions specified in the individual Schedule(s).

Each of the schedules to the agreement deals with a particular type of insurance and provides that the schedule could be deleted from the agreement at any time by one party giving to the other notice in writing. Most schedules could be deleted on six months' notice. One of them – schedule 7 dealing with accident insurance – required three months' notice. The agreement provides – clause 3.1 – that it remained in effect as long as there was at least one schedule in effect. The notice of termination given by ANZN and INGNZ purports to terminate all of the relevant schedules.

[12] The ANZ agreement provided for termination in clause 20. Relevantly clause 20.1 provides as follows:

> This Agreement may be terminated by either party:
>
> (a) by not less than six months' prior written notice given at any time after the expiration of three years from the Commencement Date for any reason;

ANZN and INGNZ have purported to give notice under this clause.

[13] Both agreements provide for the giving of notices.

[14] The National Bank agreement provides as follows:

> 13.1 Any notice or communication required to be given or made under or pursuant to this Agreement shall be in writing and shall have been duly given or made only when delivered or sent by pre-paid post (Fastpost within New Zealand) or facsimile to the Party to which such notice or communication is required to be given or made at the addresses set out in Clauses 13.2 and 13.3 or such other address as may be advised by the relevant party to the other by notice given in accordance with this Clause 13.1

13.2 The address for notice of the Company is:

TOWER Insurance Limited
67-73 Hurstmere Road
Takapuna (P O Box 33-144)
Telephone: 09-486-9340
Facsimile: 09-486-9368
Attention: The Chief Executive

…

13.4 Any notice or communication given under this Clause 13 shall be deemed to have been received:

13.4.1 At the time of delivery, if delivered by hand;

13.4.2 On the 5th day after the date of mailing, if sent by Fastpost with postage pre-paid;

13.4.3 When the transmission is sent, if sent by facsimile. If there is any dispute or difference between the Parties over the fact of transmission in any particular case, production by the sender of a confirmation of clear transmission shall be prima facie evidence of transmission and shall bind the Parties accordingly.

[15] The ANZ agreement provides as follows:

29.1 Notices under this Agreement may be delivered by hand, by pre-paid post or by facsimile to the addresses of the parties set out herein. Notice will be deemed given:

(a) In the case of hand delivery at the time when delivery is made;

(b) In the case of pre-paid post at the time when the notice should ordinarily have been received by the party in the normal course of delivery; and

(c) In the case of facsimile, upon acknowledgement of receipt.

29.2 The addresses of the parties are as follows:

Tower Insurance Limited
PO Box 33-144
Takapuna
Fax (09) 486 9368

Attention: General Manager

…

The notice of termination

[16] The notice of termination was given by letter dated 7 August 2008. The letter expressly referred to the agreements. It gave notice in terms of the National Bank agreement that schedules 1 to 7 inclusive were deleted from the agreement, and in terms of the ANZ agreement, that the agreement was terminated pursuant to clause 20.1(a). The notice stated that it was effective as from 28 February 2009. Relevantly, the letter noted as follows:

> **Address for notice**
>
> 9. We have been informed by TOWER that its head office is now at 22 Fanshawe Street, Auckland. Accordingly this notice has been sent to that address, rather than 67-73 Hurstmere Road, Takapuna.

The letter was signed by ANZN's managing director and by INGNZ's chief financial officer.

[17] The letter giving notice of termination was hand delivered on 7 August 2008 to Tower's registered office at 22 Fanshawe Street, Auckland. The evidence established that Tower's head office and registered office used to be 67-73 Hurstmere Road, Takapuna. Tower's head office was relocated progressively from Hurstmere Road to Fanshawe Street in 2004 and 2005, and the whole of the head office is now located at Fanshawe Street. The registered office is also at Fanshawe Street.

[18] The National Bank agreement gave Tower's address for notices as 67-73 Hurstmere Road, Takapuna. Tower no longer has an office at Hurstmere Road. It closed its premises and vacated the building in 2005. The space formerly occupied by Tower is now occupied by another entity. Notwithstanding paragraph 9 in the letter terminating the agreements referred at [15] above, there was nothing in the evidence before me suggesting that Tower had formally advised the National Bank of its change of address as envisaged in clause 13.1 of the National Bank agreement.

[19] Tower does not dispute that it received the notice. Indeed the same day as it received the letter, Tower gave notice to the Stock Exchange in the following terms:

> **TOWER and ANZ / National Bank Venture**
>
> TOWER has provided general insurance products to the ANZ and National Bank for 15 years through a relationship that has seen the combined ANZ / National portfolio grow to approximately $70m in annual premium revenue. However, revenue sharing arrangements have resulted in TOWER incurring an ongoing underwriting loss from the venture.
>
> The decision has now been made to discontinue this relationship between TOWER and ANZ / National which will therefore cease with effect from 1 March 2009.
>
> This decision has no effect on TOWER customers who will continue to receive insurance cover and benefits under their existing insurance policies.
>
> …

[20] There is no direct evidence that this statement was made in response to the notice of termination. However, it was not suggested by Mr Walker for Tower that the statement was not a response to the notice. The coincidence of timing – both in the release of the statement, and in the date from which the discontinuance of the relationship was to take effect – compel the conclusion that the statement was a response to the notice.

[21] Further, on the following day Tower wrote to INGNZ and ANZN acknowledging the letter of termination. Somewhat enigmatically, the reply included the following sentence:

> For the avoidance of doubt, we do not accept the validity of the letter, to the extent that it does not reflect the contracts. We will, of course, comply with our contractual obligations.

[22] It has transpired that Tower disputes that the letter constituted effective notice because it was not sent to the addresses specified in the agreements.

Submissions

[23] Mr Hodder SC's primary submission for ANZN and INGNZ is that the address provisions detailed in the agreements are not intended to be strictly

construed. He argued that the provisions are for the purpose of convenience, and to prevent either party from evading service. He suggested that the actual address itself is directory, and that the provisions are properly construed as requiring service on the current registered office. He drew a distinction between the "what" and the "how" of any notice. In his submission, what has to be sent, when it has to be sent, and what it has to say are mandatory requirements; how any complying notice is to be served is directory. Mr Hodder submitted that the service provisions exist to ensure that neither party can avoid service, and to provide an evidential safe harbour for those giving notice in one of the specified ways through the operation of the deeming provisions. He further noted that the ANZ agreement does not provide a physical address for the defendant but that it does provide for hand delivery. He submitted that ANZN and INGNZ served an unambiguous notice of termination on Tower at its registered office and that the notice indisputably conveyed the required message. Tower received and acted on the notice on the same day. He argued that as a matter of commercial reality, the notice was effective in fact and in law, and that the agreements had been validly terminated.

[24] Mr Walker for Tower submitted that the issue is one of construction. He argued that the submissions made on behalf of ANZN and INGNZ are untenable, and that the notice provisions in the agreements cannot be construed as permitting delivery to the current registered office of Tower. He suggested that the real issue is whether or not the notice provisions contained in the agreements are permissive or obligatory. He argued that stipulating an address for notices benefited both parties. He went through each clause carefully – emphasising the wording, especially in the National Bank agreement. He queried the logic in the plaintiffs' argument and suggested that if all else – the "what" – is obligatory, there is no reason why the address for service – the "how" – should be permissive. He submitted that the deeming provisions are mutual and exclusive and that neither party can prove actual receipt at a different time or by a different mode. He submitted that the scheme of the service provisions is obligatory and not permissive, and cautioned against any instinct I may have to be pragmatic and to ignore the contractual requirements. He submitted that it was in both parties' interests to know when effective notice was given, and that there was no difficulty in complying with the contractual terms here in issue.

Analysis

[25] Notwithstanding Mr Walker's caution, I record my reluctance to hold that a party who has actually received notice given under an agreement, has nevertheless not received it, because it was not sent to a specified address. On the face of it such a result is at odds with commercial reality and it offends common sense. I refer to the observations of Lord Hoffman in *Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd* [1977] AC 749 and in *Investors Compensation Scheme v West Bromich Building Society* [1998] 1 WLR 897.

[26] Each agreement must be looked at separately.

[27] I start with the National Bank agreement. In its terms clause 13.1 is clear. It provides that any notice required to be given pursuant to the agreement is "duly given" or made "only when delivered" to the party to which the notice is given "at the addresses set out in the agreement". Tower has given a physical address.

[28] In its terms clause 13.1 is mandatory. Moreover, it is difficult to construe the clause as permitting delivery to the then registered office of Tower as at the date the notice is given. This is because the clause permits each party to specify another address as its address for service. If the clause was intended to permit delivery to Tower's registered office from time to time, it was unnecessary to provide that Tower could give notice of a change of address. This militates against ANZN's and INGNZ's argument.

[29] The fact that Tower is no longer at the address given in the agreement is to my mind irrelevant. It would be deemed to be in receipt of the notice under clause 13.4 if it had been delivered to the stipulated address. If Tower changes its address and fails to give notice of that fact, then it is at risk of ANZN/INGNZ relying on the deeming provision. Any argument based on the fact that Tower has moved does not to my mind assist.

[30] ANZN and INGNZ accept that it is mandatory to give notice in writing, and to send it by one of the three stipulated methods. There is force in Mr Walker's

submission that there is no logical basis in the language used in clause 13.1 to distinguish those matters from the provision specifying the address to which the notice had to be delivered.

[31] Mr Hodder referred me to a number of authorities but I am not persuaded that any of them directly assist.

a) In *Amax Gold Mines New Zealand Ltd & Anor v Moore & Ors* CA 23/94, 8 July 1994, the Court of Appeal was called upon to interpret a notice provision in a joint venture agreement. The provision required that notices were to be in writing, and that they were deemed to be given and received in the case of delivery by hand between certain hours. The Court assumed – at p 15 – that the address to which the notice had to be given was obligatory. Its judgment was concerned more with timing issues, and the Court held that the deeming provisions contained in the joint venture agreement could not curtail the time available for giving notice when actual delivery had taken place.

b) Similarly in *Yates Building Company Limited v R J Pulleyn & Sons (York) Limited* [1976] EGD123, the Court of Appeal in the United Kingdom was concerned with a notice which was sent by ordinary post, and not by registered post, or recorded delivery post, as required by the contract there in issue. The Court held that the provisions were directory (or permissive), and that the provisions were inserted for the benefit of the party giving notice so it could be sure of its position. The case is not authority for the proposition that the place to which a notice should be sent should be interpreted as being a directory (or permissive) provision only. Rather, Lord Denning MR cited with approval an American authority – *Eliason v Henshaw* (1819) 1 Wheaton 225, where the Supreme Court of the United States expressed the view that the place to which an answer was to be sent, was said to be an essential part of the parties' agreement; the manner

of sending was "entirely unimportant" so long as the notice got to the proper place at the proper time.

c) *Mannai Investment Co. Ltd* is concerned with how notices should be construed. The House of Lords held that the construction of notices should be approached subjectively, from the perspective of how a reasonable recipient would have understood them bearing in mind their context. That finding does not address the issue which faces me. The only observation in *Mannai Investment Co. Ltd* which seems to me to be in point was that made by Lord Hoffman at p 776, where he observed as follows:

> If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease.

[32] I also note the observations of Lord Wilberforce in *Mardorf Peach & Co. Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 at p 870 at B-C which are in similar vein.

[33] Another helpful case, which was not referred to me by counsel and is of limited authority in this jurisdiction, is the decision of the United Kingdom Technology and Construction Court in *Ellis Tylin Limited v Co-operative Retail Services Limited* [1999] BLR 205. The Court was there dealing with a purported notice of termination. The notice had not been given within the timeframe detailed in the contract. Judge Bowsher QC reviewed a number of the relevant texts and authorities. He held that to be entitled to take the benefit of the termination provisions contained in the contract, the plaintiff had to give the notice required by the contractual provisions. It was not entitled to give notice at a date or in terms calculated to produce a termination of the contract earlier than allowed for by the relevant clauses, or otherwise produce a result inconsistent with the commercial purpose of the clause. The contract provided that notice could be given after the first 10 months following commencement. The 10 month period was to run from 5 February 1996. Notice was given on 26 November 1996, within the 10 month period. Nevertheless various discussions and communications took place and both

parties negotiated in accordance with the notice that was given. It was held that it would be contrary to all business common sense and justice to allow the defendant to say, a substantial time after the event, that the process contemplated by the clause never started, because notice under the clause was given too early.

[34] There is only one New Zealand case directly in point that I am aware of. It is a decision of Harrison J – *Programmed Maintenance Services (NZ) Limited v Witters* HC AK CIV 2006-416-193, 29 March 2007. In that case a notice provision in a contract required that notice be in writing, and that it be given by post or to an address specified in the agreement. Notice was given, but to a different address. Harrison J held that the notice given did not satisfy the contractual notice requirements. His Honour noted that the effect of the clauses in the contract there in issue was prescriptive and exclusive as to the mode of service of notices. He held that this strict construction complied with the intention of the parties objectively expressed, and that when invoking the unilateral power of cancellation, the party cancelling had to exercise its rights strictly in accordance with the contract. His Honour held as follows:

> There is no room to apply common law or statutory rules allowing for service to be effected on the more liberal basis of bringing a document to the attention of a party. The existence of the express notice provision mandates otherwise. Its effect would be rendered meaningless if another mode or modes of service were recognised.

[35] Although he did not cite them, Harrison J's decision is consistent with earlier New Zealand authorities – *Weight Watchers International Inc v Hansells (NZ) Ltd* HC AK CP 60/93, 22 November 1993 at p 5, and *Brown & Doherty Ltd v Whangarei County Council* [1988] 1 NZLR 33 at p 36.

[36] The law is in some respects uncertain, but in my view it is summed up in *Chitty on Contracts*, 30th Ed, Vol 1, at para 22-049 as follows:

> When interpreting a clause in a contract which lays down a procedure for termination of the contract, the Court will have regard to the commercial purpose which is served by the termination clause and interpret it in the light of that purpose. Strict or precise compliance with the termination clause may no longer be a necessary pre-requisite to a valid termination.

I refer also to para 22-051. It reads as follows:

> Where the terms of the contract expressly or impliedly provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract to be terminated pursuant to that provision. Any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice, but it is a question of construction in each case whether the notice must actually be communicated to the other party and whether it takes effect at the time of dispatch or of receipt. The terms of the contract may further provide that a specified period of notice be given; or that the notice is to be in a certain form (e.g. in writing); or that it should contain certain specified information; or that it should be given within a certain period of time. Prima facie the validity of the notice depends upon the precise observance of the specified conditions. However, a consideration of the relationship of the notice requirements to the contract as a whole and regard to general considerations of law, may show that a stipulated requirement, for example, that notice be given "without delay", was intended by the parties to be an intermediate term, the non-observance of which would not invalidate the notice (unless the other party was seriously prejudiced thereby), but would give rise to a claim for damages only.

[37] The terms of the agreement in question must be the primary consideration. As I have noted, here the relevant provision in the National Bank agreement is expressed in mandatory terms. The provision is clear and unambiguous and I can see no reason to ignore it or to read into it something which is not there. Moreover to my mind there are real risks in treating the service provisions contained in the agreement as directory or permissive. ANZN, INGNZ and Tower have freely entered into the agreement. All are major corporate entities. The agreement provided for unilateral termination, and the parties agreed on how any notices required under the agreement were to be given. Generally one would expect that strict adherence to the terms of the contract would be required. Were the Court to conclude otherwise, the parties would be denied the benefit of the bargain they have struck, and the Court would be interfering with the freedom of the parties to arrange their own affairs. If the agreement had provided that service was to be effected by hand delivery only, and ANZN/INGNZ had sent the notice of termination by post, then on their argument, service in that manner would suffice, because Tower received it, notwithstanding the failure to comply with the contractual provisions. To my mind the ANZN/INGNZ submission is asking the Court to go too far, and in effect to imply a term which is simply not there.

[38] Having considered the matter, I have concluded, albeit with some reluctance, that the terms of the National Bank agreement here in issue required not only that any notice given be in writing, but also that any notice was only duly given when it was delivered in one of the stipulated ways. If ANZN/INGNZ chose to deliver the notice by hand, it had to be to the address specified in the agreement or such new address as was communicated by Tower. The provisions contained in clause 13.1 requiring service at the address detailed in clause 13.2 were in my judgment mandatory.

[39] That, however, is not the end of the matter. Tower made a clear and an unambiguous representation not only to ANZN/INGNZ, but also to the world, that its relationship with ANZN/INGNZ was being discontinued with effect from 1 March 2009 in its statement to the New Zealand Stock Exchange on 7 August 2007. Shareholders in Tower, and potential investors, will have relied on that statement in making their investment decisions. Although there is no evidence in point, ANZN/INGNZ may have relied on the statement because they did not re-issue a notice of termination to the address stated in the agreement. Notwithstanding the letter Tower sent to ANZN and INGNZ on the following day indicating that Tower did not accept the validity of the letter – noted at [21] – it would in my view be unconsciousable for Tower to now be allowed to resile from the representation it made by its statement to the New Zealand Stock Exchange. The statement to the Stock Exchange was made to a wide audience and there is nothing to suggest that it was withdrawn or corrected. Tower cannot both approbate and reprobate at the same time. In my view Tower is estopped from denying that service of the notice under the National Bank agreement was valid.

[40] I now turn to the ANZ agreement. The position to my mind is much clearer. First, the language used in clause 29.1 is directory rather than mandatory – any notice given under the agreement "may" be delivered by hand, by pre-paid post, or by facsimile to the addresses recorded in the agreement. While that does not mean that it is open to ANZN/INGNZ to opt for another method of effecting service, e.g. email, it does make it clear that hand delivery is a valid method for serving a notice under the agreement. Secondly, Tower has not given a physical address in clause 29.2. It has only given a P O Box number and a facsimile number. Mr Walker did

submit, albeit faintly, that a document can be hand delivered to a P O Box. I do not accept that submission. While there is no evidence in relation to the issue, insofar as I am aware it is not possible to hand deliver a letter to a P O Box. Nor do I accept Mr Walker's submission that Tower's failure to state an address for hand delivery does not alter the sense of the clause. Tower, for whatever reason, has failed to provide an address for physical service in clause 29.2. Nevertheless it has accepted in clause 29.1 that notices under the agreement may be delivered by hand, and that in the case of delivery by hand, notice is deemed to be given when delivery is made. It seems to me artificial to suggest that by failing to provide a physical address, Tower has effectively limited the options available for the delivery of notices under the agreement to pre-paid post or facsimile. Rather it seems to me, on a simple interpretation of the wording used in the clause, that Tower has acknowledged that notices may be delivered by hand, effectively at any Tower office. That may not be particularly satisfactory from Tower's perspective, but it is a consequence of Tower's failure to specify a physical address for service by hand.

[41] In my view, ANZN/INGNZ have complied with clause 29 in the ANZ agreement, and that agreement has been validly terminated.

Result

[42] In my judgment ANZN/INGNZ are entitled to the declaration they seek. I declare that ANZN/INGNZ have given valid notice of termination of the National Bank agreement and of the ANZ agreement and that, with effect from 1 March 2009, those agreements are at an end.

Is Tower entitled to renew ANZN branded policies of insurance?

[43] This issue goes to the heart of the dispute between the parties. ANZN/ INGNZ claim that the insurance book is their property, and that they are entitled to transfer the book to Vero. To this end ANZN/INGNZ seek an order that on and after 1 March 2009, Tower shall not offer, sell, renew or offer to renew any ANZN-branded policy, without their consent. Tower disputes the claims and says that the

insurance book belongs to it. It says that it is entitled to continue to renew the policies as they fall due, and it denies that ANZN/INGNZ are entitled to the order sought.

[44] Which contention is right depends upon on the interpretation of the agreements, and it is necessary to examine them in detail. Before doing so it is helpful to consider the overall nature of the contractual relationship. The parties disagreed even on this basic issue – ANZN and INGNZ suggested that relationship was an alliance although they did not go so far as to suggest that it was a joint venture, whereas Tower suggested that the relationship was that of principal and agent.

a) Agency/Alliance?

Submissions

[45] ANZN/INGNZ started their submissions with the proposition that in interpreting the agreements, the language of the draftsmen is entitled to respect, but the commercial purpose and context was fundamental. They referred to Lord Hoffman's observations in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at p 956G. It was their submission that the agreements provide for the provision of underwriting services by Tower to relevant ANZN customers. It was submitted that the agreements created an alliance or joint enterprise in which the ANZN goodwill was the primary feature. Mr Hodder emphasised that ANZN owns its brands, and that they serve as a badge of quality recording that the banks have endorsed Tower's insurance product. He submitted that Tower is entitled to use the brands only as part of the alliance created by the agreements, and that following termination it has no right to do so. He went so far as to suggest that Tower would be indulging in misleading conduct and misrepresenting the position were it to continue to sell or renew bank branded policies after termination. He also referred me to certain passages in Tower's response to the "Request for Proposals" document – see [5] above – and submitted that they show that Tower shares ANZN/INGNZ's view as to the nature of the relationship.

[46] Tower for its part accepted that it was proper to have regard to the purpose of the agreements in interpreting their words, and further that a Court should be slow to derive a meaning from contractual words which was commercially irrational. However Mr Walker submitted that it is improper to ascribe a commercial purpose to the agreements, and then to ignore, rewrite or supplement their words in order to achieve that purpose. He submitted that it is quite clear from the agreements that the basic relationship between the Banks and Tower was that of agent and principal. It was Tower's submission that ANZN/INGNZ have to assert an underlying rationale that suits them, because the words in the agreements do not. He also submitted that it is not irrational from a commercial stand point for Tower to continue to offer renewals after termination using ANZN brands.

Analysis

[47] I start with the obvious. The concepts of agency and alliance are not mutually exclusive. Parties can enter into a contractual alliance whereby one acts as the principal and the other as agent.

[48] Here both agreements are called agency agreements – see [1] above – and the National Bank agreement refers in its recitals to earlier agency agreements between the Bank and Tower. Conversely the recitals to the ANZ agreement refer to the parties' desire to form an "alliance", and clause 2.1 notes the parties' agreement to form a marketing and distribution alliance.

[49] It is clear from the agreements that Tower appointed the ANZ and the National Bank respectively as its agents. I refer to clause 2.2 in both agreements.

[50] In the National Bank agreement, the Bank accepted appointment as Tower's agent for the promotion and sale of "National Bank insurances". The words "National Bank Insurances" were defined. They refer to those classes of Tower's policies as were detailed in the schedules to the agreement. The Bank was required to indicate clearly in all dealings with its customers that related to the promotion of and application for the insurances, that the insurer was Tower, and that Tower had the right to decline, alter or cancel individual policies – clause 4.3.3. Tower had an

absolute discretion to accept or reject insurance proposals, and to impose terms in accordance with its usual practices – clause 5.10. While it was required to give the Bank notice in writing before cancellation or the imposition of new terms – clause 5.10.1 – the Bank acknowledged that Tower's decision to issue, decline, alter, cancel, or refuse to renew any policy was final – clause 5.10.3. Tower also had the sole responsibility for settling any claims, and the Bank had no authority in that regard – clause 5.8.

[51] There are similar provisions in the ANZ agreement. The recitals referred to Tower's policies. The parties agreed to form a marketing and distributing alliance, whereby the ANZ was to provide the services detailed in the agreement, namely marketing the Tower products listed in a schedule to the agreement and introducing and procuring the introduction of applications by ANZ clients for Tower products – clause 2.1. Tower appointed ANZ its agent to provide those services – clause 2.2, and the ANZ accepted such appointment as agent of Tower for an initial term – clauses 2.3 and 2.4. Pursuant to clause 5, the Bank assumed various obligations. It agreed to provide the services and promote products of or promoted by Tower to its clients – clause 5.1(a). The Bank could not modify Tower products, application forms or promotional material – clause 5.2(d). Tower had an obligation to assess and process all applications but it also had a discretion whether to accept or reject any application, and it could on 30 days written notice to the bank cease to supply or otherwise make available to the Bank any of its products – clauses 6.1(b), 7.4, and clause 14.1. Tower could set premiums, and the terms and conditions of its products. The ANZ could request changes, but Tower had a discretion whether or not to accept the same – see clause 14.1(b) and (c). Tower also had a sole discretion in respect of claims – clause 8.1 – and the Bank could not admit liability on behalf of Tower or make any payment in respect of any claims – clause 5.2(c).

[52] Under the agreements the Banks were entitled to commission and to a share of Tower's profit. There were schedules providing how commission and profit share were to be calculated.

[53] All of these terms are consistent with the relationship of principal/agent.

[54] It cannot be disputed that there was a substantial benefit for Tower in the agreements. Under both agreements, the banks agreed to actively promote Tower's policies to their customers.

[55] Under the National Bank agreement, it was agreed that the corporate logo of both Tower and the Bank might appear on Tower's policies – clause 7.1. Tower agreed to designate the insurances as National Bank insurances, on the basis that the words "National Bank" were to be used exclusively in relation to the insurances promoted and sold by the bank under the agreement. Tower was also permitted to use various product names for the insurances which belong to the National Bank. The ANZ agreement was less detailed. It provided simply that the parties could agree that one or more of the insurance products could be supplied by Tower bearing a brand developed by ANZ – clause 19.1.

[56] Branding seems to have become much more important over the term of the agreements. That is clear from the affidavits filed, and branding was dealt with extensively in the deeds of novation. The words "ANZN brand" were defined and Tower acknowledged that the brands were and remained the exclusive property of ANZN. INGNZ succeeded to ANZN's obligations under the original agreements. The banks were still responsible for actively marketing the policies and Tower agreed that INGNZ might permit ANZN to use the brands in connection with the bank insurances and the performances of services under the agreements to the extent that they were distributed to customers of ANZN, and ANZN consented to the use of ANZN brands by Tower solely for the purpose of Tower fulfilling its obligations under the agreement. Tower had to discontinue any use of ANZN brands on termination, except to the extent that such use was required in relation to its ongoing maintenance of the bank insurances to customers of the ANZN.

Result

[57] In my judgment it is inescapable that the relationship created by the agreements was fundamentally that of principal and agent. Tower was the principal and the Banks were the agents. That is not to belittle the Banks' role. They clearly

played a significant part in the arrangements, and the agreements contained various provisions designed to protect their customers and their brands.

[58] There is nothing which in Tower's response to the Request for Proposals put out by ANZN and INGNZ to persuade me otherwise. The agreements are clear in their terms. Tower's response was in a semi formal rather than a legal context. It was trying to retain substantial business and its response does not in my view detract from the wording in the agreements. Nor is there anything in my view of the basic relation between the parties which offends commercial common sense. The Banks have a large number of customers. They agreed to introduce those customers to insurance products sold by Tower when they were able to do so. In return they received a commission from Tower on each successful sale and when policies were renewed and premiums were paid. They also received a share of Tower's profit. Tower received the balance of the premiums, after paying the profit share, commission, administration costs, and claims. This seems to me to be an orthodox commercial agreement.

[59] What happens following termination of the agency agreement falls to be determined by reference to specific clauses in the agreements, but bearing in mind the overall nature of the relationship the parties had entered into.

b) Renewals post-termination

[60] Both agreements contain various provisions detailing what happened on termination.

[61] Relevantly, the National Bank agreement, as amended by the deed of novation contained the following:

> 5.6 The Company will provide at its own cost an 0800 Number or numbers for use by the customers and/or Sales Personnel when they wish to communicate with the company about the National Bank Insurances. The cost of providing this 0800 support service will be a specific item for review and discussion by the parties under clause 3.2 and the Company reserves the right, if the cost factor proves to be unreasonably high (based on experience), to introduce an apportionment of those costs into either of the Commissions or the Profit Share Arrangement, as the Company and the INGNZ may agree. The Company agrees that in the event of termination of this

Agreement, it will not use the 0800 Number to promote, market, sell or support insurances other than the National Bank insurances and its ongoing use after the termination shall be as agreed between the Parties.

10.6 In the event of the termination of this Agreement by either the Company or INGNZ, then following termination:

10.6.1 Any Profit Sharing Arrangement recorded in any Schedule to this Agreement shall immediately cease to have effect; and

10.6.2 The Company shall pay INGNZ the Commission at the rates set out in the Schedule only for so long as INGNZ continues to service the relevant National Bank insurances as required under Clause 4.3 except sub-clauses 4.3.1, 4.3.2, and 4.3.3 which shall continue in effect notwithstanding the termination of this Agreement PROVIDED ALWAYS THAT the National Bank Insurances introduced by INGNZ to the Company (including any renewals, variations or replacement policies in respect of them) remain current in the books of the Company and PROVIDED FURTHER that all premium amounts are paid up to date at all relevant times. If INGNZ should cease to service the relevant National Bank Insurances after termination as outlined above, then Commissions in respect of each class shall be payable by the Company at the Reduced Commission rate(s) shown in the Schedules.

10.7 In the event of the termination of this Agreement for any reason, the Company agrees not to approach existing customers of ANZN who are insured under the National Bank Insurances deliberately and intentionally to sell or attempt to sell similar insurance products to them for a period of two years commencing from the date of termination of this Agreement, unless such sale is effected as a consequence of an introduction by a medium other than INGNZ.

[62] The ANZ agreement as amended by the deed of novation contained the following clauses:

17.8 Following termination of expiry of this Agreement, INGNZ shall continue to be entitled to receipt of all renewal Commissions for which purpose the Commission payment period or periods adopted during the final 12 months preceding termination or expiry shall be adopted.

20.2 Notwithstanding that INGNZ is an agent of TOWER, TOWER acknowledges that INGNZ has provided access to Clients to TOWER for the purposes of conducting the business contemplated by this Agreement and accordingly TOWER further acknowledges that the primary goodwill of the business remains with INGNZ.

20.3 TOWER undertakes not to solicit or attempt to deal directly with Clients following termination or expiry of this Agreement without the prior written approval of INGNZ other than to fulfil legal requirements or at the specific request of clients or where such solicitation occurs incidentally as part of a general canvassing for business without the use of Client information with the exception of those persons who were customers of TOWER prior to the commencement of this Agreement. For the purposes of this clause, Clients means Policy Holders.

20.5 Upon termination of this Agreement, TOWER shall continue to administer the Policies.

20.6 Termination or expiry of this Agreement will be without prejudice to any provisions of this Agreement which are stated to survive or are intended to survive termination or expiry of this Agreement.

[63] The deeds of novation also contained various relevant provisions. The National Bank deed of novation provided as follows :

6.1 Notwithstanding any provision of the Agreement, the Continuing Party agrees that National Bank Insurances may continue to be distributed to customers of the Retiring Party in accordance with the Agreement and to this end, and notwithstanding any provision of the Agreement, the Continuing Party further agrees that:

(a) …

(b) …

(c) the Substitute Party may permit the Retiring Party to use the ANZN Brands in connection with National Bank Insurances and the performance of services under the Agreement (including in any associated documentation) to the extent that these are distributed to customers of the Retiring Party, and for the avoidance of doubt, the Retiring Party consents to the use of the ANZN Brands by the Continuing Party solely for the purpose of the Continuing Party fulfilling its Obligations under the Agreement;

(d) the ANZN Brands are and will remain the exclusive property of the Retiring Party;

(e) …

(f) …

(g) upon termination or expiry of the Agreement, it will discontinue any use of ANZN Brands and the National Bank Insurances name, except to the extent such use is required in relation to its ongoing maintenance of National Bank Insurances to customers of the Retiring Party;

(h) …

[64] The Continuing Party referred to in this clause was Tower. The Retiring Party was ANZN and the Substitute Party was INGNZ. National Bank Insurances were defined by reference to the original agreement. They were those classes of Tower's policies which were detailed in schedules 1 to 7 of that agreement.

[65] With one exception which is not relevant for present purposes, the ANZ deed of novation contained the same clause 6.1, except that the reference was to ANZ Insurances, which were defined to mean the classes of policies provided by Tower under the original ANZ agreement.

Submissions

[66] Mr Hodder submitted that each renewal of an insurance policy creates a new contract of insurance with fresh disclosure obligations on the insured. He noted that a fresh proposal is not normally required, and that instead the original proposal is treated as if it were repeated on each renewal. When an insurer sends out a renewal notice, payment of the appropriate premium amounts to acceptance of the insurer's offer, and creates a binding contract, but he emphasised that there is no obligation on an insurer to send out a renewal notice. He accepted that while the agreements were on foot, there was an obligation as between ANZN and Tower, whereby Tower had to offer renewals, but that there was no general obligation at law as between Tower and each insured obliging Tower to renew the policies. He submitted that the provisions contained in the agreements fall to be construed by reference to this legal background.

[67] Mr Hodder then went on to submit that under the agreements, as novated, Tower could not renew ANZN branded policies after the termination date. He referred specifically to clauses 6.1(c) to (g) in the deeds of novation – see [63] above.

[68] It was Mr Hodder's submission that this clause contains a powerful series of propositions, all of which are consistent with the "alliance" thesis, and what he called a "clean break principle". He also referred to clauses 20.2 and 20.3 in the ANZ agreement. He argued that these various provisions are consistent with the

proposition that the general insurance business created pursuant to the agreements is the banks' property, and that the goodwill in that business belongs to the banks. It was submitted that none of the provisions sit comfortably with the proposition advanced by Tower that it can renew bank branded policies post-termination. Mr Hodder argued that clauses 6.1(c) to (g) protect ANZN's brands and customer information, and require that on termination, Tower must discontinue the use of the brands except to the extent such use is required in relation to its ongoing maintenance of ANZN insurances. It was his argument that "ongoing maintenance" can only refer to policies written pursuant to, and for the purpose of the agreement. He submitted that an insurance policy has a finite term, and that a renewal of a policy is legally a new contract. He submitted that the reference to ongoing maintenance was not referring to the policies of insurance and customer base as a whole. Rather it was referring to the policies current on termination, each of which has a finite life.

[69] In anticipation of arguments to be advanced for Tower, he dealt with clause 10.6 in the National Bank agreement, and clause 17.8 in the ANZ agreement.

[70] He argued that clause 10.6 in the National Bank agreement is addressed only to commission rates, and that it does not substantively address the renewal issue. He repeated that the policies of insurance here in issue are discrete annual contracts, and that given the focus in the agreement on exclusivity, there was "a complete lack of commercial common sense" in Tower being able to renew ANZN branded policies indefinitely post-termination.

[71] In regard to clause 17.8 in the ANZ agreement, he submitted that the clause was no more than a machinery clause, dealing with the ongoing entitlement to renewal commissions in the post-termination period. He argued that the clause recognises the practical reality that a transition period is required before a new underwriter is able to make offers to ANZN customers, and that it permits Tower to offer renewals only during that period.

[72] He emphasised the joint enterprise nature of the relationship, suggesting that ANZN contributed access to its proprietary brands and its customer base. He

submitted that ANZN's contribution was by way of access, not transfer, and that business common sense favoured a contractual interpretation consistent with the full resumption and redeployment of those assets by ANZN when the relationship was terminated. He emphasised the quality control aspects associated with access to ANZN brands, and submitted that this was relevant to an interpretative approach to the post-termination rights of the parties. As he put it – the contrary view takes an "under-writer centric" approach.

[73] Mr Walker, for Tower, repeated his argument that the agreements are agency agreements and that Tower is the principal. He reiterated that the products being sold under the agreements are Tower products.

[74] It was Mr Walker's base submission that both agreements provide for post-termination renewals. He referred specifically to clauses 5.6 and 10.6.2 in the National Bank agreement, and to clause 17.8 in the ANZ agreement.

[75] It was his submission that the purpose of clause 10.6.2 is to preserve the Bank's right to commission when a policy existing at termination is renewed, varied, or replaced after termination. He argued that it would not have been necessary to provide for commission for renewals post-termination unless Tower had the right to renew post-termination. He accepted that as long as there were National Bank insurances in place, Tower was obliged to pay commission. If the Bank continued to service the policies in the sense contemplated by the agreement – e.g. providing a payment system for the payment of premiums, and keeping proper records – then the Bank was entitled to commission at the rates set out in the various schedules after termination. If the bank ceased to service the policies, commission was payable at a reduced rate which, with one exception, was 50% of the rate otherwise payable.

[76] Mr Walker also referred to clause 10.7, which he argued restricts Tower's ability to circumvent the Bank agency post-termination. He submitted that clause 10.7 precludes Tower from selling products which are similar to the National Bank insurances to Bank customers after termination. As he put it, the clause is intended to stop Tower from trying to "churn the book", thereby avoiding its commission obligations, for a period of two years after termination. He submitted that clauses

10.6.2 and 10.7, read together, expressly contemplate post-termination renewals, and that the two year restriction put in place in clause 10.7 only makes sense if Tower is permitted to renew the policies. He pointed out that the clause only applies to approaches to existing customers with the Bank who **are** insured under National Bank insurances.

[77] In relation to the ANZ agreement, he relied on clause 17.8. He argued the clause is not simply a machinery provision as suggested by ANZN and INGNZ, and submitted that the clause expressly envisages that Tower is entitled to renew policies after termination.

[78] In relation to clause 20.2 he argued that it cannot be read as meaning that the value of Tower's insurance book belongs to the Bank. He suggested that the clause has to be read in light of clauses 20.3 and 17.8. He described clause 20.3 as another "anti churning" provision. He denied that the plaintiffs' suggestion that the clause limits the period during which Tower can renew until Vero as the replacement underwriter is in a position to make offers of insurance. He argued that that limitation does not appear anywhere in the agreement, and it cannot be justified.

[79] He described clause 6.1 in the deeds of novation as reflecting the fact that ANZN was replaced by INGNZ as the contracting party pursuant to the deeds, but that ANZN was still supplying the customers and its brands. He suggested that the clause simply protected ANZN's position, and that in any event the clause did not preclude renewals. He submitted that clause (g) was subject to the exception – namely that Tower can continue to use ANZN brands, and National Bank/ANZ insurance names in relation to its "ongoing maintenance" of the insurances. Ongoing maintenance must on his argument include renewals, because otherwise clause 10.6.2 in the National Bank agreement and clause 17.8 in the ANZ agreement, would be redundant.

Analysis

[80] I start with Mr Hodder's argument that each renewal of an insurance policy creates a new contract of insurance, and that there is no obligation on Tower to send

out a renewal notice post-termination. I agree with Mr Hodder's analysis as a matter of law, but in my judgment it does not affect the interpretation of the agreements here in issue. Both agreements refer to renewal on a number of occasions. It is clear from the agreements that both parties used the word in a broad sense. The policies which are the subject of the agreements were general policies of insurance and the evidence establishes that each was current for a period of one year. The policy then fell due for renewal. In my judgment, when the agreements speak of renewal, they are referring to that process, and the effect of the agreements cannot be denied by reference to the general proposition that each renewal creates a new contract of insurance.

[81] The agreements clearly contemplated that Tower would renew the policies while the agreements were in force. The Banks were entitled to a commission based on a percentage of the premiums paid on renewal. Moreover in my judgment the agreements contemplate renewals by Tower following termination.

[82] I refer to clause 10.6.2 in the National Bank agreement. It provides for what occurs following termination of the agreement. Tower is to continue to pay commission at the rates detailed in the agreement provided that the National Bank insurances, including any renewals, remain current in Tower's books. The appropriate commission rate depends on whether or not the Bank continues to provide the services detailed in the agreement but otherwise the obligation to pay commission lasts for as long as the insurances remain current in Tower's books.

[83] I cannot accept Mr Hodder's argument that the clause deals only with commission rates. It refers to renewals, and the obligation on Tower to continue paying commission extends to renewals of the policies. Clause 4.3, which places various obligations on the Bank, also continues in effect notwithstanding termination of the agreement. The only exceptions are clauses 4.3.1, 4.3.2 and 4.3.3, which are broadly concerned with the Bank's obligations to actively promote Tower's policies. For obvious reasons these provisions do not survive termination, and no doubt for that reason nor does Tower's obligation to share its profit with the Bank – see clause 10.6.1. For providing the services contemplated by clauses 4.3.4 to 4.3.10, the Bank continues to receive commission post-termination on renewals at the same rate as

was applicable when the agreement was on foot. If the Bank ceases to provide those services, it receives commission on renewals at reduced rates which are set out in the schedules.

[84] Further I have difficulty accepting Mr Hodder's argument that the clause only applies until the expiry of the insurance policies current as at the date of termination. First the clause does not say this. Secondly, if the clause applied only to policies current as at the date of termination, there would be no need to refer to renewals. The words "any renewals" can only have meaning if Tower is permitted to renew post-termination.

[85] That this is the case is reinforced if reference is made to clause 10.7. It prevents Tower post-termination from approaching and endeavouring to sell similar insurance products to ANZN customers who are insured under National Bank insurances. The prohibition lasts for a period of two years commencing from the date of termination of the agreement. The purpose of the clause is to stop any attempts that Tower might otherwise make to circumvent the Bank's right to commission but only for a period of two years. As noted, the evidence establishes that the policies are only current for a year. Clause 10.7 refers to customers who **are** insured under National Bank insurances. I agree with Mr Walker's submission that the two year restriction in clause 10.7 only makes sense if renewals are permitted.

[86] Further, I refer to clause 5.6. It contemplates that Tower can continue to use the 0800 number it was required to provide for use by customers and bank sales personnel post-termination in such manner as shall be agreed between the parties. Tower is not allowed to use the number to promote, market, sell or support insurances other than the National Bank insurances. The clear implication is that it can continue to use it for the promotion, marketing, sale and support of National Bank insurances, and way in which the number is to be used for that purpose is to be agreed between the parties.

[87] I do not consider that clause 6.1 in the deed of novation denies Tower's entitlement to offer renewals. I agree with Mr Hodder that the clause is intended to protect ANZN's brands and its customer base. However it does recognise Tower's

position. Under clause 6.1(c), ANZN consents to Tower's use of the brands so that it can fulfil its obligations under the agreement. Clause 6.1(g) deals with the use of the brands on termination. Tower is permitted to continue to use ANZN brands, and the National Bank insurances' name, following termination to the extent such use is required in relation to its "ongoing maintenance" of National Bank insurances to customers of the Bank. The words "ongoing maintenance" are not defined. In my judgment, ongoing maintenance must include renewals, variations, or replacement policies, as contemplated by clause 10.6.2. Otherwise clauses 10.6.2 and 10.7 would be redundant.

[88] This view is supported by reference to the definition used in the deed of novation. As already noted, the words "National Bank Insurances" are defined by reference to the original agreement, and it in turn refers to the schedules. The schedules refer expressly to renewals, require Tower to notify the Bank of the same, and to despatch renewal notices to Bank customers not less than 10 working days prior to the date for renewal – see for example, schedule 1, clause D. Similar provisions appear in all but two of the schedules. The use of the words "National Bank Insurances" in clause 6.1(g) extends to the renewal of policies. I cannot accept Mr Hodder's argument that the words refer only to policies current on termination. It seems to me to be clear that they are referring to all policies sold and renewed under the agreement while it was on foot.

[89] In my judgment the National Bank agreement permits Tower to renew post-termination the policies sold under the agreement while it was on foot, and to use the bank brands for that limited purpose. It must of course continue paying commission at the appropriate rate. Moreover for the reasons which I set out below – at [97] to [102] – I do not consider that this interpretation defies commercial common sense.

[90] I now turn to the ANZ agreement. Again, in my judgment the contractual position is relatively straightforward. Clause 17.8 expressly notes that the Bank/INGNZ is entitled to receipt of renewal commission following termination of the agreement. The word "commission" is defined by reference to clause 17, and it in turn refers to schedule 1. Schedule 1 expressly deals with renewal commissions, and specifies the appropriate percentages payable, depending on whether the policy

was originally sold by a bank employee, or pursuant to a Tower telesale. Clause 17.8 compels the conclusion that Tower is entitled to renew the policies.

[91] The clause is stated and intended to survive termination. It is one of the clauses in the agreement which falls within the ambit of clause 20.6.

[92] In my view there is nothing in the agreement to lead to the conclusion which Mr Hodder contends for – namely that clause 17.8 is a machinery provision which covers only such renewals as are necessarily put in place after termination before a new underwriter can make offers to ANZN customers. I agree with Mr Walker that this argument is to an extent illogical – it recognises that Tower is entitled to renew, but seeks to limit that entitlement notwithstanding the fact that the clause does not do so. There is nothing in the clause restricting the Bank's right to receive renewal commissions (and therefore Tower's entitlement to renew), and in my view to find otherwise would be adding to the contractual provisions, and implying a term which is not there, and which is not necessary to give business efficacy to the agreement.

[93] I do not think that clause 20.2 compels a different conclusion. It refers to the business contemplated by the agreement – that is the promotion and sale of Tower policies to ANZN customers. Tower acknowledges that the primary goodwill of that business remains with the Bank. Goodwill in this context would seem to refer to the good name and reputation attaching to the bank-branded policies. The business of promoting and selling those policies, and the book created as a consequence, has value to the Bank as Tower's agent. It received a profit share and commission stream while the agreement was on foot, and it continues to receive a commission stream from renewals post-termination. The goodwill attaching to the bank branded policies remains with the Bank because it continues to receive renewal commission despite termination. There are various clauses which protect its customer base, its right as against Tower to information from Tower, and its brands. The reference to "primary goodwill" in clause 20.2 must refer to this bundle of rights all related to the reputation attaching to bank-branded policies. This does not however mean that the insurance books belongs to the Bank.

[94] As I see it, there is something of an illogicality in the Bank's argument. Clause 17.8 would be unnecessary if the insurance book belongs to the Bank, because there would be no need to preserve the commission stream post-termination.

[95] It follows that in my view the Bank cannot rely on clause 20.2 to appropriate the insurance book by giving notice of termination. The Bank's argument overlooks the fact that when it sold Tower policies to its customers, those customers entered into a contractual relationship with Tower and became its customers as well. In my view it is somewhat arrogant for the Bank to now seek to interfere with that contractual relationship simply because it allowed the policies to be sold with its brands on them. If it was intended that the insurance book belonged to the Bank from the outset, something very much clearer would have been required, e.g. an express acknowledgement of that by Tower coupled with a positive obligation on Tower requiring it to assign the policies to a new underwriter on termination.

[96] I now turn to clause 20.3. It precludes Tower soliciting or attempting to deal directly with clients post-termination. The words "solicit or attempt to deal directly with" cannot preclude Tower from offering renewals to existing policy holders. First, the word "deal" takes its colour from the word "solicit", and the words "deal directly" used in the clause leave open indirect dealings with policy holders. The effect of the clause in my judgment is that Tower cannot directly seek to do new business with Bank customers. It prevents Tower circumventing the consequences of the agency relationship which applied while the agreement was in place, and depriving the Bank of its renewal commissions post-termination. Secondly, clause 20.3 cannot be said to be an absolute prohibition against Tower dealing with the existing policy holders, for the simple reason that the agreement requires that Tower continue to deal directly with ANZ's customers in relation to existing ANZ insurance policies. Tower has to deal with existing policy holders in respect of, e.g. variations to their cover, cancellation of cover, and claims. That is recognised by clause 20.5. Tower will need to deal with existing insureds in respect of renewals under clause 17.8. In my view, a reading of clauses 17.8 and 20.5 together, demonstrates that clause 20.3 was not intended to and does not prohibit renewals.

[97] ANZN/INGNZ in their submissions proceed on the premise that it is commercially irrational for Tower to continue offering renewals post-termination.

[98] I do not accept that submission. I note the following:

a) Under both agreements, the Banks receive renewal commissions. Those commissions are relatively generous – under the National Bank agreement they range from 4% to 35% of premiums depending on the insurance product. Under the ANZ agreement, they range from 5% to 25% of premiums. Moreover under the ANZ agreement, the Bank receives renewal commissions when policies sold through telesales originated by Tower are renewed.

b) The Banks' post-termination obligations do not appear to be particularly onerous. Under the National Bank agreement, clauses 4.3.4 to 4.3.10 survive but the Bank can choose to ignore those obligations and forego a part of the renewal commission it is otherwise entitled to. There are no ongoing service obligations on the Bank under the ANZ agreement.

c) Tower also benefits from continuing to renew the policies after termination. It will continue to receive the premiums paid on renewals, but net of costs, claims and commission.

d) Because both benefit, it is in the parties' joint interests to preserve commission streams. Both have an incentive to preserve the value of the insurance book.

[99] It does not seem to me that there is anything commercially irrational in this.

[100] Further, the evidence – from Mr Parkinson on behalf of Tower – confirmed that in every case but one where Tower has lost or gained bank business previously, the existing insurance book has been left in run off with the previous underwriter. He gave a number of examples where this had occurred. Mr Parkinson was cross-

examined by Mr Hodder, but he was not challenged in relation to this evidence. Nor did Bank witnesses contradict Mr Parkinson's evidence. Rather they denied that the examples referred to by Mr Parkinson exemplify a standard industry practice, and said that they are aware of contrary examples where the insurance book has been transferred.

[101] Obviously in such situations, what happens post-termination must depend on the contractual arrangements between the parties. Mr Parkinson's evidence establishes that it is not unique or even unusual for an insurer to continue to offer renewals following the termination of an insurance agency agreement. In my view there is no foundation for Mr Hodder's argument that it is commercially irrational for the Banks to have left the insurance book in run off with Tower.

[102] Indeed I find the plaintiffs' argument much less attractive from the view point of commercial common sense. If the plaintiffs are correct, 110,000 policy holders would be prevented from renewing 196,000 policies as a result of a private agreement between their insurer and their bank. The first they will learn of this is when they receive letters from either the Bank telling them that they cannot renew their policies with Tower, or from Tower telling them that it is required by their bank to terminate their insurance cover. At that point of time, they will have to either accept a new policy offered by Vero, find cover elsewhere, or become uninsured. That to my mind is an intrinsically unattractive argument. It ignores the relationship Tower has with its policy holders and it ignores their position. It can be assumed that at least as far as the Banks were concerned at the time Tower's policies were well worded, and that they provided effective insurance on appropriate terms. Otherwise the Banks would not have endorsed and promoted them and permitted their brands to be used on them. There is nothing to suggest that the terms on which the policies were issued are to change. They do not suddenly become unattractive or unacceptable policies, simply because the Banks decide to switch their allegiance to a new underwriter. The Banks' arguments seem to me to ignore the expectations of their own customers, who have at the Bank's prompting become holders of Tower policies and Tower customers.

Result

[103] In my view Tower is entitled to renew bank branded policies following termination of both the ANZ agreement and the National Bank agreement. It follows that ANZN/INGNZ are not entitled to the order sought in the amended prayer for relief that on or after 1 March 2009, Tower shall not offer, sell, renew or offer to renew any ANZ bank branded policy.

[104] ANZN/INGNZ also sought an order that Tower should not at any time knowingly sell to any ANZN customer a non-ANZN branded policy in replacement or substitution for, or at the expiry of, any ANZN branded policy unless the sale is made via a third party intermediary.

[105] The relevant contractual restrictions are those contained in clause 10.7 of the National Bank agreement, and in clause 20.3 of the ANZ agreement. Both clauses are more limited than the order sought suggests. Both contemplate that Tower can sell non-ANZN branded policies where customers approach it direct, or where the sale is introduced by a third party intermediary. Further, in the case of the National Bank agreement, the restriction only operates for a period of two years after termination. The order sought by the plaintiffs goes further than either of the clauses in the agreements contemplates, and for that reason ANZN/INGNZ are not entitled to the order they seek. In any event, Mr Fyfe who filed an affidavit in support of the Banks, annexed correspondence sent to the Banks by Tower's solicitors which makes it clear that Tower is not suggesting that it is entitled to approach existing policy holders deliberately to sell them non-ANZN branded policies. Tower has unequivocally stated that it will comply with the "anti churning" provisions contained in clause 10.7 of the National Bank agreement and clause 20.3 of the ANZ agreement. There is no need for the injunctive relief sought by ANZN and INGNZ.

[106] In paragraph 3(c) of the amended prayer for relief the Bank also sought an order in the following terms:

> Tower shall not, at any time, communicate with ANZN customers utilising its data records relating to ANZN-branded policies, or the 0800 number(s) except for the purpose of administering any ANZN-branded policy (for

> example, as to payment of premiums, claims, changes of address). In particular, Tower shall not at any time, knowingly sell, to any ANZN customer who has contacted Tower by any phone number provided to them as a contact number in respect of their ANZN-branded policy, a non-ANZN-branded policy.

[107] Mr Hodder did not deal with this issue in any great depth. No breach by Tower involving the use of 0800 numbers or other numbers used in connection with bank-branded policies was pleaded. Nor was there much evidence directly in relation to the issue. I note that Mr Fyfe annexed to his affidavit correspondence from Tower's solicitors, where it was made clear that Tower has no intention of abusing ANZN bank customer information or 0800 numbers to promote or sell Tower branded policies in breach of the agreements.

[108] The order sought has three broad elements:

a) First, it seeks to preclude Tower from communicating with bank customers except for limited purposes.

b) Secondly, it seeks to restrict Tower's use of its own data records other than for the limited purpose of administering ANZN-branded policies.

c) Thirdly, it seeks to restrict Tower's use of the 0800 number(s), or any other phone number provided to customers as a contact number in respect of their bank-branded policies.

[109] I have already held that Tower is entitled to renew bank-branded policies following termination of the agreements. This will require it to communicate with bank customers. It could also be required to communicate with ANZN customers for a number of other reasons – for example to attend to claims, to vary their cover, to cancel cover, and the like. Again it will necessarily have to communicate with ANZN customers. Communication is a necessary consequence of the various provisions contained in the agreements requiring Tower to continue maintaining and administering the policies. It is artificial to try and spell out in advance when and in what circumstances Tower can undertake that communication.

[110] Further, it is unreal to suggest that Tower cannot utilise its own data records to these ends. Customers' contact details are held on the database.

[111] In relation to telephone numbers, the only reference I am aware of in the agreements to an 0800 number is that contained in clause 5.6 of the National Bank agreement. It only precludes Tower from using the 0800 number to promote, market, sell or support policies other than the National Bank insurances, and Tower accepts this restriction. The inference from clause 5.6 however is that Tower is entitled to use the 0800 number to promote, market, sell or support National Bank insurances after termination as shall be agreed between it and the Bank.

[112] There is no provision in either agreement stopping Tower from selling policies to ANZN customers who contact Tower on other telephone numbers provided to them in respect of their policies. Tower is not permitted to initiate sales of competing Tower policies to such customers (under the ANZ agreement indefinitely and under the National Bank agreement, for a period of two years). However there is nothing in the agreements to prevent Tower from talking to a bank customer and policy holder who has contacted Tower and expressed an interest in taking out a different Tower policy. Nor there is anything to prevent Tower selling a policy to such a customer, unless the contact is made on the 0800 number referred to in clause 5.6 of the National Bank agreement.

[113] It follows that ANZN/INGNZ are not entitled to the injunctive relief they seek in paragraph 3(c) of the prayer for relief.

Is ANZN able to compete with Tower for renewals?

[114] As an alternative submission, ANZN/INGNZ argued that if the Court concludes that Tower is entitled to renew ANZN-branded policies following termination, it should also hold that ANZN is entitled to seek to renew those policies through a different underwriter.

Submissions

[115] Mr Hodder submitted that various provisions in both agreements contemplate a post-termination regime whereby ANZN can offer insurance products to its customers which involve another underwriter. He referred specifically to clause 9.3 in the National Bank agreement. In the ANZ agreement, he referred to clauses 2.7, 6.1(g) and 20.3. He also referred to clause 6.1(h) in both deeds of novation.

[116] Mr Walker accepted that the restrictions precluding ANZN/INGNZ from offering competing products sourced from another underwriter came to an end on termination of the agreements. He submitted however that ANZN is not entitled to present competing products, misleadingly, as renewals of Tower policies, or to have from Tower and pass to Vero the information required to do so.

Analysis

[117] In my view ANZN/INGNZ are entitled to market to their customers insurance policies offered by another underwriter which compete with the bank branded Tower policies following termination. In doing so, however, they will have to be careful not to infringe other provisions in the agreements which survive termination.

[118] Clauses 9.3 and 10.8 in the National Bank agreement reads as follows:

> 9.3 Except as stated in Clause 4.2 of this agreement INGNZ covenants with the Company that INGNZ will not during the currency of this Agreement (but excluding any period of notice of termination and except as provided in Clause 10.8) act as agent for or promote any policies of insurance to ANZN customers which are in direct competition with the National Bank Insurances without first obtaining the Company's consent in writing.
>
> 10.8 INGNZ covenants with the Company that INGNZ will not during any period of notice of termination given under this agreement including any schedules make or assist with any direct or indirect marketing approaches to ANZN customers already holding National Bank Insurances covered by this Agreement, for the purpose of representing or promoting similar products offered by another underwriter.

It is clear from these clauses that the restriction against offering competing products in competition with National Bank insurances comes to an end on termination of the agreement.

[119] Similarly, in the ANZ agreement, clause 2.7 provides as follows:

> INGNZ shall not market or procure applications from Clients for house, household contents, motor vehicle, caravan or rural policies which compete with any TOWER Policy being marketed by INGNZ pursuant to this Agreement, for any underwriter other than TOWER during the term of this Agreement. Provided that for the purposes of this clause 2.7 only, "Clients" means a customer of ANZ Bank, a division of ANZN.

Again it is clear from the clause that restriction comes to an end when the agreement is no longer on foot.

[120] In the case of National Bank insurances, it was also recognised in a letter sent to new policy holders when they took out a Tower policy, that the National Bank might offer insurance through another underwriter at some time in the future. This letter was on National Bank letterhead but it had been approved by both parties. The relevant clause read as follows:

> This insurance is provided in accordance with the Master Insurance Agency agreement between The National Bank and TOWER Insurance. If the agreement for this insurance arrangement is terminated, The National Bank may agree with another party to offer similar insurance products. Provided a reasonable period of time is given for consideration of the new arrangement, acceptance by me/us of any renewal notice under this new arrangement will constitute acceptance of the new arrangement and no other consents or authorisation will be necessary.

There was no similar provision in letters sent out to ANZ customers taking out insurance with Tower.

[121] I note that both agreements contain obligations which either expressly or by implication survive termination and ANZN/INGNZ will have to be careful to ensure that these provisions are not breached.

Result

[122] I hold that ANZN/INGNZ are entitled to market to their customers insurance policies which compete with bank branded Tower policies following termination of the agreements.

What entitlement does ANZN have to information held by Tower about ANZN-branded policies and policy holders?

[123] In their amended statement of claim dated 19 December 2008, the plaintiffs sought orders that Tower provide to them all information on any Tower database about current ANZN-branded policies. They sought that Tower should provide that information in electronic format enabling them to electronically search, manipulate, and upload the same, and further that Tower should provide details as to the meaning of any codes present within the data. Further, the plaintiffs sought orders that no less than six weeks before the commencement of each month from March 2009 to February 2010, Tower should provide to them all information on the Tower database about ANZN-branded policies due to expire in the relevant month. They sought the information in the same format.

[124] Interim orders were initially sought in this regard and extensive affidavits were filed in relation to the topic. I deal with the evidence briefly below. Tower alleged that much of the information held in its databases was confidential to it, and it claimed proprietary rights in relation to some of it. It also asserted that there would be very real practical difficulties in complying with a Court order in the form sought.

[125] As a consequence, the plaintiffs amended their prayer for relief. Relevantly it now seeks the following:

(a) …

(b) …

(c) …

(d) the defendant shall extract all information about current ANZN-branded policies from its NIMS system and provide that information

to the first plaintiff as early as possible, but in any case within 15 working days of judgment:

(i) in an electronic format enabling the first plaintiff to electronically search, manipulate and upload the data;

(ii) with a data dictionary, detailing the descriptions and meanings of any tables or fields (known as data schema) and an exhaustive list of all known codes for each field (validations) and any relationships between tables and fields and any explanations required by the first plaintiff to understand the information;

(e) on a monthly basis, the defendant shall extract updated information on all ANZN-branded policies due for expiry, and provide that information to the first plaintiff no later than 6 weeks before they are due for expiry:

(i) in an electronic format enabling the first plaintiff to electronically search, manipulate and upload the data;

(ii) with a data dictionary, detailing the descriptions and meanings of any tables or fields (known as data schema) and an exhaustive list of all known codes for each field (validations) and any relationships between tables and fields and any explanations required by the first plaintiff to understand the information;

(f) …

(g) the first plaintiff and the defendant shall together, within 5 working days of judgment, using all reasonable endeavours:

(i) identify the fields that are to be extracted. As a first step, within 2 working days of judgment, the defendant is to provide the first plaintiff with:

(A) a list of all fields held in NIMS;

(B) a list of all of the fields in (A) that the defendant does not propose to extract and reasons why the defendant believes them to be proprietary;

(ii) agree on the most efficient modification of existing extractor programs to achieve the full extraction:

(A) as a first step, the defendant shall identify the options and estimated timeframes for each;

(B) once the parties have agreed on the most efficient method, the defendant shall provide a work program detailing timeframes and steps required for that process;

(iii) agree on the most efficient modification of existing extractor programs to achieve the monthly updated extraction:

(A) as a first step, the defendant shall identify the options and estimated timeframes for each;

(B) once the parties have agreed on the most efficient method, the defendant shall provide a work program detailing timeframes and steps required for that process;

(iv) identify any information that is agreed to be proprietary in nature;

(h) …

(i) the first plaintiff shall provide the defendant with a list of their employees and agents who will have access to the extracted information, in order to remove any proprietary information;

(j) the first plaintiff will obtain from those employees and agents confidentiality undertakings prior to commencement of that work;

(k) upon completion of the work, the defendant will be given access to the information, … , for the purposes of verifying that it contains no proprietary information. The defendant will be allowed one full working day to provide verification. If the defendant fails to provide verification or detailed reasons for any objection, verification will be deemed to have been given;

(l) pending completion of the process described at (d)-(k) above, the defendant will continue to generate the renewal file (though not to offer to or actually renew policies) each month, and will provide that file to the first plaintiff no later than 6 weeks prior to the expiry of the relevant policies;

(m) the first plaintiff and defendant shall together, within 5 working days of judgment, using all reasonable endeavours, identify any information that is agreed to be proprietary in nature in the file described at (l);

(n) upon receipt of the file, the first plaintiff will proceed as at (h)-(k);

(o) …

(p) …

(q) …

[126] As can be seen ANZN/INGNZ have refined and to an extent limited their demand for information. They have tried to provide a mechanism whereby the information can be made available relatively expeditiously. Mr Hodder emphasised that in so doing ANZN/INGNZ are endeavouring to act reasonably. He stressed

however that both plaintiffs maintain that they are entitled to all information held on any Tower database about all bank branded policies, and that they became entitled to that information immediately upon termination.

The relevant evidence

[127] It is clear from the affidavits that most bank branded policies sold by Tower have been marketed by the Banks directly to their customers, either through the internet, through the provision of brochures, or through staff at branches and other retail centres. Typically the Banks endeavoured to raise the subject of insurance in the course of lending based customer interviews or customer financial reviews. The insurance was regarded by the Banks as an add on sale, and insurance was not normally sold as a stand alone product.

[128] When a customer wanted to take out a new policy, he or she either came into a Bank branch, or made an enquiry through an 0800 number. The customer spoke to a Bank employee, who discussed his or her needs and provided him or her with a copy of the relevant policy document. If the customer wanted to proceed, Bank staff obtained base information from the customer. To initiate a sale, Bank staff accessed a computer based system known as WESS. They entered a number of inputs into the system, including the required customer information, answers to a series of questions which determined the appropriate premium, and answers to a number of questions which determined the risk profile. WESS then generated a quote. If the quote was acceptable to the customer the Bank staff then used WESS to send the insurance application to Tower. Tower would then generally proceed to issue a policy. The information provided was retained by Tower and it was uploaded from WESS into Tower's main computer system. The base information obtained by Bank staff was not retained independently by the Banks. Generally speaking, the Banks provided no further information in respect of policy holders or policies after the initial sale transaction. All subsequent contacts with the customer in relation to the policy, including endorsements, claims and renewals were handled by Tower. Most customer contact after the initial sale was made through dedicated 0800 numbers for ANZN-branded insurances, through Tower's general 0800 number, through email or

through physical correspondence between the customer and Tower. Renewals were effected by Tower using bank-branded stationery. If a customer happened to contact the Bank rather than Tower, the Bank generally passed the customer through to Tower. The Tower representative interacting with the customer would record any information that was relevant in a diary note in a Tower system known as i-Desk. The representative would if necessary also record any required information in Tower's main computer system, and modify any policy terms or conditions in that system.

[129] The basic categories of information that Tower has about current ANZN-branded policies can be broken down as follows:

a) Client information – e.g. names, addresses, telephone numbers, date of birth and gender.

b) Policy information – e.g. effective dates, expiry dates, items insured, premium, agency and commission, re-insurance information, and information used for rating and policy analysis.

c) Sales information – e.g. underwriting information such as whether the insured has criminal convictions, has previously been declined insurance, and the insured's claims history with other underwriters.

d) Claims information – e.g. description of any loss, date of loss, who was at fault, payments in respect of claims, assessors' costs and expenses and recoveries from third parties.

e) Debtor information – e.g. payment of premiums.

f) Reports – e.g. taken from Tower's main database for various business uses, including management reporting, analysis or underwriting. They may relate either specifically to ANZN-branded policies, or generally to ANZN-branded policies and to other policies in Tower's portfolio.

g) Records of other client interactions – e.g. renewals, advice of direct debit dishonours, and amendments to information held made as a result of client interaction.

h) Emails – these are not stored in any file dedicated to the client or the policy, but are held on Tower's general email system.

i) PDFs – copies of ongoing renewal and direct debit/credit control documents and correspondence with customers.

[130] This information has been derived by Tower in four broad ways. First, and as noted, sales information and much of the client and policy information was gathered by Bank employees as part of the initial sales process and sent to Tower utilising WESS. Other information – for example claims information and some of the client and policy information was the product of direct interaction between the insured and Tower. Some information, for example rating information, was derived from Tower's broader portfolio and reports and re-insurance information generated by Tower, and some – for example rating information relating to motor vehicle risks – was purchased by Tower from third party providers.

[131] Some of the information derived by Tower from its broader insurance portfolio has been inserted into individual policy or customer records. For example Tower calculates a value for each customer which represents the profitability of each insured to Tower taking into account a range of factors measured against the whole of the Tower portfolio. Tower also derives statistical information about each of its portfolios and information purchased from third parties to drive its rating methodology which is applied to each individual policy.

[132] All of this information is stored on various Tower databases. It has the following systems:

a) A core database system known as NIMS, which is housed externally on hardware owned by a third party provider. It is a Tower wide

system, used for all of Tower's general insurance business. It has never been accessible by the Banks.

b) The sales platform system – WESS. Other Tower customers used to use WESS but more recently ANZN has been the only Tower agent using the system. Tower has no use for WESS following termination of the agreement.

c) A claims lodgement tool known as CNLT.

d) A client lookup tool known as i-Desk.

e) A database known as Mercantile Claims Recovery.

f) Tower's email server.

g) A third party server which is used to house pdf files.

[133] NIMS, WESS and i-Desk were all developed by Tower. Each of them is proprietary software, unique to Tower. CNLT and Mercantile Claims Recovery both use third party proprietary software but both have been configured to meet Tower's particular requirements.

[134] Mr White, who is a "solutions architect" working for Tower, explained that information, such as clients' names, addresses or bank account numbers, is recorded as data. The data is read using either the software or, at a minimum, a data dictionary in the software. Disclosure of the data in the form in which it is stored would be meaningless without the concurrent disclosure of Tower's software, or the relevant data dictionaries, both of which were developed by Tower and are unique. Where the data is in the form of a code, it would also be necessary to have the coding tables which are built into the software. These were also developed by Tower. Mr White states that if Tower were required to provide its data, but were permitted to do so without disclosing its or third party proprietary databases, software and coding tables, it would be necessary for Tower staff to write software programmes to identify and extract the relevant data from Tower's proprietary

systems, and translate that data so that it could be stored in readable form using a neutral format, for example an off the shelf Microsoft database. The estimated timeframe to do this – for NIMS alone – is 50 to 80 days.

The agreements

[135] The agreements contain a number of provisions relevant to the issue.

[136] The following provisions in the National Bank agreement were referred to by counsel:

> 5.1 The Company undertakes and agrees that during the term of this Agreement it will:
>
> 5.3.1 keep full, proper, appropriate and up-to-date books of account and records showing clearly transactions relating to this Agreement and will allow authorised representatives of INGNZ to have, during normal business hours and upon reasonable notice, access to the said books and records and to take such copies thereof as they may require;
>
> …
>
> 8.3 If so requested by INGNZ, the Company agrees to provide to INGNZ, at mutually convenient times and by mutually convenient means, such data about the National Bank Insurances as INGNZ may lawfully request, and INGNZ agrees to pay for the reasonable costs of the Company complying with INGNZ's request;
>
> …
>
> 8.3 Nothing shall confer upon the Company the right to, and the Company undertakes that it will not at any time (whether during the course of this Agreement or otherwise):
>
> (a) use or disclose, or permit to be used or disclosed; or
>
> (b) enter into any data storage medium; or
>
> (c) compile lists from
>
> any information provided to the Company by INGNZ or ANZN concerning any of INGNZ's or ANZN's customers without the prior consent of INGNZ and ANZN (as the case may be), other than for the purposes contemplated by this Agreement, which includes standard industry practices such as those relating to statistical analysis and to the negotiation of reinsurance treaties or arrangements.

11.2.1 The Company shall, upon request by INGNZ, deliver to INGNZ or to any person nominated by INGNZ all documents, records and other information, and any Materials, held by it or on its behalf relating to the National Bank Insurances and/or to the performance of the duties and obligations of the Company under this Agreement, and INGNZ shall bear the Company's reasonable costs associated with fulfilling INGNZ's request;

[137] The National Bank deed of novation is also relevant. The introduction to clause 6.1 has been set out above at [63]. Clauses 6.1(f) and (h) record Tower's agreement that:

6.1 …

(f) it will not at any time, without the prior consent of the Retiring Party:

(i) use or disclose, or permit to be used or disclosed; or

(ii) enter into any data storage medium; or

(iii) compile lists from,

any information provided to it concerning any customer of the Retiring Party, other than for the purposes contemplated by the Agreement;

(g) …

(h) acknowledges that any information contained on its data base about customers of the Retiring Party, collectively or individually, that is or has been:

(i) collected or obtained by the Retiring Party and/or the Substitute Party and passed to the Continuing Party; or

(ii) derived by the Continuing Party pursuant to the Agreement,

including the Common Information, is and remains at all times the property of the Retiring Party. Notwithstanding this, the Retiring Party acknowledges and makes exception for the Continuing Party's obligations at law and under the Agreement to use and retain information about claims and policies for prescribed periods of time and to fulfil obligations resulting from the Continuing Party's participation in the Insurance Claims Register administered by the Insurance Council of New Zealand Incorporated, and further acknowledges that, as a result of those obligations, some Common Information is and remains at all times also the property of the Continuing Party and of the Insurance Claims Register.

[138] There are provisions in the ANZ agreement which were referred to by counsel. They include clause 20.2, set out above at [62] and the following:

> 6.1 Tower shall be responsible … for
>
> (f) ensuring that the Application forms used by TOWER authorise it to disclose to INGNZ and its employees and agents such information as INGNZ may reasonably require for marketing purposes including Client contact details, Policy details, payment frequency, people covered, payment details, history and commission details and also details of business written by each Sales Personnel; and
>
> 20.4 Upon termination of this Agreement, TOWER shall immediately provide to INGNZ a schedule of all policies written under this Agreement including those current at the time of termination in the form of a computer tape or printed listings as required by INGNZ. Such schedule shall include such particulars of each Policy as are reasonably requested by INGNZ including the information described in clause 6.1 (f) of this Agreement. INGNZ agrees to meet the reasonable costs incurred by TOWER in fulfillment of this clause.
>
> 22.1 Unless authorised in writing by the other party, neither TOWER nor INGNZ or any of their employees will reveal to any person or company any of the trade secrets, secret or confidential operations or dealings or information concerning the organisation, business, finances, transactions or affairs of the other or any of its related companies which may come to its knowledge during the term of this Agreement (the "confidential information") and in the case of TOWER this obligation shall extend to any list of Clients however selected which shall be deemed to be confidential information of INGNZ. Each party and its employees will keep with complete secrecy the confidential information unless such information comes into the public domain (other than by breach of this clause) or is required to be disclosed by compulsion of law and will not use or attempt to use it in any manner which may injure or cause loss either directly or indirectly to the other party or its related companies or ANZN. This clause shall not prevent disclosure of details of the business covered by this Agreement by the majority shareholder in a party to any prospective purchaser of shares in the party provided that the recipient is legally bound to maintain the confidentiality of such information.

[139] There are also similar provisions in the ANZN deed of novation to those contained in the National Bank deed of novation. Clause 6.1(f) is identical, but clause 6.1(h) does not include the final sentence starting “Notwithstanding this …”.

Submissions

[140] Mr Hodder submitted that the customer information, while stored on Tower's computer systems, was and remains the property of ANZN/INGNZ. He argued that the agreements require Tower to keep the customer information up-to-date, and to provide it to ANZN/INGNZ when requested. He submitted that under the agreements Tower must give ANZN reasonable access to the information during the course of the agreements, and that on termination, Tower is required to provide ANZN with all customer policy information stored by it pursuant to the agreement.

[141] Mr Hodder referred specifically to clause 20.4 in the ANZ agreement which incorporates clause 6.1(f) and noted that this latter clause makes specific reference to the potential use by ANZN of the information requested "for marketing purposes". He submitted that this plainly includes offering new and competing policies following termination of the agreements.

[142] He focused attention on the use of the word "property" in the deeds of novation. He submitted that it is a fundamental concept, and that ownership of property donates "a powerful bundle of legal rights". He stressed that the customers in question are customers of ANZN, that the goodwill belongs to ANZN, and that Tower is not entitled to use customer information without the consent of ANZN.

[143] He referred to the reference in clause 20.4 to Tower being required to provide the information in the form of the computer tape, or printed listing. He submitted that the reference to the words "computer tape" should be interpreted in an "ambulatory" manner, to keep up with the current state of technology. He submitted that it is common knowledge that computer tapes are no longer in general usage, and that clause 20.4 is most sensibly read to mean, at a general level, in soft copy or hard copy. It is on that basis that the plaintiffs seek the information in an electronic form that is searchable, manipulable, and able to be uploaded. He submitted that this is consistent with the wording, and the intent, of the provision.

[144] In relation to the difficulties in extracting the information raised by Tower, he submitted that the fact that Tower's systems operate in a way which makes it

difficult to provide the information to ANZN is not a reason for non-compliance by Tower with its obligations. He referred to *Attorney-General v Mason and Bradley* [1972] NZLR 468 at p 471, in this regard.

[145] He emphasised that the plaintiffs are not concerned with Tower's proprietary systems. He stated that they are simply interested in what they regard as their customer information, and that if Tower can provide the information in a neutral format, the plaintiffs will accept it in that format. However he went on to say that if the information cannot be provided in a way that does not include Tower's proprietary information, or if a significant delay will be required to convert the information into a neutral format, then Tower must provide the information regardless. He submitted that the plaintiffs are entitled to the information immediately on termination.

[146] In anticipation of arguments to be mounted by Tower, he dealt with the assertion that releasing the information will breach customers' privacy. He referred to the Privacy Act, and in particular to principles 10 and 11 contained in s 6 of that Act. He denied that there was any disclosure. He also referred to a Privacy Act declaration obtained by ANZN staff when collecting information during the sales process, and to what customers were told when Tower collected information from them in relation to endorsements and claims. He submitted that the statements of purpose in each case would generally be understood by a reasonable customer to encompass any disclosure that the parties must make of the information in order to facilitate the provision of bank branded insurance policies. He submitted that the disclosure of the information to enable ANZN to offer bank branded policies (albeit through another underwriter), is directly related to the purpose for which the information was given, and cannot constitute a breach of the Act. He also relied upon customer authorisation, once again by reference to the Privacy Act declarations obtained by ANZN staff when collecting information during the sales process. He argued that customers not only authorised ANZN to provide the information to Tower in the first place, but authorised ANZN to obtain the information back from Tower. He submitted there could be no breach of confidence if Tower were to provide customer information to ANZN/INGNZ.

[147] Mr Walker for Tower focused on the terms of the relevant clauses relied on by the plaintiffs. He submitted that they were limited, and in some cases inapplicable. He submitted that much of the information provided directly or indirectly by clients is provided to Tower in confidence and in private. He submitted that clause 6.1(h) in the deeds of novation refers only to source information, and not to the proprietary database languages in which Tower captures and represents the information. He drew a distinction between information used in connection with ANZN and customers, and information about ANZN and customers. He submitted that information is not about ANZN customers merely because it was inputted into a customer or policy record, or because it was used in connection with the customers' policies. He suggested, e.g. that Tower's regional designation risks did not become information within the meaning of clause 6.1(h) merely because they were used to rate the policies held by ANZN customers. He submitted that Tower could not be required to deliver up such information.

[148] He queried what was meant by the use of the word "property". He submitted that whatever it meant, it was not in the plaintiffs', or Tower's power, to agree that information belonging to third parties is the property of one or other of them. He submitted that much of the information is properly regarded as that of the customer, or in some cases, of the third parties providing the information. He submitted that it was necessary for Tower to get the customer's express permission if it is to pass the stipulated information to the Bank. He submitted that by denoting customer information as "property" in clause 6.1(h), the parties could not sensibly be taken to have meant that the Banks are entitled to require delivery up of all information, or to use it in any way they see fit. He submitted that much of the information is confidential and private to Tower's insured, and that Tower is prevented by the law of confidence, and by the Privacy Act, from disclosing that information, whatever may be its contractual position with ANZN and INGNZ.

Analysis

[149] In its amended prayer for relief, paragraph d), ANZN/INGNZ seeks to require Tower to extract "all information" about current ANZN-branded policies from its NIMS system.

[150] First I note that paragraph d) is confined to information on the NIMS system. It does not seek information held on other systems – e.g. i-Desk. Secondly I note that the information sought is limited to information about "current" ANZN-branded policies. No historical information is sought. Thirdly, I note that what is sought is "all information" about current ANZN-branded policies. The requirement is not confined to specific categories of information.

[151] There is no express obligation in either agreement requiring Tower to deliver up to ANZN/INGNZ all information on its databases about current ANZN-branded policies. Rather there are a series of general provisions in the agreements, clause 20.4 in the ANZ agreement, and clause 6.1(h) in both deeds of novation. There are differences in clause 6.1(h) between the deeds which may have some bearing on the issue.

[152] I start with the National Bank agreement.

[153] Clause 5.3.1 obliges Tower to keep proper books of account and records, and to allow authorised representatives of INGNZ to inspect those books and records on reasonable notice. This clause imposes an ongoing obligation on Tower during the term of the agreement. The National Bank was under a similar obligation. In my view the clause is relatively limited in its purview. It relates only to books of account and records showing transactions, and it applies only during the term of the agreement. It does not of itself justify an order of the type sought.

[154] Similarly clause 5.3.4 is limited to such data about National Bank insurances as INGNZ may lawfully request. On the face of it, this clause again creates a general obligation, applicable only during the term of the agreement, to compile information about the insurance book at the Bank's request, and to provide it to Bank at the

Bank's expense. It does not on its face create an obligation to deliver up all information about current ANZN-branded policies held by Tower on NIMS on termination.

[155] Clause 8.3 does not seem to me to be in point. In broad terms it imposes an obligation on Tower not to use or disclose information provided to it by INGNZ or ANZN about their customers without their consent, other than for the purposes contemplated by the agreement. There is nothing in the clause which gives ANZN or INGNZ the right to require Tower to hand over all information about the bank-branded policies on its NIMS computer system on termination.

[156] The National Bank agreement in its original form did contain a clause – clause 8.5 – which contained an acknowledgement that "common information" relating to the insurances contained on Tower's database was and remained the property of the Bank. This clause was deleted by the deed of novation.

[157] Clause 11.2.1 is also in my view not in point. It applies only in respect of a termination of the agreement pursuant to clauses 10.1, 10.2 and 10.4. Here ANZN/INGNZ have not terminated under any of those clauses. Rather they have terminated under clause 10.5 – see [11]. There is no clause in the National Bank agreement requiring the delivery by Tower of all documents, records and other information held by it when termination takes place under clause 10.5.

[158] Clause 6.1(f) in the deed of novation does not seem to me to significantly advance matters. It imposes an obligation on Tower not to use information provided to it concerning ANZN customers. It is difficult to see that it does much more than repeat the obligations contained in clause 8.5 of the original agreement. It cannot be said to impose an obligation on Tower requiring it to extract all information from its NIMS system, and to provide that information to ANZN.

[159] Clause 6.1(h) in the deed of novation is the most significant clause. It comprises an acknowledgement by Tower that any information contained on its database about ANZN customers, collectively or individually, is and remains the property of ANZN. The clause has a wide ambit. As long as the information is

about customers of ANZN, whether collectively or individually, it extends to any information collected or obtained by ANZN and/or INGNZ and passed to Tower, and to information derived by Tower pursuant to the agreement. It also extends to "common information", as defined in the principal agreement. Common information means information collected by INGNZ and/or ANZN about their customers pertaining to the issue of National Bank insurances, any subsequent information obtained by them and/or passed onto Tower for the purpose of amending information pertaining to the issue of National Bank insurances, and any statistical information derived by Tower about the National Bank insurances collectively and/or about the individual customers. All of this information is recorded as being and remaining the property of ANZN.

[160] In my judgment clause 6.1(h) catches:

a) the information given by customers to Bank employees at the time they applied for a policy, which information was passed onto Tower and retained by it;

b) the information derived by Tower pursuant to the agreements, including information such as the effective dates and expiry dates, items insured, premium, agency and commission, re-insurance information and the like;

c) the information used by Tower for rating and analysis purposes such as information about the location of the risk, the type of car insured, and whether there was a no claims bonus;

d) sales information, such as whether the insured has criminal convictions, has been declined insurance by other underwriters, and details of the insured's claim history with other underwriters;

e) claims information, such as description of any loss, date of loss, payments in respect of a claims, excesses and solicitor's costs and expenses, and recoveries from third parties;

f) debtor's information;

g) records of client interaction such as renewals, advice of direct debit dishonours, and any amendments to information to held as a result of client contact;

h) information received by email from the insured.

All of this information is information either collected or obtained by ANZN and/or INGNZ, or derived by Tower pursuant to its obligations under the agreements. Further, the clause must catch any additional statistical information derived by Tower, but only if the statistical information is about the ANZN insurances or about ANZN customers, whether collectively, or individually. If the information relates to a particular ANZN customer, and/or if it has been inputted into an individual customer or policy record, it seems to me that it must be caught by clause 6.1(h) because it is common information. If the statistical information has been derived by Tower and used by it in a collective way, for example to enable it to calculate its risk designation in a particular region, or to better understand the risks associated with particular motor vehicles, then it will be caught by the clause if it is about ANZN insurances. It will not be caught if it is not about ANZN insurances collectively, or if it is not about individual customers. If it is partly about the bank-branded insurances and partly about Tower's general insurance book, then that part of the statistical information as relates to the bank-branded policies collectively and/or about individual customers is in my view caught by the clause. In practice I suspect that it will be difficult in some cases to say whether general Tower derived information is or is not caught by the clause. Such cases will have to be considered on an item by item basis.

[161] All of this information caught by clause 6.1(h) is ANZN's "property". I agree with Mr Hodder that if the information is ANZN's property, it must be entitled to ask for the same. I do not accept Mr Walker's argument that the designation of the information caught by clause 6.1(h) as property does not entail a right, on the part of the bank, to demand that the information be delivered up to it. The clause is clear in its terms. In my judgment if the information is the property of the Bank,

then the Bank must have the right to require that it be handed over. While there are other clauses in the agreement which deal with the collection and provision of information, as Mr Walker points out, they do not in their terms apply on termination. Clause 6.1(h) in my view is a catch all provision which provides for the property in the information caught by the clause when and if it is necessary to address that question. If termination had occurred under clause 10.3(a), (b), (c) or (d), then Tower's obligations would have been set out in clause 11.1. If termination had occurred under clauses 10.1, 10.2 or 10.4, then clause 11.2 would have applied. Both clauses 11.1 and 11.2 provided for Tower to deliver up all documents, records and other information, and materials relating to the insurances on termination. Here, termination occurred under clause 10.5. Clause 6.1(h) provides a backstop for the Bank. It is entitled to exercise its right of property in the information which Tower has expressly accepted. Tower's position as the insurer, and in particular its right to continue to renew the policies, is protected by the proviso which permits it to use and retain the information to fulfil its obligations at law and under the agreement.

[162] There are, however, difficulties in the way of the relief the Bank is seeking.

a) First, clause 6.1(h) refers only to information which Tower has on its database. There is nothing in the clause obliging Tower to deliver up to ANZN its proprietary software, the computer languages used by it, or the data dictionaries in which it has captured and represented some of the information it holds. In my view Tower cannot be obliged to deliver up details of its proprietary software. It must, however, provide the information covered by clause 6.1(h), and if that requires that the information be put into a non-proprietary format, then that must occur if Tower is to comply with its obligations. I agree with Mr Hodder that difficulties in complying with the contractual obligations can not absolve Tower from its responsibilities to provide the required information.

b) Clause 6.1(h) does not oblige Tower to provide the information in any particular format. It could provide it in hard copy, or in electronic format using non-proprietary software. It cannot, however, be

compelled to provide the data in a format which enables ANZN to search, manipulate and upload the data as is sought in the prayer for relief.

c) There is nothing requiring Tower, following termination, to provide extracted and updated information on all ANZN branded policies due for expiry no later than six weeks before they are due to expire. The expiry date of individual policies is information which Tower is required to deliver up as part of the overall information package it has agreed belongs to ANZN. There is no ongoing contractual provision requiring it to provide further information on a monthly basis.

d) There is nothing in clause 6.1(h) detailing when the information has to be provided. Clearly it has to be within a reasonable timeframe but in my view there is no basis on which ANZN can assert that it became entitled to the stipulated information immediately on termination.

e) ANZN's property right as against Tower, and Tower's contractual obligation to deliver up the information, cannot in my view cut across the rights of others who may be able to assert that the information is confidential to them. This is an important qualification which I return to below at [169] to [200].

[163] I now turn to the ANZ agreement.

[164] Clause 20.2 in the ANZ agreement does not directly assist in the present context. I have explained above at [93] what the words "primary goodwill" mean. The right of property in the information caught by clause 6.1(h) is part of that goodwill, but the clause itself does not advance how or when the information is to be made available.

[165] Nor does clause 22.1 assist. It deals with the obligations both parties have to maintain confidentiality in information gleaned during the course of the business relationship created by the agreement.

[166] Clause 20.4 is in point. There are a number of things to note about the clause:

a) The clause does specify when the information covered by the clause is required to be provided. It must be provided immediately upon termination.

b) The information which has to be provided under the clause is limited. It is confined to a schedule of all policies written under the agreement, including those current at the time of termination. The schedule extends to all policies – whether or not the same are current. Further the schedule is required to include such particulars of each policy as are reasonably requested by INGNZ, including the information described in clause 6.1(f). Clause 6.1(f) in turn refers to such information as may reasonably be required for marketing purposes, including client contact details, policy details, payment frequency, people covered, payment details, history and commission details. Notwithstanding the width of clause 6.1(f), it seems to me that the schedule Tower had to provide under clause 20.4 was not required to include all of the information the subject of clause 6.1(h) in the deed of novation.

c) The clause specifies how the schedule is to be provided. It must be provided either in the form of a computer tape, or printed listings, as required by INGNZ. I do not accept Mr Hodder's argument that this clause is "ambulatory". It clearly specifies the forms in which the schedule can be provided and I can see no proper basis for ignoring the words in the agreement or for extending them beyond their plain meaning. In my view Tower cannot be required to provide the schedule in any other form.

d) Tower's reasonable costs in making the schedule available are to be met by INGNZ.

[167] In addition to its obligations under clause 20.4, Tower is under the same obligations under clause 6.1(h) of the ANZ deed of novation as it is pursuant to the National Bank deed of novation. I have dealt with that clause above.

[168] There is one significant difference between clause 6.1(h) in the two deeds of novation. In the ANZ deed of novation the final sentence is omitted. On the face of it this means that Tower is not entitled to retain and use the information. However the terms of the ANZ agreement require Tower to continue to administer the policies following termination – clause 20.5 – and I have held that it is entitled to continue renewing them – clause 17.8. Necessarily Tower will have to retain the information or much of it if it is do comply with these contractual obligations. I note that deponents for Tower appeared to accept this practical reality. In my view it must be an implied term of the ANZ agreement that Tower is entitled to retain the necessary information for these purposes. Such a term is necessary to give the ANZ agreement business efficacy.

[169] The above observations and findings in relation to Tower's obligation to deliver up information relate only to the obligations of the parties as between themselves. I agree with Mr Walker's submission that it is not in ANZN/INGNZ's and/or Tower's power, to agree that information belonging to third parties is the property of one or other of them. A and B cannot agree that C's car belongs not to C but rather to A or B or even to both of them.

[170] Here the evidence makes it clear that both parties have in the course of their business relationship obtained personal information from insured, either at inception when the insurance policies were put in place, or during the term of the policies. That information is *prima facie* the information of the individual insured.

[171] The Privacy Act 1993 establishes principles with respect to the collection, use and disclosure by public and private sector agencies of information relating to individuals. Here Tower is an agency as defined by the Act and it is obliged to comply with the principles detailed in s 6. In broad terms those principles require that personal information is not to be collected by any agency, unless the information is collected for a lawful purpose and is necessary for that purpose. An agency

collecting personal information must generally seek to collect the information directly from the individual concerned and make the individual aware of the fact the information is being collected, and for what purpose. The agency is required to keep the information secure, to give individuals access to it, and to allow individuals the right to request corrections to the information.

[172] Relevantly principle 10 provides as follows:

> **Principle 10: Limits on use of personal information**
>
> An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless that agency believes, on reasonable grounds:
>
> (a) …
>
> (b) that the use of the information for that other purpose is authorised by the individual concerned; or
>
> (c) …
>
> (d) …
>
> (e) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained; or
>
> (f) …

Principle 11 provides as follows:

> **Principle 11: Limits on disclosure of personal information**
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds:
>
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
>
> (b) …
>
> (c) …
>
> (d) that the disclosure is authorised by the individual concerned; or
>
> (e) …

[173] Principle 10 limits the use of personal information. Principle 11 limits its disclosure.

[174] I deal first with principle 10. ANZN wants the information so that it and Vero can use it to offer insured new insurance policies, with Vero as the new underwriter, when the existing bank-branded policies fall due for renewal.

[175] The information held by Tower has been obtained from ANZN customers on two different occasions, first when they took out their policy of insurance, and secondly when they contacted Tower during the term of the policy and any renewals.

[176] When a completed application was submitted to Tower an authorisation and declaration letter was handed by the ANZN staff member to the customer. The letter was printed out by the bank staff member, on bank-branded stationery, from the WESS system. It was signed by a bank officer. It referred to the fact that Tower was the underwriter for the insurance. It then contained the following:

> You have also confirmed that: …. • TOWER Insurance is authorised to give to and obtain from other parties other insurance companies, TOWER Group Companies and the Insurance Claims Register administered by the Insurance Council of New Zealand information relating to this insurance and any claims made under it or any other insurance I/we have with TOWER Insurance … • TOWER Insurance is collecting information on this declaration to evaluate your insurance.

[177] Further every time a customer purchased a policy from Tower through either the ANZ Bank or the National Bank, the bank staff member processing the sale was required to deliver a "Privacy Act declaration". The declaration was the same for both brands. It provided as follows:

> **Privacy Act Declaration**
>
> We need to obtain some information from you so that we can evaluate your inquiry.
>
> - You have an important duty to tell us any information that could influence us in deciding whether we can provide this insurance cover.
>
> - Failure to provide any of this information may result in TOWER Insurance refusing to offer this insurance cover and any claims being declined.

- The information you provide will be kept on our files. You have certain rights of access to, and correction of, this information.

- We will take reasonable steps to ensure that any identifiable personal information we have collected is stored securely.

- We also need your authority to provide this information to other parties including other insurance companies, TOWER Group companies, any party with an interest in your policy and the Insurance Claims Register administered by the Insurance Counsel, or to obtain information from them in relation to your insurance.

- From time to time we may also use your information to provide you with information updating you on the full range of services we offer. If you do not want to receive this communication, please contact us.

NOTE: You cannot continue if the Privacy Act is not understood.

[178] It is not clear on the evidence who the "we" in the clause related to. Mr Hodder submitted that it referred to ANZN. Mr Walker denied this, and said that the "we" in the authorisation referred to Tower and not to the Bank. Unfortunately the deponent – Mr Meekan – who gave the relevant evidence in regard to this question did not make the matter particularly clear. He said that the declaration was given on behalf of ANZN and Tower by an ANZN staff member. He did not annex a copy of the letter containing the declaration, because it contained Tower's underwriting questions. He was not cross-examined.

[179] Moreover it is not clear from the evidence which declaration was given first – although it does seem that both were given.

[180] Mr Hodder says in relation to both authorisations and declarations that one of the purposes for which the information was collected was to facilitate the provision of bank-branded policies generally. I do not accept that this assertion is correct. The information was initially given so that a quote could be obtained from Tower in relation to a Tower insurance policy and so that Tower could determine whether or not it wished to issue cover. It was not given for any other reason. In particular the information was not given for the purpose of obtaining insurance generally from any underwriter with whom ANZN might see fit to deal in the future. Further, in my view it is stretching matters to say that the purpose for which ANZN now intends to use the information, namely the promotion of new insurance policies by another

underwriter, is "directly related" to the purpose for which the information was initially given.

[181] In my judgment even if ANZN is entitled to require not only as against Tower but also the insured that the information given to it at the time the policies were put in place be disclosed to it, it is not entitled to use that information for its intended purpose because it was not provided for that purpose, and its intended purpose is not directly related to the purpose for which the information was initially obtained.

[182] I now turn to the second category of information – that given to Tower by insured during the term of the policies. The evidence established that every time an insured called Tower about his or her policy to provide new and material information, to change the policy cover, or to make a claim, the Tower staff member taking the call delivered a Privacy Act declaration before proceeding with the call.

[183] The script for endorsements was as follows:

> We need to obtain some information from you so that we can evaluate your inquiry.
>
> - You have an important duty to tell us any information that would influence us in deciding whether we can provide this Insurance cover.
> - Failure to provide any of this information may result in TOWER Insurance refusing to offer this insurance cover and any claims being declined.
> - The information you provide will be kept on our files. You have certain rights of access to, and correction of, this information.
> - We also need your authority to provide this information to other parties including other insurance companies, TOWER Group companies, any party with an interest in your policy and the Insurance Claims Register administered by the Insurance Counsel, or to obtain information from them in relation to your insurance.
>
> Do you understand everything I have just told you? Yes / No

[184] The script for claims was as follows:

> To comply with the Privacy Act we need to let you know that certain matters:

- Tower is collecting this information so that we can consider your claim;
- You can request access to this information at any time and you should let us know if it needs correcting;
- You need to make sure that all information you give us is complete and correct or we could decline your claim, even if you correct it later on;
- Also, I need your authority to obtain information about this claim from other people and to release information about this claim to other people including the Insurance Claims Register.

Without your acceptance of this we are unable to progress with your claim.

[185] The context in which these declarations were sought, together with the terms of the applicable declarations, seem to me to be clearly limit the purpose for which Tower received the information. Tower is not permitted in terms of principle 10 to use the information for any other purpose.

[186] Mr Hodder submitted that the insured have authorised disclosure of the information to ANZN either because it is an interested person (because it receives commission in relation to the policies), or because it is an "other party" or "other person" in terms of the authorisations.

[187] I doubt that it can be said that the ANZN is a party with an interest in the policies simply because it receives commission in relation to them. That is a private arrangement between Tower and ANZN as its agent. It is not an interest in a policy which has any significance from the point of view of an insured. ANZN may properly be considered to be an interested party in some policies, e.g. where it has advanced money to the insured against the security of the asset covered by the policy. It seems to me that that is what an insured who considered the matter might reasonably have considered the words to mean.

[188] Further to my mind, the authorisation permitting Tower to provide the information to "other parties" or "other persons" is too vague and non specific given the purpose for which the information was given to Tower. What the words mean has to be taken from their context and to hold that they permit disclosure of all information obtained from Tower for one purpose so that it could be used for another purpose would be to drive a "coach and horses" through principle 10.

[189] The letter of authorisation sent to National Bank customers taking out a Tower policy did acknowledge that the National Bank might agree to offer similar products through another insurer and that no other consent or authorisation would be necessary – see [120] above. This provision is rather more helpful to ANZN and INGNZ but it is not worded particularly clearly – in particular it is not clear what consents or authorisations have already been given. Moreover, at best from ANZN/INGNZ's perception, the provision can only apply to the information given by the customer at the time the policy was put in place, and not to information subsequently given to Tower. As I understand it, this limited information is not sufficient for ANZN/INGNZ's intended purpose. It needs all up-to-date information in relation to policies. Further there is no equivalent authorisation in the authorisation letter sent to ANZ customers.

[190] I now turn to deal with principle 11.

[191] Mr Hodder submitted that there can be no disclosure in terms of this principle because the concept of disclosure involves making something known that was not previously known by the recipient of the information. He referred to two authorities in the United Kingdom, *Attorney General v Associated Newspapers Limited* [1994] 1 All ER 556, and *Bank of Credit and Commerce International (Overseas) Ltd (In liquidation) v Pricewaterhouse* [1997] 4 All ER 781. He also referred to a decision of The Human Rights Tribunal in this country, *Williams v The Department of Corrections*, Decision Number 04/04, reference number HRRT33/01. The Tribunal there applied the concept of disclosure adopted in the United Kingdom – see [42] to [46]. Mr Hodder submitted that it follows that if Tower provided ANZN with the information which ANZN first collected and had access to, this could not constitute a disclosure breaching the Privacy Act. Mr Walker responded that ANZN did not retain a copy of the information it initially collected and that the information was initially collected by ANZN as Tower's agent. He also noted that ANZN has never had access to, nor known of any updating or other information collected directly by Tower after the initial policy sale.

[192] ANZN Bank staff did obtain the initial base information from their customers. However they did so as agents for Tower. It seems that they obtained

authority from those customers to pass that information onto Tower. ANZN did not retain it. I doubt that it can be said that the information was ever information ANZN held in its own right or for its own purposes. It was information collected for a specific purpose by an agent acting on such. When Tower accepted the application for insurance, and issued a policy, the ANZN customers became customers of Tower, and became insured under a Tower policy. They subsequently provided information direct to Tower, and they authorised Tower to use that additional information for certain purposes. In my view it would, however, be a breach of privacy were Tower to now hand across information obtained by ANZN as its agent whether it was made available to Tower by the insured when the policy was first put in place or during the course of the policy. There is no basis on the materials before me on which I can find that disclosure by Tower to ANZN of that information is one of the purposes in connection with which the information was obtained or that disclosure is directly related to purposes in connection with which the information was obtained. Nor (with the possible exception of the initial information provided by National Bank customers) can I conclude that disclosure by Tower to ANZN has been authorised by the individuals concerned.

[193] In my view Tower would be breaching principle 11 of the Privacy Act if it disclosed all of the information sought by ANZN without express authorisation from the affected insured. Further and even if it is entitled to the information without the consent of the insured, ANZN would be in breach of principle 10 if it used it for the intended purpose of offering alternative insurance products from another underwriter.

[194] I now turn to the information obtained by Tower from third parties, and used by it in one way or another in relation to ANZN policies. On the evidence Tower is prevented from disclosing the codes and the underlying information it has purchased from third parties by confidentiality agreements put in place by the vendors of that information. Further, in the course of processing claims, Tower has received information from third parties such as assessors, investigators, cause and origin experts, lawyers, engineers, valuers, repairers, the Police and the Ministry of Justice. That information has generally been provided on a confidential basis. It may be legally privileged.

[195] Tower claims that it would be committing a breach of confidence were it to provide this third party information to ANZN.

[196] In order to establish a breach of confidence, any third party would need to establish:

a) the information must have the necessary quality of confidence about it;

b) the information must have been communicated in circumstances importing an obligation of confidence; and

c) there must have been an unauthorised use of the information to the detriment of the person communicating it – that is the person entitled to the benefit of the confidence.

See *Todd, The Law of Torts in New Zealand*, 4th Edition, para 15.5.02 and cases there cited.

[197] Here, on the limited evidence available, the third party information is confidential in nature. There has been no challenge to Mr Meekan's assertions in that regard. Further, on the face of it, it seems that the information was communicated to Tower by third parties in circumstances importing an obligation of confidence, and any disclosure of that information by Tower to ANZN without the third party's consent would be to the detriment of the third party entitled to the benefit of the confidence.

[198] The same argument and right of action in tort may also be available to insured who have given confidential information to Tower in the circumstances discussed above.

[199] I am not prepared to make an order requiring Tower to disclose to ANZN confidential information it holds, either from insured, or from third parties, which could result in a breach of the Privacy Act, or a breach of the law of confidence.

[200] It seems to me that in the circumstances, Tower, if it is to comply with its contractual obligations, must go to each of the individual insured, and to the third parties, and seek their consent to disclosure of the information demanded by ANZN. Alternatively, or perhaps in addition, Tower could inter plead or seek the appropriate declaration. Individual insured and third parties must be entitled to express a view on this issue and counsel could be appointed to represent the various groupings of affected persons. Their views could then be heard.

Result

[201] In summary, under both agreements and as between ANZN and Tower, Tower can be required to deliver up to ANZN the information caught by clause 6.1(h) in the deeds of novation. There is no set timeframe within which it must do so, but everything else aside it would have to do so within a reasonable time period. There is no pre-agreed format for the provision of the information. Tower cannot be required to provide its proprietary database languages, or its proprietary software. Further Tower is entitled to retain a copy of the information, and to use that information to carry out its obligations under the agreements.

[202] In relation to the ANZ agreement, Tower was under an obligation, as at the date of termination, to provide the schedule required by clause 20.4 of the ANZ agreement. The information required to be detailed in that schedule is a subset of the information required under clause 6.1(h). INGNZ can require the information in the form of a computer tape, or as printed listings. It is entitled to a schedule of all policies written under the agreement. It could of course waive its contractual entitlement, and require only a schedule of current policies.

[203] I am not prepared to make an order in terms sought by ANZN/INGNZ in their amended prayer for relief. First, it seems to me that paragraph (d) in the prayer for relief goes well beyond the terms contained in the agreements. Secondly, and of more importance, to make an order in the terms sought would expose Tower to claims that it had breached the Privacy Act and the general law of confidence. It would result in the disclosure of information which in my view is confidential. I am not prepared to make an order that would have those effects. Either the parties must

obtain the consent of the affected persons before the information is disclosed, or alternatively Tower will have to inter plead and/or seek a declaration so that the Court will have all relevant information, including the views of those affected, before it finally determines the issue.

Is ANZN entitled to pass on such information as it receives from Tower to Vero?

[204] To an extent, this issue is tied up with the findings I have made in relation to the previous issue. While I am not prepared to order that the information be provided at the present point of time on the basis of the materials before me, I have held that Tower is obliged to give the stipulated information to ANZN when and if the insured consent, or if the Court ultimately determines that it is appropriate for it to do so. The issue of what ANZN/INGNZ can do with the information will then arise. I am reluctant to deal with this matter in a proleptic way and do so only because the amended prayer for relief sought orders that ANZN/INGNZ could provide the information sought to Vero (paragraphs 2(f) and (o)), the issue was argued, and Vero was represented and had the opportunity to make submission on the issue. In the event, Ms Armstrong for Vero adopted the submissions made by Mr Hodder on this point.

The agreements

[205] These agreements contain a number of provisions relevant to the issue.

a) The National Bank agreement has clauses 8.2 and 8.3. Clause 8.3 is set out at [136] above. Clause 8.2 provides as follows:

> Each of the Parties pledges to observe and declares that it will, except under obligation or compulsion of law, observe the strictest secrecy concerning the business of each other and of all persons, companies or bodies from time to time having accounts, policies or business with either the Company or INGNZ which may come to the knowledge directly or indirectly of either Party by virtue of the relationship recorded in this Agreement.

There are also clauses 6.1(f) and (h) contained in the deed of novation – see [137] above.

b) In the ANZ agreement, there are clauses 5.2(f) and 20.2 – see [62] above, and clauses 22.2, 22.3 and 26.1. There are also 6.1(f) and (h) in the deed of novation – see [137] above.

Clause 5.2(f) provides as follows:

> INGNZ shall not–
>
> …
>
> divulge directly or indirectly any information regarding the affairs of any person acquired whilst acting as agent under this Agreement except in the performance of its duties under this Agreement; and
>
> …

Clauses 22.2 and 22.3 provides as follows:

> 22.2 Each of the parties agrees that it will except under obligation or compulsion of law observe the strictest secrecy with information concerning Policy Holders or concerning any other person which may come to the knowledge directly or indirectly of either party by virtue of the relationship established by this Agreement.
>
> 22.3 The parties acknowledge that the provisions of this clause shall take effect and continue to be binding on the parties notwithstanding the termination of this Agreement.

Clause 26.1 provides as follows:

> TOWER shall give to INGNZ continued access to Policy Holder information provided that TOWER shall be entitled to withhold access by INGNZ and refuse to provide information to INGNZ in relation to specific Policy Holder information and records relating to claims history. TOWER may also withhold other information if that information has been provided solely to TOWER by or in respect of the Policy Holder in confidence or if disclosure would contravene any provision of the Privacy Act 1993 or the Health Information Privacy Code 1994. Subject as aforesaid, TOWER shall maintain at its place of business full and

> complete records files and data which shall accurately reflect the business conducted pursuant to this Agreement and INGNZ shall have the right, on giving reasonable notice to TOWER, at such times as shall be agreed with TOWER and subject to accompaniment by TOWER personnel to enter TOWER'S premises or other location where records are maintained to inspect, audit and to make copies of such documents, records, papers and files held which relate solely to the business the subject of this Agreement.

Submissions

[206] Mr Hodder relied on the various provisions in the agreements to the effect that the information is the property of ANZN.

[207] He referred specifically to clauses 8.3 and 8.4 in the National Bank agreement. He submitted that clause 8.2 in the agreement is a narrow provision only. He acknowledged that there was no provision in the National Bank agreement comparable to the clause in the ANZ agreement providing that the goodwill of the business remains with INGNZ, but submitted that other provisions make it clear that the ANZN brand, and information regarding ANZN customers, remains the property of ANZN. He referred specifically to clauses 6.1(d) and (h) in the deed of novation.

[208] He referred to clauses 20.2, 20.4 and 26.1 in the ANZ agreement. He noted the reference in clause 20.4 to clause 6.1(f), which refers to the provision of information required by INGNZ for "marketing purposes". He submitted that any argument that ANZN/INGNZ would be in breach of the agreements if they were to pass the information onto Vero ignores clause 20.2 which acknowledges that the primary goodwill of the business remains with INGNZ. He also submitted that any such argument was inconsistent with clauses 22.1 and 22.2. He suggested that clause 22.2 focuses on trade secret or confidential operations or dealings, or information concerning the organisation, business, finances, transactions or affairs of the other. He submitted that details about ANZN's own customers do not fit within these categories. He further suggested that clause 22.1 expressly provides that the confidentiality in relation to any list of clients belongs to ANZN only. In relation to clause 22.2, he submitted that it requires only that strict privacy be observed in relation to information concerning policy holders. He submitted that the clause was

there to ensure that insured customers' privacy is not breached, and that the information is not put to unauthorised uses. He submitted that the clause cannot be read to enable Tower to withhold from ANZN information about its own customers, or to prevent ANZN from being able to continue its insurance book with a new underwriter after termination of the agreements with Tower.

[209] Mr Walker's submissions can be summed up reasonably briefly. He submitted that both agreements expressly prohibit the disclosure of information about the insured, or their policies. He referred to clause 8.2 of the National Bank agreement, and to clauses 5.2(f), 22.2 and 22.3 of the ANZ agreement. He submitted that ANZN/INGNZ are not entitled to pass the information onto Vero as a third party.

Analysis

[210] I have already dealt with Privacy Act arguments above – [169] to [200]. My observations and findings there made are equally applicable in the present context.

[211] In my view ANZN's submissions erroneously assume that the information held by Tower belongs to the Banks. As I have noted above, the contractual arrangements between ANZN/INGNZ and Tower do not affect the rights of those who have provided this information. The information is theirs.

[212] Further, as between ANZN/INGNZ and Tower, in my view the agreements do provide for confidentiality.

[213] In the National Bank agreement, clause 8.2 places strict obligations on both parties to observe the strictest secrecy concern *inter alia* the business of all persons having policies or business with either Tower or the Bank which comes to the knowledge directly or indirectly of either party by virtue of the relationship recorded in the agreement. The clause is expressed in very wide terms. It is not just the business of Tower or the Bank which is protected from disclosure. So also is the business of persons having policies with Tower. In my view it plainly precludes the Bank making the information available to Vero. While the clause is not expressed to

survive following termination of the agreement, it seems to me that it must do so. Otherwise the obligation of confidence would be meaningless.

[214] Under the ANZ agreement, clause 5.2(f) contains an express undertaking that INGNZ will not divulge directly or indirectly any information regarding the affairs of any person acquired while acting as agent under the agreement. It may only do so in the performance of its duties under the agreement. Negotiating replacement insurance through Vero is not an action taken in the performance of its duties under the ANZ agreement.

[215] Clause 22.2 is directly in point. Both parties agree to observe the strictest secrecy with information concerning policy holders, or concerning any other person which may come to the knowledge directly or indirectly by virtue of the relationship established by the agreement. The information which ANZN and INGNZ wish to pass on to Vero must come within the wording of the clause. They want to give to Vero information about policies underwritten by Tower and about the holders of those policies. Clause 22.3 makes it clear that the provisions of clause 22.2 take effect, and continue to be binding on the parties notwithstanding the termination of the agreement. Clause 22.2 is stated to survive termination, and it comes within the terms of clause 20.6.

Result

[216] ANZN cannot pass onto Vero information concerning policy holders or the business of policy holders which came to its knowledge by virtue of the relationship established by the National Bank agreement and the ANZ agreement.

Further conduct of proceedings

[217] In this judgment I have dealt with the various matters canvassed during the hearing which commenced on 9 February 2009. There are other issues still outstanding between the parties, and no doubt there will be issues they will want to consider as a result of this judgment. I direct the Registrar to schedule a telephone

conference at the first convenient time 10 working days after the date of the delivery of this judgment so that the further conduct of these proceedings can be considered.

[218] Both parties have had a measure of success in this judgment. I invite the parties to endeavour to reach agreement in relation to costs. If agreement cannot be reached, then I will put in place an appropriate timetable for the exchange of memoranda regarding costs at the telephone conference which I have directed shall be held.

Wylie J