IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2011-409-000810
[2012] NZHC 944

BETWEEN	NICOLA JAYNE MARCHAND, JACQUES RENARD MARCHAND AND PATRICK GREGORY COSTELLO First Plaintiffs
AND	NICOLA JAYNE MARCHAND AND JACQUES RENARD MARCHAND Second Plaintiffs
AND	JOHN F JACKSON Defendant
AND	IAG NEW ZEALAND LIMITED Third Party

Hearing: 29 March 2012

Appearances: G A Hair for Plaintiffs
B R D Burke and K Hill-Dunne for Defendant
G S A Macdonald for Third Party

Judgment: 2 May 2012

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] In September 2010 and February 2011 the plaintiffs' home, and a substantial part of its contents, along with the land on which the home stands and other improvements, were substantially damaged in two earthquakes.

[2] In May 2009 they had engaged the defendant to arrange insurance cover for them on their home and contents, their motor vehicles and the assets in the first-named plaintiffs' medical practice. Although the defendant assured the plaintiffs that cover had been arranged with New Zealand Insurance (NZI), that was not the case. This came to light after the earthquake in September 2010. The plaintiffs have

brought this proceeding alleging breach of contract, breach of a duty of care owed in tort and breach of certain provisions of the Fair Trading Act.

[3] At material times the third party was the indemnifier of the defendant for professional liability. The defendant alleges that the third party should indemnify him for any loss on the part of the plaintiffs for which he might be found liable. The third party denies liability. It has brought an application for summary judgment in its favour on the defendant's third party claim, relying on one or other of two exclusion provisions in the policy. The issue on this application is whether either of these exclusions applies.

Principles of summary judgment

[4] Rules 4.7(2) and 12.2 of the High Court Rules provide that the Court may give judgment against a defendant if a third party satisfies the Court that none of the causes of action in the defendant's claim can succeed. The onus is on the third party to establish this position to the satisfaction of the Court: see, for example, *Garnett v Tower Insurance Ltd*.[1]

[5] In this case, as will be seen, it is necessary to have regard to two principles in relation to the evidence before the Court, first that the Court need not accept uncritically evidence which is inherently lacking in credibility (for example where it is inconsistent with undisputed contemporary documents or is inherently improbable): *Eng Mee Yong v Letchumanan*,[2] and secondly, that evidence must be considered in a robust and realistic manner: *Bilbie Dymock Corporation v Patel*.[3]

[6] As will also emerge, it is alleged by the third party that in certain respects the actions of the defendant which are relevant to this case were dishonest. Bearing in mind that an application for summary judgment is determined on evidence by way of affidavit, without witnesses appearing in person and thus being able to respond orally to such allegations and to be assessed for credibility, it is necessary to proceed with circumspection. The onus of proving dishonesty remains the civil standard of

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1 *Garnett v Tower Insurance Ltd* [2011] NZCA 576 at [9].
2 *Eng Mee Yong v Letchumanan* [1980] AC 331.
3 *Bilbie Dymock Corporation v Patel* (1987) 1 PRNZ 84 (CA).

the balance of probabilities, but it is established that the more serious the allegation of dishonesty, the stronger the evidence in support of it should be: *Re H (Minors)*.[4]

Facts

[7] On engagement by the plaintiffs to arrange insurance cover for their assets the defendant contacted a number of insurers, and on receipt of their responses recommended to the plaintiffs that the best prospect for appropriate cover lay with NZI. At the defendant's request the plaintiffs completed a High Value Homes questionnaire for NZI which the defendant emailed to the company together with photographs of the property, and a request to quote terms and a premium for cover on the house, contents and vehicles. NZI emailed a quote and an offer of cover, on 1 July 2009. The defendant did not refer this to the plaintiffs.

[8] Late in July or early in August 2009 Mrs Marchand telephoned the defendant to check that they had insurance cover for their house, contents and vehicles. The defendant informed her that they did have cover, but this was not true.

[9] Early in 2010 Mrs Marchand once more inquired with the defendant about cover on their assets and was once more informed that the property was insured.

[10] Although the defendant received the NZI quote at the beginning of July 2009, he did not take any further steps to implement the cover until after September 2010. On 4 September the plaintiffs' house and contents, and other improvements on their property, sustained serious damage in a major earthquake. Endeavours by the defendant to arrange cover with NZI after that were unsuccessful. As a consequence the plaintiffs were uninsured, with a further consequence that they were without access to compensation from the Earthquake Commission.

[11] The plaintiffs' property suffered further damage in another major earthquake on 22 February 2011. On 21 April 2011 their solicitors advised the defendant they would claim against him.

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4 *Re H (Minors)* [1996] AC 563.

[12] Early in August 2009 the defendant learnt that Dr Jacques Marchand had earlier been convicted of making false medical claims to the Accident Compensation Corporation. The consequence of this had been the cancellation of the plaintiffs' existing insurance cover by their former insurer, Medical Assurance Society. He was not aware of this at the time he had approached NZI to arrange insurance on their behalf, in June that year.

[13] In May 2010 Mrs Marchand contacted the defendant to advise that she wished to claim on their insurance policy for a pair of spectacles. A claim was completed by the defendant but not forwarded to NZI. Instead the defendant paid the amount claimed to Mrs Marchand himself.

[14] From 12 May 2009 to 12 May 2010 the defendant was insured against certain professional risks under a policy with the third party. In February 2010 he completed a proposal for a renewal of this insurance for a 12 month period from 12 May 2010 to 12 May 2011. The document required him to advise whether he had received any claims, or knew of any circumstances that may give rise to a claim. He completed the form on 22 February 2010 and ticked the available box for response to this question, "yes". He did not complete any details by way of elaboration, in the space below. He received an inquiry from the third party about the circumstances to which he was referring with this response. His reply was that he had ticked the "yes" box in error; as far as can be ascertained from the photocopies produced on this application, he took the same form, twinked out the tick in the "yes" box, ticked the "no" box, initialled the alteration, redated the form 3rd March 2010 and sent it to NZI. The policy was duly renewed for a 12 month period from 12 May 2010 to 12 May 2011.

The policy

[15] Although the third party raises a greater number of defences to the third party claim, it isolates two of those defences as grounds for this application for summary judgment. To place those grounds in context, I refer to the following key provisions of the policy document:

(a) First, the defendant is insured for civil liability arising from an error occurring in the conduct of professional services provided he first knew or ought to have known of a claim in relation to that error during the period of insurance, and he has advised the third party of that claim as soon as possible but no later than 30 days after the period of insurance ends.

(b) The policy extends (automatic extension B) to insuring the defendant for any claim or circumstance that may give rise to a claim that he first knew of or ought to have known of and that should have been advised to the third party during any previous period of insurance. However, this extended cover only applies if certain tests are met, the first being that the failure to disclose the claim, or the circumstances that may give rise to a claim, at each subsequent renewal was not deliberate, and another being that advice is given to the third party of the claim or circumstances that may give rise to a claim no later than the end of the subsequent period of insurance or 30 days thereafter. Any such claim is subject to the terms of the policy in existence when the claim, or circumstances that may give rise to a claim, were first known, or the terms of the then current policy, whichever provides lesser cover (at the sole discretion of the third party). Further, exclusion part Q, to which I refer to below, does not apply to that extension.

(c) Exclusion part E, dishonesty or fraud, provides that the third party is "not insured for civil liability in connection with any dishonest, fraudulent, criminal or malicious acts or omissions by [him], employees, principals, or officers or directors of [his] or the business".

(d) Exclusion part Q, known claims and circumstances, provides that the defendant is "not insured for civil liability in connection with any claim or circumstance that may give rise to a claim that [he] first knew of or ought to have known of, prior to the inception date of this policy".

(e) Obligation 4 in the policy requires the insured party to inform the insurer immediately if there is a material increase in the risk insured, or alteration of the risk insured. It is provided that for the avoidance of any doubt, information is material where the insurer would have made different decisions about accepting the insurance or setting the terms of the insurance. This imposes on an insured a continuing obligation to notify an increase in the risk or alteration of the risk, where that is material, as defined. Thus although the annual short form renewal proposal signed by the defendant included a declaration that he had disclosed all material facts, and would give notice immediately of any information he had provided which might alter between the date of the proposal and the inception date of the insurance, an obligation to inform the insurer is ongoing, within the parameters set by obligation 4.

Insurance Law Reform Act 1977

[16] Section 9 of this Act contains the following relevant provision:

> 9 (1) A provision of a contract of insurance prescribing any manner in which or any limit of time within which notice of any claim by the insured under such contract must be given or prescribing any limit of time within which any suit or action by the insured must be brought shall –
>
> (a) ...
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> (b) In any other case bind the insured only if in the opinion of the arbitrator or Court determining the claim the insured has in the particular circumstances been so prejudiced by the failure of the insured to comply with such provision that it would inequitable if such provision were not to bind the insured.

[17] Section 11 of the Act relevantly provides:

> 11 Certain exclusions forbidden
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> Where –
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> (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the

insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

(b) In the view of the Court or arbitrator determining a claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, -

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Exclusion E

[18] The first issue in relation to exclusion E is whether the defendant's conduct was dishonest, and the second is whether, if there was dishonest conduct, his potential civil liability to the plaintiffs was "in connection with" that dishonesty.

[19] Dishonesty has been considered in *McMillan v Joseph*.[5] In the Court of Appeal, Cooke P said:

> Subject to one qualification, which may not have been fully intentional, the Judge accepted that in the exclusion clause "dishonesty" bears the meaning contended for by the insurer. After referring to the *Shorter Oxford English Dictionary* he said:
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> > "I am content to approach the matter upon the basis of the defendant's submission and to consider whether the evidence shows that Moulder's conduct in respect of the two advances was dishonest in the sense that it was deliberate and such as to be called 'not straightforward' and 'underhand'. This necessarily involves an intention to deceive. The onus of proving this is, of course, upon the defendant and the standard of proof is the balance of probabilities but recognising that the allegation is a grave one."
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> I would respectfully adopt that passage, save only the addendum "This necessarily involves an intention to deceive". It is doubtful whether the Judge really meant to express a considered opinion on that point. It seems plain that there can be dishonesty without deceit, just as there can be fraud without deceit (*Scott v Metropolitan Police Commissioner* (1975) A.C. 819 at pp 836-839).

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5 *McMillan v Joseph* (1987) 4 ANZ Insurance Cases 60-822 at 75,053.

[20] On 8 June 2011 the defendant made a statement in the presence of the third party's solicitors, in relation to this matter. He was separately legally represented and did not seek to resile from the statement made, nor to have it excluded from consideration, in this case. The evidence upon which the third party relies in its contention that I should make a finding of dishonesty on the part of Mr Jackson is entirely contained within this statement. After setting out the details of how his involvement with the Marchands came about, and the steps he took with a view to arranging insurance for them, he made the following further statements:

> • On receipt of NZI's house and contents quote I should have sent a hold cover request to NZI. I should also have sent the Marchands a proposal, policy wording and premium payment options. This should have been done in early July 2009 ...
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> • I thought that I had sent the relevant documents off to the Marchands. I admit that I cannot find any evidence of having done this.
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> • The Marchand file should have gone into my Review Cases file, but I found out later that it had not been filed there.
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> • Because the Marchand file had not been correctly filed or actioned I did not do anything to secure insurance cover for the Marchand's house, contents and car between July 2009 and September 2010. I did not accept the NZI quote or send a hold cover request to NZI. I did not send any documents to the Marchands or NZI. The policy should have been issued and a premium account sent out. But this was not done. This was a failure on my part. NZI did not issue a policy schedule.

[21] Up to this point, the statement outlines conduct which might be described as negligent. However, there came a point at which, the third party submits, the conduct crossed the line from negligence into dishonesty. The statement continues:

> • Nicola Marchand telephoned me twice saying she was concerned that she had not received a tax invoice for the premium or a policy in relation to their house, contents and car insurance. The first call was in late July or early August 2009. She asked me whether they were covered. Nicola called me again a few months later. It would have been early in 2010. Again she asked for confirmation that they had insurance cover. On each occasion I assured her that they had insurance cover with NZI for their house, contents and car, even though this was not the case. Each time Nicky called I thought to myself that I must get the papers sent out to her and get that cover in place and sorted. But I never did.
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> • I looked for my Marchand file after one of these conversations. I could not find it. I later found the Marchand documents in Janet Marchand's file. Janet is not related to Jacques and Nicola as far as I know.

> Another time I found the Marchand documents in my Underwriting Concerns file.
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> - At the beginning of August 2009 I heard concerning reports about Jacques Marchand. I heard that he had been convicted of making false medical claims. I understand that this was related to the head injury he had sustained. On reflection I realise that I saw the Marchand file as problematic and to be followed up. But I did not do so. The file did not get the action it required of me.
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> - In May 2010 Nicky notified me of a claim for damage to a pair of spectacles. The claim was for about $650. I paid the claim myself. Not much money was involved. By the time the excess was taken into account I only paid a few hundred dollars. I paid the claim myself because I knew that I hadn't placed the insurance. I did not tell Nicola that I paid the claim personally but I believe the optometrist informed her that I had paid some money.
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> - ... This event should have been a signal to me to do something about the policy and get the insurance placed. I paid the claim and then did nothing further. I admit that I dropped the ball on it.
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> - Nicola Marchand notified me of another claim in late August 2010. She told me that floor cleaners had damaged the wall paper at her house. I emailed an NZI claim form to Nicola for her to complete. Subsequent events meant that this claim was not pursued.

[22] The first Christchurch earthquake on 4 September 2010 was the event referred to. After that the defendant "quickly issued a policy backdated to 1 July 2009" but NZI advised that it would not meet the claim as it was not on risk at the relevant time.

[23] The final excerpt from his statement, of present relevance, is:

> In hindsight I had a number of opportunities to get house, contents and car insurance cover in place for the Marchands. I should have obtained that cover in July 2009. I had further opportunities to remedy the situation when Nicola rang me on at least two occasions and expressed her concern about the fact that she had not received a policy or a bill for the premium and also when the glasses claim was made in May 2010. I cannot explain why I did not take action to put the NZI insurance cover in place but have always felt uneasy about the timing of making application and the moral risk of Dr Jacques Marchand.

[24] For the third party, Mr Macdonald submitted that, in terms of the passage quoted from *McMillan & Joseph*, the defendant's conduct was deliberate and could be described as "not straightforward, and underhand".

[25] I find that the defendant's conduct was deliberate in certain respects:

- His repeated advice to Mrs Marchand that insurance cover was in place.

- His paying the claim for the spectacles in the knowledge that cover was not in place as a result of his own negligent conduct.

- His emailing of an NZI claim form to Mrs Marchand for her to complete in relation to the wallpaper damage, again with the same knowledge.

I do not understand the defendant to contend otherwise.

[26] Mr Burke submitted that the defendant's actions must be considered "within the context of a busy practice and the defendant's health issues". He emphasised evidence given by the defendant in his affidavits on the facts he had covered in his statement, in particular:

- Due to the workload of the practice I overlooked reviewing Mr and Mrs Marchand's matter on 6 July.

- ... I failed to follow up due to inadvertence. Because Mr and Mrs Marchand's file had been incorrectly filed, I overlooked formally binding the cover with NZI. As outlined in my statement, Mrs Marchand telephoned me a couple of times. I believe the first time was in early August 2009 and a second time in 2010. I assured Mrs Marchand that she was covered. I thought on both occasions that I must get on and formally bind cover but on each occasion it got overlooked by me and I forgot about it.

- I was not particularly worried about not formally binding Mr and Mrs Marchand's insurance as I believed that they would obtain automatic acceptance as NZI had previously indicated acceptance.

[27] The defendant stated that when he completed his claim for professional indemnity (PI) cover with the third party he had forgotten about the Marchands, that he was not aware of any claim that Mr or Mrs Marchand had against him at that time, and he did not believe that there were circumstances that would give rise to a claim, having forgotten about their matter. To place this in context he said:

> My memory has not been good since I had a heart attack and a TIA in 2007 ... I can sometimes forget what has happened the previous day.

It was explained to me that a TIA might be loosely translated as a stroke.

[28] The defendant filed an affidavit from Alistair Macleod, a consultant psychiatrist on the defendant's medical difficulties since 2007. His conclusions are:

> - However, after this earthquake [September 2010] it became apparent that he had made at least two significant work related errors. He had been aware for some time that he had not been performing as well as previously, tending to be a little forgetful, to perhaps procrastinate and not to be as decisive as previously. These mistakes have resulted in major legal proceedings.
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> - ... he has normal MRI a scan and other investigations have essentially been non contributory.
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> - With respect to the legal predicament I think it is highly likely that the combination of the above physical, social and relationship losses would likely be distracting and probably interfere with work performance. There is no organic explanation for his inattentions and lapses ...

[29] Mr Burke also referred to passages from the judgments in *McMillan v Joseph* (above). He noted that the passage from the judgment of Cooke P also included the following:[6]

> ... here, we are concerned with the use of "dishonest" in an exception clause where it is accompanied by "fraudulent, criminal or malicious" and is evidently used in a wide general sense rather than some special one.

Mr Burke submitted that the learned Judge did not appear to have considered whether the term "dishonest" in that exception clause was coloured by the words which followed.

[30] In the same judgment, Somers J expressed the view that the word 'dishonest' "has overtones of lack of probity, conduct that is underhand, not straightforward, that is dishonourable or disgraceful".[7]

[31] Casey J added that 'dishonest' is used in the sense of deliberate conduct carrying its ordinary meanings (amongst others) of not straightforward and underhand. He went on to say:[8]

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6 Above, n 4, at 75,054.
7 Ibid at 75,055.
8 Ibid at 75,056.

> Like fraud, the term is one of wide application in the almost infinite variety of human activity and while the general concepts it embodies are well understood, attempts to analyse or define them narrowly are usually fruitless. In any given case a decision on whether conduct is dishonest is best left to the common sense and experience of the judge or jury after consideration of all the relevant circumstances.

[32] Mr Burke referred me to *Starglade Properties Ltd v Roland Nash*,[9] a judgment of the English Court of Appeal. In his judgment, the Lord Chancellor cited the following passage from Lord Nicholls of Birkenhead in *Royal Brunei Airlines v Tan*,[10] where, after emphasising that the standard of conduct constituting honest or dishonest conduct is not to be subjectively assessed, or accorded higher or lower values according to the moral standards of each individual, his Lordship said:[11]

> ... When called upon to decide whether a person was acting honestly a Court will look at all the circumstances known to the third party at the time. The Court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.

[33] The Lord Chancellor then concluded:

> The relevant standard, described variously in the statements I have quoted, is the ordinary standard of honest behaviour. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also it is irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. Ultimately in civil proceedings, it is for the court to determine what that standard is and to apply it to the facts of the case.[12]

[34] On those authorities Mr Burke founded a submission that the term "dishonest" in Exclusion E must be considered in light of the wider background and circumstances surrounding the plaintiffs' claim against the defendant. These would include the circumstances known to the defendant, his experience and intelligence, and the reason he acted the way he did. He submitted that these issues can only be determined by a trial.

[35] In *Campbell v Stoneman*,[13] the High Court considered an application by the third party, Lumley General Insurance NZ Limited, to strike out the defendant's third

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9 *Starglade Properties Ltd v Roland Nash* [2012] EWCA Civ 1314.
10 *Royal Brunei Airlines v Tan* [1995] 2 AC 378.
11 Above, n 5, at para 25.
12 Above, n 5, at para 32.
13 *Campbell v Stoneman* [2012] NZHC 392.

party notice against it, on the basis of an exclusion clause in the relevant policy. Although this is an application for summary judgment, Mr Burke submitted that the Court should approach the issue in a similar way. The learned Judge referred to *Fussell and McNamara v Broadbase Christchurch Ltd*,[14] where Associate Judge Osborne referred to a number of cases concerning strike-out applications by insurers. Associate Judge Osborne referred in particular to the judgment of the Court of Appeal in *Vero Liability Insurance Ltd v Symphony Group Ltd & Ors*,[15] where Harrison J, delivering the judgment of the Court, noted that it would have been reluctant to determine the scope and effect of the clause in question in that case in the absence of primary evidence such as might have been given if the Court had earlier ordered formulation of a question or questions for trial, informed by evidence of a limited nature. Reference was also made to *Clasper v Duns*,[16] where Panckhurst J, considering a fraud and dishonesty exemption clause under a professional indemnity policy, noted that proof of actual fraud or dishonesty was required under the exemption clause and held that whether either was a proximate cause of the loss must await resolution of the claim, at which point the real basis, or substance, of the case will fall for consideration.

[36] Against that background Mackenzie J said in *Campbell v Stoneman*:[17]

> As that case, and the authorities there cited, recognise, the application of a liability policy, including in particular the application of an exclusion clause in the policy, requires an assessment of the facts pursuant to which the claim under the policy arises. I consider that the Court should be slow to address questions of policy coverage in the absence of that factual matrix.

Mackenzie J expressed his reluctance, which he stated he shared with the Court of Appeal in *Vero*, to decide a question of policy interpretation outside the matrix of the relevant facts. He said:[18]

> I consider that such questions as whether, if the plaintiff succeeds against a defendant, that liability arises out of a claim involving investment advice, and whether that claim arises out of, is based upon, is attributable to, the sale or promotion of an investment, require consideration in the light of all the

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14 *Fussell and McNamara v Broadbase Christchurch Ltd* HC Christchurch CIV-2009-409-000834, 29 June 2011.
15 *Vero Liability Insurance Ltd v Symphony Group Ltd & Ors* [2008] NZCA 419.
16 *Clasper v Duns* [2008] NZCCLR 32.
17 Above, n 7, at [8].
18 Above n 7, at [9].

> evidence, and should not be determined on the hypothetical basis necessarily involved in a strikeout application.

[37] In this proceeding the Court is required to consider a different exclusion clause from the clause in *Campbell v Stoneman*, but Mr Burke urged me to approach the matter the same way. In particular, he submitted that the Court needs to consider at trial detailed evidence on two particular aspects of the facts which cannot presently be determined. First, he submitted that the plaintiffs face difficulty with their claim against the defendant because the dishonest conduct of Dr Marchand on an unrelated matter means that he would not have obtained cover from NZI in any event, and accordingly the actions of the defendant have not caused the plaintiffs any loss. Secondly, a full examination of the circumstances of the defendant's life, and the effect of those circumstances on his practice, is necessary in order to determine whether his conduct was in fact dishonest, in all the circumstances of this case, even though it is to be objectively assessed (see the discussion in the judgment of Casey J in *MacMillan v Joseph*, above at para [31]).

[38] Counsel for the plaintiffs who attended the hearing of this application addressed, briefly, the first of these issues, strenuously denying that the conduct of his client would have resulted in cover not being given anyway, basing this on the fact that NZI has, evidently, granted Dr Marchand some cover subsequent to the events in question. With respect to counsel I can give this very little weight; at best it emphasises the room for argument between all parties to this case at trial.

[39] Mr Macdonald submitted that it is immaterial whether NZI would have granted cover to the plaintiffs, with knowledge of Dr Marchand's convictions, because if they had granted cover the Marchands would not have suffered any loss, and if they had refused the Marchands would have sought insurance elsewhere. Therefore, either way, the defendant's conduct in not attempting to arrange the cover and informing the plaintiffs, incorrectly, that he had done so, was the cause of the plaintiffs' loss.

Discussion and conclusion in relation to Exclusion E

[40] On its face, the conduct of the defendant which I have found to be deliberate (para [25]) has the appearance of also being dishonest in the sense of not being straightforward, and being underhand, in terms of the judgment in *MacMillan v Joseph* (para [19]). In essence the defendant's explanation for his conduct is that he forgot to review the Marchands' insurance, that he failed to follow it up due to inadvertence, partly caused by their papers having been wrongly filed, and that his memory had been adversely affected by his physical illnesses. Although the report from Dr Macleod, psychiatrist, ruled out the presence of an organic explanation for the defendant's "inattentions and lapses" he did express the view that "it is highly likely the combination of the ... physical, social and relationship losses" which he outlined in detail in his report would "likely be distracting and probably interfere with work performance".

[41] I am required on this application for summary judgment to determine, as one element of the application, whether the third party has satisfied me that the defendant's conduct was dishonest. Grossly negligent conduct, even if the defendant's actions can be thus classified, does not equate to dishonest conduct. The authorities I have summarised require the Court, when deciding whether conduct is dishonest when assessed objectively, to consider the surrounding circumstances. There is sufficient in the report from Dr Macleod to leave me less than satisfied that the defendant was dishonest in his dealings with the plaintiffs. Dr Macleod's opinion on the high likelihood of the effect of the physical, social and relationship losses suffered by the defendant, even considering the evidence in a realistic and robust manner, and giving due regard to elements of it which might otherwise be seen as inherently improbable (para [5] above), leave me with a real doubt that a finding of a dishonesty is appropriate on this application for summary judgment.

[42] For exclusion E to apply, the civil liability which would otherwise be covered by the policy must be in connection with dishonest acts or omissions by the defendant. The phrase "in connection with" has a wide meaning and requires only a

relationship between one thing and another.[19] For civil liability to be in connection with a dishonest act or omission, it does not require a causal relationship between the two elements to be established.[20]

[43] The words "in connection with" are not prescriptive as to the link called for between the two elements. It is enough if one is "bound up with" or having to "do with" the other.[21]

[44] Applying these authorities Mr Macdonald submitted that if the defendant had told Nicola Marchand the truth about the insurance they expected to have not having been effected, she would have known by July or August 2009 and would have been in a position to take out insurance by other means. Thus the Marchands would not have their present claim against the defendant. Therefore, Mr Macdonald submitted, the defendant's dishonesty to the plaintiffs was in connection with his civil liability to them, within the terms of the authorities to which I have referred.

[45] Given the finding I have made in relation to the establishment of dishonesty on this application, it is not necessary for me to determine whether the defendant's actions were or were not in connection with the civil liability otherwise covered by the policy, nor is it necessary for me to determine whether s 11 of the Insurance Law Reform Act 1977 might assist the defendant.

Exclusion Q

[46] The inception date for the policy renewal was 12 May 2010; thus the issue on this aspect of the application is whether the third party has established that as at that date the defendant knew or ought to have known of circumstances that may give rise to a claim. In support of his submission that this was the position, Mr Macdonald

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19 *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006 at para [31].

20 *Ffrench v Sestili*; *Sestili v Triton Underwriting Insurance Agency P/L* [2007] SASC 241 at [85].

21 *Timtech Chemicals Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2009-404-2194 28 March 2011 at para [25].

referred to *Attorney-General v AON New Zealand Ltd*,[22] where Mallon J said that the test:

> is an objective one, requiring notice when a reasonable person in the insured's position would consider that there was a reasonable possibility of a claim. Notice is not required if the possibility of a claim is remote or unlikely. However, providing there is real or definite risk of a claim notice is required even if the claim is not probable.[23]

[47] Mr Macdonald submitted that this test was met because:

- The defendant acknowledged that when he received the NZI quote for cover he should have sent a hold covered request to NZI and sent the plaintiffs a proposal policy wording and premium payment options.

- Mrs Marchand contacted the defendant twice seeking confirmation that she and her husband had cover on their house contents and cars and the defendant assured them on each occasion that cover was in place, when he knew that it was not.

- The defendant personally paid out the claim in respect of Mrs Marchand's spectacles without informing her that she did not have cover.

- In his first affidavit in opposition to this application the defendant said:

  > I had forgotten about the Marchand claim when I renewed PI cover with the Third Party for the period 12 May 2010 and 12 May 2011. I was not aware of any claim Mr and Mrs Marchand had against the company, or against me, at that stage.

  Mr Macdonald submitted that there is a material inconsistency in this paragraph, the first sentence implying knowledge of a claim by the Marchands (otherwise there was nothing for him to have forgotten), but the second sentence disavowing any knowledge of any claim.

- Repeated failure to arrange cover, in the knowledge of that failure from July 2009.

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22 *Attorney-General v AON New Zealand Ltd* CIV-2005-485-1814 HC Wellington, 10 April 2008, Mallon J.

23 Ibid at [66].

- A reasonable broker in the defendant's position would have known that there was a reasonable possibility of a claim in the circumstances of which he was aware.

[48] Mr Burke submitted that automatic Extension B (see [15](b) above) provides his client with an extension to his cover where the defendant knew or ought to have known of the circumstances that may give rise to a claim, with the result that advice should have been given to the third party during the previous period of insurance. He accepted that this would not apply if the failure to give notice of those circumstances was deliberate but submitted that a finding of deliberate withholding of this information could not be made on this application. At paragraph [25] I have made a finding that certain conduct by the defendant was deliberate. At paragraph [26] I have noted the defendant's statement that his failure to follow up the issue of cover was due to inadvertence. This inaction is not the same as failing to tell the third party of circumstances that may give rise to a claim. Non-disclosure of the circumstances at the time of completing the 2010/2011 insurance renewal arose in the circumstances I have described in paragraph [14]. If one accepts that the defendant made a mistake in initially ticking the response box "yes", the circumstances plainly show that he subsequently deliberately ticked it "no" – in other words he specifically turned his mind to the issue of whether there were any such circumstances, having erroneously stated there were, and then certified that there were not. I am satisfied that was a deliberate act. Mr Jackson's explanation for this is that when he took this deliberate step he had "forgotten about the Marchand claim" and "was not aware of any claim Mr and Mrs Marchand had against the company or against me, at that stage." I have already noted the internal inconsistency in this statement. He went on to say:

> Any failure to disclose the circumstances that may give rise to a claim was not deliberate on my part. At that stage Mr and Mrs Marchand had not made a claim and I did believe that there were any circumstances that would give rise to a claim. I had forgotten about Mr and Mrs Marchand's matter.

I assume, in Mr Jackson's favour, that in the second of these sentences the word "not" should be read in between "did" and "believe" because otherwise the sentence does not make sense in its context.

[49] Mr Jackson reiterated that he had forgotten about the Marchands' insurance at the time he renewed his cover with the third party. He was not reminded about it until May 2010 when Mrs Marchand contacted him about her spectacles. Whilst that was at the same time as the inception of the next year of insurance cover, it was a few weeks after the proposal was completed.

[50] Mr Jackson's claim to have forgotten about the circumstances must be read in light of the circumstances affecting his acumen and ability to function properly at work, to which I have already referred. Those circumstances support his claim to have forgotten, as does the misfiling of the Marchands' papers. Consistent with the finding I have made about dishonesty, I am not satisfied to the degree necessary on an application for summary judgment that the defendant deliberately failed to inform the third party of the circumstances of the Marchands' affairs when he completed his 2010/2011 application for PI cover. It is arguable that at trial it will be shown that these actions were not deliberate.

[51] To deliberately conceal known circumstances that may give rise to a claim, from an indemnifier, would in all likelihood amount to dishonesty. I have expressed the reasons why in the circumstances of this case, and on an application for summary judgment, I am reluctant to make findings of dishonesty against the defendant given the explanations of forgetfulness and inattention that he has given, and the likelihood expressed by Dr McLeod that Mr Jackson's physical and mental ill health problems contributed to a deterioration of his work performance. In my opinion it is appropriate that a Judge at trial makes a decision on the extent to, and manner in which these factors impacted on the defendant's non-disclosure of circumstances that might give rise to a claim.

Obligation 4

[52] As noted at paragraph [15](e) above, Obligation 4 requires ongoing disclosure. This broadens the inquiry beyond the specific act of failing to refer to the circumstances in the policy renewal, to an examination of the defendant's conduct over a longer period. For the reasons enunciated in relation to Exclusion Q, I am not satisfied to the extent required for this application that the defendant is in breach of

this obligation. I accept that in all probability, had the circumstances been made known to the insurer, it would have been information "material" to the insurer in terms of Obligation 4. However, for the reasons I have canvassed in relation to the specific exclusions relied upon by the insurer on this application, it is my view that the defendant's actions and their relevance to the liability of the third party under the policy must be scrutinised at trial and I am not satisfied for present purposes that the defendant has acted in breach of Obligation 4.

Outcome

[53] The specific defences relied upon by the third party in support of its application for summary judgment all require the Court to be satisfied of certain circumstances, which all depend in whole or in part on findings relating to the defendant's conduct being dishonest and/or deliberate. Whilst it is fair to record that the evidence before the Court on this application points to grounds for making the findings sought by the third party, the defendant's actions also appear to be out of character with the conduct one might ordinarily expect from an insurance agent with many years of professional experience, including experience in senior management roles, in the insurance industry. That fact seen in the context of the circumstances of the defendant's life throughout the period under scrutiny and their effects on his ability to function, leaves me with a sufficient doubt that the defendant's claim against the third party cannot succeed at trial. In this context I am mindful of the statements made in *Campbell v Stoneman* ([36] above) and other cases referred to in [35] above, to the effect that the Court should be slow to address questions of policy coverage in the absence of a full assessment of the facts pursuant to which the claim under the policy arises. I accept that there is a good deal of factual material before the Court on this application. However, the circumstances raised by the defendant about his personal life and the effects of it on his ability to properly conduct his business affairs, serve to demonstrate the wisdom of applying the cautionary note evident in these cases to my decision in this case.

[54] The application for summary judgment is declined. Costs are reserved.

J G Matthews
Associate Judge

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