IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000106
[2016] NZHC 1244

BETWEEN	EMMONS DEVELOPMENTS NEW ZEALAND LIMITED Plaintiff
AND	MITSUI SUMITOMO INSURANCE CO LIMITED First Defendant
	VERO INSURANCE NEW ZEALAND LIMITED Second Defendant

Hearing: 10 June 2016 (Determined on the papers)

Counsel: P J Woods and L Taylor for Plaintiff
G Macdonald and A Priaulx for Defendants

Judgment: 10 June 2016

COSTS JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] In this proceeding the plaintiff sues the defendants under the material damage section of a Business Package Policy issued by the defendant insurers for the period from 31 December 2010 to 31 December 2011, during which three buildings in Christchurch owned by the plaintiff were substantially damaged in the Christchurch earthquake sequence.

[2] The claim is made under three automatic extensions of the policy covering costs incurred in demolition and related actions, together with professional fees, and costs incurred in protecting an insured property from any cause of loss threatening to involve that property which is covered under the material damage section of the policy.

[3] It is trite to say that in order to establish an entitlement to cover the plaintiff must prove that the losses or costs for which it claims are within the terms of the contract of insurance.

[4] This claim, and other claims brought by the plaintiff against the insurers as a consequence of the earthquake sequence relate to three substantial buildings in inner city Christchurch, Rydges Hotel, an adjacent Christchurch City Council car park and the Grant Thornton building. The claims which this proceeding relates was submitted on 16 October 2015. By 18 December 2015 the insurers had not responded to the claim, and the plaintiff put the insurers on notice that it intended to commence a proceeding against them as a consequence. This elicited a response from the insurer's solicitor dated 5 January 2016. The response included an estimate of a sum the insurers thought may be payable, on a provisional basis, considerably below the amount claimed. Further information was requested in order for the claim to be considered further.

[5] The insurers also said that whatever liability it may have in respect of the claim, it was entitled to a set-off arising from what they maintained was an overpayment it had made of a sum approaching $5,586,220 under the policy for material damage to Rydges Hotel. According to the plaintiff this was the first notice it had received of a claim to a set-off despite the insurers having made two substantial previous payments after the time when the set-off was said to have arisen, without making reference to it.

[6] The plaintiff then filed this proceeding, including an application for summary judgment. The insurers filed a notice of opposition and evidence, after which the plaintiff withdrew its application. The insurers now seek costs on the summary judgment application.

[7] The defendants say that an application for summary judgment should not have been filed, as it could not have succeeded for three principal reasons. First, in the application the plaintiff failed to establish the facts necessary to prove that their claim was within the terms of the extensions of the policy to which I have referred. Secondly, the insurers had put the plaintiff on notice that they required further

information from the plaintiff in order to properly assess the plaintiff's claim, and that information had not been provided. Thirdly, the defendants claim a set-off as I have explained. As a result the insurers say that they should be awarded costs and disbursements, including expert witness fees, on the withdrawal of the application, as though it had proceeded and then failed.

[8] The plaintiff defends its issue of the summary judgment application and says that it withdrew it promptly after receiving the insurers' notice of opposition and affidavits. It says that costs should be reserved and assessed after trial of the proceeding, in accordance with the principle in *NZI Bank Ltd v Philpott*.[1] It says that in correspondence prior to issue of the proceeding the insurers had accepted that they were responsible for payment of part of the sum claimed, that in their opposition they also accepted responsibility for part (though a lower sum than previously stated) and therefore the application for summary judgment would have been successful in part.

Discussion

[9] In *NZI Bank Ltd v Philpott* the Court of Appeal decided that in most cases of unsuccessful summary judgment applications the incidence of costs is best decided when the final result of the case is known. This is not necessarily the correct course in every case, an example of which is that there is a bona fide question of fact that can only be decided at trial, yet the plaintiff has embarked on summary judgment proceedings knowing that to be the case.

[10] Certain factors suggest that the plaintiff was at fault in applying for a summary judgment. First, in order to succeed in this claim the plaintiff must bring itself within the specific terms of the policy extensions to which I have referred. It was a bold move, in my view, to bring an application carrying with it an obligation to prove that the insurers did not have a defence when the elements of the claim included points on which there was inevitably considerable scope for argument. By way of example, under extension 4, covering demolition and other costs, those costs must be shown to have been "necessarily incurred", and in relation to professional

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1 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403.

fees it was necessary to show that they were reasonable and, again, were necessarily incurred for the purpose stated in the extension. Protection costs under extension 16 must also have been reasonably incurred for the stated purpose. Each one of these invokes a concept (necessity, reasonableness) on which a factual assessment was going to have to be made by the Court. By the time the plaintiff elected to file an application for summary judgment it had already been informed in writing that further information was required by the insurers in order to assess the elements of the claim, to see whether they fell within the terms of the policy. It should in my view have been clear to the plaintiff that there was considerable scope for argument, just from the very nature of the issues I have identified, on which judgement would need to be brought to bear. And, of course, that is exactly how it turned out, when the evidence in opposition was produced.

[11] The plaintiff's case also faced a further difficulty from the outset. Prior to issuing the application it was on notice that the insurers maintained they had a right to a set-off arising from what they believed was an overpayment to the plaintiff under a different element of the plaintiff's claim resulting from the earthquake sequence. It is established law that a set-off may be regarded as a defence to a summary judgment application.[2] How the plaintiff intended to cope with this obstacle to its application is obscure. Its argument on this application refers to this not having been raised on two earlier occasions when it could have been. That seems to imply that the plaintiff did not think the insurers were serious. That was, in my view, unwise.

[12] It is no answer to these negative comments on the plaintiff's actions to say that it withdrew the application promptly. The onus on an applicant plaintiff for summary judgment is by definition high, and the time to assess whether the claim has a real prospect of success is before it is issued.[3] Nor in my view is it an answer to say that the insurers have accepted responsibility for part of the claim for which summary judgment was sought and therefore the claim would have succeeded in part. This is because the claim was not brought for part – it was brought for the whole of the plaintiff's alleged recoverable losses. The fact that the degree of

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2 *M L Paynter Ltd v Ben Candy Investments Ltd* [1987] 1 NZLR 257.

3 The plaintiff must satisfy the Court that the defendant has no defence to a cause of action: r 12.2.

acceptance shifted between correspondence and pleading shows how fluid the position was when the plaintiff decided to apply.

[13] For these reasons it should, in my judgment, have been clear to the plaintiff that there was considerable scope for argument by the very nature and terms of its claim and that the claim was not suitable for an application for summary judgment. Whilst it is understandable, to a point, that the plaintiff may have wished to press for resolution of its claim with greater speed than was being exhibited by the insurers, the plaintiff did know before it issued that the claim was under review, and that further information was required in order for that review to be completed, and the insurer's response to the claim to be given. It also knew that whatever the response to the claim was, the insurer was of the view that any liability it may have would be covered by its entitlement to a set-off for an earlier alleged overpayment.

[14] I have therefore formed the view that the general principle in *NZI Bank Ltd v Philpott* should not apply as there was fault on the part of the plaintiff in bringing an application for summary judgment.

[15] The insurers claim costs for certain specific steps in relation to the summary judgment including filing memoranda for case management conferences, filing a notice of opposition, preparation of affidavits and preparation of written submissions in relation to costs. The plaintiff accepts that if costs are awarded it is responsible for the preparation of memoranda and a notice of opposition, but describes the claim in respect of preparation of affidavits as erroneous. It says that the claim for submissions in relation to costs should be for one memorandum, under Item 11 of Schedule 3 of the High Court Rules. The insurers claim under Item 24, preparation of written submissions.

[16] The insurers have claimed for preparation of affidavits under Item 30, preparation of briefs of evidence, by analogy, claiming a total of 2.5 days. In my opinion this analogy is appropriate in the present case. The bulk of the time taken in responding to the plaintiff's application would have been taken in preparation of evidence. In my view a claim for 2.5 days is reasonable.

[17] I do not find the claim for 1.5 days for preparation of written submissions on this costs application to be appropriate and agree with the plaintiff that the correct time allocation is in accordance with Item 11 of the scale, 0.4 days. In the result, therefore, the defendants are entitled to costs for 4.3 days at the applicable daily rate for a Category 2 proceeding.

[18] The plaintiff objects to the defendants' claim for witness fees in respect of the experts by whom affidavits were presented. It says, first, that this is not an item which can be claimed, and secondly that if the Court decides that it is, the invoices presented in support of the claim describe work which does not appear to be related to the summary judgment application. Detailed time sheets would be required for an accurate analysis to be made.

[19] I have reviewed the attachments to the memoranda of counsel for the defendants. One is an email from Mr Quayle in which he specifically states the amount of his firm's invoice which is solely related to "the scaffolding and propping investigation and estimates, investigation of copier costs and production of affidavit for evidence".

[20] I am satisfied on balance that the sums claimed in respect of witnesses' expenses are accurate and should be paid by the plaintiff on this summary judgment application.

Outcome

[21] The plaintiff will pay to the insurers costs for 4.3 days at the applicable daily rate, plus disbursements and witnesses' expenses in the sum of $9,714.95.

J G Matthews
Associate Judge

Solicitors:
Anthony Harper, Christchurch.
DLA Piper, Auckland.