IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY
I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000784
[2018] NZHC 1255

BETWEEN	M E GABRIEL, C E GABRIEL and LANDLEY TRUSTEES LIMITED being the trustees of THE ME & CE GABRIEL FAMILY TRUST Plaintiffs
AND	EARTHQUAKE COMMISSION First Defendant
AND	VERO INSURANCE NEW ZEALAND LIMITED Second Defendant

Hearing: 24 May 2018

Appearances: S E M Corban and A L Parker for Second Defendant/Applicant
T D Grimwood for Plaintiffs/Respondents

Judgment: 31 May 2018

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on defendant's summary judgment application

Introduction

[1] This is a defendant's application for summary judgment.

[2] The house which the plaintiffs (the Gabriels) now own was insured with the second defendant (Vero) by a previous owner (Patricia Crichton) at the time of the Canterbury Earthquake Sequence.

[3] The Gabriels are suing on the basis that they are entitled to claim as assignees of Ms Crichton's insurance claims.

[4] Vero asserts that it is entitled to summary judgment on the basis that there were no remaining claims available to assign when the Gabriels came to own the property. In Vero's statement of defence, three affirmative defences are pleaded (waiver, policy exclusion and limitation on extent of indemnity value). Vero for its summary judgment application relies only upon the defence of waiver. Ms Corban, for Vero, conceded that Vero will be entitled to summary judgment only if it can establish (beyond argument) that the waiver defence must succeed.

Vero's waiver defence

Factual background

[5] The factual background necessary for an understanding of the waiver defence can be briefly stated:

(a) Ms Crichton had the property insured with Vero.

(b) Ms Crichton submitted claims to the Earthquake Commission (EQC) in relation to damage caused by the 4 September 2010 and 22 February 2011 earthquakes.

(c) Ms Crichton also lodged a claim with Vero for the damage caused by the 22 February 2011 earthquake.

(d) Both EQC and Vero had the earthquake damage assessed and concluded that the damage was below EQC's statutory cap.

(e) In July 2011, Ms Crichton sold the property to Peter and Jeanette Withell (the Withells) and at the same time executed a deed of assignment of claims (expressed to be an assignment of EQC claims).

(f) In 2012, EQC had remedial work undertaken at the property (which the Gabriels assert was defective).

(g) In January 2013, the dealings took place between Ms Crichton and Vero which Vero asserts involved a waiver of any rights she might otherwise have had.

(h) In February 2014, the Gabriels purchased the property from the Withells who executed a deed of assignment expressed to be an assignment of the EQC claim.

(i) In July 2013, the Gabriels, through their agent, informed Vero that their claim was now expected to be over cap.

(j) In subsequent correspondence, Vero asserted that there was no record of Ms Crichton's assignment of claims to the Gabriels.

(k) On 28 August 2017, a deed of assignment of claims lodged with Vero was executed by the executor of Ms Crichton's estate (Ms Crichton having died) and the Gabriels.

(l) On 28 September 2017, the Gabriels commenced this proceeding, asserting rights as assignees of claims lodged with Vero.

The January 2013 correspondence and conversation

[6] Whether or not it was ultimately determined that the damage to the property was below EQC's statutory cap, Vero (under the insurance policy) was going to have a liability for EQC-excluded damage, being the earthquake damage to paths and fences.

[7] Vero took up this issue with Ms Crichton in early-January 2013. The evidence in relation to the events which followed is limited by the fact that Ms Crichton has died and the claims consultant of Vero primarily involved (Anne Wyma) has deposed that she does not have an independent recollection of her correspondence and telephone discussions.

[8] On 3 January 2013, Ms Wyma reviewed Ms Crichton's claim file in order to deal with the EQC-excluded items. She sent a letter to Ms Crichton setting out two options offered by Vero (namely arrangement and payment of the repairs for Ms Crichton or payment of a cash settlement). A copy of the actual letter sent to Ms Crichton has not been located but it is clear that Vero's standard form option letter (under the name of AMP) was sent to Ms Crichton that day.

[9] On 11 January 2013, Ms Crichton telephoned Ms Wyma. Ms Wyma recorded the call in a note as taking place at 8.32 a.m. (all the following times occurring on 11 January 2013). The note reads:

> 11/1/2013 AW – Trish Crichton rang. She informed me that the house sold over a year ago, there was no DOA during the course of the sale. The new owner is a builder and has attended to repairs and she doesn't want anything more to do with the claim. She informed me I can close the claim. I will proceed with claim closure.

(The acronym "DOA" stands for deed of assignment).

[10] At 8.57 a.m., Ms Wyma sent an internal email to the Vero claims team. It reads:

> Hi team,
>
> Please close this claim on your records.
>
> I have talked to the insured and she has advised me that the house was sold over a year ago.
>
> The house sale never was processed with a Deed of Assignment.
>
> The new owner who is a builder has completed all repairs and this insured wants nothing more to do with the claim.
>
> Many thanks,

[11] At the same time, Ms Wyma completed an internal document headed "Domestic claim closure notification form". In that form, in a box provided for "Reason for Claim Closure", Ms Wyma marked the box which reads:

> Withdrawn (insurer or insured) have withdrawn the claim from MWHM e.g. non-MWHM reinstatement.

[12] At 9.01 a.m., Ms Wyma sent an email to Ms Crichton's broker stating:

> Hi Laura,
>
> I have managed to get hold of Trish Crichton regarding her claim on the above property.
>
> She told me the house sold over a year ago. A Deed of Assignment was never processed at the same time the house was sold.
>
> The new owner a builder has completed all repairs as he bought the house cheaply and the insured wants nothing more to do with this claim.
>
> I am closing this claim and you can also update your records to close your files regarding this claim.
>
> Kind regards,

[13] Ms Wyma around the same time prepared and sent to Ms Crichton a letter which reads:

> Dear Trish,
>
> **Re: Your EQC Excluded Claim 3950159,**
>
> Thank you for your phone call regarding the update with your claim on the property at 9 Drayton Drive, Mt Pleasant.
>
> As we discussed the house was sold over a year ago and there wasn't a Deed of Assignment to hand over the claim on the property. For this reason you have advised us we can close this claim.
>
> This claim is now closed.
>
> I have informed your broker that this claim is now closed.
>
> Thank you for your time,
>
> Yours faithfully,
>
> Anne Wyma
> Claims Consultant
>
> (emphasis as in original)

[14] At 9.13 a.m., Ms Wyma typed a file note for Ms Crichton's file which reads:

> 11/1/2013 AW - Claim closure form to MWHM/CHOPS.
> Email to broker informing of claim closure.
> Letter to insured confirming claim closure.
> This claim is now closed.

Competing positions

[15] For Vero, Ms Corban submitted that the Court's formulation of the requirements of waiver, as formulated in *Watson v Healy Lands Ltd,* remains authoritative:[1]

> … whether or not the representation relied upon as a waiver is really a sort of estoppel, I think the representee must show that two elements at least have operated. First he must show that there was an unambiguous representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances… although the intention may be implied by imputation of law in the given circumstances… And secondly, he must show that, relying upon that representation, he has carried out the new arrangement…

[16] Ms Corban submits that in this case all the elements of waiver are established beyond argument.

[17] For the Gabriels, Mr Grimwood submitted that the nature of Ms Crichton's representation to Ms Wyma is open to interpretation, that even Ms Wyma's note of the conversation is at best ambiguous, and that it is arguable that Ms Crichton was not aware of all the material circumstances at the time of the alleged waiver.

Defendant's summary judgment – the principles

[18] The starting point for a defendant's summary judgment application is r 12.2(2) High Court Rules, which requires that the defendant satisfy the Court that none of the causes of action in the statement of claim can succeed.

[19] I summarise the general principles which I adopt in relation to the application:

(a) The onus is on the defendant seeking summary judgment to show that none of the plaintiff's causes of action can succeed. The Court must be left without any real doubt or uncertainty on the matter.

(b) The Court will not hesitate to decide questions of law where appropriate.

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1 *Watson v Healy Lands Ltd* [1965] NZLR 511 (SC) at 514.

(c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

Discussion

[20] Vero has chosen to put its first affirmative defence upon the basis of waiver. For the Gabriels, Mr Grimwood was content to base his submissions in opposition upon the basis that the law as stated in *Watson v Healy Lands Ltd* is applicable to this case and in particular to the defence asserted by Vero.[2]

[21] As I find that Vero has not satisfied the test for summary judgment in relation to the *Watson v Healy Lands Ltd* requirements of an unambiguous representation and reliance, it is unnecessary that I consider other elements of waiver or indeed whether the circumstances pleaded by Vero, if established, properly fall to be considered as a waiver.[3]

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2 Above n 1.

3 See *Laws of New Zealand* Contract at 327. The authors identify six types …of discharging or suspensory agreements which may impact on contractual obligations. These include discharge by

[22] Having regard to my finding on the dispositive issue (the requirement of an unambiguous representation relied on by the representee) and the summary judgment context, I will not explore further in this judgment other matters which were traversed in submissions.

[23] The requirements in relation to waiver that the representation relied on must have been unambiguous (as identified in *Watson v Healy Lands Ltd*) was confirmed by the Privy Council in *Neylon v Dickens*.[4] There, their Lordships observed that on the facts of that case, the purchasers (for waiver), had to establish that the vendors' solicitor by his conduct had represented unambiguously that the vendors were no longer treating a particular date for settlement as being of the essence of the contract.[5] For that approach, their Lordships referred to the formulation of Lord Wilberforce in *Mardorf Peach v Attica Sea Carriers,* where his Lordship had referred to the requirement for clear and unequivocal evidence of waiver.[6]

[24] For the insured in Ms Crichton's position, there were two aspects of insurance claim affecting Vero. One was what Vero referred to as the EQC-excluded claim which was the subject of Ms Wyma's "options" letter to Ms Crichton on 3 January 2013. The second was what may be referred to as the "EQC-included claim" – it relates to that potential liability that Vero had, in the event the property damage exceeded EQC's statutory cap, carried out its own assessment which had resulted at that time in the same conclusion as EQC had reached, namely that that claim was under EQC's cap.

[25] When Ms Wyma wrote to Ms Crichton on 3 January 2013, the letter concerned only the EQC-excluded claim. It set out Ms Crichton's options in relation to that claim and asked her to respond.

[26] That was the context of Ms Crichton's telephone call to Ms Wyma on 11 January 2013.

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agreement (at 328 – 332), waiver (at 337 – 340), accord and satisfaction (at 341 – 349) and release (at 350 – 352). (The ambiguous use of the term "waiver" is discussed by the authors at 337.)

4 *Neylon v Dickens* [1978] 2 NZLR 35.

5 *Neylon v Dickens,* above n 4, at [38].

6 *Mardorf Peach v Attica Sea Carriers* [1977] AC 850 at 871; [1977] 1 All ER 545 at 551.

[27] If Vero was to obtain summary judgment on the basis of a waiver which occurred on 11 January 2015, Vero would have to satisfy the Court that the representation made by Ms Crichton in her telephone conversation that morning was (beyond argument) a clear and equivocal representation that Ms Crichton was abandoning both the EQC-excluded claim or the EQC-included claim. Ms Corban, for Vero, places emphasis upon the wording of Ms Wyma's notes – these record that Ms Crichton informed Ms Wyma that the latter could "close the claim" (at [13] above) and that (because of the subsequent (cheap) sale to a builder who had attended to repairs), Ms Crichton did not want anything to do with "the claim" (at [10] above).

[28] These matters led Ms Corban in her written submissions, dealing with the requirement of an unambiguous representation, to state simply:

> Ms Crichton's unambiguous representation was that she did not want anything more to do with the claim and that Vero could close the claim. Her words were clear and unequivocal.

[29] An alternative view of the representation is that "the claim" which was in Ms Crichton's head and was being discussed by her was the EQC-excluded claim. It was that claim, which was the subject of Ms Wyma's letter to her, to which she was responding in her telephone call. There is no evidence that the EQC-included claim was in Ms Crichton's thinking in that telephone conversation let alone a subject of discussion that day. Arguably, the most important document in the chain of notes and correspondence dated 11 January 2013 is Ms Wyma's letter to Ms Crichton recording the subject-matter and outcome of their discussion. The subject-matter is expressly stated to be "Your EQC-Excluded Claim 3950159" (in bold in the original – set out at [13] above). In the letter, Ms Wyma states that "this claim is now closed".

[30] In this summary judgment context, I find that it is at least arguable that Ms Crichton's references to "the claim" were ambiguous. Having regard to the content of Ms Wyma's letter to Ms Crichton recording the conversation, I find it also arguable that Vero (through Ms Wyma) could not have reasonably relied upon Ms Crichton's conversation as representing that she was abandoning both her EQC-excluded and EQC-included claims – Ms Wyma's letter to Ms Crichton (above at [13]) which recorded the discussion records only that the EQC-excluded claim was closed.

Outcome

[31] Vero is not entitled to summary judgment.

[32] In the event the Court were to dismiss the application, counsel requested that costs be reserved. On a plaintiff's summary judgment application, it is common practice to reserve costs.[7] The Court of Appeal has observed that there is no settled practice as to the awarding of costs when a defendant fails to obtain summary judgment.[8]

[33] If the parties are unable to agree on costs, submissions are to be filed (four-page limit) first by the plaintiffs and within five working days thereafter by the defendants. The Court will then determine costs on the papers.

Orders

[34] I order:

(a) The second defendant's interlocutory application dated 23 November 2017 is dismissed.

(b) The costs and disbursements of the application are reserved.

Associate Judge Osborne

Solicitors:
Anthony Harper, Christchurch
Hesketh Henry, Auckland
Chapman Tripp, Wellington

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7 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA) at 406.

8 *Miah v National Mutual Life Association of Australasia Ltd* [2016] NZCA 590, [2017] 2 NZLR 241 at n 39.