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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A No 14/82

No Special Consideration

IN THE MATTER of the Declaratory Judgments Act 1908

AND

IN THE MATTER of the Earthquake and War Damage Act 1944

BETWEEN THE EARTHQUAKE AND WAR DAMAGE COMMISSION

Plaintiff

AND HENRY THOMAS GRAVES AND ELIZABETH JANE GRAVES

First Defendants

AND ALEXANDER CAMPBELL WALKER and UNA FRANCIS WALKER

Second Defendants

Hearing : 23 September 1982

Counsel : K Robinson for plaintiff
R V Duell for first defendants
R M Kean for second defendants

Judgment : 11 March 1983

JUDGMENT OF WHITE J

By agreement between the parties a declaratory judgment is sought regarding the interpretation of certain provisions of the Earthquake and War Damage

Act 1944 and Regulations made thereunder.

There were agreed facts in this case which can be summarised as follows :

(a) The plaintiff (which I shall call "the Commission") was created by the Earthquake & War Damage Act 1944 and is charged with the administration of that Act and the disaster fund from which claims including those arising from "landslip damage" may be met as from 17 July 1970.

(b) The claim arises out of damage to a house at 34 Kirkland Street, Dunedin, which is situated on a hillside which "has probably been slowly slipping for some years past". The house was built about 1950 on concrete foundations with brick veneer walls and a tile roof.

(c) In February 1974 the house was apparently owned by a Mr & Mrs Chung. On 5 February 1974 they gave notice of a claim for damage caused by landslip which caused"cracking by land movement" about a year before. (Any defects in the notice were waived.) They had insured the property with the Guardian Royal Exchange Assurance of NZ Ltd for $12,000 and an Earthquake & War Damage premium of $6.00 had been paid. A report on the damage was obtained dated 30 September

1977.

(d) On or about 3 October 1975 the Chungs sold the property to the first defendants for $15,000 and assigned to the purchasers their interest under the policy which had been renewed for a further 12 months. And by notice in writing dated 12 June 1981 the Chungs also assigned to the first defendants their interest in any claim against the Commission. The Commission, however, did not become aware of the sale until January 1978. The first defendants claim to have obtained no valuer's report and to have been unaware of any damage to the property from landslip or earthquake.

(e) By letter dated 17 February 1978 the plaintiff gave notice to the first defendants purporting to cancel further cover under s 14 of the Act.

(f) By notification of claim dated 31 March 1980 the first defendants purported to make a claim against the Commission.

(g) The first defendants continued to insure the property as already mentioned to 18 September 1979 when they increased the sum insured to $15,000 including $10.50 as the statutory premium under the Act. It remained so insured until 26 September 1982.

(h) At all material times the second defendants have owned the property at 36 Kirkland Street which is next door to the first defendants' property.

(i) On 20 September 1973 the second defendants gave notice of claim against the plaintiff.

(j) On 25 April 1974 and 6 May 1976 the second defendants purported to give notice of further claims.

(k) At the time of the first notice given by the second defendants the dwelling was insured under a contract of fire insurance with the Royal Insurance Fire & General NZ Ltd for $9,000 and a premium of $4.50 had been paid in accordance with the Act. For the years 1975 and 1976 the second defendants maintained that insurance. On 1 January 1976 a new policy was issued which was maintained and progressively increased as follows :

1976/77	$14,500
1977/78	17,000
1978/79	20,000
1979/80	22,000
1980/81	24,200

And in each year the statutory premium under the Act was duly paid and retained by the Commission.

(1) No classification of either property has been made for the purposes of condition 25 of the schedule to the Earthquake & War Damage Regulations 1956.

The various documents referred to in the statement of facts were produced by consent, including a full report on the properties and the damage to 34 Kirkland Street.

The Commission has resolved that its liability in respect of each of the properties is limited to the amount of its liability at the date at which a claim was first lodged but the first and second defendants claim to be entitled to payment of the full sums for which their respective properties are now insured.

In presenting his case Mr Robinson pointed out at the outset that the usual mode of resolving disputes was by arbitration but because the questions in the present case involved interpretation of the statute it had been agreed that an application for a declaratory judgment was appropriate.

Mr Robinson made it clear that his submission would be that "the event giving rise to the claim occurred in, say, February 1973, and it is to that event that the first defendants' claim relates.

If necessary, Mr Robinson said his submission would be that an insurance company is not the Commission's agent even for the purpose of receiving the statutory premium. It was conceded that all insurance contracts were in force as claimed and that all statutory premiums had been paid.

The questions asked in the originating summons are as follows :

" 1. Has the plaintiff an unrestricted discretion under condition 4 in the Schedule to the Earthquake and War Damage Regulations 1956 to cancel cover at any time?

2 Was the notice to the first defendants dated 17 February 1978 sufficient to terminate any further liability by the plaintiff to the first defendants notwithstanding that the plaintiff has made no refund to the first defendants in terms of the said condition 4, and that the first defendants have at the request of their insurer subsequently continued to pay, and the plaintiff has so far retained, the premiums prescribed by the Act?

3. Is the liability of the plaintiff to the first and second defendants limited to the maximum sum payable at the date of first notification of loss in each case notwithstanding the continued payment by each defendant at the request of their respective insurers, of Earthquake and War Damage premiums and the retention thereof so far by the plaintiff?

4. If the answer to question 3 be no, what is the limit of the plaintiff's liability to :

(a) the first defendants and

(b) the second defendants . "

Dealing with the first question, condition 4 provides :

> "The insurance may be cancelled or the amount of the insurance may be reduced by the Commission, in its discretion, at any time. Upon any such cancellation or reduction a proportionate part of the premium paid for every complete month of the unexpired term of the insurance shall be refunded by the Commission to or for the benefit of the insured person."

Mr Robinson submitted that the power conferred could hardly be more widely expressed and he contended that, provided the Commission acts in good faith and does not otherwise act so as to leave its decision open to review proceedings, it has an untrammelled discretion. Furthermore, it was argued that repayment of the premium is only a consequence of the power of cancellation, and not a condition of it.

Mr Robinson referred to Sun Fire Office v Hart (1889) 14 AC 98, a decision of the Privy Council, where the clause in a policy read "If by reason of such change, or from any other cause whatever the society...should desire to terminate the insurance effected...it shall be lawful for the society or its agents to do so, by notice to the insured". It was held that, giving the words their primary and natural meaning, they were wide and comprehensive so that nothing was required except the existence of a

desire, on the part of the insurers to get rid of future liability, whether such desire was prompted by causes which prevented the policy attaching or by any other cause whatever. Similarly, it was submitted, there are no limiting conditions on the exercise of the power contained in condition 4, provided the Commission acts bona fide and within the policy of the Regulations and the Act.

For the defendants it was accepted that the Commission has a wide discretion but it was argued that before a cancellation could be effected the Commission must have returned a proportion of the premium to the insured. In my opinion the duty to refund is not a condition precedent to the effective exercise of the Commission's discretion. The words used in the second sentence of condition 4 are "upon such cancellation". In short, in my opinion, the cancellation takes effect once the Commission has exercised its discretion whereupon the premium becomes repayable by the Commission. This is the ordinary construction of those words.

In my opinion the answer to Question one is "Yes".

I turn then to the second question. The first part of this question as to refund has been dealt with in considering the first question and the real issue was whether the renewal of fire insurance policies by the property owners meant that the statutory liability of the Commission

arose under "new policies".

In a letter dated 17 February 1978 the plaintiff advised the first defendants that pursuant to condition 4 of the Schedule to the 1956 Regulations, all cover under s 14 of the Act had been cancelled in respect of their property at 34 Kirkland Street and that the Commission was "thereby contracting out of any further liability for damage occurring at this situation". It is quite clear that the plaintiff intended this notice of cancellation to have effect in the future. The Commission said in its letter that it expected the first defendants to notify future owners of the property that cover under the Act did not attach.

Mr Robinson contended that it is clear that the cancellation was not merely for the term of the current fire insurance contract held by the first defendants (which was due to expire on 25 September 1978) but was intended to be permanent, and that the notice was adequately expressed to effect this. In addition Mr Robinson pointed to the inconvenience that would result if it was obliged to issue fresh cancellations each time an insured took on or renewed insurance. Therefore, it was submitted, notwithstanding the payment of subsequent premiums, and the retention of them, the notice of 17 February 1978 did terminate cover at that date for the future.

Mr Duell submitted (and his submissions were

adopted by Mr Kean) that if the cancellation was effective then it was effective only in respect of the insurance contract for the insurance year ending 25 September 1978 and he referred to s 2 (3) which provides :

> "For the purposes of this Act a renewal of a contract of insurance shall be deemed to be a new contract."

It was argued that this means that the statutory cover for landslips provided by s 14 of the Act was still in force, because once they renewed their policy in September 1978, there was a new contract. It was also submitted that the cover provided by the Act is there for the protection of the public and not for the convenience of the Commission, and that the inconvenience caused to the Commission is small when compared with the substantial risk of loss of cover to an insured. Finally, Mr Duell submitted that the Commission, having continued to accept the premiums for two to three years, should be deemed to have waived the cancellation.

Mr Robinson's answer to Mr Duell's argument based on s 2 (3) and s 14 was that the sections did not apply because there was no contract between the Commission and the property owners. It was submitted that while contracts between the Commission and a property owner could be entered into under s 15,

in the present case the statutory cover arose under s 14.

The position, in my view, is that s 2 (3) clearly states that a renewal of a contract of insurance, "shall be deemed to be a new contract". Section 14 is concerned with contracts of fire insurance, which are defined in s 2 (1), and in my view s 2 (3) includes such contracts. In my view, if the legislation had intended s 2 (3) to refer only to contracts referred to in s 15 it would have said so. I consider that relevant contracts in the present case which were renewed must be deemed to be new contracts.

That is not an end of the matter, however, having regard to the notice of cancellation. As has been noted the first defendants were clearly notified of the cancellation and its purported effect as to the future. It was argued, however, by Mr Duell that the cancellation had been waived through accepting premiums in respect of the renewed contracts. Mr Robinson submitted that no question of waiver arose because there was no intentional act with knowledge - see Spencer Bower and Turner on Estoppel by Representation 3 ed at p 318.

Apparently the general practice of insurance companies in paying premiums under s 14 (3) is that a schedule of payments is provided monthly without specifying the names of the insured persons on whose

behalf the premiums are being paid. As a result the Commission has no information that a premium has been paid for any particular insured unless it makes enquiries. While there are no doubt difficulties in practice in operating the system there can be no doubt, in my view, that the question before me must be determined as a matter of interpretation of the statute. In my opinion the Commission's power to cancel "at any time" must be related to the existing insurance at the time the Commission purports to cancel it. The language of condition 4 supports that conclusion in referring to the repayment of "a proportionate part of the premium paid for every complete month of the unexpired term of the insurance..." At the expiration of any contract of fire insurance there is no insurance under the Act, but whenever there is a renewal of a contract of insurance a new contract is deemed to have been entered into. Accordingly, in my opinion, the provisions of s 14 must apply to the new contracts in the present case.

For these reasons I consider the notice of cancellation dated 17 February 1978 was effective to terminate the liability of the plaintiff to the first defendants notwithstanding that no refund was made to the first defendants in terms of condition 4, but that the cancellation was only in respect of the contract in existence at the date of cancellation.

The third question refers to both defendants. The question is whether the liability of the plaintiff to the first and second defendants is limited to the maximum sum payable at the date of the first notification of loss in each case notwithstanding the continued payment by each defendant at the request of their respective insurers of Earthquake and War Damage premiums and the retention thereof by the Commission.

Dealing with the first defendants the answer to question 2 being "Yes", the only claim which was lodged prior to the cancellation of the cover by the Commission was that dated 5 February 1974. At that time the property was insured for $12,000 by the previous owners the Chungs, and this interest was assigned to the first defendants on purchasing the property.

Mr Robinson submitted that the document determines the time at which s 16 (1) operates. Section 16 imposes a duty on the Commission to make good all loss or damage, in this case, caused by landslip damage, "to an amount not exceeding in respect of the property or any part thereof the amount to which the property or that part thereof is respectively so insured". Mr Robinson referred to condition 6 of the schedule to the 1956 Regulations which provides that on the occurrence of any loss or damage, notice shall be given to the Commission and within 30 days of the notice a claim must be made. It was then submitted that the maximum amount for which the Commission was liable was the amount for which the property was insured at the

time of the occurrence of the loss or damage which is the subject of the claim, namely $12,000.

Mr Duell agreed with the basic proposition, but submitted that as the cover had not been cancelled for later years after 17 February 1978 the defendants were covered when they claimed on 31 March 1980 under the contract of insurance then in force. Accordingly, it was submitted, the maximum amount for which the Commission was liable in 1980 was $15,000 being the amount which the first defendants had arranged as from 18 September 1979.

On the basis that the second question might be answered as I have answered it Mr Robinson submitted that the damage to which the second claim of the first defendants related occurred substantially before 31 March 1980 and that accordingly the plaintiff's liability remained at $12,000.

What happened in this case was that there was understandable delay in settling the claim. A "wait and see" attitude was adopted having regard to an engineer's report which indicated that there was no indication of earth movement "slowing" and that "considerable more damage must be expected to the claimant's property in the future". It seems to me that in adopting a "wait and see" attitude, having regard to the engineer's report, the Commission was taking both a realistic and fair view of the situation.

Indeed I think this attitude showed, and would be taken at the time as indicating to all concerned that the Commission and the insurers accepted that the insurable interest of the property owners should continue to be protected by renewal of the insurance until the position became clearer. In fact the time came when the Borough Council gave notice that the properties should be vacated because there was no likelihood that the land movement would cease in the forseeable future. As expected by the engineers there had not been any slowing down of movement in the area and there was no prospect of reinstatement.

As far as the first defendants were concerned nothing was paid by the Commission and the first defendants continued to have an insurable interest in the property. The claims in 1974 and 1980 were made in respect of different damage. At the time of the first claim the amount for which the property was insured was $12,000 and at the time of the second claim $15,000. As nothing had been paid out on the first claim the insurable interest of the first defendants had not been diminished. In my opinion the appropriate course, taking into account the "wait and see" policy, is to deal with the claim of the first defendants as a whole on the basis that the property was insured for $15,000.

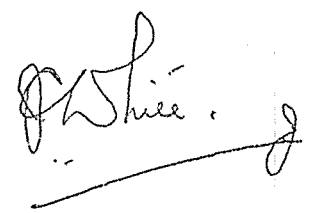
The second defendants made three claims. None of the claims was settled during the period the property was insured for $9,000. Another difference in their case was that no notice of cancellation was given by the Commission. It is significant, as Mr Kean pointed out that the engineer's report obtained in respect of the first defendants' property referred also to the second defendants' property. Again, taking into account the "wait and see" attitude adopted, the insurable interest was protected by insurance from year to year and contributions were made to the Earthquake and War Damage Commission in accordance with the Statute. By not acting on the claims immediately the Commission, in my view, treated them as continuing, with the result that the claims were capable of covering further damage that might have, and in fact did occur while the Commission chose to adopt this "wait and see" policy. At the time the second defendants were forced to vacate the property was insured for $24,200.

While all the second defendants' claims were made while the property was insured for $9,000 I think the delay in settling the claims by the Commission was fully understandable in the circumstances and although no claim was lodged in 1980 the situation which had developed and the loss to the second defendants could only be calculated at the end of the period of waiting. The property was then insured for $24,200. There is no suggestion that the figure was other than

realistic as the insurable value of the property at the time the contract was renewed.

For these reasons the third question is answered "No". The answer to question 4 (a) is $15,000 and to question 4 (b) $24,200.

In the course of preparing my reasons for judgment it occurred to me that by reason of condition 19 of Part 1 of the Schedule to the Earthquake & War Damage Regulations 1956 (directing a reference to arbitration) this Court might not have jurisdiction to deal with the matter. I referred the matter to counsel and have had the advantage of considering a comprehensive memoranda submitted by Mr Robinson with which other counsel agreed. Having considered the argument I accepted that the Court had jurisdiction. My reasons are set out in a ruling delivered on 4 March 1983.



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Solicitors for second defendants : Webb Brash Ward & Co (Dunedin.)