IN THE COURT OF APPEAL OF NEW ZEALAND

CA274/2012
[2013] NZCA 302

	BETWEEN	IAG NEW ZEALAND LIMITED Appellant
	AND	JOHN F JACKSON Respondent

Hearing:	11 March 2013 and 14 June 2013
Court:	O'Regan P, Arnold and Miller JJ
Counsel:	GSA Macdonald and J M Hayes for Appellant (First Hearing) BRD Burke and M K Crimp for Respondent (First Hearing) M R Ring QC and J M Hayes for Appellant (Second Hearing) BRD Burke for Respondent (Second Hearing)
Judgment:	15 July 2013 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed. IAG will have summary judgment on its ninth affirmative defence to Mr Jackson's claim.

B Costs are reserved with a timetable for submissions as noted in paragraph [33].

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] In May 2009 a Christchurch couple, Nicola and Jacques Marchand, engaged an insurance broker, John Jackson, to arrange insurance cover for their home and contents, their motor vehicles, and a medical practice.

[2] Mr Jackson placed business interruption cover for the medical practice, but he arranged none of the other insurances. This was an oversight initially. But he assured the Marchands not once but several times that he had placed the cover with New Zealand Insurance, apparently intending on each occasion to do so immediately.

[3] The truth was revealed after the earthquake of September 2010 badly damaged the Marchands' home. They sued Mr Jackson for their uninsured loss. He joined IAG, his professional indemnity insurer, as a third party. It moved for summary judgment, citing a policy exclusion for liability in connection with dishonest conduct, but failed in the High Court, Associate Judge Matthews reasoning that dishonesty must be decided on the facts at trial.[1] IAG brings this appeal against that judgment.

[4] Since the judgment under appeal the Marchands have succeeded at trial against Mr Jackson. IAG did not participate.[2] Kós J was not required to decide why Mr Jackson acted as he did. The Judge did find on the evidence before him that the reasons remained a mystery but it seemed that pressures of business, in combination with some reversals in health, overwhelmed Mr Jackson.[3]

What Mr Jackson did

[5] The central facts are not in dispute. The Marchands approached Mr Jackson because they had been declined cover by their existing insurer after Mr Marchand was convicted of offences of dishonesty relating to his medical practice.[4]

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1 *Marchand v Jackson* HC Christchurch CIV-2011-409-810, 2 May 2012 [*Marchand* No 1].

2 IAG was joined not long before trial. It was offered the opportunity to participate, but preferred to pursue summary judgment.

3 *Marchand v Jackson* [2012] NZHC 2893 at [14] [*Marchand* No 2].

4 The principal issue before Kós J was whether the Marchands had failed to disclose the

Mr Jackson had them complete a High Value Homes questionnaire for NZI, and on 1 July 2009 he secured a quote. He did not bind cover or refer the quote to the Marchands. Nor did he invoice them for the premium.

[6] Mrs Marchand wondered why no account had been sent for a premium. She telephoned Mr Jackson about the end of July 2009 to check that the home, vehicles and contents were insured. He assured her that they were. She repeated her inquiry early in 2010, and he repeated his assurance. He knew when he offered them that these assurances were untrue. In May 2010 Mrs Marchand told Mr Jackson that she wanted to make a claim for $649.20 for a pair of spectacles. He had her complete an NZI claim form, but he did not send it to NZI. Rather, he paid the claim himself.

[7] The first Canterbury earthquake struck on 4 September 2010. Only then did Mr Jackson try to arrange cover with NZI, submitting an application form which he had dated 30 August 2010.[5]

What the evidence tells us about why Mr Jackson acted as he did

[8] Mr Jackson made a written statement in the presence of IAG's solicitors. That document, prepared on 8 June 2011, underpins IAG's claim that his conduct was dishonest. It included the following account which, as the Associate Judge found, might well suggest negligence:

> On receipt of NZI's house and contents quote I should have sent a hold covered 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 ...
>
> 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

convictions to Mr Jackson, so would have been denied cover in any event.

5 *Marchand* No 2, above n 3, at [53].

> quote or send a hold covered 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.

[9] Mr Jackson went on, however, to say that while he knew he had not placed cover he always meant to do so:

> 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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> ...
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> ... 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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> ... 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 paid some money.

[10] Mr Jackson concluded by saying that he could not explain why he had acted as he did:

> 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.

[11] In his first affidavit in opposition to the summary judgment application, Mr Jackson attributed his failure to place cover to inadvertence and repeated oversights:

> … 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 the second time in early 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.

[12] In a third affidavit, Mr Jackson recounted serious health problems that he has endured since 2007 and explained that he now suffers a very poor memory. A consultant psychiatrist, Alistair MacLeod, also swore an affidavit in which he addressed the question whether Mr Jackson suffers a depressive illness which may have precipitated "memory lapses and discrepancies". He found it highly likely that a combination of heart disease, the side-effects of treatment for prostate cancer, stress and possible major depression would distract Mr Jackson and interfere with his performance at work.

The exclusion in the professional indemnity policy

[13] IAG has advanced several defences to Mr Jackson's claim. We need not survey them. It is not in dispute that Mr Jackson's liability to the Marchands was prima facie covered under the professional indemnity policy, which covered civil liabilities arising in the conduct of professional services. The only relevant part of the policy for our purposes is Exclusion E, which provided that Mr Jackson was:

> … not insured for civil liability in connection with any dishonest, fraudulent, criminal or malicious acts or omissions by you….

[14] It will be seen that the exclusion required a civil liability to another, a dishonest act or omission, and a connection between the two. (IAG does not say that Mr Jackson's acts or omissions were fraudulent, criminal or malicious.) Two questions arise; what "dishonest" means in this setting, and what connection must be shown between the insured's dishonest conduct and his civil liability.

Summary judgment

[15] IAG moved under r 12.2 of the High Court Rules, which governs a defendant's (or in this case, third party's) application for summary judgment. IAG

must show that none of Mr Jackson's causes of action can succeed.[6] The principles that the Court applies when assessing a defendant's or third party's summary judgment application are not in issue.[7] IAG acknowledges that the decision whether Exclusion E applies must await trial if the reasons why Mr Jackson acted as he did matter. It says the reasons do not matter, for he knew the assurances he gave the Marchands were false and IAG needs no more than that to invoke the exclusion.

Has IAG shown that Mr Jackson acted dishonestly?

[16] The Associate Judge recognised that the affidavit evidence pointed to dishonesty, in the sense that Mr Jackson's conduct appeared to be underhand or not straightforward, but he reasoned that the conduct was out of character and might be explained by the evidence of Dr MacLeod. That being so, he could not be satisfied to the summary judgment standard that the exclusion applied.[8]

[17] On appeal, Mr Burke supported the High Court decision by advancing two propositions: honesty is a subjective quality which requires conscious impropriety, so the Court's assessment depends on what Mr Jackson actually knew at the time;[9] and the dishonesty of any given action is accordingly best left to the fact-finder's judgement, which will be formed after assessing all the circumstances that he then knew.[10]

[18] Both counsel accepted before us, as had the Associate Judge, that the test of dishonesty in this context is found in *McMillan v Joseph*.[11] Conduct is dishonest if it is both deliberate and underhand or not straightforward. It need not be motivated by an intention to deceive.[12] Although dishonesty is a subjective mental state, the law uses an objective standard to measure it: the person's subjective knowledge must make his or her conduct dishonest by normally accepted standards.[13] The civil

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6 In this case he has a single cause of action in contract.

7 See *Stevens v ASB Bank Ltd* [2012] NZCA 611 at [32]–[33]. The authorities were summarised in *Krukziener v Hanover Finance* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26].

8 *Marchand* No 1, above n 1, at [40] and [53].

9 *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389.

10 *McMillan v Joseph* (1987) 4 ANZ Insurance Cases ¶60-822 at 75,056 per Casey J.

11 At 75,053, per Cooke P.

12 Ibid. *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65, (2000) 203 CLR 579.

13 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 at [15] per Lord Hoffman.

standard applies, but the Court recognises the seriousness of the allegation when assessing the proof.

[19] As we have noted, Mr Jackson knew when he gave the assurances that they were false. He has admitted it. His behaviour confirms it, most notably in having Mrs Marchand complete an NZI claim form only to pay the claim himself. Self-evidently, his purpose was to give Mrs Marchand the impression that she had cover when in truth she did not. Nothing about Dr MacLeod's report or the evidence that Mr Jackson has given since making his statement to IAG's solicitors alters these facts. Mr Burke contended that the assurances were not subjectively dishonest, for Mr Jackson always meant to get on with it by placing the cover and would have done so had he been coping at the time. That may be so. It would matter, however, only if dishonesty were measured by a subjective standard, or if the insurer must prove an intention to deceive.

[20] We accordingly conclude, respectfully differing from the Associate Judge, that Mr Jackson has no answer to IAG's allegation that he acted dishonestly. His admitted contemporaneous knowledge that the assurances he gave the Marchands were false made his conduct objectively dishonest.

Is there a sufficient connection between Mr Jackson's dishonest act and his civil liability to the Marchands?

[21] The next question is whether Mr Jackson's dishonest acts or omissions were "in connection with" his civil liability to the Marchands. The question must be answered because it is common ground that Mr Jackson did not act dishonestly when he first incurred a liability to the Marchands by failing to act on their instructions to secure cover for their home, contents and vehicles. Dishonesty came later.

[22] This question was addressed briefly in argument before us on 11 March 2013. Mr Macdonald argued that "in connection with" requires merely a relationship between one thing and another; it suffices that one thing is "having to do with the other". In particular, the relationship need not be causal in nature. The same

proposition had been accepted in the High Court,[14] and Mr Burke chose not to contest it on appeal.

[23] After reserving judgment we sought further submissions, which led to a hearing on 14 June, when Mr Ring QC appeared with Ms Hayes for IAG. He contended that there need be no causal relationship between dishonesty and civil liability, but was prepared to accept that the former must play a "material" part in the latter. By way of illustration, he accepted that there would not be a sufficient connection had Mr Jackson's attempt to pre-date cover after the 4 September earthquake been his only act of dishonesty. Mr Burke responded that "in connection with" requires some causal or consequential relationship between the dishonest act or omission and the civil liability.

[24] The phrase "in connection with" plainly requires a nexus between one thing and another, but the nature and closeness of the required connection always depends on context and purpose.[15] Mr Ring cited *Re Nanaimo Community Hotel* for the proposition that "in connection with" means no more than "having to do with".[16] We observe, however, that that was not an insurance case. It dealt with the jurisdiction of an Exchequer Court over questions arising in connection with the Income War Tax Act, and specifically the levying of an excess profits tax on particular businesses. The Supreme Court of British Columbia relied upon what it described as "very generally accepted" meanings, and held that "in connection with" includes "matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing".[17] This statement was upheld on appeal.[18]

[25] The Australian Federal Court adopted the broad *Re Nanaimo Community Hotel* definition in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal*,[19] a judicial review application about procedures to be followed in connection with the grant of commercial radio licences. The particular point in issue was whether "in

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14 *Marchand* No 1, above n1, at [43].
15 *Hadfield v Health Insurance Commission* (1987) 15 FCR 487 (FCA) at 491.
16 *Re Nanaimo Community Hotel Ltd* (1944) 4 DLR 638 (BCSC).
17 At 639.
18 *Nanaimo Community Hotel v Board of Referees* [1945] 3 DLR 225 (BCCA) at 261-262.
19 *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (Unreported, Federal Court of Australia, Wilcox J, 4 September 1987) at [37].

connection with" requires a temporal relationship between one thing and another. *Our Town FM Pty Ltd* has in turn been followed in an insurance setting, notably in *Drayton v Martin*,[20] which decided whether investment advisory services formed part of the professional business of an accountant.

[26] However, Australian courts have taken a narrower view in cases which turned on the closeness of the relationship required, in an insurance setting, by the phrases "in connection with" and "arising out of". In *Dickinson v Motor Vehicle Insurance Trust* one child suffered burns after another played with matches. They had been left in a parked car while the driver went shopping. The High Court held that the injuries arose out of use of the car and so were covered, reasoning that:[21]

> ... The test posited by the words "arising out of" is wider than that posited by the words "caused by" and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.

The High Court had earlier taken a similar view in *Government Insurance Office of New South Wales v Green and Lloyd Pty Ltd*.[22]

[27] In *RAA-GIO Insurance Ltd v O'Halloran* the Supreme Court of South Australia examined a claim under a home insurance policy which extended to legal liability in respect of any accident.[23] The policy excluded claims arising out of or in connection with any business of the insured. His liability arose when he returned to his office building after hours for non-work purposes and caused a fire which damaged other premises. A Full Court found that "in connection with" required an appropriate nexus between his liability and his business or occupation.[24] It did not suffice that he was in the building where his office was located, for he went there for a non-work purpose. Accordingly, the exclusion did not apply.

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20 *Drayton v Martin* (1996) 67 FCR 1 (FCA).
21 *Dickinson v Motor Vehicle Insurance Trust* (1987) 74 ALR 197, [1987] HCA 49 at 200.
22 *Government Insurance Office of New South Wales v Green and Lloyd Pty Ltd* (1966) 114 CLR 437.
23 *RAA-GIO Insurance Ltd v O'Halloran* (2008) 15 ANZ Insurance Cases ¶61-652 (SCSAFC).
24 At [30].

[28] The narrower interpretation has also been adopted in New Zealand in an insurance setting. The policy in *Industrial Steel and Plant Ltd v AV Swanson & Sons* contained an extension for losses "caused by or in connection with or arising from" goods or materials supplied, installed or used by the insured in building work.[25] A crane which the plaintiff had installed on a building site was damaged when another contractor's crane toppled onto it. The plaintiff claimed under the policy for damage to its crane. After examining some of the overseas authorities, O'Regan J held that there was "no relationship of cause and effect, or causal relationship or sense of consequence between the crane as a mere item of goods and the loss or damage sustained".[26]

[29] In this case IAG must establish a nexus or relationship between dishonest conduct and civil liability if it is to exclude cover for liability incurred when delivering professional services. The dishonest act need not be the direct or proximate cause of the civil liability, and it need not precede the liability in time. But we accept, following *Industrial Steel and Plant Ltd v Swanson & Sons Ltd*, that "in connection with" does demand some causal or consequential relationship between the two things in this setting. We reject Mr Ring's alternative test – namely, that there need be no sense of consequence so long as the connection is "material" – as both uncertain and without support in the authorities.

[30] Has IAG discharged its burden? As noted, the parties agree that Mr Jackson acted honestly when he first failed to place cover. He incurred a liability for breach of his retainer at that time. However, Kós J held that had he not hidden the truth from the Marchands they would have secured cover before the earthquake. Mr Burke accepted that finding for present purposes. That being so, IAG has established the necessary nexus between Mr Jackson's dishonest acts and his liability to the Marchands.

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[25] *Industrial Steel and Plant Ltd v A V Swanson & Sons* Ltd (1982) 2 ANZ Insurance Cases 60-489 (HC).

[26] At 77,787. Other New Zealand cases have also examined the meaning of the phrase, but we do not gain assistance from them in this case: *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006 and *Timtech Chemicals Ltd v QBE Insurance (International)* Ltd HC Auckland CIV-2009-404-2194, 28 March 2011.

[31] Mr Ring also pointed out that the policy defines "civil liability" as "[l]iability for damages… that a civil court or arbitrator orders you to pay or settlements negotiated by [IAG]…." He argued that in the professional indemnity setting, in contrast to the position at common law, liability does not arise until a definite sum is fixed by judgment or settlement, meaning that Mr Jackson's civil liability must be taken to have arisen after the acts of dishonesty.[27] Implicit in the argument is the proposition that if the Court insists upon a consequential relationship between dishonesty and liability, this chronological sequence would establish it. We have accepted, however, that "in connection with" does not insist upon any particular temporal relationship. We do not find it necessary to decide whether anything turns on the definition of civil liability.

Decision

[32] The appeal is allowed. IAG will have judgment on its ninth affirmative defence to Mr Jackson's claim, meaning that his claim for indemnity is excluded under Exclusion E.

[33] Costs should follow the event, but it may be unfair to Mr Jackson to adopt the scale in the circumstances. We are provisionally inclined to allow IAG costs for the first hearing in this Court. However, we will formally reserve costs. If counsel cannot agree they may file submissions. IAG's should be filed within four weeks of the date of this judgment, and Mr Jackson's within a further two weeks.

Solicitors:
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[27] *Rigby v Sun Alliance and London Insurance* [1980] 1 Lloyd's Rep 359 (QB).