

IN THE COURT OF APPEAL OF NEW ZEALAND

CA134/05

BETWEEN QBE INSURANCE (INTERNATIONAL)
LIMITED
Appellant

AND DAVID VIVIAN JAGGAR AND
CARMEL ANNE JAGGAR
Respondents

Hearing: 9 August 2006

Court: William Young P, O'Regan and Arnold JJ

Counsel: M Ring QC and D J Heaney for Appellant
A R Galbraith QC and P Barratt for Respondents

Judgment: 13 December 2006 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondents costs of \$6,000 together with usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] On 12 October 2000, a severe south-westerly storm buffeted Canterbury and caused significant damage. Particularly affected was the Magazine Bay marina in Lyttelton Harbour. The marina broke up and many vessels which were moored there (including a 12 metre launch owned by the respondents, Mr David Jaggar and his wife Mrs Carmel Jaggar) were damaged or destroyed.

[2] The companies which were responsible for the development and construction of the marina (Lyttelton Marina Ltd and Saltwater Marinas (NZ) Ltd) were already in financial difficulties and the storm damage was the last straw. Lyttelton Marina was placed in receivership in November 2000 and Saltwater Marinas the next year. They had, however, taken out public liability cover with QBE Insurance (International) Ltd which thus had a potential liability under s 9 of the Law Reform Act 1936 to the owners of the vessels which had been damaged or destroyed.

[3] Mr and Mrs Jaggar sued QBE seeking to recover compensation for the loss of their vessel. It was not seriously in dispute that they were entitled to damages against the Lyttelton Marina and Saltwater Marinas. Nor is it now disputed that the marina companies' public liability cover with QBE prima facie provides indemnity in relation to their liability to Mr and Mrs Jaggar. The only remaining question is whether QBE is entitled to avoid the policy for non-disclosure. If QBE cannot do so, Mr and Mrs Jaggar are entitled under the Law Reform Act to damages directly from QBE.

[4] The case was tried before Panckhurst J and in a judgment now reported at [2006] 2 NZLR 87 (HC), he found in favour of Mr and Mrs Jaggar.

[5] QBE now appeals.

Factual background

[6] The marina development started in 1998. At that time there was in Magazine Bay an existing pier with 92 berths for mooring boats and this was protected from the south-west by a breakwater constructed from old tyres.

[7] The proposed development was in two phases:

- (a) In the first phase a fixed breakwater 160 metres long was to be constructed to protect the area against easterly swells and two overlapping floating breakwaters were to be created to protect the marina from waves from the south-west. A number of on-shore developments were also planned.
- (b) In the second phase (which was dependent on demand for berths) the existing pier was to be removed and further floating berths constructed in its place.

[8] Lyttleton Marina was the developer and owner of the marina assets. As developer, it contracted with Saltwater Marinas to construct the marina. The companies were closely related. Saltwater Marinas subcontracted its design duties to Beca Carter Hollings and Ferner Ltd. It was Beca Carter that designed the floating breakwater.

[9] An attempt to raise funds through a public subscription was not successful and financial difficulties (and associated publicity in local newspapers) were a recurring theme during the development exercises.

[10] Construction of the fixed breakwater and one of the floating breakwaters was largely completed when, in August and September 1999, moderate storms revealed design problems in the floating breakwater. The structure proved to be too inflexible to withstand wave pressure. So Beca Carter withdrew as designers and a new engineering consultant, OCEL Consultants Ltd, assumed design responsibility in November 1999.

[11] In mid-December 1999 and early January 2000 more storms caused further damage including, in December, to boats in the marina (although it is not entirely clear whether the boats which were damaged were in the “old” or the “new” marina).

[12] In the meantime, OCEL had redesigned the floating breakwater. The breakwater system was designed to withstand a one in fifty year storm. Implementation of its design required the removal of the existing breakwater structures with the result that the marina would necessarily be vulnerable from the south-west during the period which would have to elapse before the new breakwater system could be installed.

[13] OCEL was itself concerned as to its insurance position in relation to its redesign work. On 8 February 2000, it was advised by its brokers that professional indemnity cover would depend upon its work being peer reviewed. Such a process would necessarily take some time but the marina companies were extremely anxious to get on with the redevelopment and made this clear to OCEL. The upshot was a letter of 11 February 2000 from OCEL to them which concluded in this way:

You should not attempt to have any work done either using these drawings or the proposed design of work they contain. Our suggested remedial design has not been fully analysed and tested. As noted above the whole issue of whether the breakwater can be repaired is the subject of a peer review. That peer review may result in us advising you that we do not consider that repair of the existing breakwater should be undertaken. We accept no liability for any use you make of the drawings which have not been approved for construction.

[14] Despite this letter, the marina companies proceeded with the reinstatement of the breakwater on the basis of OCEL’s plans. And in the course of this exercise OCEL certified the construction works. On 12 October 2000 complete reinstatement was about two weeks away. There remained a 100 metre gap in the breakwater, and, as result, the marina, and the vessels in it, were not protected from the south-west when the storm struck.

The insurance relationships

[15] QBE had commenced insuring Lyttelton Marina and Saltwater Marinas for public liability on 21 May 1998. The first proposal was made in December 1997. This cover was renewed in May 1999 for a further 12 months.

[16] On 8 March 2000 Saltwater Marinas sought professional indemnity insurance to cover the redesign by OCEL of the floating breakwater. This is not the policy which is directly material to the appeal but, for reasons to which we will revert, the extent of the disclosure made by Saltwater Marinas is nonetheless relevant. We will discuss the detail of this disclosure shortly.

[17] On 12 May 2000, in anticipation of the upcoming date of renewal of the public liability insurance cover, QBE sent out a certificate of currency to the companies' insurance brokers, together with a renewal declaration form. The declaration required answers to five questions, including whether the companies' business activities had changed, and whether there were any claims pending or circumstances likely to produce a claim. The declaration was completed on behalf of the companies on 18 May 2000 and returned to their insurance brokers on 19 May.

[18] The QBE underwriter who made the decision to accept the risk was Mr Warren Tucker.

[19] It will be recalled that the storm struck on 12 October 2000. On the same day, an internal QBE memorandum noted that Saltwater Marinas was seeking to extend its cover under its public liability cover from \$3m to \$10m. On 19 October 2000, the broker notified QBE of the storm damage noting that the marina berths had broken up and that a large number of pleasure craft had been damaged. The following day, QBE provided a quotation for increased cover but on terms which were not taken up.

[20] QBE avoided the public liability policy on 7 May 2002, citing material non-disclosure as the reason for the avoidance.

Defences which are no longer relied on

[21] The material misstatement and non-disclosure defences run at trial included complaints as to non-disclosure of the damage caused by the December 1999 and January 2000 storms, vessels using the marina despite it not having been reinstated and the financial difficulties of the marina companies.

[22] These defences were rejected by Panckhurst J for a variety of reasons, a number of which we should record:

- (a) QBE was on notice of the storm damage which had occurred in August/September 1999 which culminated in the dispute and settlement with Beca Carter, see [84] and [98] of his judgment.
- (b) The problems faced by the marina companies were in the public domain and the subject of much publicity (see for instance [85] - [87]). Anyone who read local newspapers would have been well aware that there were boats in the marina during the early months of 2000.
- (c) Mr Tucker wrote to his superior on 19 October 2000 addressing the storm in terms which did not suggest any surprise that there were boats in the marina to be damaged.
- (d) The overall disclosure (starting in December 1997) together with the additional material supplied in March 2000 conveyed clearly that boats would continue to be moored in the marina during the reinstatement phase.
- (e) On the issue of damage to boats in the December 1999 storm, although there was non-disclosure, the underwriter “probably possessed knowledge of this aspect” (see [157]). Such non-disclosure did not therefore induce QBE to accept the risk.

The Judge's approach to the defence associated with OCEL's 11 February 2000 letter

[23] The Judge agreed that there had been a material non-disclosure in this respect:

[130] It seems to me that the rival contentions as to materiality involved an interesting difference of emphasis. For the plaintiffs the focus was upon the fact or circumstance that reinstatement work was being undertaken, which was calculated to improve the safety of the marina generally. Hence, it was submitted, because the work would diminish the risk, disclosure was not required.

[131] But the argument for QBE was much narrower. Its focus was not upon the reinstatement work itself, but rather on the circumstance that it was being undertaken against OCEL's advice. The complaint was that OCEL's advice (not to act on preliminary design drawings until there was a peer review sign-off of them) was not disclosed.

[132] In my view the warning contained in OCEL's letter of 11 February 2000 was a material fact or circumstance. A deliberate election to proceed with reinstatement of the breakwater on the basis of preliminary drawings, when there was an express warning issued by OCEL that such drawings may not gain approval on peer review had the potential to influence the judgment of a prudent insurer in assessing the risk or in fixing the premium. Mr Thomas's evidence confirmed as much. Even Mr Simpson, although dismissive of the risk entailed in acting on what were merely preliminary drawings, accepted that OCEL's disclaimer of liability was material with reference to subrogation rights and therefore to assessment of the risk. That must be so. Had the breakwater been fully reinstated and failed on account of design deficiencies, causing third party loss, QBE could not have called OCEL to account. I am satisfied, therefore, that this fact or circumstance was not disclosed and as to its materiality.

We note that Mr Thomas gave expert evidence for QBE and Mr Simpson gave expert evidence for Mr and Mrs Jagger.

[24] The Judge was nonetheless of the view QBE had waived the need for disclosure of OCEL's advice in its letter of 11 February 2000.

[137] With reference to the public liability renewal in May 2000, Aon Risk Services [the companies' insurance brokers] provided the renewal form to the insured. It was returned under cover of a memorandum completed by an employee of the insured and which included "please let me know if there is anything further you require". The form itself was headed "Public Liability Declaration for Renewal". Under that heading appeared the words "Important: Cover under this policy ceases on the expiry date shown. To ensure continuation of cover please complete and return this declaration

prior to expiry". The one-page form asked only five questions. These required Saltwater Marinas to estimate its turnover for the forthcoming year, to specify its staff numbers and the number of buildings it owned, to advise whether its business activities had changed in the last 12 months or were expected to change "in the preceding 12 months" (presumably intended to be the next 12 months), and finally asked whether there were claims pending or circumstances likely to produce a claim under the policy.

...

[139] The issue for present purposes is whether the insured, on being requested to complete the renewal declaration (which, incidentally, was not actually a declaration, although headed as such), absent any further inquiry, was nevertheless required to disclose OCEL's advice contained in the February 2000 letter. More accurately, did QBE by virtue of the contents of the renewal form so limit the scope of the information which needed to be provided at that point as to waive the need for disclosure of OCEL's advice?

[140] In my view a waiver is established. Against the particular background or history to which I have referred I do not see that an insured could think otherwise than that the renewal form expressly identified the scope of the matters to be disclosed. Extensive information had just been disclosed in a professional indemnity context. A short and routine form was provided to ensure continuity of cover. An offer to provide further information was also conveyed.

Given the Judge's conclusions on the waiver point, he did not go on to consider (or determine) whether the non-disclosure induced QBE to accept the risk.

Overview of the appeal

[25] We propose to discuss the arguments by reference to two questions:

- (a) Was there material non-disclosure in relation to the OCEL letter?
- (b) Did non-disclosure induce QBE to accept the risk?

Was there material non-disclosure in relation to the OCEL letter?

Was disclosure of the substance of the OCEL letter required

[26] It is elementary that the marina companies were required to disclose the OCEL letter and that they were continuing with the reinstatement of the marina,

despite the warning contained in that letter, if that information would have been regarded as material by a reasonable or prudent underwriter, see *State Insurance General Manager v McHale* [1992] 2 NZLR 399 (CA).

[27] Panckhurst J concluded that there was a material non-disclosure because the letter of 11 February 2000 and the associated fact that reinstatement was nonetheless proceeding meant that if anything went wrong there could be no claim against OCEL.

[28] The materiality issue falls to be determined in an unusual factual situation. On the other findings of fact made by the Judge, QBE was aware of the storm damage in August, September and December 1999 and January 2000, it “probably” knew that boats had been damaged in the December 1999 storm and it appreciated that substantial reinstatement was required. It also knew that boats were nonetheless moored in the marina.

[29] Against the principle that there is no need to disclose material which diminishes risk, the materiality of the 11 February 2000 letter is perhaps marginal. It is perhaps not insignificant that the issue was raised for the first time shortly before trial. In a context in which QBE would appear to have been particularly astute to find grounds for avoiding the policy, the fact that it took so long to recognise this one is telling.

[30] All of that said, we agree with the Judge’s conclusion that QBE was entitled to be told that the design engineers were not warranting their work, providing the risk was being presented to QBE on the basis that there was such a warranty. If that was the case, the difference between the risk as presented and in reality was sufficiently material to require disclosure. Where we have reservations about the Judge’s approach is on the question whether QBE was on notice that there was no such warranty, a point which we can most conveniently discuss in the next section of our judgment.

Was the substance of the OCEL letter disclosed in March 2000?

[31] We have looked through the disclosures which were made. The material which was supplied to QBE in March 2000 included a document styled “project background” which made it clear that work was under way. The document referred to the difficulties in relation to the initial design and then went on:

Construction was stopped whilst a design solution was sought. This was achieved and a settlement was reached between [Saltwater Marinas] and [Beca Carter].

As a result of this agreement, all design information was to be released by [Beca Carter] to [Saltwater Marinas] and this information was subsequently provided to OCEL Consultants Ltd (OCEL) for their review. OCEL then designed a new system to overcome the design fault and this design is subsequently being peer reviewed by Ove ARUP of Brisbane.

Both companies will be signing off on the design and OCEL will be supervising and certifying the construction works.

[32] This material put QBE on notice that reinstatement had started ahead of completion of the peer review and also ahead of either OCEL or Ove Arup “signing off” on the design. This might, in turn, be thought to have put QBE on notice that OCEL was not warranting its design (as this might be thought to be implicit in it not having “signed off” on the design).

[33] One of the problems with this aspect of the case is that the complaint about non-disclosure of the 11 February 2000 letter was such a late starter in the litigation that it was not as fully addressed at trial as would have been desirable. In particular there was no focus on the “project background” document which we have cited from. As far as we can tell, the expert underwriting witnesses did not address the document and what it implies as to the absence of a warranty. Mr Tucker did not give evidence and what, if anything, he took from that document is a matter of conjecture. For this reason there was no evidence directed specifically to the question whether non-disclosure of the OCEL letter was of any materiality (from the point of view of the prudent insurer or Mr Tucker) given what was implicit in the “project background” document.

[34] Before expressing our conclusions about this document in relation to this aspect of the case, we should mention the possible relevance of waiver.

Waiver

[35] Waiver in this context is a very limited concept, see *Wise Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] 2 Lloyd's Law Rep 483 (CA). It usually applies in two situations:

- (a) Where an insurer asks questions about a particular topic, it will have waived disclosure of material facts and circumstances which fall strictly outside the ambit of the particular questions on that topic. By way of example, the insurer might ask whether a prospective insured has ever been convicted of an offence for which he/she was imprisoned. Such a question would waive disclosure in relation to convictions which did not result in imprisonment.
- (b) Where the insured discloses facts and circumstances which reasonably indicate the possible existence of further material facts, the insurer will have waived disclosure if it fails to make further enquiry. An example might be disclosure by an insured that he or she has been in hospital. A failure by the insurer to inquire into the circumstances would waive the need for disclosure of such circumstances.

[36] The Judge would appear to have considered that the case fell into the second category. Two months prior to May 2000, QBE had been informed of a number of difficulties relating to the development. In that context, the Judge plainly thought it extremely significant that on the renewal of the public liability policy, QBE was content only to require answers to the questions set out on a short and routine standard form.

[37] The corollary of the Judge's conclusions as to materiality is that the OCEL letter of 11 February 2000 (or at least its substance) should have been disclosed by Saltwater Marinas in March 2000. If the March disclosure was inadequate, we

would not be able to accept the Judge's conclusions. But if the March disclosure was adequate, it seems logical to conclude that there was no need for the insured to repeat that disclosure in May given the limited nature of the inquiries made of them. This is not quite the basis the Judge approached the case on but it seems to us to be appropriate.

Conclusions on this aspect of the case

[38] In this not entirely satisfactory state of affairs, we can express our conclusions shortly:

- (a) The "project background" document stated sufficient facts to make it clear to QBE that work was underway despite OCEL not having signed off on the design and this put QBE on notice that there was in all probability no warranty.
- (b) There was no evidential basis for a conclusion that the difference between what was implicit in the "project background" document and the 11 February 2000 letter was sufficiently material to warrant disclosure.
- (c) In this context, QBE waived further disclosure associated with this in May 2000 when it required completion of only a short form (and formal) disclosure document.
- (d) In any event, since QBE could not fairly claim to be dealing with Lyttelton Marina and Saltwater Marinas on the basis that OCEL was warranting its design, non disclosure of the fact that there was no such warranty did not involve material non disclosure.

Did non-disclosure induce QBE to accept the risk?

[39] The Judge did not address this issue in relation to the OCEL letter because he found against QBE on the waiver issue. But, given the difficulties we have had on the first issue, we think it best to make findings as to inducement, which we will do on the assumption that there was material non-disclosure in relation to the OCEL letter.

[40] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (HL) is authority for the proposition that an insurer relying on non-disclosure must establish that the disclosure in question would have been material not only to a prudent insurer but also to the actual insurer. This Court has left open the applicability in New Zealand of the *Pan Atlantic* case, see *Benjamin v State Insurance Ltd* (1998) 10 ANZ Insurance Cases 61-414. But QBE accepts that we should apply *Pan Atlantic*. Accordingly QBE had to show that if the 11 February 2000 letter had been disclosed it would have made a difference to whether QBE would have renewed the policy on substantially the same terms or at the same premium.

[41] In *Pan Atlantic* Lord Lloyd of Berwick observed at 638:

Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions. (1) Did the misrepresentation or nondisclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise.

The evidence of the insurer himself will normally be required to satisfy the court on the first question. The evidence of an independent broker or underwriter will normally be required to satisfy the court on the second question. This produces a uniform and workable solution, which has the further advantage, as I see it, of according with good commercial common sense.

Also relevant is *Assicurazioni Generali SpA v Arab Insurance Group* [2003] Lloyd's Rep IR 131 (CA) where Clarke LJ said at 149:

62. In all the circumstances I would summarise the relevant principles of inducement in this context in this way:

1. In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.
2. There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation.
3. The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence from evidence from him.
4. In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant nondisclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so.

[42] We note in passing that there are two questions associated with the *Pan Atlantic* principles:

- (a) The first is whether a presumption of inducement follows once materiality has been established. Lord Mustill expressed the opinion in *Pan Atlantic* that there was such a presumption, but this view has not subsequently been acted on, see for instance the passage from *Assicurazioni Generali SpA v Arab Insurance Group* which we have just cited.
- (b) The second is whether, in assessing materiality objectively, ie *vis à vis* the prudent insurer, it is sufficient if the fact in issue would have had an effect on the mind of the prudent insurer or whether it must be shown that that effect would have been decisive (as to either acceptance of the risk or the terms on which the risk was accepted). On this point, the majority in *Pan Atlantic* (Lords Goff of Chieveley, Mustill and Slynn of Hadley) adopted the less exacting test whereas the minority (Lords Templeman and Lloyd of Berwick) adopted the

decisive influence test. The two tests were discussed by this Court in *State Insurance General Manager v McHale* but a choice between them was not made.

[43] As indicated, the underwriting decision on the May 2000 renewal was made by Mr Tucker. But although he was available to give evidence, QBE did not call him as a witness. Instead it called his superior, Mr Marcus Oxenham who, at the material time, was based in Hong Kong. The public liability policy provided cover limited to \$3m and it was within Mr Tucker's responsibilities to approve insurance up to that limit. But Mr Oxenham said that Mr Tucker would have been required to consult him if aware of the earlier storm damage, that boats were using the marina prior to its reinstatement, or the OCEL letter. He made it clear in his evidence that he would have seen the letter as distinctly relevant to whether the risk would have been accepted.

[44] It will be recalled that the Judge held that although there had been non-disclosure of the damage to boats which had occurred in December 1999, QBE probably knew about this and he emphasised the fact that Mr Tucker was not called to give evidence. So he held that such non-disclosure did not relevantly induce QBE to accept the risk. It is likewise clear that QBE was aware that boats were using the marina in the relevant period. Further, as this judgment shows, Mr Tucker was prepared to accept the risk despite the "project background document" indicating that construction was proceeding ahead of the engineers signing off on the design. So Mr Oxenham's evidence as to what should have happened was not a good fit with what did happen. On that basis, we are satisfied that the actual underwriter for present purposes was Mr Tucker and not Mr Oxenham.

[45] The finding of the Judge that the 11 February 2000 OCEL letter was material was because the letter made it clear that the developers were proceeding without a warranty as to design. This finding therefore assumes that Lyttelton Marina and Saltwater Marinas had presented the risk on the basis that there was a design warranty from OCEL. But as is already apparent we think that it was at least implicit in the "project background" document, that work was proceeding despite

OCEL not warranting its design. If, contrary to our view, there was, overall (ie allowing for what was said in March) material non-disclosure, this can only have been by a narrow margin. We have already referred to the unusual nature of the risk and the late raising of this argument. As well, there is the reality that given the insecure state of the marina in May 1999 the risk to boats overall was likely to be diminished rather than enhanced by prompt reinstatement. Although this last consideration is not directly relevant to a comparison between the risk as presented and the risk as it was, it is nonetheless the sort of consideration which might have been seen as relevant by an actual underwriter who was prepared to provide cover despite knowing that boats were using the incomplete marina (along with everything else which Mr Tucker knew).

[46] In those circumstances, would Mr Tucker have been troubled by the 11 February letter given that he was prepared to provide cover on the basis of what QBE did know? In our view, it would not be right to infer inducement in the absence of evidence from Mr Tucker. To put this another way, on the state of the evidence as it was, we are not satisfied on the balance of probabilities that QBE was induced to enter into the contract of insurance by the non-disclosure of the letter of 11 February 2000.

Result

[47] Accordingly the appeal is dismissed. The appellant is to pay the respondents costs of \$6,000 together with usual disbursements.

Solicitors:
Heaney & Co, Auckland for Appellant
Jones Fee, Auckland for Respondents