IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-001781
[2016] NZHC 826

BETWEEN	LWR DURHAM PROPERTIES LIMITED (IN RECEIVERSHIP) Plaintiff
AND	VERO INSURANCE NEW ZEALAND LIMITED First Defendant
	IAG NEW ZEALAND LIMITED Second Defendant

Hearing: 22 April 2016

Appearances: S P Rennie and P J Anderson for Plaintiff
J C Dymock and C M Brick for Defendants
C F Olds and O D Peers for non-party Bank of New Zealand

Judgment: 28 April 2016

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] In this proceeding the plaintiff, LWR Durham Properties Limited (LWR) sues under a policy of insurance issued by the defendants, Vero Insurance New Zealand Limited (Vero) and IAG New Zealand Limited (IAG), in relation to damage sustained by its buildings in the Christchurch earthquake sequence in 2010 and 2011. LWR applies for an order that the first defendant, Vero, provide further and better discovery.

[2] On 14 March 2014 in a case management Minute issued on the Earthquake Case Management List operated at the Christchurch High Court, Kós J ordered tailored discovery in six categories, listed in paragraphs (a) to (f). In a memorandum dated 13 March 2014 Mr Rennie, counsel for the plaintiff, had recorded agreement that tailored discovery should be given, and then listed the tailored discovery LWR 2sought from Vero and IAG New Zealand Limited (IAG) in seven categories, the

seventh being marked with the letter (g) and being "all reserves set by the insurers". This category of document was not in the list ordered by Kós J on 14 March. Mr Rennie now applies for an order that discovery be given of documents in this category.

[3] The insurance claim recording system operated by Vero includes a register of reserves, which are figures relating to each claim that is filed representing an estimate of what the claim may ultimately cost Vero based on the information available to Vero about the claim at the time the reserve is set up. As time goes on estimates are reviewed on the basis of information that comes to hand. The figures may include estimates for claim assessment expenses which Vero considers it might incur.

[4] Mr Rennie says that in a case such as this, where the appropriate entitlement of the insured is in issue, evidence of the perceived liability for which an insurer holds itself responsible cannot be said to be irrelevant, and is fundamental to the credibility of the position that the insurer seeks to advance at trial. Mr Rennie notes that Vero discovered reserves in *Prattley Enterprises Ltd v Vero Insurance Ltd*,[1] and says the present case is analogous as that case also involved assessment of damage on a per event basis, and apportionment, as here.

[5] Counsel for Vero agrees that discovery in relation to reserves was excluded from the orders by Kós J and draws an inference that the Judge deliberately intended not to order discovery of this category of documents. Further, she says that the reserves set by Vero are not relevant to any issue in the proceeding. Counsel lists the issues as identification of the damage to LWR's buildings as a result of earthquakes on 4 September 2010, 22 February 2011 and 13 June 2011, establishing the scope of repairs required to rectify the damage from each event, and its cost, and whether the plaintiff may be prevented from recovering for damage under one or more of the earthquake events due to a failure to promptly notify a claim. Counsel also refers to an issue relating to the correct measure of the plaintiff's indemnity entitlement under the policy, but given the amendment now foreshadowed (and ordered) by which any

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1 *Prattley Enterprises Ltd v Vero Insurance Ltd* [2015] NZHC 1444, [2015] 18 ANZ Insurance Cases 62-075.

reference to a claim for indemnity will be removed from the plaintiff's pleading, this issue appears to fall away. There remains an issue, however, on what amount the plaintiff is entitled to recover under the policy if it incurs reinstatement costs in light of the terms and conditions of the policy including the limits on liability for each earthquake event.

[6] Counsel for Vero says its principal basis for opposing discovery of reserves is that they say nothing at all about the amount of the plaintiff's claim under the policy. Rather, they are an inexact estimate of a range of possible costs that may be incurred, including, for example, in assessing the claim itself. These are not relevant to the question the Court must decide, namely the scope of the plaintiff's entitlements under the policy.

[7] Vero also says that it did not make a reserves entry in relation to the September 2010 earthquake because no claim was lodged by LWR for that event. The claim in relation to the February 2011 earthquake was lodged on 16 May 2011 and a reserve was entered in respect of it on that date. So far as the 11 June 2011 earthquake is concerned, Vero did not open a claim until May 2014, after this proceeding was filed.

[8] Counsel says that if the documents are sought as a source of material with which to endeavour to impugn the credibility of any witness or witnesses for Vero, by referring to any distinction that might be drawn between the reserve entries and the position taken at trial by Vero, the Court will not ordinarily order discovery of documents for that purpose, and should not do so.[2]

Discussion

[9] The decision by LWR to advance its case on the basis of a claim for reinstatement only emerged when it filed its amended statement of claim in November 2015. As recorded in a Minute issued on 26 April 2016, LWR is to file a second amended statement of claim clarifying its intention to rely solely on extension clause MD022 as conferring on it the right to reinstatement. In the prayer

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2 *Domenico Trustee Ltd v Tower Insurance Ltd* [2014] NZHC 2657.

for relief in the amended statement of claim LWR seeks declarations directed specifically at LWR's entitlement to reinstatement, and its apportionment in accordance with a professional report by Weidlinger Associates Limited on which it relies. Further declarations are sought in relation to fees and sums deductible from payments made under the policy. A further order is sought "reserving to the parties leave to seek further relief in relation to the reinstatement cost owed under MD022 and any further coverage under the policy".

[10] LWR does not seek judgment in a sum or sums of money, but assessment of the cost of reinstatement (and fees and other related expenses) presumably follows as a second step from establishment of liability by way of declaration – hence the request for a reservation of leave. The entries in the reserves cannot therefore have any relevance to quantum, as the pleading stands. Even if that were not the case, I am not satisfied that entries in the reserves records of Vero have any relevance to the issues which LWR pleads in this case. At best they are a relatively unsophisticated or inexact estimate of the possible financial consequences of claims as they are made, and as they update it, and I am unable to see how these broad estimates are relevant to the issues the Court must decide. The plaintiff asserts an entitlement to reinstatement and apportionment on a certain basis analysed in the expert report to which I have referred; presumably Vero and IAG deny the entitlement under the policy, and the apportionment assessed by the expert. Vero and IAG would presumably lead evidence to support that position. In my view earlier assessments of exposure in the reserves could only be relevant to showing that on a different day, and on the basis of different information, Vero held a different view of its exposure from that which it promotes at trial by way of evidence. Apart possibly from one point, I cannot see that as relevant to determination of the issue before the Court. It may have some scant value as material for cross-examination but that is not a proper basis upon which discovery of it should be ordered.

[11] As I discussed with counsel the only possible basis upon which I can see that this material might be relevant is in respect of Vero and IAG's argument that LWR's claims were for reinstatement have been brought too late. Conceivably, if the reserves show an assessment of possible liability calculated on the basis of reinstatement, that may be relevant to any question of prejudice to Vero and IAG

resulting from LWR's claims being, in their view, filed late. The specific reasons pleaded by Vero and IAG on this issue include loss of opportunity to inspect the buildings after each earthquake in order to view and record damage, loss of opportunity to ensure that LWR took steps after each earthquake to record damage, loss of opportunity to obtain engineering reports on the damage after each event, and greater difficulty in distinguishing between earthquake damage and pre-existing damage and degradation. I was not presented with any detailed argument by either counsel on how the reserves may be relevant to these issues. At most, they could show, possibly, that Vero factored some liability on a reinstatement basis into its reserves at the dates I have set out, but I am not satisfied on the material before me that even if it did so, these are relevant to the specific timing issues pleaded as a defence.

[12] Finally, two points. First, although Kós J, may have deliberately omitted reference to discovering records of reserves, because it was in a memorandum from counsel which his Honour would have had before him, and it is not in his Honour's list, I cannot exclude the possibility that his Honour's Minute was issued after a transcription error from one list to the other. The Minute does not give any reason for the order not following the list of categories of documents which Mr Rennie requested. I have not derived any assistance in reaching my conclusion on this application from this omission.

[13] Secondly, I have not found the decision in *Prattley*, of any assistance.[3] An order for discovery is made by reference to the pleadings. In *Prattley* the issues before the Court were derived from the wish of the insured to reopen its claim against the insurer after a negotiated settlement and receipt of the agreed payment from the insurer, on the basis that both parties were mistaken about the measure of the insured's entitlement. The knowledge of the insured at the time of the settlement agreement was in issue and for reasons specific to that case, discovery of information about the reserves logged by the insurer was required. Here the position is different. The knowledge of the insurer at an early point after the lodging of claims is not called in question. I agree with counsel for Vero that *Prattley* is distinguishable on the facts.

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3 *Prattley Enterprises Ltd v Vero Insurance Ltd*, above n 1, at [4].

Conclusion

[14] The application for discovery in relation to reserves is dismissed.

[15] Vero and IAG are entitled to costs on a 2B basis with disbursements fixed by the Registrar.

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J G Matthews
Associate Judge

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