Highly stressful circumstances:

Court of Appeal assesses contract in earthquake insurance mess

WRITTEN BY ALEXANDER LYALL

The Court of Appeal (the Court) has issued a decision in a long-running dispute between a Christchurch homeowner and her insurance and legal advocates. *Pfisterer v Claims Resolution Service Limited & Anor*[1] contains a close look at several factors related to the status of parties involved in the contract. The decision affirms principles related to unconscionable bargains, breaches of contract, misleading and deceptive conduct and fiduciary duties.

Although stemming from the devastation of the Christchurch earthquakes, the decision contains points of law that will be relevant to any community impacted by natural disasters.

Background

In 2009 Mrs Pfisterer bought a home in the Christchurch suburb Opawa for $351,000. Mrs Pfisterer took out a home insurance policy with AMI Insurance, the liabilities of which were subsequently acquired by Southern Response. A year and a half later, Mrs Pfisterer's home was significantly damaged in the Canterbury earthquakes of 2010 and 2011.

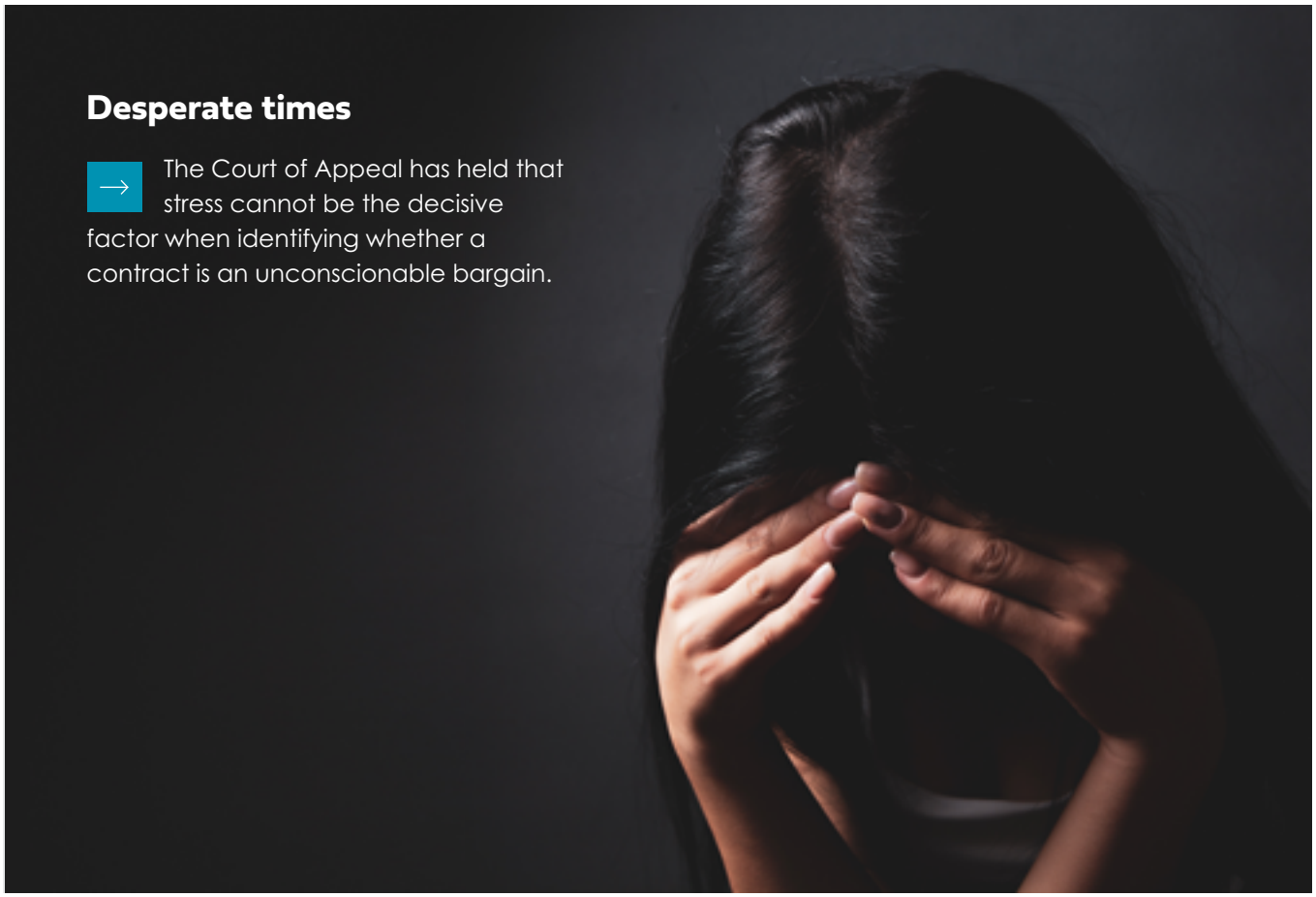
In 2013 Mrs Pfisterer was able to settle with the Earthquake Commission (**EQC**), but not with Southern Response. This was a matter that the services of Claims Resolution Services Ltd (**CRS**) specialised in. Founded by a former loss adjuster for EQC, CRS offered homeowners assistance with their insurance providers. The fee structure was commission-based and advertised as "no win, no pay". This operated in a way where most costs would not be paid by the client until the case was settled.

After two years of negotiations, Southern Response offered Mrs Pfisterer a settlement option. Mrs Pfisterer accepted and CRS attempted to obtain their commission fee.

High Court holds no special disadvantage

Mrs Pfisterer refused to pay CRS's fee, causing CRS to file proceedings against Mrs Pfisterer in the High Court. Mrs Pfisterer issued a counterclaim arguing that the contract arose from an unconscionable bargain.

1 *Pfisterer v Claims Resolution Service Limited & Anor* [2023] NZCA 511.



Desperate times

→ The Court of Appeal has held that stress cannot be the decisive factor when identifying whether a contract is an unconscionable bargain.

The High Court disagreed, finding that although highly stressed from the damage to her house, Mrs Pfisterer could not be said to be in a state for which the unconscionable bargain doctrine would apply.

Further, the High Court found that CRS had not breached its contractual duties. Where independence was stated, this was in reference to EQC and insurers. While CRS's relationship with the law firm it referred its clients to was not wholly independent, it was independent in the sense that firm could act independently for Mrs Pfisterer.[2]

Court of Appeal takes view on the cumulative weight of Mrs Pfisterer's circumstances

Mrs Pfisterer appealed several points in relation to the agreement. Principally, that she was at a disadvantage at the time of the agreement due to high levels of distress, an inability to find a lawyer and a lack of understanding of the transaction.

The Court took a wide view of the relationship between Mrs Pfisterer and CRS. To identify what was relevant, Justice Katz confirmed a list of non-exhaustive principles relating to the doctrine of an unconscionable bargain.[3] These include:

- a court is to *protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation*;
- this disability or disadvantage *does not arise simply from an inequality of bargaining power*; and

2 *Claims Resolution Service Ltd v Pfisterer* [2021] NZHC 1088 at [102].

3 Listed in *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205. See [22] of *Pfisterer*, above n 1, for the expanded but non-exhaustive list.

- the disability or disadvantage of the weaker party must be known to the stronger party. The stronger party must take advantage of that knowledge.

Like the High Court, Justice Katz found Mrs Pfisterer's circumstances to be distinct from those envisioned by the test in *Gustav & Co*. It was well supported by evidence that Mrs Pfisterer was an *intelligent, capable, and assertive* person. Much of this evidence revolved around Mrs Pfisterer's conduct in her meetings with CRS. One employee recalled Mrs Pfisterer's high engagement with the process and that Mrs Pfisterer showed an understanding of the points of contention with Southern Response.

"No win, no pay" – a half-truth?

Mrs Pfisterer argued that CRS's statement promoting the "no win, no pay" arrangement was a half-truth and therefore misleading. CRS's statement had given Mrs Pfisterer the impression that CRS was taking on the financial risk of acting as a litigation funder. As Mrs Pfisterer saw it, that financial risk was being diluted on the basis that CRS's payments were not being provided to the relevant law firm in a timely manner. Conduct may be misleading or deceptive by an omission to provide information even if no obligation to provide that information exists.[4] Under this principle, Mrs Pfisterer argued that the disparity amounted to a statement likely to mislead or deceive.

Justice Katz agreed with the High Court's finding. The "no win, no pay" statement was not supposed to be an implied representation of CRS's funding arrangements. Further, it was certainly not a representation of its payment schedule with third parties. Rather, "no win, no pay" meant exactly what it said – unless and until Mrs Pfisterer's claim was settled, payment to CRS was not required. From the point of view of a client, that was all that mattered.[5]

What kind of commercial relationship existed between Mrs Pfisterer and CRS?

Mrs Pfisterer claimed that CRS had a fiduciary duty to her. The contract had established their relationship as one of agent and principal; and as a stressed individual, this put extra weight on CRS's responsibilities. Justice Katz rejected this argument, going further than the High Court who had believed there was at least a principal/agent relationship. Looking at the terms of the contract, it was clear to Justice Katz that CRS was required to seek instructions from Mrs Pfisterer when engaging with third parties.

The argument that CRS had added responsibilities due to Mrs Pfisterer's stress was rejected for the same reason no unconscionable bargain existed

Conclusion

One of many tragic consequences following a natural disaster is the long and drawn-out battle between homeowners and their insurers. The situation in *Pfisterer* presents just a snapshot of these tensions.

It was not merely that the settlement process was long and complicated, but the delay caused Mrs Pfisterer's home to deteriorate even further. This had a direct impact on her physical and mental health. The Court recognised this stress and acknowledged it as a spectre inherent in the aftermath of natural disasters. The *highly stressful circumstances* of a damaged home will often lead to the need to pursue litigation. However, for the contract to be an unconscionable bargain the relevant circumstances will require additional features.

About the author:

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team, working with BDT. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff and The Press.

4 *Des Forges v Wright* [1996] 2 NZLR 758 (HC).

5 *Pfisterer,* above n 1, at [62].