IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA8/2023
[2023] NZCA 357

BETWEEN	HUGH RODERICK CATHERWOOD Appellant
AND	ASTERON LIFE LIMITED Respondent

Hearing: 13 June 2023

Court: Wylie, Thomas and Brewer JJ

Counsel: H D J Holderness for Appellant
C M Meechan KC and A Borchardt for Respondent

Judgment: 9 August 2023 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] Notwithstanding that he is alive and, on the evidence, in good health, the appellant, Hugh Catherwood, seeks payment of the sum insured (or the death benefit) under a life insurance policy he holds with the respondent, Asteron Life Limited (Asteron). He says that he is entitled to payment of the sum insured because, in early

to mid-2019, he was "terminally ill". The policy provides that an insured is terminally ill if his or her "life expectancy is, due to *sickness* and regardless of any available treatment, not greater than 12 months". Mr Catherwood says that when he made the claim for the death benefit in early 2019, he was sick, that the policy requires that the treatments available to him be ignored and that, when they are ignored, his life expectancy at the time was not greater than 12 months.

[2] Asteron has declined to pay the sum insured to Mr Catherwood. It argues that his condition at the relevant time did not fall within the definition of the words "terminally ill" contained in the policy. It says that the policy requires that Mr Catherwood's life expectancy had to be not greater than 12 months, despite the treatments which were available to him at the time. It notes that Mr Catherwood's prognosis in early 2019, taking into account the treatments he was then receiving and was likely to undergo, was that he was unlikely to die within 12 months.

[3] In the High Court at Christchurch, Dunningham J ruled in favour of Asteron and rejected Mr Catherwood's assertion that Asteron was in breach of the policy when it declined to make payment of the sum insured to him.[1]

[4] Mr Catherwood appeals this judgment. He says that the Judge failed to correctly interpret the relevant provisions in the policy, that as a consequence she erred in interpreting the same and that she made a number of associated errors. Asteron disagrees. It says that the policy was correctly interpreted by the Judge and that it is not yet obliged to pay the sum insured to Mr Catherwood under the policy.[2]

[5] The dispute between the parties is narrow. It turns on the meaning of the words "regardless of" found in the definition of the words "terminally ill". Mr Catherwood says that the words "regardless of" mean "ignoring the effect of". Asteron says that the words "regardless of" mean "despite the effect of".

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1 *Catherwood v Asteron Life Ltd* [2022] NZHC 3296 [Judgment under appeal].

2 We use "not yet" because the policy is still in force and, provided it is maintained by Mr Catherwood, Asteron will become liable to pay the sum insured when Mr Catherwood dies or becomes terminally ill.

Factual background

[6] There was no dispute at trial, nor before us, as to the relevant factual background. It was summarised by the Judge. We gratefully adopt her analysis.

> **The events which gave rise to the claim**
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> [5] Mr Catherwood is a senior lawyer in Christchurch. He has maintained a life insurance policy since 1976. In 2009, at the recommendation of his then insurance broker, Mr Richard Abbot, he terminated his life insurance policy with AMP and entered into a life insurance policy with Asteron. While he does not recall the specific reasons for the change, he assumes there was an advantage over his existing policy when looking at the cover provided and the premium payable.
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> [6] The policy was called a "SmartLife Policy". It provided a death benefit which would be paid should Mr Catherwood die. At the time of taking out the policy this was [$940,070]. The policy also promised to pay the death benefit if Mr Catherwood became terminally ill.
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> [7] The policy also offered a range of optional benefits. Mr Catherwood selected the Trauma Cover option. It provided that if he was diagnosed as having one of a range of serious medical conditions listed in the policy, or underwent major surgery, and survived at least 14 days from the date of diagnosis or surgery, he would be paid the sum insured under this option. The sum for Trauma Cover which Mr Catherwood initially agreed to was $117,508.
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> [8] In 2012, Asteron offered a new enhanced Trauma Recovery option and, while Mr Catherwood did not recall it, Asteron's records show he elected to take up the new Trauma Recovery option, and he increased the amount of cover to $500,000. By this time, the death benefit had been increased to $1,200,020 as a consequence of inflation adjustments. The monthly premium for life cover at that point was $506, while the Trauma Recovery monthly premium was $795.
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> [9] Sadly, in July 2018 Mr Catherwood's wife passed away after a prolonged struggle with breast cancer. Another family member was also diagnosed with a serious health issue. This prompted Mr Catherwood to check that he did not have any serious health issues looming. On the recommendation of his GP, he undertook an MRI scan for his head and a CT scan for his torso in December 2018. To Mr Catherwood's surprise, given he had no previous symptoms, he was found to have a tumour at the top of his stomach in close proximity to the oesophagus and diaphragm.
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> [10] The formal diagnosis which he received in January 2019 was that it was an oesophageal adenocarcinoma. He very quickly developed symptoms and, by the end of January 2019, the tumour caused difficulties with swallowing. He came under the medical care of a general surgeon, Mr Coulter, and an oncologist, Dr Edwards. His treatment involved eight weeks of chemotherapy followed by surgery in May 2019 to remove the top part of his stomach and the lower portion of his oesophagus. That was then

followed by a further eight weeks of chemotherapy once he had healed from the surgery.

The claims process

[11] Shortly after he was diagnosed in January 2019, Mr Catherwood made contact with his insurance broker, Mr Eru Manuera, about the possibility of making a claim. He made a claim under the Trauma Recovery option of the policy in January 2019, and he was paid $564,185.23 on 4 February 2019.

[12] He also discussed with Mr Manuera the possibility of making a claim in respect of the life cover. Mr Manuera's advice was to wait until Asteron had paid out under the Trauma Recovery option before making a claim in respect of life cover if, in fact, the medical advice was that he met the criteria in the policy for the payment of life cover prior to death.

[13] Mr Catherwood says he had already been told by Mr Coulter that if he did not have treatment then he would die within 12 months, but if he had both surgery and chemotherapy, his chances of survival would improve, although at that point it was still considered he had less than a 50 per cent chance of being alive in five years.

[14] At Mr Catherwood's request, his broker obtained the claim form for early payment of life cover from Asteron. Asteron also advised Mr Manuera that to consider an early payment of life cover under the policy, it required "supporting medical information in the form of copies of all reports, test results, specialist referrals and any other relevant information [as well as] the latest specialist letter … with information regarding prognosis". The claim form itself sought a range of information, including contact details for the claimant's doctor and details of all treatment being received for the condition. It also required the insured to provide an authority to release to Asteron all information with respect to "any sickness or injury, medical history, consultations, prescriptions, or treatment and copies of all hospital or medical records".

[15] Mr Manuera forwarded the completed claim form through to Asteron on 20 February 2019. Ms Christina Brown, a claims specialist with Asteron, acknowledged receipt of the claim form but queried whether Mr Catherwood was going to provide the supporting medical notes including the latest specialist review outlining his prognosis.

[16] When this email was forwarded to Mr Catherwood, his broker suggested that Mr Catherwood direct Ms Brown to Mr Catherwood's oncologist. On 26 February 2019, Mr Catherwood provided Ms Brown with contact details for Dr Edwards.

[17] On 28 February 2019, Ms Brown emailed Dr Edwards explaining that Asteron was currently assessing Mr Catherwood's claim and asked him to provide the following information:

(a) What is the prognosis?

(b) In his opinion, would the life expectancy be 12 months or less?

(c) Are there any factors specifically related to this case that give a life expectancy poorer than the medial survival? If so, please outline these.

(d) If there is any further treatment available to Mr Catherwood that could have a positive effect on his prognosis or life expectancy?

(e) If so, what is Mr Catherwood's treatment plan?

[18] In due course, Dr Edwards provided Asteron with his advice on Mr Catherwood's prognosis. That advice was succinct. He said:

> The aim of the treatment is cure. Obviously it doesn't always work out that way but I think the chances of [Mr Catherwood] dying in the next 12 months is low ie less than 10%. He is currently having neo-adjuvant chemotherapy prior to planned curative surgery. We plan to reassess his disease with CT scan within a month. This may change the prognosis. From there he would go to surgery. The results of which will determine the prognosis.

[19] Dr Edwards' response was provided to Mr Catherwood, and, on 19 March 2019, Mr Catherwood emailed Ms Brown directly. It was at this point the diverging views emerged regarding how the definition of "terminal illness" should be read. In his email Mr Catherwood said:

> It appears that there is some misunderstanding.
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> My surgeon, Mr Coulter, has advised me that if I don't have surgery the cancer will kill me within 12 months. If I have treatment, surgery and chemo, those odds will change considerably.
>
> Mr Edwards response to you sets out the prognosis if I have treatment. The definition of "Terminal Illness" in the policy contemplates my situation without any treatment, and that prognosis is as indicated by Mr Coulter above.
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> Mr Edwards has also confirmed to me verbally that without treatment I'll be dead inside 12 months.

[20] This view was provided to Dr Edwards, who queried whether Asteron wanted to know the prognosis without treatment or with treatment, but in any event said:

> [Mr Catherwood] is correct in saying that if he didn't have treatment his survival would be limited. In that case I would expect the majority of patients in his situation would die within 12 months. On the other hand his disease is potentially curable if we treat it (which we are). I expect the chance of cure [is] approximately 50%.

The decision to decline the claim

[21] There followed further email communications in which Ms Brown indicated that Mr Catherwood did not meet the terminal illness criteria of the

policy. This culminated in an email from Asteron on 29 April 2019, declining the claim. In it, Ms Brown said:

> The terminal illness definition under the policy requires your life expectancy not to be greater than 12 months. This timeframe takes into account any treatment that you may be undergoing for your illness. Based on the current information we have received from Dr Edwards and on the basis you are undergoing chemotherapy, it is expected that your life expectancy is more than 12 months.
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> At present your condition does not meet the definition of "terminal illness" and must decline your claim for early payment of Life Cover. However, should your situation change and chemotherapy is stopped due to low tolerance, please get in touch with us and provide us with your latest Medical Oncology report so we can re-assess your claim.

[22] That decision was followed up by a formal letter sent on 10 May 2019. The letter advised that Asteron's chief medical officer had reviewed the claim and he "confirms that there is no evidence that you meet the Terminal Illness criteria and is hopeful that you are on your way to being cured of your illness".

[23] Mr Catherwood promptly sought a review of the claim, again asserting that the words "regardless of any treatment" meant that Asteron should have no regard to any treatment he may be having. Asteron's claims review committee reconsidered Mr Catherwood's claim and, on 12 June 2019, confirmed the decision to decline the claim.

[24] Mr Catherwood then requested that the matter be referred to Asteron's customer relationship management team in accordance with Asteron's dispute resolution procedure. That occurred, and on 3 July 2019, Asteron wrote to Mr Catherwood advising that the customer relationship management team confirmed the earlier decision on the claim, which was that he did not meet the definition of terminal illness.

[25] Mr Catherwood completed treatment. It has been successful. Mr Catherwood understands that there is currently no sign of cancer in his body and Dr Edwards, the oncologist, confirms this.

[26] Despite that, Mr Catherwood maintains that he met the policy definition of terminally ill when he made his claim in February [2019] and that he was, and remains, entitled to payment of the sum insured under his life policy. ...

The High Court decision

[7] The Judge noted that the issue before her was "very confined".[3] After recording the factual background (and referring to a procedural issue regarding the admissibility of a brief of evidence tendered by Asteron — see below at [12]), she

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3 Judgment under appeal, above n 1, at [4].

summarised the respective cases for the parties. She then turned to analyse the competing arguments.

[8] The Judge started by observing that the idea that someone can be described as terminally ill when there is an available cure, is contradictory.[4] She considered that the interpretation advanced by Mr Catherwood was not the most logical way to read the definition in the policy and that there would need to be strong indications in the policy and in any other background circumstances, to suggest that an insurance company intended to adopt a definition of terminally ill which included individuals who are able to be cured by accepting available treatment. She did not consider that there were any such indications in this case. [5]

[9] The Judge looked at the policy and at various factors which she considered supported Asteron's interpretation of the definition of the words terminally ill. She noted the following:

(a) The terminally ill benefit was "part and parcel" of the life cover offered, which was only intended to be payable on death.[6] The benefit accelerated payment of the life cover and that it was more logical that payment would be made only in circumstances when death is expected to occur within 12 months rather than also in circumstances when death is possible but could be delayed or avoided by treatment.[7]

(b) Asteron's interpretation was supported by the fact that the policy terminates on payment of the death or terminal illness benefit. This position can be contrasted with the ability to choose the trauma reinstatement option under the policy, where, despite receiving an insurance payment under that option, new cover can be obtained under one of the trauma options.[8] The trauma reinstatement option recognises that people can suffer more than one trauma event as defined in their

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4 At [58].
5 At [58].
6 At [59].
7 At [59].
8 Clause 6.3.4 provides that the policy owner can request "new cover" in certain defined circumstances including that the policy owner is still alive.

lifetimes and so makes provision for reinstatement of that cover option on specified terms. No such provision applies to the terminally ill benefit and the logical reason for this is that the terminal illness benefit simply accelerates payment of the death benefit; therefore there is no need to make provision for reinstatement.[9]

(c) The policy offered optional benefits which an insured could choose to take, at additional cost, including a trauma option. The trauma (recovery) benefit[10] was payable upon diagnosis of a number of listed illnesses or on the occurrence of listed surgical events. It was complementary to the death benefit. The Judge observed that while the same event could trigger both the trauma benefit and the death benefit, the terminal illness benefit had an additional requirement — a life expectancy of less than 12 months. There would be a considerable, and in her view illogical, overlap between the terminal illness benefit and the trauma option if Mr Catherwood's interpretation was accepted.[11]

[10] The Judge also referred to two Australian cases, both of which she considered illustrated "the reasonableness of taking into account the likely outcome of available treatment when deciding whether someone is terminally ill."[12]

[11] The Judge considered that it was clear that the definition of the words "terminal illness" and "terminally ill", construed objectively, was intended to take account of available medical treatment and that this was the only reasonable interpretation available. She considered that it was highly strained and artificial to suggest that an insured was entitled to a terminal illness benefit when treatment was available which meant the insured was not likely to die within 12 months.[13] Accordingly the Judge

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9 At [61].

10 The Judge used the words trauma recovery benefit. We could not find provision for such a payment by Asteron. Rather the policy refers to a trauma benefit.

11 At [60].

12 At [63]–[69], citing *Tower Australia Ltd v Farkas* [2005] NSWCA 363, (2005) 64 NSWLR 253 at [34]; and *Galaxy Homes Pty Ltd v National Mutual Life of Australasia Ltd* [2013] SASCFC 34, (2013) 116 SASR 41.

13 Judgment under appeal, above n 1, at [69].

ruled that Mr Catherwood's claim must fail, and that Asteron had not breached the terms of the contract of insurance.[14]

[12] In addition, the Judge held that the challenged evidence — a brief of evidence from Mr Russell Hutchinson tendered by Asteron — was admissible. She recorded that she had reached her conclusion as to the interpretation of the policy without express reference to, or reliance on, Mr Hutchinson's brief.[15] She nevertheless noted as follows:

(a) Mr Hutchinson gave evidence about a number of life insurance policies with accelerated death benefit clauses in the event of terminal illness. He said that it was common for life insurance policies to have a terminal illness benefit, using a definition of terminal illness that focused on prognosis taking into account medical treatment.

(b) The evidence supported Asteron's assertion that, if the terminal illness benefit was intended to be paid notwithstanding an insured's prognosis with treatment, this would have been a notable difference which would have distinguished Asteron's SmartLife policy from other policies.

(c) There was no evidence to suggest that Asteron, Mr Catherwood, or his broker, understood the terminal illness benefit to be payable to Mr Catherwood notwithstanding a positive prognosis with appropriate treatment.

She ruled that because the evidence supported the assertion that there was a common approach to terminal illness benefits, which was not displaced in Mr Catherwood's case, it was therefore admissible. She considered that Mr Hutchinson had not offered an opinion on how a life insurance company should conduct itself in considering a claim by an insured, or on the circumstances surrounding Mr Catherwood's contract of life insurance. She did not consider that Mr Hutchinson had strayed into areas beyond his expertise.[16]

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14 At [71].
15 At [72].
16 At [73]–[74].

Submissions on appeal

[13] Mr Holderness for Mr Catherwood argued that Judge erred when she accepted that the words "regardless of" in the definition of the words "terminal illness" and 'terminally ill" could mean either disregarding or despite. He said that, viewed in context, the words meant disregarding and that this is their ordinary meaning. He further submitted that the context was critical and that there was nothing in the terminally ill definition which suggested that the words were intended to mean without being affected/prevented by, or despite. He submitted that the Judge should have concluded that the ordinary meaning of the words "regardless of" in the definition of terminally ill required that the life expectancy assessment had to be carried out disregarding or ignoring the effect of any available treatment. He put it to us that such an approach was not necessarily contrary to common sense, contradictory or unreasonable.

[14] Mr Holderness also argued that the Judge erred in taking into account the trauma benefit option as an aid to interpretation and in finding that Asteron's interpretation was supported by the fact that the policy ends on payment of the death or terminal illness benefit. He criticised the Judge's reliance on the Australian authorities, pointing to differences in the contractual context. He referred to other provisions in the policy, including cl 1.1, and to the use of the words "regardless of" in other provisions, particularly cls 3.2 and 7.7. He argued that there was nothing in the policy to displace the ordinary and natural meaning of the words "regardless of" and that the interpretation contended for by Mr Catherwood was the correct interpretation. He also referred to the contra proferentem rule and argued that, as a tool of last resort, it should, if necessary, be applied in Mr Catherwood's favour.

[15] Ms Meechan KC, for Asteron, emphasised that the approach to be taken to the interpretation of an insurance policy is no different to that taken in interpreting any other contract. She submitted that the Judge applied commonly accepted principles in an entirely conventional way in concluding that an insured who was unlikely to die in the next 12 months did not meet the definition of being terminally ill. She argued that the Judge did no more than state the obvious when she observed that the words "regardless of" in the definition of terminally ill can mean two things. She argued that

there could not be any serious challenge to this starting point, and that the whole point of the subsequent analysis undertaken by the Judge was to determine which of the two available interpretations was correct.

[16] Similarly, Ms Meechan argued that the Judge's observations as to common sense were non-controversial and raised the rhetorical question — why would an insurer commit to paying the death benefit to an insured suffering from a condition that was treatable and who was unlikely to die from the condition? She argued that the Judge was entitled to take into account the trauma benefit provisions in the policy and that it was open to the Judge to look at the insurance contract as a whole.

[17] She referred to the contra proferentem rule, arguing that it should not be applied merely because the language of the provision was ambiguous; rather it fell to be used only if competing constructions were strongly supported by augmentation and if dictionaries and logic alone could not readily carry the day for either construction. She submitted that the Judge's analysis of the terminally ill provision was conventional, that it yielded a reasonable interpretation of the policy and that there was no need to engage the rule.

Analysis

The SmartLife policy

[18] Mr Catherwood's SmartLife policy with Asteron was a life insurance policy with a number of related options. Primarily it provided for the payment by Asteron of the sum insured to Mr Catherwood if he died while covered under the policy. It also provided as follows:

> 5.2 Terminal Illness Benefit
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> If you become *terminally ill* while covered under this policy, we will pay the *sum insured* for the SmartLife cover.

The effect of the terminal illness benefit was to accelerate payment of the sum insured when an insured was terminally ill, presumably so that the insured could ease his or her final months and better arrange his or her affairs.

[19] Clause 9.4 set out Asteron's requirements where a claim was made for a terminal illness payment. Mr Catherwood was required to provide a number of things, including proof of the diagnosis, recommendation or prognosis giving rise to the claim by a registered doctor who was an appropriate specialist medical practitioner, and copies of all investigations performed which could include, but was not limited to, clinical, radiological, histological and laboratory evidence. The clause provided that payment was to be made once Asteron had confirmed that Mr Catherwood was eligible for the same.

[20] Clause 10 defined a number of words or expressions found in the policy. Relevantly it provided as follows:

> ***terminal illness*** and ***terminally ill*** means
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> • in the opinion of a *specialist medical practitioner*; and
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> • if we require, in the opinion of one of our approved *specialist medical practitioners*; and
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> • in our assessment, having considered medical or other evidence we may require,
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> your life expectancy is, due to *sickness* and regardless of any available treatment, not greater than 12 months.

The relevant principles of construction

[21] A policy of insurance is a contract between the insurer and the insured. As such, it is subject to the rules of construction which apply to any contract (although there are also certain rules which have evolved to deal with the particular problems insurance law can pose).[17]

[22] Traditionally, the courts in New Zealand applied the "plain meaning" rule — if the words of the contract were plain and unambiguous as they stood, they were treated as speaking for themselves and evidence of context was not admitted to show

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[17] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63]; Robert Merkin KC and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, 2017) at [2.1.1]; David Kelly and Michael Ball (eds) *Kelly and Ball Principles of Insurance Law* (2nd ed, Butterworths, Chatswood (NSW), 2001) at [5.0280] et seq; and John Birds and Katie Richards (eds) *Birds' Modern Insurance Law* (12th ed, Sweet & Maxwell, Croydon, 2022) at [13-09].

that the parties intended something different.[18] More recently, the courts have become more willing to receive evidence of surrounding circumstances for the purpose of interpreting written contracts.[19] Such evidence can sometimes have the effect that, what prima facie seems the most obvious meaning of the words used is displaced by a secondary, less obvious meaning.[20] The courts have held that evidence of the context in which a contract was entered into can be admitted, because it is always possible that what appears to be the plain meaning of the document may, on further examination, turn out not to be.[21]

[23] The more modern approach was encapsulated in the seminal judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[22] He said as follows:[23]

> … I do not think that the fundamental change which has overtaken this branch of the law … is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
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> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

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18 See generally Matthew Barber "Contents of the Contract" in Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) 173 at [6.3.1].

19 At [6.3.4]. See, for example, *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

20 At [6.3.2]; and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* above n 17, at [60].

21 At [6.3.3].

22 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; see also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267 at [14].

23 At [912]–[913] (citations omitted).

> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax …
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. …

[24] While there has been some criticism of Lord Hoffmann's approach,[24] his statement of the law has been adopted in New Zealand, initially in this Court in *Boat Park Ltd v Hutchinson*.[25] It has been followed in numerous contractual interpretation cases since. In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* (a case concerning an insurance contract), the Supreme Court declined to reconsider the principles of contractual interpretation and reiterated that Lord Hoffmann's approach represents the position in this country.[26] This was more recently confirmed, also by the Supreme Court, in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[27]

[25] It follows that, in interpreting a contractual provision, the courts will endeavour to identify what the parties meant through the eyes of a reasonable reader. That

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24 Jonathan Sumption "A Question of Taste: The Supreme Court and the Interpretation of Contracts" in *Law in a Time of Crisis* (Profile Books Ltd, London, 2021) 142. See also *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [64].

25 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 81–82.

26 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* above n 17, at [60].

27 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43].

meaning is most likely to be gleaned from the language used,[28] but the courts will also look at the contract as a whole and in context, because the words used by the parties are set in that context. The context of the contract will usually operate as a cross-check, but the plain meaning of a word or term is provisional, and is always susceptible to being altered by context.[29] The courts are also prepared to look at the factual matrix, even if the words of the contract seem clear at first sight.[30] Pre-contractual negotiations, if they shed an objective light on meaning, can be relevant and admissible, but not if they are simply evidence of subjective intention.[31] Evidence as to a party's subjective intent is not admissible if it was not communicated before the contract was formed. However, evidence of a common mutual understanding will be admissible.[32]

The interpretation of Mr Catherwood's SmartLife policy

[26] As already noted, the dispute between the parties turns on the words "regardless of" in the phrase "and regardless of any available treatment" found in the definition of the words "terminal illness" and "terminally ill".

[27] The SmartLife policy is not well worded. The definition of the words "terminal illness" and "terminally ill" is ambiguous because the words "regardless of" can bear two different meanings.

[28] It is noted in most major dictionaries that the word "regardless" is normally followed by the word "of". The meaning of the words "regardless" and/or "regardless of" are given as follows:

(a) In the *Shorter Oxford English Dictionary on Historical Principles*, the meaning of the word regardless, is said to be, "heedless, indifferent, careless; without consideration *of* … without regard to or consideration *of* something; despite the consequences, nonetheless".[33]

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28 *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593 at [17].
29 *Vector Gas,* above n 24, at [24] per Tipping J.
30 At [4] per Blanchard J, at [22] per Tipping J, at [64] per McGrath J.
31 At [20] per Tipping J.
32 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 27, at [75]–[76].
33 John Kendall *Shorter Oxford Dictionary on Historical Principles* (6th ed, Oxford University Press, United Kingdom) at 2511.

(b) In the *Concise Oxford English Dictionary*, "regardless of", is said to mean "without regard for".[34]

(c) In *Chambers 21st Century Dictionary*, the meaning of the word "regardless" is said to be as follows, "1. not thinking or caring about problems, dangers, etc. 2. nevertheless; in spite of everything…" and with the word "of", "taking no notice of [something]".[35]

(d) In *The New Zealand Oxford Dictionary*, it is suggested that the word "regardless" followed by the word "of" means "without regard or consideration for".[36]

[29] While a number of the dictionary definitions favour the interpretation contended for by Mr Catherwood, namely that the words "regardless of" mean disregarding or ignoring, it cannot be said that the words "regardless of" cannot mean "despite" or "in spite of". As Mr Holderness properly acknowledged, to an extent the words "regardless of" and "despite" or "in spite of" can be used interchangeably. While he sought to qualify his concession by asserting that it was not because they carry the same ordinary meaning, we do not accept that argument. It is in our view clear that the words "regardless of" and "despite" can, in many contexts, be used interchangeably. Consequently, we do not consider that it can be said the Judge erred when she observed that the interpretation advanced for Mr Catherwood was not the only interpretation available.[37] The Judge's view that the words "regardless of" can also mean "despite the consequences of", and that as a result there were two available interpretations which could be given to the definition of the words terminal illness in the SmartLife policy, was in our view, correct.[38] Accordingly, we reject the submission advanced for Mr Catherwood that the words "regardless of" used in the terminally ill definition have the ordinary and natural meaning of "disregarding". Rather, we agree with Ms Meechan that the words "regardless of" are capable of two meanings,

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34 *Concise Oxford English Dictionary* (11th ed, Oxford University Press, United Kingdom) at 1210.
35 Mairi Robinson and George Davidson (eds) *Chambers 21st Century Dictionary Chambers* (Chambers Harrap Publishers Ltd, Edinburgh, 1999) at 1173.
36 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 945.
37 Judgment under appeal, above n 1, at [57].
38 At [57].

"disregarding" and "despite", and that it is necessary to examine the context in which the words are used to ascertain their meaning in the definition of terminally ill.

[30] In this regard we note the following:

(a) As we have already noted, the SmartLife policy was primarily a life insurance policy. Any payment by Asteron under the terminally ill provision was, in effect, an early payment of the sum insured — the death benefit.[39] We agree with the Judge that the idea that an insured can be described as terminally ill and claim an accelerated death benefit, when there is an available cure and the insured is likely to survive, is contradictory.[40] An interpretation which permitted that result could result in the payment of the death benefit to someone who is alive, in good health, and with no adverse health conditions likely to result in his or her death. It would ignore the words "terminal" and "terminally". An insured could be paid out the death benefit, take out another life insurance policy, ultimately die and be paid out a death benefit twice in respect of different events, only one of them being death. To us, this makes little sense, and it would be an unlikely result.

(b) There are a number of optional benefits which an insured could elect to take out under the policy.[41] Payment of the amount insured for many of these options is triggered by diagnoses of certain health conditions. There is no other precondition for payment. It is only the sum insured (the death benefit) set out in section 5 of the policy which requires, as a precondition of payment, either death or a prognosis of death within no more than 12 months. The policy distinguishes between the core life insurance provisions, which are dependent on death or imminent

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39 That a payment, in the event of terminal illness, simply accelerated the payment of the insured sum clear from the policy. The insurer's obligation to pay the sum insured was subject to any payments that the insurer had already made for terminal illness (cl 5.1). The policy ceased on full payment of the sum insured, or when the sum insured reduced to nil and the insured died (cl 4).

40 Judgment under appeal, above n 1, at [58].

41 The policy included optional benefits, such as the accidental death option, the trauma option, the total and permanent disablement option, the mortgage repayment option, the cancer cover option, and the needlestick option.

death, and the add on options, which are dependent on health-related conditions falling short of death.

(c) The insurer's liability to pay out under some of the optional provisions, for example the trauma option, the total and permanent disability option, the cancer cover option and the needlestick option) ceases on, inter alia, payment being made for terminal illness. If payment in respect of an optional benefit is linked to the imminence of death, this is readily understandable. There is, however, little or no logic in the cessation of the payment provisions for optional cover if Mr Catherwood's interpretation is preferred.

(d) The optional cover available under the policy responds to specific health-related circumstances. There would be little or no need for the optional cover provisions if the terminal illness benefit did not require consideration of the impact of medical treatment on the imminence of death.

[31] Mr Holderness pointed to cl 1.1 in the policy. That clause dealt with how an insured should understand the policy document. Inter alia, it noted that words or expressions used that had a particular meaning were shown in italic type and that they were explained in either the section in which they appeared, in section 10, or in the schedule to the policy. Although Mr Holderness submitted to the contrary, we cannot see that this clause favours the interpretation contended for on behalf of Mr Catherwood. It appears to us that the clause is neutral.

[32] Similarly, the fact that the words "regardless of" are used in two other clauses in the policy does not affect the position. Clause 3.2 records that Asteron will continue to renew the policy each year, "regardless of" the number of claims made, or any changes to the insured's health, occupation, or pastimes. Clause 7.7 deals with the amounts payable under a partially disabled benefit option; it provides that arrangements entered into with the purpose or effect of altering other income while disabled are void for the purposes of the policy and that where the arrangement has two or more purposes and effects, one of which is to alter other income while disabled,

then "regardless of" whether the other purpose(s) or effect(s) relates to ordinary business or family dealings, the arrangement is to be void for the purposes of the policy. It can be assumed that the same words are used consistently throughout the policy. It seems to us that the meaning of both clauses is clear and that the words "regardless of" mean, in context, "despite" or "in spite of". This argument does not assist Mr Catherwood.

[33] We also consider that the Judge did not err when she took into account the Australian cases. She acknowledged that neither of the cases was "on all fours" with Mr Catherwood's circumstances.[42] Rather she considered that they illustrate the reasonableness of taking into account the likely outcome of available treatment when deciding whether someone is terminally ill. We agree.

[34] The first case was *Tower Australia Ltd v Farkas*.[43] As Dunningham J noted, in that case the policy provided both life cover and a critical illness benefit. The insured was diagnosed with cancer. He underwent extensive chemotherapy and stem cell replacement and as a result, the disease went into remission. He claimed that he was entitled to both benefits. The policy provided that the critical illness benefit was payable if the insured was suffering from "an illness or condition which is highly likely to result in death within 12 months".[44] The medical experts agreed that, if Mr Farkas had not undertaken any treatment, he would have died within 12 months of diagnosis. He argued that on a proper construction of the policy, all he had to establish was a prognosis of death within 12 months as being highly likely, without taking into account treatment that was then available. Mason P, in the New South Wales Court of Appeal, rejected the proposition that a proper construction of the definition of the policy provision required the insurer to ignore the likely outcome of treatment. He noted as follows:[45]

> … The history of medicine is replete with instances of life-threatening diseases that have ceased to be such due to the progress of medical science. Illnesses or conditions like tetanus and snake bite[s] are no longer generally regarded as fatal, because of the ready availability of relief save in exceptional cases. To refuse to take account of available treatment in any and every case

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42 Judgment under appeal, above n 1, at [63].
43 *Tower Australia Ltd v Farkas*, above n 12, at [34].
44 *Tower Australia Ltd v Farkas*, above n 12, at [7].
45 At [34].

> … would be to convert the Policy into a lottery ticket without textual justification and contrary to a fair, commercial and reasonable reading of it. A person with an accidentally cut finger who (without reason) declined all offers of assistance, choosing to bleed to death for want of staunching the wound, would be regarded as the cause of his or her own demise. It would in the circumstances be absurd to regard that person as having suffered an illness or condition highly likely to result in death within 12 months, or any time. …

As Dunningham J noted, while the policy in issue in *Farkas* did not use the words "regardless of any treatment", the decision supports the reasonableness of adopting an interpretation which takes into account available medical treatment where this is an available reading of the definition in issue.[46]

[35] The second case was *Galaxy Homes Pty Ltd v National Mutual Life of Australia Ltd*.[47] In that case, the full Court of the Supreme Court of South Australia considered an insured's entitlement to a terminal illness benefit following the insured's diagnosis with a recurring metastatic melanoma. The policy defined terminal illness as follows:[48]

> Terminal illness means any illness which, … will result in the death of the person insured within 12 months, regardless of any treatment that might be undertaken. …

Again, the matter at issue in *Galaxy Homes* did not turn on the interpretation of the words "regardless of any treatment". Rather it turned on whether the insured was terminally ill, as defined. However, as Dunningham J noted,[49] the Court in *Galaxy Homes* took into account the effect of available medical treatment in deciding whether the threshold of being terminally ill was reached. It noted as follows:

> [50] … It is not simply a question of whether a person will die within 12 months, the insured must prove that this outcome will occur "regardless of any treatment that might be undertaken". That whole sentence and the connection between "will" and "regardless of any treatment" is important and supportive of the interpretation of the judge. It shows in our view that even a theoretical recovery from the most expensive and rare treatment is to be taken into account.
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> [51] It is our view that the construction is also based on the commercial setting of the insurance contract. As his Honour says … it is not a claim for the "life benefit" but for an acceleration of a payment for that benefit. … [T]he

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46 Judgment under appeal, above n 1, at [66].
47 *Galaxy Homes Pty Ltd v National Mutual Life of Australasia Ltd*, above n 12.
48 At [3].
49 Judgment under appeal, above n 1, at [68].

> insurer has used the word "will" to confine the insured's entitlement. It is intended to be a benefit available only on a restricted basis.

[36] We agree with the Judge that these decisions were broadly helpful and that they supported the conclusion she ultimately reached that the definition of terminal illness and terminally ill, construed objectively, was intended to take account of available medical treatment and that this was the only reasonable interpretation available.[50]

[37] For completeness, we briefly turn to the contra proferentem rule. This provides that "where a policy is ambiguous, it must be construed against the party who has drafted it".[51] Mr Holderness contended that as a tool of last resort, contra proferentem should be used to find an interpretation in Mr Catherwood's favour. Ms Meechan submitted there is no need to engage with this rule as the Judge's analysis yielded a reasonable interpretation of the definition of terminal illness. We accept that the contra proferentem rule for resolving ambiguity can be of use in the interpretation of insurance contracts.[52] However, the rule does not assist us in this case. There is no ambiguity as to the proper interpretation of the definition.

[38] For all of the above reasons, we uphold the judgment in relation to the substantive issue — the interpretation of the policy — and dismiss the appeal in relation to that issue.

The disputed evidence

[39] As we have noted above, Mr Catherwood argued that Mr Hutchinson's evidence was inadmissible before the Judge. Mr Hutchinson's evidence focused on life insurance policies generally, highlighting that it is common for such policies to have a terminal illness benefit that takes into account any available medical treatment. At trial, it was argued that the evidence was inadmissible because it could not substantially help the Court in interpreting Mr Catherwood's policy and because

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50 At [69].

51 Robert Merkin, Laura Hodgson and Peter Tyldesley (eds) *Colinvaux's Law of Insurance* (13th ed, Thomson Reuters, 2022) at [3-027].

52 *Firm PI 1 Ltd,* above n 17, at [66], citing *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23 at [69]. See also Robert Merkin, Laura Hodgson and Peter Tyldesley, above n 51, at [3-027].

Mr Hutchinson had no expertise on how a life insurance company should conduct itself when considering a claim.

[40] As noted above at [12], the Judge ruled that Mr Hutchinson's evidence was admissible. She expressly recorded that she had reached her conclusion on the appropriate interpretation of the policy without taking into account Mr Hutchinson's evidence.[53] On appeal, Mr Holderness nevertheless submitted that the Judge erred in holding the evidence admissible.

[41] It does not seem to us that anything turns on this aspect of the appeal, given the Judge's express reference to the fact that she did not take Mr Hutchinson's evidence into account in reaching her substantive conclusion. Nevertheless, we comment on the issue briefly.

[42] The appropriate approach to the admissibility of extrinsic evidence when interpreting a contract was outlined in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[54] In that case, the Supreme Court rejected the exclusionary rule against oral evidence of a party's intentions and the course of negotiations, and held that prior negotiations can be admissible background where relevant to the search for objective shared meaning.[55] The Court held that the admissibility of extrinsic evidence "is to be regarded as an evidential issue, to be determined in accordance with the law of evidence".[56]

[43] It follows that the Evidence Act 2006 applies to Mr Hutchinson's evidence. It must be relevant under s 7, which, in the context of contract interpretation, means that the:[57]

> … evidence is prima facie admissible if it has a tendency to prove or disprove anything of consequence to determining the meaning the contractual document would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation in which they were at the time of the contract. …

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53 Judgment under appeal, above n 1, at [72].
54 *Bathurst Resources Ltd*, above n 27.
55 *Bathurst Resources Ltd,* above n 27, at [44], [48], [70] and [76]; see also *Future Sustainable Development Ltd v Liu* [2022] NZCA 249 at [34].
56 *Bathurst Resources Ltd*, above n 27, at [57].
57 At [62].

[44] Mr Hutchinson's evidence does not go to either Mr Catherwood's or Asteron's subjective intent. Rather it is evidence of general practice within the insurance industry. The evidence speaks to the general context within which Mr Catherwood's contract was entered into, and to insurance contracts dealing with terminal illness more generally. The evidence was relevant to Asteron's argument that its policy was not out of step with other policies and that had it been, this would have been a point of distinction between it and other providers of life insurance. In our view, information about life insurance policies generally was relevant and there was no reason why it should have been excluded under s 8 of the Evidence Act. It was likely that the Judge, as fact finder, might obtain substantial help from it. It was properly admissible under s 25 of the Act. Accordingly, we do not consider that the Judge erred in accepting that Mr Hutchinson's evidence was admissible.

Result

[45] For the reasons we have set out, the appeal is dismissed.

[46] Counsel were agreed that costs should be fixed for a standard appeal on a band A basis. Mr Holderness also accepted that in the event the appeal was dismissed, we should certify for second counsel.

[47] The appellant must pay costs to the respondent for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

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