

BETWEEN STATE INSURANCE LIMITED

Appellant

AND CEDENCO FOODS LIMITED

Respondent

Coram: Gault J
 Henry J
 Thomas J
 Blanchard J
 Tipping J

Hearing: 11 June 1998

Counsel: M A Muir and P M Smith for Appellant
 P W David and A Hansen for Respondent

Judgment: 6 August 1998

JUDGMENT OF GAULT, HENRY, BLANCHARD AND TIPPING JJ
DELIVERED BY TIPPING J

Introduction

This appeal concerns exemplary damages in a commercial setting. The respondent, Cedenco Foods Ltd (Cedenco), insured growing crops under policies issued by the appellant, State Insurance Ltd (State). As a result of its crops being damaged by heavy rainfall, Cedenco made claims on State under the policies. Various aspects of the claims were either settled between the parties, or resolved by the judgment of Salmon J in the High Court: see [1996] 3 NZLR 205. The aspect

which has led to this appeal is the Judge's award of \$20,000 exemplary damages against State for its failure to pay an established claim promptly. There is a cross-appeal by Cedenco to which we will come later.

State did not deny it had a duty to pay established claims promptly. It contended there had been no breach of that duty, and even if there had, that no exemplary damages could, or alternatively should, be awarded. There was an issue at trial arising from the fact that Cedenco had pleaded State's breach as a breach of the duty of utmost good faith, and not as a breach of an implied term. It followed, in State's submission, that no damages of any kind could be awarded as the only relief available for a breach of the duty of utmost good faith was rescission, rather than damages. As damages can undoubtedly be awarded for breach of an implied term, this issue was essentially one of pleading.

As this case turns on other issues it is unnecessary for us to decide whether damages can be awarded for a breach of the duty of utmost good faith. For present purposes we will assume they can, but without deciding as much. The point remains open and can await a case in which a decision is necessary.

It is similarly unnecessary to decide whether exemplary damages can be awarded for breach of contract. Again, we will assume that they can, but without deciding the question, which remains open. We adopt this approach because, with respect to Salmon J, we are satisfied that this case cannot on its facts justify an award of exemplary damages. A decision as to their availability in a contractual setting, and if so on what basis, would be better made in a case in which the facts might be thought to be at a level which would justify such relief if it is legally available.

Factual background

The claim which led to the exemplary damages award was what became known as the Death of Plants claim. It arose out of excessive rainfall which fell on 18 and 19 February 1993. In April 1993, following preliminary enquiries and

meetings between the parties, State instructed its loss adjusters, Agricultural Risk Management (Pacific) Ltd (ARM), to prepare reports in relation to several claims made by Cedenco under its policies, including the Death of Plants claim. ARM's report in relation to this claim was received by State in May 1993. In the meantime, in late March 1993 Cedenco had commenced proceedings in the High Court at Auckland in respect of another claim called the Seedlings Claim, which had arisen out of earlier events. State defended this claim and counter-claimed for moneys earlier paid, allegedly by mistake.

There was also an allegation in the counter-claim of material non-disclosure affecting a number of claims, including the Death of Plants claim. Cedenco applied to strike out State's counter-claim. After partial success in front of the Master, it achieved the total striking out of the counter-claim in December 1993, when Blanchard J made an order to that effect. The Death of Plants claim was not settled until January 1995. When it was paid, interest was included from an agreed date to recognise the delay, but Cedenco expressly reserved its right to seek exemplary damages in the proceedings which were still extant in respect of other claims.

Essentially Cedenco contends that, in order to apply improper pressure on it, State unreasonably and unjustifiably delayed payment of the Death of Plants claim from May 1993 to January 1995. It says that in the light of ARM's report of May 1993 there was no legitimate basis on which State could have withheld payment of this claim whatever may have been position with other claims. State does not now dispute that it should have paid earlier, but says that the circumstances fell well short of justifying an award of exemplary damages assuming they were available as a matter of law.

It should be noted that Cedenco made no claim for compound interest. It could not have done so consistently with its acceptance of simple interest. Other forms of loss, which it said had resulted from State's failure to pay promptly, were not accepted as proved by the Judge. This last aspect will be mentioned again when we consider Cedenco's cross-appeal.

The High Court judgment

The Judge first considered the availability of exemplary damages in a contractual context. He decided that such damages were available if the conduct of the defendant was “outrageous”. Having directed himself in law in that way, the Judge expressed his reasons for deciding that exemplary damages should be awarded very briefly:

In the present case I am satisfied that there was no excuse for State refusing to pay out on the Death of Plants claim. Interest has been paid, and this, of course, goes some way to providing proper compensation. Nevertheless the failure of an insurance company to pay out on a properly established claim is significant and should attract the disapproval of the Court. Accordingly, I award the sum of \$20,000 exemplary damages.

The Judge’s reasoning appears to have proceeded on the premise that State had “no excuse” for refusing to pay and that the failure of “an” insurance company to pay a properly established claim was “significant”.

The Judge did not characterise State’s conduct as outrageous. Thus he appears not to have applied the law, as he earlier identified it, to the facts. The concepts of there being no excuse, and of the failure of an insurance company to pay promptly being significant, do not immediately strike us as synonymous with outrageous conduct. The point is more than semantic. In spite of this difficulty and the sparsity of the Judge’s reasoning, Mr David for Cedenco argued that there was material in the evidence which would have entitled Salmon J, and hence this Court, to take the view that State’s conduct had been outrageous.

Appellant’s argument

Mr David identified six matters which cumulatively, he argued, demonstrated that State had indulged in outrageous conduct in the form of what was described as stand over tactics. In essence, Cedenco claims that State’s purpose or motive in delaying payment was to exert improper pressure on it to settle other claims on a basis more advantageous to State than would otherwise have been

the case. If that had been found by the Judge to have been State's motive for the delay, Cedenco would have had a firmer foundation for the exemplary damages award. There was, however, no such finding. The matters relied on by Mr David were as follows:

1. A delay of 20 months (May 1993-January 1995) between State's receipt of ARM's report and the ultimate payment.
2. The allied proposition that there was nothing further to negotiate about after State received ARM's report.
3. The fact that there was no satisfactory explanation, in the Judge's view, for the delay.
4. The background of a range of disputes with State choosing what it would offer.
5. The filing by State of the counter-claim which was ultimately struck out. This was described by State's own expert witness as having been a step no responsible insurer should have taken.
6. The proposition that although the Judge did not expressly refer to them he must have had the foregoing points and their effects on Cedenco in mind when he made his award.

It is important to determine the period during which the delay can be characterised as unjustifiable. Again, the Judge made no express findings on this aspect. He simply spoke of State refusing to pay out and the failure of an insurance company to pay out. The length of unjustified delay is obviously material to whether an insurer's conduct can properly be described as outrageous, assuming that to be the appropriate test.

ARM reported to State in May 1993. Later reports were commissioned and supplied during 1994. The May 1993 report was a comprehensive one of 25 pages covering a lot of ground. It required detailed consideration by State. The purpose of the report was to describe the damage that had occurred and the amount of the loss that had resulted. The report did not of and in itself result in the claims

necessarily being payable in the amounts referred to in the schedule. That schedule had figures for what were described as claim value and deductible based on nine different fields.

State's crop manager, Mr Reeves, gave evidence. He had not been directly involved, as he had only recently joined State. His knowledge came from having perused the files. He said that there were negotiations over quite a lengthy period of time on the quantum of the Death of Plants claim. Particular issues appear to have been the amount of the deductibles and the subject of interest. It is not easy from the printed record to achieve any clarity as to the point of time from which it can fairly be said that State moved from *bona fide* consideration to delay, let alone outrageous delay.

Cedenco's pleading on the aspect of delay was as follows:

The defendant failed reasonably and honestly to assess claims 3012-6009B [the Death of Plants claim] and 3012-6017 within a reasonable period of time, and without cause declined the claims in circumstances where the claims should have been accepted, admitted and paid within a reasonable time.

In respect of claims 3012-6009B and 3012-6017 the plaintiff says that a reasonable time in terms of paragraph 35 amounted to either no more than two months from the date of notification of a claim or no later than 24 June 1993.

Thus on its own pleading Cedenco's view was that the delay commenced on 24 June 1993. That date was fixed as being 2 months from the date of notification of the claim. In a case of the present kind, a time span of 2 months from notification cannot of itself be regarded as determinative of when material delay commenced.

Earlier in its statement of claim Cedenco had made various other allegations seeking to impugn State's motives in conducting the negotiations in the ways described. There was an allegation that State refused to deal with various claims on an individual basis and sought to resolve all claims by means of a take it or leave it global figure. There was also an allegation that State sought to impose unfair and

improperly motivated settlement terms in respect of a claim which should have been settled individually and unconditionally. Finally, on this topic, Cedenco suggested that State's initial unwillingness to pay interest on the Death of Plants claim was a stance taken on a spurious basis, as particularised.

The Judge did not make any findings of fact in terms of these allegations. As the points were expressly pleaded, his failure to do so can only have been because he was not satisfied the allegations had been made out. As expressed, the Judge's rationale for exemplary damages was that there was no excuse for the lateness of the payment, coupled with the significance of an insurers' failure to pay out. That significance must have been the significance for the insured thereby affected. In that respect, however, the financial significance for an insured of late payment is capable of being compensated on ordinary principles of contractual damages, if qualifying loss is established. Indeed, mental significance may well be within reasonable contemplation also. It is worth mentioning at this point that actionable delay by an insurer in paying an established claim may be open to an award of damages in the form of compound interest. The basis for such an award could be that it is within the reasonable contemplation of parties to an insurance contract that the insured will suffer loss in these terms from the delay. Whether an award on this basis may be available without proof of such loss on the ground of a breach of the duty of utmost good faith must remain open.

The key question which the Judge identified earlier but did not seem to apply to the facts, was whether State's conduct was outrageous to the point of requiring punishment. In summary on the question of delay, it is by no means clear how long the period of ostensibly outrageous delay was. This derives in part from the lack of clarity in relation to when there ceased to be anything genuine to negotiate about. It is perhaps of some moment that the claim of a breach of utmost good faith by delay was not made until an amended pleading was filed by Cedenco late in 1994. It is difficult to take Mr David's first two points any further than that.

The third point relates to the Judge's finding that there was no adequate reason for the delay. That made it actionable, but not, without more, susceptible of exemplary damages. This was not a case in which State proffered no explanation at all for the delay, as the Judge appeared to be saying at one point. Indeed, his judgment in this respect was somewhat contradictory. He said variously that State, through its principal witness Mr Twaddle, was not able to give any reason at all (judgment, page 39); that State had claimed there was no delay because the period was one of negotiation on a without prejudice basis (judgment, page 38); and that the negotiations which were taking place between the parties did not constitute an "acceptable" reason for a delay in payment (judgment, page 39). The essence seems to have been that, in the Judge's view, the composite nature of the negotiations did not give State any valid reason to delay payment of an individual claim once its validity and amount had been determined.

State's explanation for its composite approach was that it understood Cedenco wanted to achieve a global settlement of all outstanding claims together. When Mr Twaddle was challenged in cross-examination with the proposition that payment had been held back for 18 months for no reason whatsoever, he said:

That's incorrect. At the meeting on 30 March it was Mr Witters [Cedenco's Managing Director] who brought with him a list of claims and it was Mr Witters that wanted them all considered together as one. It was Mr Witters that wanted the claims settled together. He was unwilling to have the claims settled individually. Indeed I recall one of the claims was settled for an amount in excess of \$30,000 and that cheque was returned by Mr Witters' solicitors. Now, if we are trying to settle a claim on one hand and have the cheque returned, isn't that an indication that Mr Witters was not prepared to have individual settlements of everything and that's what was portrayed to us.

Shortly afterwards, Mr Twaddle was asked by the Judge why State had not paid the Death of Plants claim. He said that specifically he was not sure. At that stage there was a reorganisation at State and the matter was being supervised by a claims manager. On being asked by the Judge why he had not found out the answer, being aware that he was likely to be asked about this, Mr Twaddle answered:

I was under the belief that the without prejudice negotiations that State had entered into with Mr Witters encompassing this claim would not require me to comment on that.

The Judge observed that this did not seem to him to be an appropriate answer to the question why State did not pay out on the claim. To this Mr Twaddle replied:

I can only, this report was in May [1993] and I can only assume that we [were] under legal proceedings at that stage and certainly we would have put the report and the claim in total to our legal advisors.

The Judge made no specific findings on these matters. While, as Mr Muir properly accepted, he was entitled to find State's explanation inadequate, its stated perception of how Cedenco wanted matters dealt with was clearly relevant to the exemplary damages issue.

This is an appropriate point at which to introduce a reference to the Judge's appreciation of the tenor of the relationship between Cedenco and State during this time and the nature of the negotiations.

In a supplementary judgment on costs, the Judge said that both parties had taken a "scorched earth" approach towards the litigation, particularly in relation to interlocutory matters. We conclude from this remark, and from the evidence, that Cedenco's approach to State was rather aggressive. This may have coloured State's response. The point is relevant to the appropriateness of the exemplary damages award.

Mr David's fourth point was that the background to the Death of Plants claim was one which involved State and Cedenco being in a number of disputes, with State "choosing" what it would offer in respect of those disputes. We cannot see how this point, either of itself or in combination with other points, assists the resolution of the present issue. The fact that the parties were in dispute on a number of fronts and State chose what it would offer, does not bear on whether

State's conduct in relation to the Death of Plants claim can properly be characterised as outrageous. While the point provides the setting for the issue, it does not assist in resolving it, at least not in favour of Cedenco's contention.

The fifth point concerns State's counter-claim. Obviously this is part of what the Judge saw as the scorched earth policy on both sides. The litigation was clearly hard fought and there was no inequality of arms. While the counter-claim was found to have no merit to the point of ultimately being struck out, the most that can be said is that this exemplified an unjustified step in the interlocutory warfare. It is a long step from that conclusion to infer that the delay in settling the Death of Plants claim was the product of base motives on State's part requiring punishment on top of compensation for such losses as Cedenco proved it had suffered as a result of the delay.

Mr David's sixth proposition was essentially the conclusion he invited the Court to draw from the five preceding points. We find ourselves unable to conclude that the five matters discussed above justify the inference that by its delay State was endeavouring to apply standover tactics against Cedenco. Unless the evidence justifies the imputation of a motive of that kind to State, the case does not approach a level at which it might be appropriate to consider an award of exemplary damages. Furthermore, when Mr Twaddle was cross-examined on this topic, his evidence proceeded as follows:

- Q. I put it to you that the counterclaim and the failure to pay the death of plants claim was a strategy employed by State to force Cedenco to drop the claims.
- A. I find that suggestion both on behalf of State and myself absolutely abhorrent. I reject it completely that is untrue. If I can continue, State was forced into the position it was in by Cedenco taking these claims and issuing proceedings against State. Mr Witters told me on several occasions that he proposed to take State to the cleaners, that all of these claims would be paid in full immediately or Mr Witters would institute legal action and he would see to it that State never wrote crop insurance in New Zealand again. Under threats like that I believed that it was important that every move that we made we should do with legal advice, and from the

institution of the summary judgment proceedings every move that State made was done with legal advice. I can, however, assure you that for my part and from State's part there was never any intention to delay or anything else with those claims, any actions we took were with legal advice.

Q. You accept though that the actions that State took were its actions.

A. Yes. After legal advice.

Conclusion

After considering the evidence and submissions made on both sides we are left well short of being able to accept that there are findings of fact based on adequate evidence sufficient to support a conclusion that State's conduct was outrageous and deserving of punishment. Nor are we able to accede to counsel's request to make such findings ourselves. The Judge's reasons for awarding exemplary damages were not themselves sufficient, nor are we prepared to support his conclusion on the basis advanced in this Court by Cedenco. It follows that State's appeal against the award of exemplary damages must succeed.

Cross-appeal

Cedenco has cross-appealed against the Judge's conclusion that it failed to prove various specific losses which it had claimed as a result of the delay in settling the Death of Plants claim.

The first issue concerned what can conveniently be called management time. The Judge found that the delay in settlement of the Death of Plants claim had not resulted in any identifiable loss of management time. What is more, there is no evidence suggesting that Cedenco had incurred any loss on this account. The executives concerned were not paid any more than their ordinary salaries; thus there was no direct financial loss. The only viable possibility was a loss of business opportunity. Here again, the Judge rejected this aspect of the claim. He said:

The other part of the claim relates to a loss of business opportunities. This is said to have resulted due to the unavailability of funding which in turn was because State had not paid out on the insurance claims.

Once again, the evidence does not satisfy me that those losses can be attributed to a failure to settle a claim for \$494,900. The claim for compensatory damages under this head, therefore, fails.

It can be seen that the claim was put on the basis that the absence of the settlement money caused loss of business opportunities. It is not suggested that the unavailability of management time had done so.

In his evidence Mr Witters said there were a number of other projects that Cedenco might have considered if it had had sufficient funds. He gave two examples of what were allegedly lost opportunities in Egypt and China. No attempt was made to relate those so-called lost opportunities to the amount of the Death of Plants claim, as opposed to the claims as a whole. The venture in Egypt was said to involve an investment of approximately \$2.6m. The Death of Plants claim was for about \$0.5m. The Chinese opportunities were said to involve investment of "around \$0.6m to \$1.8m". Mr Witters expressed the belief that these projects would have been successful and would have returned "20% plus" on the capital invested. These suggested lost opportunities were not only speculative as to their success but, in any event, too remote. The Judge was right to reject this head of claim and the claim for loss of management time. The cross-appeal fails.

Formal orders

For the reasons given, State's appeal against the award of exemplary damages is allowed. Cedenco's cross-appeal is dismissed. The judgment entered in the High Court is varied by quashing the award of \$20,000 for exemplary damages. State is allowed costs in this Court in the sum of \$5,000 plus disbursements, including the reasonable travel and accommodation expenses of counsel to be fixed, if necessary, by the Registrar.



Solicitors

Fortune Manning Law Partnership, Auckland, for Appellant
Russell McVeagh McKenzie Bartleet & Co, Auckland, for Respondent

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JUDGMENT OF THOMAS J

In this concurring judgment I refer only to the reference in the judgment of the plurality delivered by Tipping J to the possibility of awarding compound interest against a defaulting or dilatory insurance company.

While State Insurance Ltd must succeed in its appeal against the award of punitive damages made by Salmon J in the Court below for the reasons so ably articulated by Tipping J, it may not have been so fortunate if Cedenco Foods Ltd had chosen to seek compound interest rather than punitive damages in response to the strategy or tactics which State adopted in settling the claims.

Salmon J found that State refused to deal with the various claims made by Cedenco on an individual basis and on the merits of each claim uninfluenced by

disputes in respect of other claims. He also pointed to the lengthy delay which had taken place in the payment of a valid claim and the failure of State to provide an adequate explanation for the delay. He concluded that there was no excuse for State refusing to pay on the claim in issue. It was this failure by State to pay out on a properly established claim that attracted the disapproval of the Judge and the award of punitive damages.

Experience in the Courts confirms that unwarranted delays in meeting a valid claim and the adoption of such tactics in pursuit of a favourable settlement are not unknown on the part of insurance companies or their advisers. At times, the insurance company's delay in meeting a proper claim or its insistence on a global settlement has caused the claimant severe financial strain, and even insolvency. Yet, the obligation of an insurance company is clear; it must process a claim with reasonable diligence and expedition and cannot unreasonably delay the settlement of a valid claim. For that reason, it cannot withhold payment on a claim or claims which are properly payable with the objective of achieving a more favourable overall settlement. Nor can it take advantage of the financial difficulties of the insurer caused wholly or in large part by the very event covered by the insurance policy in order to persuade the insurer to accept less on other disputed claims or to accept a global sum in which the valid claims are effectively submerged.

Where these circumstances occur, as the Judge at first instance found in this case, and putting to one side the possibility of a properly formulated claim for consequential loss, an award of compound interest may be the most effective means of compensating the plaintiff for the delay in payment. The fact that the Law Commission has recommended that general legislation be passed dealing with both pre-judgment and post-judgment interest and that the rate of interest be compounded on a monthly basis, does not mean that compound interest cannot be awarded by the Courts in certain circumstances now. (*Aspects of Damages: The Award of Interest on Money Claims* (May 1994)). The Law Commission confirmed (at p 7) that there are a limited range of situations where the practice is to award compound interest. One example given by the Commission is that of a fiduciary who has misappropriated funds for his

or her own use. Compound interest has also been awarded for the purpose of providing compensation where companies are deprived of money needed for business or trustees breach their duty to invest trust property. See e.g., *AG v Alford* (1855) 43 ER 737, at 741; *In re Emmet's Estate* (1881) 17 Ch D 142, at 149-50; and *Wallersteiner v Moir* (No 2) [1975] QB 373, at 388. See also *Millar v Rama* (18 March 1994, CA 5/93); and *National Bank of New Zealand Ltd v Development Finance Corporation of New Zealand* [1990] 3 NZLR 257, esp. Somers J at 263.

The courts' jurisdiction in equity to award compound interest was discussed by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961. Although dissenting with Lord Woolf, Lord Goff enunciated a general principle which may in due course appeal to this Court (at 975):

...where the jurisdiction of the court derives from common law or equity, and is designed to do justice in cases which come before the courts, it is startling to be faced by an argument that the jurisdiction is so restricted as to prevent the courts from doing justice. Jurisdiction of that kind should as a matter of principle be as broad as possible, to enable justice to be done wherever necessary; and the relevant limits should be found, not in the scope of the jurisdiction, but in the manner of its exercise as the principles are worked out from case to case.

The distinguished Law Lord observed that, in his view, the jurisdiction to award compound interest should not be confined so as to exclude any class of case simply because that class of case has not been previously recognised as falling within it.

While it appears that there is no case at present which establishes that an award of compound interest can be made against an insurance company which has unreasonably delayed payment of a proper claim or insisted on a global settlement and withheld payment of a valid claim or claims pending that settlement, Lord Goff's view that the jurisdiction to award compound interest should not exclude any class of case simply because it has not been previously recognised, must have some attraction. A possible justification for awarding compound interest in these circumstances may lie in the fact that the principle of *uberrima fides* or duty of utmost good faith is imported by equity. Assuming for the moment that this obligation requires the insurance companies

to act conscientiously, fairly and reasonably when dealing with claims, the equitable jurisdiction to award compound interest could, by analogy with other cases where an equitable principle has been in issue, possibly be extended to cases such as the present where monies properly payable under the terms of the policy have been deliberately withheld or payment delayed. There may, of course, be other bases on which to found such a claim, but it is not necessary to explore them.

The short point for present purposes is simply that the fact punitive damages may be inappropriate in cases where the manner in which a defaulting insurance company has dealt with a claim or claims cannot be said to be outrageous and deserving of punishment does not mean that the law is necessarily impotent to properly compensate plaintiffs who suffer a financial loss through the delay or tactics pursued by the insurance company in dealing with their claims.

Thomas J

Solicitors

Fortune Manning Law Partnership, Auckland for Appellant

Russell McVeagh McKenzie Bartleet & Co, Auckland for Respondent