IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-810
[2013] NZHC 1752

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

Hearing: 1-3 July 2013

Counsel: G A Hair for Plaintiffs
B R D Burke for Defendant

Judgment: 11 July 2013

JUDGMENT OF THE HON JUSTICE KÓS
(Quantum)

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[1] The defendant, Mr Jackson, was the plaintiffs' insurance broker. Despite repeatedly advising them that he had arranged the insurance of their house through NZI, he had not in fact done so. On 4 September 2010 the house was very badly damaged in the first Christchurch earthquake. It is a write-off.

[2] In my liability judgment,[1] I held Mr Jackson liable personally for breach of a contractual duty of care owed to the plaintiffs. I rejected a defence that the risk was uninsurable because one of the plaintiffs, Dr Marchand, had been convicted of

[1] *Marchand v Jackson* [2012] NZHC 2893.

dishonesty offences in 2008. I held that it was more likely than not that the Marchands would have made full disclosure of this fact had the insurance application forms been provided to them for completion in July 2009. I also held that it was more likely than not that they would then have obtained insurance.[2] I rejected a defence of contributory negligence.

[3] I held that the plaintiffs' loss, for which Mr Jackson is liable, is the amount necessary to put them in the same position as if the insurance cover sought by them had been obtained.[3] Trial of liability and quantum having been separated, a further hearing was convened to resolve the latter.

Quantum issues

[4] Eight issues arose in the quantum hearing.

[5] Before addressing those issues I express my appreciation to parties, counsel and the expert witnesses for the extensive and largely successful efforts they engaged in to reach agreement. Primarily on matters of calculation, but also on some significant matters of principle.

Issue 1: What form of policy was likely to have been obtained?

[6] On this issue there was no real contest. Mr Jackson was very close to the insurer, NZI. He sought and obtained 30-day interim cover under an NZI "Echelon Home policy" on 1 July 2009. The grave misfortune for everyone in this case was that Mr Jackson then omitted to confirm cover, so that it lapsed. Cover on that interim basis was as follows:

> Echelon wording restricted to $1,500,000 until an ins valuation is received.

[7] After the earthquake, and when Mr Jackson realised the implications of his omission, he purported to issue a backdated cover note for the Marchands' house on an NZI Echelon Home policy wording. That cover note was limited to 498m^2, which was within Mr Jackson's direct authority from NZI. That limit is immaterial,

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2 At [58]. Notably they had received business and motor vehicle cover from NZI after full disclosure. There was no reason why home cover would not also have been written.

3 At [68].

inasmuch as cover was then rejected by NZI and the property has a net area of 514 to 565m^2 (depending on whether a semi-enclosed area is included). When the Marchands filled in application forms in October 2010 they specified an area of 600 m^2: 489m^2 for the house and the balance the garages. These form part of the "home" covered in such a policy.

[8] There is no evidence that the Marchands found the NZI Echelon Home policy wording unsuitable, and would have rejected it in favour of another. The application forms completed by them in October 2010 were for that policy.

[9] I find that that NZI Echelon Home policy cover is what the Marchands sought, and would have received had Mr Jackson performed his duty as their broker.

Conclusion

[10] The answer to Issue 1 is that it is more likely than not that an NZI Echelon Home policy would have been written on the Marchands' property.

Issue 2: Would the policy have been capped at either $1,5000,000 or 500 m^2?

[11] It was suggested by Mr Jackson that the Marchands' position was one of desperation, because their previous insurer (the Medical Assurance Society) had cancelled their policy with just 14 days' notice and Dr Marchand's convictions meant insurance would be difficult to obtain. But given Mr Jackson's authority to write business up to $1,500,000 cover on properties of up to 500m^2, they would have gone with that option.

[12] The Marchands denied in evidence that they were desperate about obtaining insurance. As on the last occasion, I find Dr Marchand has made lighter of his situation than reality suggests. They had not told Mr Jackson about the convictions. However Mr Jackson became aware of them in August 2009.[4] But on the other hand, as already noted, I found it more likely than not that due disclosure would have been made in the application process (which Mr Jackson failed to complete) and that they would then have obtained insurance.

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4 At [32].

[13] As noted earlier, the interim cover given by NZI was limited until an insurance valuation was received. Both Mr Jackson and Mr Batty, the insurance expert he called at the quantum hearing, accepted that NZI would have required an insurance valuation for this risk. The plaintiffs' expert, Mr Yarrell, was of the same opinion. The point was also conceded by Mr Hair in closing for the plaintiffs. That valuation would have established that the house dimensions, between 514 and 565 m^2, would have taken the property beyond Mr Jackson's authority to write cover. It would also have shown the property value significantly exceeded $1,500,000, with the same result. It is common ground between the experts that NZI would not then have permitted the Marchands to underinsure the property by placing a $1,500,000 limit on their cover.

Conclusion

[14] The answer to Issue 2 is "No". Cover would not have been limited to $1,5000,000 or 500 m^2.

Issue 3: Would the policy have been capped at the insurance valuation of the house?

[15] The plaintiffs' expert, Mr Yarrell, said in evidence that his experience of the market at the time was that insurers would have granted open-ended replacement cover based on the square meterage of the house and outbuildings as shown in the requisite insurance valuation.

[16] The defendant's expert, Mr Batty, disagreed. He noted that the NZI Echelon Home policy, although a full replacement policy, permitted the specification of a maximum sum in the schedule. He considered that this risk, being a very high value home in a rural area, would have been referred by the NZI branch to a specialist staff underwriter. The likely outcome in his view would have been specification of dollar value cap on cover.

[17] In the liability trial the plaintiffs had called a different expert, Mr Howie. I found him an excellent and careful expert witness on the insurance matters at issue in this case. On this subject he said:

> I am not privy to NZI's underwriting criteria, however based on Ms Rainey's email, the size of IAG (NZI's parent) and my knowledge of personal lines underwriting, 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.

[18] I find that the policy would likely have been capped in the way described by Messrs Howie and Batty. While Mr Yarrell had a different opinion, his experience lay primarily with AMP policies. While he of course had a working knowledge of competing products, Messrs Howie and Batty had in my view a more commanding understanding of the manner in which NZI would have responded had a policy application been made in July 2009. At the very least, the plaintiffs have not satisfied me on the balance of probabilities that the policy would have been open-ended.

Conclusion

[19] The answer to Issue 3 is "Yes". Cover would have been limited to the sum shown in the insurance valuation required to obtain the policy.

Issue 4: What insurance value cap would have been imposed in July 2009?

[20] The parties are in agreement, following caucusing by their quantity survey experts, that the answer to Issue 4 is "$2,525,756".

Issue 5: What insurance value cap would have applied in September 2010?

[21] The parties are in agreement that the answer to Issue 5 is "$2,626,786", being a 4 per cent increase on the value for the previous year.

Issue 6: Would the policy have covered the disputed items?

[22] There were three disputed items at closing: a pump house, marble chips in landscaping areas and shingle in the driveway. Their inclusion is a matter of interpretation of the policy.

[23] Mr Burke in closing for the defendant conceded that the pump house was covered. So that is one of the three items accounted for.

[24] The other two items, marble chips in landscaping areas and shingle in the driveway, I find to be excluded. First, "home" (which is the property covered) includes a driveway "of permanent construction" and a "patio, path, paving, tennis court or other permanent domestic structure". I do not find that these loose ground cover items fall within those definitions. Secondly, the following items are expressly excluded in the policy: "fixture [sic] or fitting that is not permanently attached", trees and shrubs, and "land, earth or fill". By association I find the disputed items closer in nature to these excluded items.

Issue 7: Would the policy have allowed recovery of an additional sustainability upgrade?

[25] The policy provides a series of extended benefits over and above the maximum sum insured (as declared in [21] above). The only item remaining in dispute is the "sustainability upgrade" extension of up to $15,000 provided for on page 6 of the policy. Liability on the defendant's part for that sum depends upon actual reconstruction, using "sustainable products" falling generally within the description on page 14 of the policy. The defendant is liable provisionally for that amount.

Issue 8: What is the total extent of the defendant's liability to the plaintiffs?

[26] In accordance with the joint memorandum of agreement provided by counsel at the time of closing, the total sum for which the defendant is liable to the plaintiffs is **$2,686,779**. It falls into two parts:

(a) *Item 1:* $2,671,779, being the insurance cover the Marchands would have had (being the sum declared in [21], together with certain agreed extensions but excluding the prospective sustainability upgrade); and

(b) *Item 2:* $15,000, being the sustainability upgrade extension.

Result

[27] Declarations are made in accordance with [10], [14], [19] – [21] and [23] – [26].

[28] Judgment is entered against the defendant in the sum set out at [26]. However Item 2 in [26] is not payable until the requisite receipts for "sustainable products" are tendered to the defendant's solicitors.

[29] The Court has a statutory discretion to award interest prior to the date of judgment.[5] Further submissions were sought from counsel on this issue. For the plaintiffs, Mr Hair submits that this property was a rebuild; that had the plaintiffs been insured they would have had the option of either sale (with an assignment of the insurance claim) or prompt resolution of the claim with NZI. Interest should run either from accrual of the cause of action (4 September 2010) or from the date of commencement of proceedings (12 May 2011).[6] For the defendant, Mr Burke submits that the status of the house (and the access bridge) remained complex. No geotechnical report had been obtained by the plaintiffs, although the property was subject to extensive liquefaction. The defendant's quantity surveyor did not accept that a definitive opinion or rebuild versus repair could be made without such a report.

[30] Despite that uncertainty, the defendant did accept at the quantum hearing that the house was irreparable. Conversely, the plaintiffs accepted at that hearing that the bridge was in fact repairable. Neither party called evidence as to NZI's claims settlement practice.

[31] Any award of pre-judgment interest would be calculated to put the plaintiffs in the position they would have been in had they had NZI Echelon Home cover. Interest should run only from the date it is likely NZI would have made payment under that policy to the plaintiffs. I am not satisfied on the evidence that the plaintiffs have demonstrated that NZI would likely have made payment any earlier

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5 Judicature Act 1908, s 87(1).

6 Applying *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA).

than the date of this judgment. I therefore decline to award pre-judgment interest under s 87.

[32] Interest on Item 1 in [26] will run from the date of this judgment. Interest on Item 2 will run from 30 days after the date the requisite receipts are tendered. In each case the rate will be that prescribed in the Judicature Act 1908.

[33] I reserve leave to parties to apply if further clarification of quantum issues within scope of the present pleadings is required.

[34] Costs are reserved. If not agreed, brief memoranda may be submitted within 21 and 28 days from today, respectively.

Stephen Kós J

Solicitors:
Malley & Co, Christchurch for Plaintiffs
Harmans, Christchurch for Defendant