IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-810
[2012] NZHC 2893

BETWEEN	NICOLA JAYNE MARCHAND, JACQUES RENARD MARCHAND AND PATRICK GREGORY COSTELLOE 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: 20-23 August 2012

Counsel: G A Hair for Plaintiffs
B R D Burke for Defendant
Appearance excused for Third Party

Judgment: 2 November 2012

JUDGMENT OF THE HON JUSTICE KÓS

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[1] An insurance broker is retained to arrange house and contents insurance. For one reason or another he fails to do so. Yet he tells his clients he has placed the insurance. They make a small claim on the policy. Unknown to them, the broker pays the claim himself. Then disaster strikes. The clients' house is severely damaged in the September 2010 Canterbury earthquake. The broker says he is not liable for failing to place the insurance. He says the house was not insurable in the first place. That is because one of the clients has convictions for fraud, which led to his previous insurance being cancelled. The broker says these facts had not been disclosed. Had they been, insurance could not have been obtained.

[2] Were the convictions and cancellation disclosed? Was the house insurable? Is the broker liable?

Background

[3] The first plaintiffs, Mrs Marchand, her husband Dr Marchand and their solicitor Mr Costelloe, are trustees of the Nicola Marchand Family Trust. Thereby they are also the owners of a five hectare farmlet at 21 River Road, Tai Tapu, south west of Christchurch. On the farmlet is a large modern house. Its replacement value is not entirely clear. Probably it exceeds $1.5 million.

[4] In June 2009 the first plaintiffs (whom I will describe collectively as "the Marchands") retained the defendant insurance broker, Mr John Jackson, to arrange house, contents and other insurance. They also retained him to arrange business insurance for their medical practice, Doctors on Cashel Limited.

The narrative suspended

[5] I pause at this point to explain two things. First, why the Marchands went to Mr Jackson to obtain insurance. And second, why Mr Jackson faces personal liability in this case.

Why new insurance was needed

[6] In 2008 Dr Marchand was convicted on three representative counts of using a document to obtain a pecuniary advantage, and one representative count of dishonestly using a document for the same purpose. The charges related to fictitious general medical services claims. Some 57 transactions in all, amounting to $30,500 in fraudulent claims over a three and a half year period. Dr Marchand pleaded guilty part way through a defended trial. Convictions were entered in September 2008.

Sentencing occurred that December. Dr Marchand was sentenced to eight months' home detention.[1] The sentencing judge, Judge Doherty, noted full repayment had been made, a full apology given to Pegasus Health, and that Dr Marchand had no prior convictions. The Judge also noted medical evidence that head injuries caused, first, by a motoring accident and later a soccer-related injury, had contributed to the offending. It was obvious at the hearing before me that these convictions have caused great shame and distress, to Mrs Marchand in particular.

[7] The plaintiffs had held insurance with the Medical Assurance Society (MAS) since 1982. It is a specialist insurer, focused on the medical profession. But on 12 June 2009 MAS wrote to the plaintiffs. The letter told them that all their insurances would be cancelled with effect 14 days hence. No reason was given, but an earlier telephone call suggested that MAS was taking that step because what it perceived to be non-disclosure of the criminal proceedings. Dr Marchand disputed that. He said that he had told the former South Island Manager of MAS. Be all that as it may, there was no doubt MAS was entitled to cancel the insurances. So new insurance needed to be obtained, and quickly.

Mr Jackson's obligations personal, not corporate

[8] The Marchands went to Mr Jackson on referral from another broker. It does not appear they had dealt with him before. They had had no need to do so. Their insurances had always been dealt with by MAS. But effective 26 June 2009, they would no longer be insured.

[9] Mr Jackson is an insurance broker specialising in fire and general insurance. He trades as "Town and Country Brokers". That is a mere trading name. In none of the documents presented in evidence - letters written by Mr Jackson, emails and other communications from him to the Marchands and NZI Insurance - does the name of any incorporated entity appear. It turns out that there is a company called

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[1] Subsequently in March 2009 the Health Practitioners Disciplinary Tribunal censured Dr Marchand and suspended him from practice for nine months (itself suspended to enable him to undertake examination).

"John F Jackson Insurance Broker Limited". The plaintiffs had never heard of it. It did not feature in their dealings with Mr Jackson.

[10] Mr Jackson attempted initially to defend these proceedings on the basis that any liability here was that of his corporate entity, rather than him personally. That defence, sensibly, was abandoned in closing.

The narrative resumed

[11] At [4] I left off the narrative with Mr Jackson having been retained to arrange house, contents and other insurance for the Marchands. The details of what transpired will be analysed shortly.

[12] Suffice to say for present purposes that Mr Jackson failed to arrange any insurance other than business insurance for Doctors on Cashel Limited. As at July 2009 – 14 months before the first serious Christchurch earthquake in September 2010 – this would have been a serious, but (with hindsight) merely inconvenient, interim exposure. But Mr Jackson told the Marchands that cover was in fact in place. I will analyse the representations he made in due course. I am satisfied that as from August 2009 the Marchands were under the clear belief, induced directly by Mr Jackson's assurances, that they had house and contents cover for their property in River Road.

[13] It is common ground that Mr Jackson submitted a questionnaire, completed by the Marchands, to NZI on 1 July 2009. NZI emailed Mr Jackson back with a quote and offer of cover. The offer of cover on the house was restricted to $1.5 million until a valuation was obtained. The premium was $2,215, and the excess $500. Mr Jackson negotiated the premium down to $2,104.

[14] Again it is common ground that at that point Mr Jackson should have requested that NZI hold the Marchands covered while a proposal form was completed and a valuation obtained. Such cover would have held good for 30 days under Mr Jackson's standard arrangement with NZI. Mr Jackson did not do that. In truth, he did nothing much at all – except to tell the Marchands on a number of

occasions that they were covered. Quite why he did so remains a mystery. It seems that the pressures of his business, in combination with some reversals in his health, overwhelmed him.

Disaster

[15] On 4 September 2010 the Marchands' house was seriously damaged by the first Christchurch earthquake. Shortly afterwards, on 11 September 2010, Mr Jackson submitted an application for cover to NZI. He backdated the application 30 August 2010 – i.e. before the earthquake – although it is clear on the evidence it was prepared *after* it. He completed the form himself and signed it on behalf of the Marchands. In answer to the question:

> Have you or any member of your family living with you ... had a conviction for a criminal offence within the last 7 years?

Mr Jackson wrote "No". As we will see, by September 2010 he knew that was not correct. In a later statement (and again in evidence before me) Mr Jackson acknowledged:

> At the beginning of August 2009 (i.e. a year earlier) I heard concerning reports about Jacques Marchand. I heard that he had been convicted of making false medical claims.

He attempted to explain that he thought it was a merely civil issue. That is, a dispute between MAS and the Marchands over insurance claims. I do not accept that qualification.

[16] Later in September 2010 NZI declined to accept the application – either backdated or at all.

The claim

[17] The claim brought against Mr Jackson by the Marchands was advanced originally on four bases: contract, Consumer Guarantees Act 1993 (s 28), Fair Trading Act 1986 (s 9) and negligence. During the course of trial Mr Jackson's counsel, Mr Brian Burke, abandoned his client's corporate personal defence, and

acknowledged that Mr Jackson had entered into "an ordinary contract of engagement" with the Marchands as insurance broker. On that acknowledgment, Mr Greg Hair, counsel for the Marchands, abandoned his clients' other causes of action and was content to rely on contract alone. The content of Mr Jackson's contractual duties will be considered anon. It is axiomatic, however, that an insurance broker must complete his engagement with reasonable care and proper skill.[2] Mr Jackson acknowledges that burden.

[18] The defence advanced by Mr Burke for Mr Jackson was as follows. First, that the Marchands had not disclosed to him Dr Marchand's convictions or that they had had their prior insurance cancelled. Had that disclosure been made they would have been unable to obtain insurance cover. Secondly, and alternatively, had they *not* disclosed that information, but Mr Jackson had obtained cover for them, the insurer would have voided the policy for material non-disclosure. Thirdly, again alternatively, any house cover would have been limited to a maximum of $1.5 million, contents cover to $150,000 and bridge cover (there was a bridge on the property) to $100,000. Fourthly, any contractual liability on Mr Jackson's part should be rebated for contributory negligence by the Marchands.

[19] This judgment is concerned with liability only. If liability is found, there will need to be a further hearing as to quantum.

Factual issues

[20] In the course of trial, eight factual issues were identified.

1 When did the plaintiffs and defendant meet in 2009?

[21] There is a dispute over when the parties first met.

[22] The Marchands say they and Mr Jackson met in "early June", before receiving notice of cancellation from MAS. Mrs Marchand gave evidence of two

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2 *Cee Bee Marine Limited v Lombard Insurance Co Limited* [1990] 2 NZLR 1 (CA) at 4.

meetings at the property before 23 June 2009. On that day, 23 June 2009, Mr Jackson wrote to them. The letter says:

> We have commenced the exercise to find a replacement insurer, particularly one that will be more user friendly than Medical Assurance Society.

It asked them to complete a high value homes questionnaire and return it to Mr Jackson's office. It can be inferred from that letter that the parties had met at least once by 23 June 2009.

[23] Dr Marchand says that he agrees with his wife's account. He says at the time of the first meeting they had not received the letter from MAS. The second meeting was held after they had received the 12 June 2009 letter from MAS.

[24] Mr Jackson had a different recollection of events. In his first brief of evidence he said that he met Dr and Mrs Marchand once "in June 2009". In his supplementary brief of evidence he suggests it was probably 22 June 2009. That is, the day before the letter quoted above. He says that he did not meet the Marchands again until 29 July 2009. He says that he was not told that MAS had cancelled their policy. Mr Jackson acknowledged in cross-examination that he had given affidavit evidence earlier in this proceeding that his memory had been affected by health problems, the onset of which occurred in 2007. But he said in evidence that he was "fairly sure" that the only meetings were on 22 June and 29 July 2009.

[25] At the end of the day, when the parties met is less important than what was in fact disclosed. There are no file notes or diary notes that shed light on either issue. Generally, I found Mrs Marchand in particular to be a careful and reliable witness. She was more cautious and thoughtful than her husband in answering questions. Mr Jackson's evidence I found less reliable, in part because his memory did not appear to be as good as that of other witnesses of fact, and in part because at various points he sought to qualify or alter prior statements given in a less guarded manner. In particular, I refer to a detailed statement that he gave his professional indemnity insurer, NZI, in June 2011, after problems with his broking business came to light. A copy of that statement was in evidence. There was no issue as to its admissibility.

Where inconsistent with his later evidence, generally I preferred the accuracy of Mr Jackson's earlier statement.

[26] I find on the balance of probabilities that one meeting took place at the River Road property between 12 June 2009 and 23 June 2009 – probably on 22 June 2009. Although generally preferring the evidence of the Marchands (in particular that of Mrs Marchand) over that of Mr Jackson, I am not satisfied on the balance of probabilities that any meeting took place prior to 12 June 2009. It may have occurred, but it has not been proved to my satisfaction.

[27] Be that as it may, it is the meeting between 12 June and 23 June 2009 that assumes most importance. Only at that meeting could the Marchands have disclosed that MAS had cancelled their insurance policies. Prior to 12 June 2009 they had no such knowledge. There was some evidence that cancellation had been foreshadowed in a telephone conversation with someone from MAS. The exact date and content of that conversation was unclear.

2 What did the plaintiffs disclose to the defendant?

[28] The Marchands say that, at the meeting on or about 22 June 2009, they told Mr Jackson that "MAS have dumped us". And that Mr Jackson's only interest at that point was when cover would expire, so that he could arrange alternative insurance in time. The real question is whether they disclosed two things:

(a) cancellation of their insurance policies by MAS; and

(b) Dr Marchand's convictions.

On the Marchands' evidence, the first arguably was disclosed on or about 22 June 2009. The second was only disclosed later, in October 2010. After the earthquake. But also well after Mr Jackson appears to have become aware of both facts.

[29] In his statement to NZI in June 2011, Mr Jackson said:

> 35 I went to the Marchand home at 21 River Road, Tai Tapu, Christchurch in June 2009 to have a look around, as it is a high value property. The Marchands said to me at our meeting that they needed insurance in a hurry because 'we are not sure if we're covered'. I thought this was odd. I knew that the Marchands were insured with Medical Assurance Society New Zealand Limited as they gave me house and contents insurance renewals and indicated that insurance was current until October 2009. Following my visit I contacted the Medical Assurance Society. I was told that the Marchand's policy had been cancelled mid-term. I thought at the time that this was very unusual.
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> ...
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> 50 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.

If this is right, then Mr Jackson knew circa July 2009 that the MAS insurance had been cancelled. And then, the following month, he knew that Dr Marchand had convictions for making false medical claims. But in his evidence before me, Mr Jackson said his earlier statement was incorrect in both respects.

[30] In his evidence-in-chief Mr Jackson did not refer to his conversation with MAS regarding cancellation. And he said that while "at the beginning of August 2009" he did become aware of reports about Dr Marchand being convicted of making false medical claims:

> ... I did not know the nature and extent of Dr Marchand's convictions and of the cancellations of their previous policies by [MAS] at that stage. I only became fully aware of the position after the 4 September 2010 earthquake.

He then says, further:

> I understood from this conversation [i.e. on or about 22 June 2009] that Dr Marchand had made a false claim under his disability policy with [MAS]. My statement that I had heard that Dr Marchand had been convicted of making false claims was a reflection (sic) to his disability policy. I was not referring to Dr Marchand's fraud convictions. I did not find out about Dr Marchand's fraud convictions until after I had completed and lodged the pro forma insurance proposal after the 4 September 2010 earthquake ...

Be that as it may, the statement about convictions is unequivocal.

[31] In cross-examination he was tested by Mr Hair on the NZI statement. Mr Jackson confirmed the veracity of what he had said to NZI in June 2011.[3] MAS had told him that they had cancelled the Marchands' policies, but not why. But this happened he said "months and months later" – i.e. months and months after June 2009. If so, and I do not accept the qualification advanced by Mr Jackson against the plain words of his earlier statement, then it was after he became aware in August 2009 that Dr Marchand "had convictions" for false medical claims. Mr Hair taxed him on that subject also. Mr Jackson accepted that "convicted" was a strong word, was not to be used lightly, and that he had used it in his statement to NZI, in affidavits given earlier in this proceeding, and in his first brief of evidence.

[32] I find that the evidence of the Marchands on this subject, corroborated in part by the statement made by Mr Jackson to NZI in June 2011, is reliable. That is I find:

(a) That on or about 22 June 2009 the Marchands told Mr Jackson that they had been "dumped" by MAS. They may not have told him that the policies formally had been cancelled. In any event, shortly thereafter Mr Jackson obtained confirmation from MAS as to cancellation. I find that his inquiry of MAS was made in consequence of what he had been told by the Marchands, which put him on notice that the policies may have been cancelled. MAS confirmed that that was so.

(b) The Marchands did not tell Mr Jackson that Dr Marchand had criminal convictions until October 2010. But Mr Jackson became aware of that fact himself in August 2009. I suspect, but do not formally find, that this was connected to his discovery that the Marchands' policies had been cancelled by MAS. I do find, formally, that Mr Jackson's knowledge of Dr Marchand's position was that he had criminal convictions. Not the more watered-down account that he sought to advance in evidence about a civil dispute with MAS over medical disability claims.

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[3] See [25] above.

3 What assurances did the defendant give the plaintiffs as to cover (and when)?

[33] This issue was not particularly controversial. Mr Jackson concedes that he gave the following assurances to Mrs Marchand that home and contents cover was actually in place:

(a) In response to an inquiry in August 2009, he assured Mrs Marchand that the insurance cover was in place.

(b) A second like assurance was given "in early 2010". He said:

> I assured Mrs Marchand that they were 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."

(c) In May 2010 Mrs Marchand made a claim for a broken pair of spectacles. The claim was for $649.20. Mrs Marchand filled in an NZI claim form, supplied to her by Mr Jackson, and sent it back to him with a copy of the optometrist's bill. Mr Jackson then paid the optometrist personally. "Ex gratia" as he put it. He did not tell Mrs Marchand that he had paid it. Nor did he tell her that cover was still not in place nearly a year after he had been retained.

(d) A second claim was submitted three months later after a cleaning contractor damaged wallpaper in the foyer of the Marchands' house. The claim form was sent to Mrs Marchand by Mr Jackson. There would of course be no point him doing so unless cover existed. The claim form was signed by her on 31 August 2010. Less than a week later the first Canterbury earthquake occurred.

[34] There is no question that, as from August 2009, the Marchands were under the impression, based on direct assurances, and then actions, by Mr Jackson, that home and contents insurance cover was in place.

4 What insurance was sought by the plaintiffs?

[35] The high value homes questionnaire filled in by the Marchands in June 2009 indicates the scope of insurance sought. It was for replacement value insurance for a home of 498 square metres, together with outbuildings. Replacement value was estimated on the form as $1.2 to $1.5 million. It may be taken that the assurances given by Mr Jackson related to cover in those terms.

[36] That is then confirmed by the policy note and invoice issued by Mr Jackson in October 2010 when he sought to put in place insurance for the Marchands after the earthquake. That was for cover under the NZI "Echelon Home Policy" wording, with "total replacement to 498 square metres". It confirmed natural disaster cover, and provided a voluntary excess of $350. The premium charged for that policy was $1,022.91. The Marchands paid that on 30 October 2010. Of course NZI later refused to confirm cover, as they were perfectly entitled to do.

[37] In the end this issue was not the subject of great controversy. Mr Jackson accepted that the insurance sought was to be on the NZI Echelon Home Policy terms, and that the policy note issued in October 2010 was an appropriate reflection of the cover the Marchands had sought.

[38] I have noted already that this judgment is concerned with liability only. There will need to be a separate determination of quantum. One thing that may require further evidence is the extent to which the policy would have been capped by a dollar sum, as opposed to a description of total area covered for replacement. NZI's initial quote, given on 1 July 2009, restricted the Echelon Home Policy in this case to $1.5 million "until an insurance valuation is received". The Marchands called expert evidence from Mr Anthony Howie, an expert in the insurance industry. Mr Howie's evidence was that the Echelon Home Policy cover is open-ended, with no value limit unless specifically noted. Noting the terms of the 1 July 2009 response from NZI, Mr Howie's evidence was:

> I would have expected that, once NZI received the requested insurance valuation, they would offer cover for full replacement, but limited to a specified maximum that would have been based on that valuation.

[39] The outcome is, in a sense, ironic. But for the cancellation of their policies, the Marchands would have retained their insurance arrangements with MAS. Yet the cover they had secured from MAS was inadequate: just $1 million (including the $100,000 EQC cover). The cover Mr Jackson said he had obtained materially exceeded that. The problem was it was never put in place.

5 Could the plaintiffs have obtained that insurance (from NZI or elsewhere) with full disclosure?

[40] Mr Jackson's principal defence was that regardless of his assurances otherwise, no loss was caused by his actions. That, he said, was because the plaintiffs were uninsurable as a result of Dr Marchand's convictions. That begs a number of separate questions. But for Mr Jackson's assurances, would the Marchands still have owned the house at all 14 months later, had they known they could not insure it? That involves potential loss of chance issues. Would they have elected to sell it, or take the risk? Had they elected to sell, would they have sold it? And if so, what for? But before entering those shark-infested waters, the initial premise needs to be examined.

[41] The battle-line is drawn in the amended statement of defence of 22 August 2012, at [39]–[41]:

> 39 The plaintiffs failed to disclose the following material information to John F Jackson Insurance Broker Limited:
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> (a) In 2008 Jacques Marchand was convicted of three representative counts of using a document to obtain a pecuniary advantage with intent to defraud under section 299A(b) of the Crimes Act and one representative count of dishonestly using a document to obtain a pecuniary advantage under section 228(b) of the Crimes Act.
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> (b) In 2009 the plaintiffs had their insurance cancelled by Medical Assurance Society.
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> 40 If the plaintiffs had disclosed the information referred to in paragraph 31 above they would have been unable to obtain insurance cover.
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> 41 Alternatively if the plaintiffs had not disclosed the information referred to in paragraph 31 above any insurer would have been

> entitled to avoid the policy on the grounds of material non-disclosure.

It is [40] with which we are concerned. I have found already that cancellation was partially disclosed in June 2009, and that Mr Jackson became aware of the exact position in about July 2009. Likewise he became aware of Dr Marchand's convictions at the beginning of August 2009. So the question is whether, in light of those events, insurance cover could still have been secured.

[42] Mr Jackson called an expert from the insurance industry to support his contention. Mr John Sloan, who has over 35 years experience in the industry, gave initially very absolute evidence. Mr Sloan's written evidence was that had Mr Jackson submitted the house and contents proposal to NZI, with full disclosure of Dr Marchand's criminal convictions and the cancellation of his policies, "NZI would have declined to accept the insurance". Further, had he then submitted the insurance to other insurers, "they would have followed suit". Mr Sloan concluded:

> Consequently, putting the causation factors aside, Dr Marchand's house and contents insurance were rendered uninsurable from the moment [MAS] terminated the coverages.

I have to record that when first reading that brief of evidence, I wrote beside that paragraph, "That simply cannot be right". So it proved to be.

[43] In opposition the Marchands called another insurance industry expert, Mr Howie. I have already introduced him.[4] His evidence was more subtle than Mr Sloan's. First he accepted that the fact of criminal convictions and cancellation of insurance by a previous insurer would be "material facts" which would influence an insurer in deciding whether a particular risk was acceptable. And on what terms. But then he went on to say that on receipt of an application where those facts were disclosed, it would be normal for the file to be referred to a senior underwriter to review. The decision of that underwriter would depend on the full circumstances of the case. Drawing on *his* 35 years of experience in the industry, Mr Howie concluded that after reviewing the letters provided by Dr Marchand's neurosurgeon, Prof Gorman, and Dr Marchand's counsel at his criminal hearing, "a prudent

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4 At [38].

underwriter would have accepted the policy on standard terms". Mr Howie supported that conclusion by reference to the fact that NZI had become aware of the convictions in January 2011, but since that date had remained on risk for the Marchands' business Doctors on Cashel. It had indeed renewed the policy. And it had accepted and paid out on two claims under it. Further, it had issued new insurance for the Marchands' motor vehicles. Mr Howie maintained these views under close cross-examination by Mr Burke.

[44] Under cross-examination from Mr Hair, Mr Sloan retreated significantly from his earlier absolute views. First, he accepted that the convictions and the cancellation by MAS were really a single material fact. That was because the one followed directly from the other. Secondly, he accepted that NZI's business policy underwriters were aware of Dr Marchand's convictions from at least 26 January 2011 and it continued to cover the Marchand's medical practice business, renewed that policy, paid claims under it and wrote a new policy for the Marchands' motor vehicles. Thirdly, Mr Sloan accepted that in fact he could not say whether NZI (or any other insurer) would cover the Marchands for house and contents insurance, or not. That would be an issue of risk evaluation, and different underwriters would reach different conclusions. Fourthly, it was at the end of the day, a question of evaluating the risk. Insurers do cover tenanted properties where tenants have fraud or other convictions. They do not drill down into tenants' convictions. If the fact that one of the trustee owners (who was also an occupant) here had fraud convictions was material to the insurer, one risk response might be to give extended cover but increase the premium to cover the additional administrative costs of scrutinising claims with more care. Alternatively, cover might be excluded for criminal acts, such as burglary. Natural disaster damage, which no amount of criminality can induce, would continue to be covered. Alternatively again, the excess might have been increased. Finally, Mr Sloan accepted, as he had to, that people with criminal convictions are not by virtue of that status uninsurable. Except, perhaps, where the convictions are for arson or other serious wilful damage. That would be the insurance market cutting off its nose to spite its face, and losing a valuable source of premium income. It is not in fact what happens in that industry.

[45] The absolute view taken by Mr Sloan initially was not correct. He was right to moderate his views. In the end there was little difference between the experts on this issue, and little controversy as to the answer to this issue. The Marchands' house was not uninsurable by virtue of Dr Marchand's past convictions. As a matter of fact, past convictions require additional scrutiny, and perhaps additional exclusions, premium or excess. But in most cases they do not render the applicant uninsurable. Mr Jackson plainly did not think so when he submitted the revised application form in October 2010. NZI did not think so when, in full knowledge of Dr Marchand's convictions, it renewed the Doctors on Cashel business policy on a number of occasions, most recently in 2012. NZI had also accepted and paid out on claims under that policy, such claims having been paid in June 2011 and February 2012. And it had issued new motor vehicle insurance for the plaintiffs' motor vehicles in September 2011. It had renewed that policy in March 2012. These were significant events because the risk of a false claim based on Dr Marchand's history was probably greater in relation to those policies than in relation to the house and contents policy. I agree with the evidence of Mr Howie (and that ultimately given by Mr Sloan) that the Marchands could have obtained the full replacement insurance they sought from either NZI or elsewhere if they had made full disclosure. Accordingly, the answer to this factual issue is "yes".

6 If not, what insurance could they have obtained?

[46] Given the affirmative answer to the preceding factual issue, this question no longer arises.

7 Is it likely that the plaintiffs would have made full disclosure?

[47] It is true that the Marchands might have been more forthcoming in their disclosure. Probably they should have been clearer with Mr Jackson about both cancellation and conviction. Dr Marchand would have been wearing his home detention ankle bracelet when the meeting took place on or about 22 June 2009. Against that criticism, as far as it goes, three points need to be made.

[48] First, at that time, in mid-2009, no formal application form had been put before the Marchands. Indeed one may not have been put in front of them before October 2010. That form sets out the importance of full disclosure, and it asks a series of questions about prior convictions and cancellations. But prior to October 2010 the Marchands had seen only the high value homes questionnaire. That questionnaire did not ask such questions. The Doctors on Cashel business policy, which was put in place, was the product of an application form signed by Mr Jackson himself, in late July 2009. The other handwriting on the application form apart from his is not that of the Marchands. Mrs Marchand says she had not seen that form, and I accept her evidence. Likewise Dr Marchand. I therefore accept that the first occasion in which the issue of disclosure of convictions arose was in October 2010.

[49] Secondly, a broker advising a client has a duty to elicit information relevant to a proposal.[5] Mr Jackson acknowledged that duty in cross-examination. It is part of the broker's responsibility to explain to the insured his or her duty to disclose all material circumstances. But it seems that that explanation was not given until October 2010. That duty was also a continuing one. So that on becoming aware of cancellation, and then of convictions, and with the formal policy application not yet having been completed, Mr Jackson had a duty to go back and discuss these matters with the Marchands. Quite inexplicably, he did not. Even more inexplicably, he told them they were covered.

[50] Thirdly, as noted [15], when the *first* formal home and contents application form was completed in September 2010, Mr Jackson himself filled it in. He backdated it to 31 August 2010. He stated that no member of the Marchand family had had insurance cancelled. And that no family member had been convicted of a criminal offence in the last seven years. He must have known that was not correct. NZI would not accept that form anyway, as it was not signed by the intended insured. As a result, the form was recompleted.

[51] The *second* application form was signed by Mrs Marchand, and dated 19 October 2010. Both questions this time were answered in the affirmative. Full

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5 *Jones v Environcom Limited (No 2)* [2010] EWHC 759, at [54].

details, and extenuating circumstances, were given. It was put to Mrs Marchand in cross-examination that this second form was created after the event, to "bolster her case". She denied that accusation. I accept her evidence on that point. I reject that of Mr Jackson which suggests that the second form was a concoction of which he had no knowledge.

[52] There was then a *third* application form, also prepared on 19 October 2010. This time it bore Mr Jackson's broker's stamp. And this time the two questions were answered "no", as in the case of the initial September application prepared by Mr Jackson. The letters from Dr Marchand's counsel and neurosurgeon were attached. These explain quite clearly that there have been convictions. Mrs Marchand's evidence was that this was a compromise between Mr Jackson's original ("31 August 2010") form and Mrs Marchand's second (19 October 2010) completely explicit form. That explanation in context rings true. She said that Mr Jackson said that the application (which, remember, post-dated the earthquake) "needed to be in the best light possible to the insurance company while still declaring the relevant facts". She said:

> He then stated that it was correct to tick no against cancellations and criminal convictions because the applicants were the Trust and me, but then to tick yes against any other information likely to affect this insurance and declare Jacques' convictions with an attached letter.

In the circumstances, with Mr Jackson all too aware of the pickle he was in over cover, this explanation also rings true.

[53] Mr Jackson's explanation did not. Indeed his evidence on this matter stretches credibility to breaking point. Mr Jackson said the following about the third form:

> Mrs Marchand answered no to the questions concerning previous cancellations and criminal convictions. I did not believe it was my place to correct her on the issue of criminal convictions. Also, the letters of Dr Gorman and Dr Marchand's solicitor were enclosed. I did not know about the [MAS] cancellation.

The latter point is untrue, and it is unlikely that Mr Jackson had forgotten. Mrs Marchand's evidence in any case was that she had reminded him of the situation

on 19 October 2010 when the second and third forms were being completed. I accept that evidence. The former point – "not [his] place" to correct Mrs Marchand on the issue of criminal convictions – beggars belief. He was aware of the convictions, and detail was given of them in the letters attached. His duty, as he accepted in cross-examination, was to explain the duty of disclosure by an insured, and the consequence of non-disclosure. All this, remember, came after Mr Jackson had himself prepared a backdated application form dated 30 August 2010 – but in truth certainly postdating the 4 September 2010 earthquake (as he accepted in cross-examination) – which ticked "no" to the two questions concerning cancellation and convictions.

[54] I conclude that it is more likely than not that had the NZI Echelon Home Policy application form been put before the Marchands in June or July 2009, they would have disclosed the fact of Dr Marchands' convictions. On the same basis, they would have clarified that, in being "dumped" by MAS, their policies had been cancelled.

[55] For the avoidance of doubt also, as we are dealing with double contingencies (due disclosure and insurance available in that event), I also conclude on the evidence before me that it is more probable than not that *both* outcomes together could and would have resulted had the matter been actioned in mid-2009.

8 If not, what would the consequences of non-disclosure have been?

[56] Strictly, this issue does not arise given the affirmative conclusion to the preceding factual issues. It is however relatively uncontroversial that had the Marchands not disclosed the convictions and cancellations, at least in the manner disclosed in the third version of the October 2010 application form,[6] then NZI would likely have cancelled the policy. The implications of that, and whether there would have been a chance that the Marchands could successfully challenge such cancellation, were not explored fully, and the issue does not now arise.

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6 See [52] above.

[57] It is in any case academic. Mr Jackson, armed with the information he had by August 2009 about the cancellation and convictions, had a duty to the Marchands to revisit their policy cover. In that event, it is likely that they would still have been able to secure cover. The position might have been affected by any deliberate non-disclosure on the NZI Echelon Home Policy application form. That was not explored before me, and I have in any case found that it is more probable than not that that would not have occurred.

Summary of factual conclusions

[58] In this section of my judgment I have concluded as follows:

(a) The Marchands met Mr Jackson on or about 22 June 2009 to arrange replacement house and contents insurance.

(b) At that time the Marchands disclosed to Mr Jackson that they had been "dumped" by MAS. Shortly afterwards, probably in July 2009, Mr Jackson ascertained from MAS that their policies had been cancelled.

(c) The Marchands did not disclose that Dr Marchand had criminal convictions until October 2010. I note in this respect they had not been asked about that, and nor was the normal application form which would have elicited such information put in front of them until October 2010. Despite that, Mr Jackson himself discovered that Dr Marchand had criminal convictions at the beginning of August 2009.

(d) Despite the fact that Mr Jackson had not placed home and contents cover with NZI (or any other insurer), and despite the fact that he knew he had not done so, he repeatedly assured the Marchands that such cover was in place.

(e) The insurance cover sought by the Marchands was cover under the NZI Echelon Home Policy wording, with a "total replacement of 498 square metres" including natural disaster cover, and with a voluntary excess of $350. An issue not determined at this hearing is whether cover would however have been capped to a total value.

(f) It is more likely than not that the Marchands would have been able to have obtained the insurance cover they sought, following full disclosure. That conclusion remains subject to the issue of whether a total value cap would have applied.

(g) I am also satisfied on the balance of probabilities that had the proper insurance application form been put in front of the Marchands in June or July 2009, they would have disclosed the fact of Dr Marchand's convictions and clarified that the preceding MAS policies had been cancelled.

(h) For the avoidance of doubt, I am satisfied on the same balance of probabilities that *both* (f) and (g) would have occurred if the matter had been addressed, as it should, in mid-2009.

Legal issues

[59] Mr Jackson acknowledged at trial that an ordinary contract of engagement as insurance broker had been entered between he and the plaintiffs. In that context the following legal issues arise:

(a) Issue 1: What was the content of Mr Jackson's duties under that contract?

(b) Issue 2: Was Mr Jackson in breach of those contractual duties?

(c) Issue 3: If breach has occurred, what loss in principle is Mr Jackson liable for?

(d) Issue 4: Should that in principle loss be rebated for contributory negligence by the plaintiffs?

Issue 1: What was the content of Mr Jackson's duties under that contract?

[60] In *Cee Bee Marine Limited v Lombard Insurance Co Limited* the Court of Appeal said:[7]

> The broker's general responsibility in that situation is summed up in the following passage in *Ivamy's General Principles of Insurance Law* (5th ed, 1986) at p 514:
>
> > It is the duty of the agent to carry out the transaction which he is employed to carry out, or, if it is impossible for him to do so, to inform the principal promptly in order to prevent him from suffering loss through relying on the successful completion of the transaction by the agent.
> >
> > Thus, an agent employed to effect or renew an insurance must effect it or renew it effectively, or, if he is unable to do so, must notify his principal of his inability as soon as possible so as to enable the principal to take steps to insure elsewhere.
>
> And where, as here, the client without giving particularised instructions relies on the broker to see that the client is protected and the agent has agreed to do business on those terms, "then he cannot afterwards when an uninsured loss arises, shrug off the responsibility he has assumed" ... The broker's duty is to assess the risk that should be insured; then, as this broker put it in offering its services to the Farrant companies, "to obtain the best possible cover at the most economical rates"; but, if the broker's efforts fail and it cannot obtain appropriate insurance, then the broker must report the failure promptly and seek further instructions. In this case the broker led the Farrant companies to believe that the fibreglass operations at Montreal Street were covered. They were not.

[61] An insurance broker is normally the agent of the insured.[8] Usual legal principles of agency govern that relationship. It all depends on the instructions. Normally a broker's instructions are to complete a proposal for clients, negotiate the appropriate contract of insurance on behalf of its client, and advise on the meaning of policy terms and the extent of cover. Part of that, as Mr Jackson accepted under cross-examination, is to advise on the importance of proper disclosure. That duty

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7 *Cee Bee Marine Limited v Lombard Insurance Co Limited* [1990] 2 NZLR 1 (CA) at 5 per Richardson J.

8 *Helicopter Equipment Limited v Marine Insurance Co Limited* [1986] 1 NZLR 448 (HC).

was reinforced on the front page of the NZI application forms. But as I have held, those forms were not put in front of the Marchands until October 2010.

[62] There was no real argument between the parties that the principles in *Cee Bee Insurance*, expressed over 20 years ago, remain apposite. Insurance brokers must act with reasonable care and proper skill. In doing so they must diligently take all necessary steps to effect cover and protect the client. If they are unable to effect cover, then they must promptly report that fact to the client.[9]

Issue 2: Was Mr Jackson in breach?

[63] Despite the most valiant efforts of Mr Burke on his behalf, there was simply no doubt in this case that Mr Jackson was comprehensively in breach of his duties as broker to the Marchands. He did not act with reasonable care and skill. He did not act diligently in taking all necessary steps to effect cover and to protect the Marchands. He exacerbated the problem by telling the Marchands, quite wrongly, that they were covered. And then by paying out, himself, a claim that they thought had been accepted by the insurer. By these means an insurable risk was left uninsured. And all for want of a nail.

Issue 3: What loss in principle is Mr Jackson liable for?

[64] I am dealing here with loss in principle only, as the final assessment of quantum remains to be resolved in a further hearing.

[65] This question, also, was addressed in the Court of Appeal's judgment in *Cee Bee Marine Limited v Lombard Insurance Co Limited*.[10] That case was one in which an insurance broker had erroneously omitted to obtain insurance cover for stock and plant owned by the intended insured (the policy being written in favour of another entity without an insurable interest). The Court of Appeal confirmed that the measure of damages applicable when an agent has failed to effect or renew a valid insurance in accordance with instructions is the amount necessary to place the

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9 Merkin (ed) *Colinvaux's Law of Insurance* (9 ed, Sweet & Maxwell, London, 2010) at [15-034].
10 *Cee Bee Marine Limited v Lombard Insurance Co Limited* [1990] 2 NZLR 1 (CA).

principal in the same position as if the insurance contract had been made or renewed as instructed.[11] The Court of Appeal noted that that proposition proceeded on the premise that insurance cover would have been available, and was not directed to a case where the ready availability of insurance cover (and under what terms) was in question. Where doubt existed, the issue became one of loss of a chance. The Court of Appeal then said:[12]

> The inquiry thus calls for assessment of what, if any, cover could reasonably have been arranged had the broker taken proper steps to negotiate cover at the time with Lombard or another insurer, and on what terms that cover would have been provided. If acceptable insurance were not available then it would, we think, be necessary to assess what course the client could have followed and would have followed. To stop short at the first step and limit the inquiry to consideration of the possibility of obtaining insurance cover, as the Judge did, is to fail to reflect the contractual duty owed by the broker to report promptly to Cee Bee if unable to obtain appropriate insurance. In the end it is a judgment as to what the outcome would have been in the absence of the negligent conduct complained of. The outcome is then reduced to money terms and in appropriate cases is discounted to reflect any uncertainties affecting the achievement of that outcome.

[66] The Court of Appeal concluded in that case it was more likely than not that Cee Bee would have obtained effective insurance cover from Lombard or another insurer against the risk that ultimately destroyed its stock and plant. That being the outcome on the balance of probabilities, no loss of chance analysis was required.

[67] I have taken the same approach in this case in analysing whether the Marchands could have obtained insurance (and also whether they would have made full disclosure in obtaining that insurance). I have concluded already that it was more likely than not that the Marchands would have made full disclosure and obtained insurance cover as sought, had the matter been addressed properly in mid-2009.

[68] It follows from this that the plaintiffs' loss in this case will be the amount necessary to put them in the same position as if the insurance cover sought by them had been obtained. As I have said before (and say now for the last time), there remains at large the question of whether a total value cap on that insurance would have applied. That is for determination at another time.

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[11] At 5–6.
[12] At 6.

Issue 4: Should the plaintiffs' loss be rebated for contributory negligence?

[69] The plaintiffs do not dispute that s 3 of the Contributory Negligence Act 1947 could apply in the circumstances of the present case.[13] What conduct constitutes contributory negligence is a question of fact to be determined in relation to the circumstances of each particular case. In this case, Mr Jackson asserts contributory negligence by the Marchands in two respects:

(a) failure to disclose Dr Marchand's convictions and their prior insurance policy cancellation; and

(b) failure to require production of a formal policy advice statement and policy for their home, contents and motor vehicle insurance from either Mr Jackson or NZI.

[70] I can be brief. I do not accept that either particular can be advanced here.

[71] As to the first point, there are two answers. First, the operative cause of non-disclosure in this case (given that I have found that the Marchands would have disclosed the true position if and when the NZI application form was put before them) was Mr Jackson's failure to perform his duty to effect cover by presenting the proposal application form to the Marchands in June or July 2009. Secondly, what is particularly noteworthy in this case is that notwithstanding the fact that Mr Jackson became aware of both events (conviction and cancellation) he did nothing about it. He did not, as he should have as the Marchands' broker, counsel them on the consequences of that information. Nor did he put to them the policy application forms in mid-2009 in the way that he then did in October 2010 when the die was already cast. I have found that had he done so, and the form been filled in with appropriate disclosure, it would have been more likely than not that NZI (or another insurer) would have extended cover.

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[13] *Singh v Rutherford* [2012] NZHC 380. See generally Merkin (ed) *Colinvaux's Law of Insurance (*9 ed, Sweet & Maxwell, London 2010) at [15-051].

[72] As to the second point, the Marchands failing to require a formal policy advice statement, they were relying on Mr Jackson as their professional adviser. He had expressly (and by his conduct) confirmed that insurance cover was in place. That assurance was false and in breach of duty. The Marchands were not required to look past these repeated assurances. Mr Jackson's argument in this respect is, as Mr Hair put it, "a contention that the plaintiffs were negligent because they relied on his advice and assurances as their professional adviser". The proposition need only be stated for its falsity to become apparent.

[73] There is no proper basis for the reduction of damages on the basis of any contributory negligence by the plaintiffs. In my view there was none.

Result

[74] Judgment for the first plaintiffs.

[75] The defendant is liable to the first plaintiffs on the basis set out in [68] above.

[76] If a further hearing as to quantum is required, counsel are to confer and produce a joint memorandum as to steps required and suggested timetabling.

[77] The first plaintiffs are entitled to costs. If these cannot be agreed, I will receive memoranda. They are not to exceed three pages each, and are to be submitted within 14 and 21 days respectively.

[78] I thank counsel for their assistance.

Stephen Kós J

Solicitors:
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