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IN THE HIGH COURT OF NEW ZEALAND A. 36/81

WHANGAREI REGISTRY

Special Consideration

431

BETWEEN JOHN CLIFFORD WALTER ROBINSON and KATHARINA AGNES LOUISA ELIZABETH ROBINSON

PLAINTIFFS

A N D THE STATE INSURANCE GENERAL MANAGER

DEFENDANT

Judgment: 16 April 1984

Hearing: 19 and 20 March 1984

Counsel: A.J. Twaddle for Plaintiffs
M.B. O'Brien for Defendant

JUDGMENT OF CASEY J.

The Plaintiffs are orchid growers in Whangarei and in 1980 built a propogation (or "Mericlone") house which they proceeded to fill with 10,000 to 15,000 young plants. It was a long shed with fibre glass roof and fabric sides on timber framing. Mr Robinson wanted windstorm insurance and spoke to the State Insurance Office and was informed by its inspector (Mr Read) that he would have to take out fire cover as well, and the Defendant duly issued a policy on 25th August for $6,000 on the building, $20,000 for the stock of orchids and $200 for plant making a total of $26,200. Mr Robinson intended to instal a heating system to prevent frost damage and copied a unit his brother had used successfully with mushrooms, consisting of a fan blowing air across a car radiator through which hot water circulated. These items were installed inside the house with appropriate ducting to circulate the air and it was necessary to adopt a suitable method of heating the water. Mr Robinson built a small fire shed next to the house with a concrete base and lower wall of concrete blocks, plywood and frame upper wall and an iron roof, intending to experiment with different firing methods using sawdust to heat the water, which was circulated through a wetback on the shed floor.

As soon as the shed was finished, he made a temporary cover out of gibraltar board over the hearth area containing the wetback, using a small section of galvanised iron pipe as a flue, which passed to the outside through the plywood wall. He thought he might have surrounded it with boxing which ended at the wall, but it is clear that where it passed through, the pipe was in contact with the plywood. He said that if this method of heating the water proved successful he intended to build a metal hood and flue as a permanent fixture. He then proceeded to test various grades of sawdust and at about 7.30 p.m. he had a fire going and went inside to take a shower. Shortly after he left, the plywood caught fire, obviously through over-heating from the flue, and the flames spread to the Mericlone house. He was able to extinguish them before the fire brigade arrived but there was substantial damage to that end of the structure. He spent some time in cleaning up and next morning reported the incident to the Claims Officer (Mr Clotworthy) who sent out Mr Read, the same person with whom he had arranged the insurance cover. It was clearly a matter of urgency to get repairs under way in order to save the stock and the latter accepted this had to be done and told Mr Robinson to get a quotation from a builder. There was some discussion about heat damage to the plants, but Mr Robinson was not prepared to commit himself to a figure at that stage as it might take some days for this to become manifest. Repairs got under way immediately, but Mr Read was unhappy about the cause of the fire and reported his concern to the Claims Officer who arranged for an assessor to inspect and report.

During these discussions Mr Read arranged further fire and windstorm cover over two more orchid houses which Mr Robinson had built. On 21st May (two days later) these were extensively damaged by a storm and the Defendant met those claims, but on 8th June 1981 it declined liability to the Plaintiffs for the fire damage because of the failure to advise of the addition of the heating arrangements in contravention of Condition 4(a) of the policy. However, it agreed later to pay the repair costs of $2,906 pursuant to its separate obligation to the mortgagee, but it was accepted that this

payment was not to be taken as an admission of liability, or as constituting waiver or estoppel. Following the windstorm damage the Defendant terminated all the insurances in accordance with the policy conditions on 21st May 1981. Mr Robinson eventually rebuilt the fire shed entirely out of concrete blocks and installed a commercial boiler to heat the water.

The Plaintiffs now sue for $20,000 for the orchids lost in the fire and $305,332 for consequential loss due to the Defendant's breach of the insurance contract. The latter pleaded non-compliance with Condition 4(a), and also relied on a clause excluding loss or damage occasioned by any heating or drying process, but Mr O'Brien informed me that this was no longer pursued. By later amendment it also invoked the forfeiture provisions of Condition 8, alleging that a fraudulent or false declaration was made to the assessor (Mr Rayner) about the flue. At the end of the evidence it was clear that this could have been a genuine misunderstanding, and Mr O'Brien rightly conceded that it was no longer relied on. Counsel were agreed that I need only concern myself with the preliminary issue of liability and any questions of damages would be deferred. This case therefore turned on whether Condition 4(a) applied to exclude liability, the onus being on the Defendant to establish this exception. If it did, the Plaintiffs said it had been waived; alternatively they submitted that the Defendant was estopped from relying on it by its conduct.

Condition 4(a) (or a variation) is common in fire insurance policies. It reads:-

> "4. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction by endorsement signed by or on behalf of the General Manager:
>
> (a) If the trade or manufacture carried on be altered, or if the nature of the occupation or other circumstances affecting the building insured or containing the insured property be

changed in such a way as to increase the risk of loss or damage."

It is common ground that there was no sanction. Mr O'Brien favoured me with helpful extracts from a number of authorities. Over many years the Courts have been concerned with the application of similar conditions, in the light of the fundamental principle in this field of insurance that it extends to cover the consequences of negligent as well as purely accidental damage. This principle was established as long ago as 1829 in Dobson v. Sotheby (1827) M & M 90, in which it was held that a description of premises including the words "where no fire is kept, and no hazardous goods are deposited" must be understood as referring to the habitual use of fire or deposit of hazardous goods, and not their occasional introduction for a temporary purpose connected with the occupation of the premises. The concept of permanence has ever since been adopted by the Courts as qualifying the scope of conditions of the present type. The cases were discussed by Somers J. in Dawson v. Monarch Insurance Co. (1977) 1 NZLR 372, 375 although the wording in that policy was simply to exclude liability if at any time "the risk be in any way increased". That fire had been caused by welding to a trailer containing the damaged goods. He considered that the condition was inapplicable because it referred only to an increase of the risk, which he felt to be something different from increasing the risk of loss or damage - the wording in the present policy. However, if the latter construction applied, he regarded the welding as not being within its intent, because of its casual nature.

In this case the Defendant has to satsify me that the circumstances affecting the Mericlone house have been changed in such a way as to increase the risk of loss or damage to it or its contents, so something more than a mere change is required. In Brown v. Ocean Accident & Guarantee Corporation (1916) NZLR 377 Cooper J. had to consider the meaning of a virtually identical clause in a fire policy over a house insured as a dwelling house but subsequently used for

the accommodation of a small number of boarders. He held there had been no change in the nature of the occupation, and went on to consider the question of change of circumstances in these terms at p.382:-

> "I do not think that the remaining parts of paragraph (a), "or if other circumstances affecting the building be changed", apply to such a case as the present. They are ambiguous, and it is difficult to give a definite meaning to them. But I think that they can be more reasonably held to be something which affects the building as a building, something distinct from the change of the nature of the occupation of the building, for this is provided for in the previous words of the paragraph. They may perhaps mean - where, as here, the building was a detached building - the erection of a contiguous building, or they may mean the alteration of the insured building."

I think, with respect, that this sufficiently demonstrates the meaning of this part of the condition for present purposes, and I hold that the erection of the fire shed and the installation in the Mericlone house of the fan unit, the circulating pipes and the fireplace in the shed amounted to a change of circumstances affecting the house itself. Mr Twaddle submitted that these arrangements lacked that permanent character necessary to bring them within the intent of the clause, in line with the cases I have referred to. I cannot agree. As installed, all the items except the gibraltar board cover and the flue were of a permanent character. Those parts of the operation might be described as temporary; but it was always Mr Robinson's intention to have a combustion unit in the shed, although he was still experimenting to find the appropriate type. It was part of the overall process of effecting a permanent change and in my view was far removed from the examples of casual or temporary operations mentioned in the reported cases. I am satisfied that the construction of this shed with plywood walls to house a fire in order to heat the pipes was a change carried out in such a way as to increase the risk of loss or damage to the Mericlone house and its contents.

I reach that conclusion notwithstanding Mr Twaddle's submission that this risk was not increased because it was in contemplation when the insurance was arranged, as Mr Robinson had told Mr Read about it. There is some conflict of evidence here. Mr Robinson says that when the insurance was being arranged, there was a general discussion about raising orchids in the course of which he told him of the need to heat the house during the winter. He added that he was "fairly sure" that he would have discussed the basic form of heating he was going to use, and thought he remembered saying that the unit worked on a system of blowing hot air into the house. He said Mr Read showed no more interest in this than in any other facet of the operations they were talking about. On the other hand, the latter said in evidence he could not recall any such discussion about heating, although in an affidavit in interlocutory proceedings he conceded that Mr Robinson may have mentioned the subject. The latter was cross-examined about his action in ringing Mr Read after the Defendant had denied liability and asking about this discussion, and he rejected the inference that he was then uncertain about this conversation. He is supported by Mr Clotworthy's note made on 26th May, that he claimed to have told Mr Read about heating. Mr Read also explained the concession he made in his affidavit as being the result of Mr Robinson's assertion that such a discussion had taken place, although he himself could still not recall it. I am persuaded by Mr Robinson's evidence that when the insurance was being arranged he told Mr Read about the need for heating, but he did not enlarge upon his plans or mention any particular method.

In support of his submissions that the risk of damage contemplated was not increased, Mr Twaddle referred to Law Guarantee Trust and Accident Society v. Munich Reinsurance Company (1912) 1 Ch. 138, dealing with the question of alteration to the risk following liquidation of a company which had insured its liability under a guarantee. I doubt whether that case has much relevance; however, I accept that if Mr Read had been given full details of what Mr Robinson proposed, including the method of heating the circulating

water, and had accepted the insurance in that knowledge, it might well be said that fulfilment of those plans did not amount to an increase of risk, because it was substantially the same as that to which it was known the building would be subject at the time the insurance contract was made. An alternative view might be that the circumstances then affecting the building included the plan to heat it in that fashion, and they were not changed by its implementation. But in view of my finding that Mr Robinson only mentioned heating in a very general way, I do not think he can thereby avoid the consequences of Condition 4(a) upon these grounds. It was accepted that a number of heating methods could have been employed, some of which would have been safe. I agree with Mr O'Brien that the insurer would hardly contemplate the sort of hazard ultimately created by Mr Robinson, even if he had mentioned a blower system.

This brings me to the issues of waiver and estoppel where the onus is on the Plaintiffs, and Mr Twaddle acknowledged they were at the heart of his case. Particulars were given in his letter of 17th May 1983 as follows:-

> "The allegations relied on in respect of the claim of waiver are that Mr Robinson advised Mr Read prior to completing the proposal form that he intended to install heating in the mericlone house. Having been placed on notice Mr Read did not make further inquiries of Mr Robinson concerning the nature of the heating unit and did not advise Mr Robinson about condition 4(a) of the proposed policy.
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> The allegations relied on in respect of the claim of estoppel are that Mr Read on behalf of the defendant accepted liability for the claim and the quantum of the claim on 19th May 1981 when he attended at the plaintiffs' property and our clients proceeded on this basis."

Counsel cited a number of authorities, but for the purposes of this case I need only refer to the following extract from 9 Halsbury (4th Edition) p.396, para. 574:-

"Waiver may be express or implied from conduct,

> but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances."

In the course of his submissions Mr Twaddle added to the particulars mentioned in his letter a claim that the Plaintiffs were entitled to rely on estoppel because of Mr Read's silence when told of the heating needs. As pointed out by the author of Spencer Bower and Turner "Estoppel by Representation" (3rd Edition p.50, "waiver" and "estoppel" are used interchargeably to describe the situation of a party standing by in silence, and liability is dependent on the existence of a legal duty to speak. If the submission about failure to advise about Condition 4(a) is to succeed, Mr Twaddle must therefore establish some duty on Mr Read to inform Mr Robinson of its contents, or at least to tell him that he should notify the insurer of the details when he planned to instal the heating system. The evidence suggests nothing beyond the normal relationship between an insurance agent selling a prospect common insurance cover, and there is no suggestion that Mr Robinson was seeking Mr Read's advice as a specialist in this field, or had otherwise relied on him in a way that would give rise to a relation of confidence involving such a duty. With hindsight, it is regrettable that Mr Read did not say something along those lines, but I am not prepared to hold that in the circumstances, and with the limited information he was given, there was any duty on him to take this matter further with the insured.

Mr Twaddle also suggested that such a duty could arise from the obligation of good faith under the general law of insurance required of both the insurer and the insured, and he cited a passage from Ivamy's "Fire and Motor Insurance" (3rd Edition) pp. 7 and 8, referring to the insurer's duty to deal fairly with the insured and place at his disposal any information it may possess affecting the risk. This goes back to comments made by Lord Mansfield in Carter v. Boehm (1766) 3 Burr. 1905. One can readily understand this in relation to the "risk" insured from the example he gave of an

underwriter insuring a ship for a voyage when he knew it had already arrived at the port. But I cannot see that the insurer (or its agent) is under any obligation to point out or warn the insured about particular provisions which are fully set out in its policy.

In relation to his other basis of waiver - failure to make enquiries - Mr Twaddle said that the comment about heating was enough to put Mr Read on notice of Mr Robinson's intention and he should have asked further questions. This submission can be subjected to the same criticism as that made by Scrutton L.J. in Greenhill v. Federal Insurance Co. (1927) 1 KB 65, 87. He was dealing with non-disclosure by the insured of the material fact of a previous carriage when arranging marine cover on a cargo, but his remarks seem pertinent here; to paraphrase them, the plaintiffs answer that because the insurer was told of the need for heating, it is to be taken to know every possible method whereby this could be done and which the insured knows about - but which it did not in fact know, because its agent did not proceed by questions to explore them. He said "Such an argument, such a view of waiver, would as I have said, entirely destroy, in my view, the obligation to disclose." The underlying obligation of full disclosure by the insured is fundamental in this branch of the law and the insurer is entitled to know any material facts relevant to the risk. The Court should be slow to impose upon it the duty of asking questions and I am certainly not prepared to hold that the reference to heating made by Mr Robinson in the course of a general conversation about orchid cultivation was enough to put Mr Read on enquiry, or lead me to the conclusion that his silence in these circumstances demonstrated a positive and intentional decision to waive Condition 4(a).

I turn now to the Plaintiffs' last submission, that the Defendant is estopped from repudiating because Mr Read's conduct when he visited the premises immediately after the fire on 19th May was understood as an acceptance of liability by the Plaintiffs, who relied on it and thereby changed their position to their detriment. I accept Mr Robinson's evidence

that after the fire he was vitally concerned to get the Mericlone house repaired and the orchid stock protected from the weather as quickly as possible, and he was on the phone to Mr Clotworthy as soon as his office opened that morning. He emphasised the need for speed, explaining their financial position and that he could not carry out any work unless he had assurances from the Defendant. He said he mentioned three or four times that it was "imperative that whoever he sent up to deal with the claim had the authority to give us yes or no answers on what we were actually allowed to do." As he remembers it, Mr Clotworthy assured him that whoever he sent up would have that authority and Mr Read duly turned up about half an hour later. In his evidence, Mr Clotworthy agreed that Mr Robinson had asked for someone to come who had authority to settle the claim and he said he made no comment, but merely told him they would get someone out as soon as possible.

Mr Robinson then described the inspection carried out by Mr Read and his conversation with him, which covered in some detail the repairs needed and the quickest way of having them carried out. Mr Read said he was surprised to see the shed from which the fire had spread, and he confirms Mr Robinson's evidence there would be no cover for it because it was not mentioned in the policy. He had reservations about accepting the claim but said nothing of this to the insured and decided to report back to the Claims Manager. A claim form was completed and it is common ground that there was no figure put in for the orchid stock. I accept that Mr Robinson made it clear this could not be quantified until latent damage had become apparent over the next few days. He said he was led to expect payment within ten days, although Mr Read maintains that he told him only that payment could be made within ten days after the claim was settled, and I think this is the more likely version. Mr Robinson informed him he was on overdraft and had no ready source of funds and said Mr Read told him exactly what they could replace, which included three trusses, half the Duralite roof and the plastic fittings which were part of the house. He was told to get a builder in that morning to check the damage and give a written estimate.

At his suggestion Mr Robinson contacted a Mr Henwood and when he arrived, dealt with him on the basis that the State Insurance was meeting the claim.

He also mentioned his concern about whether the Duralite left on the roof may have suffered heat damage and said he received an assurance from Mr Read that he could get it tested by the makers and, if it was in fact damaged, the insurer would replace the remainder. They then discussed insurance for the two new houses and arranged cover for them. Mr Robinson said that Mr Read's general attitude was most helpful and co-operative and as a result he started in immediately with the necessary permanent repairs. In cross-examination he firmly denied that only temporary repairs had been authorised; and the work (except replacement of the trusses) was completed within a day or so. Evidence supporting Mr Robinson's account of these conversations was given by his father who was above the two men, stripping damaged material from the rafters at the time.

Mr Read's version of his visit was generally along the same lines, except that he denied making any commitment of liability. He agreed that they had inspected the damage and discussed which parts needed replacing and he authorised the obtaining of an estimate from a builder. He said nothing about his reservations over the safety of the heating unit, on which he reported to the Claims Manager. He maintained that they only discussed temporary repairs to close in the house, but in cross-examination he accepted that the repairs done on the day after the fire were permanent, except that the trusses could not be replaced immediately and they were temporarily strengthened. He also agreed that there was a discussion about the remainder of the Duralite roofing, although he maintains he only said that if it was affected, Mr Robinson could make a claim for it - not that the Insurance Company would pay.

Mr Read reported his concern to Mr Clotworthy who arranged for an independent assessor, Mr Rayner, to examine the

property. He met Mr Robinson and the former said that their discussion on his first visit concentrated on the loss of the orchid stock rather than the circumstances of the fire, although they did talk about that briefly. He said he was pushing for recovery on the plants and it was imperative that he got his money in a hurry. Mr Rayner said he told him there were all sorts of factors - they had to investigate the cause of the fire and ascertain the loss; and they couldn't just accept the fact that the plants had been damaged, and all this was going to take some time. He came back on another occasion to look more closely at the heating unit and discussed this with Mr Robinson, enquiring whether he had a permit to build it and he made a sketch from the information he was given. It was this that led to the abandoned claim of false statement in breach of Condition 8. The upshot was that he reported to Mr Clotworthy that the heating was unsafe and the claim should be declined. It seems clear on each visit that, so far as Mr Robinson was concerned, the main interest was quantification and settlement of the claim for damaged stock and there was never any suggestion to him that liability was in question. He was only made aware of this on a visit to the office some time after the 25th May when Mr Clotworthy told him they were still awaiting a further report from Mr Rayner, and on that occasion he pointed out the provisions of Condition 4(a) of the policy. In accordance with Mr Rayner's recommendation liability appears to have been denied in a telephone conversation of 2nd June and confirmed by letter of 8th June.

As Mr O'Brien said, this issue of estoppel is largely a question of fact and turns on my impressions of the witnesses, bearing in mind the normal failures of memory, and the tendency of some, in all sincerity, to arrive at a recollection of events more likely to further their interest. Mr Robinson struck me as a forthright man and in some respects his confident assertions may be open to doubt, but on the whole I found his account of the discussions with Mr Read credible and convincing, and accept that they left him with the impression that liability was not in question. I am satisfied he made it very clear to Mr Clotworthy that he wanted

to deal with someone who could give an answer on the spot, and the latter said nothing to make him believe otherwise when he responded to his call by sending Mr Read. The latter saw what had happened but kept his reservations to himself and spoke to Mr Robinson in a way that any reasonable person in his circumstances could only assume was an acceptance of responsibility for the cost of the permanent repairs, in an apparently helpful endeavour to restore the premises as quickly as possible. And to cap it all, he gave cover for the other two shade houses on the spot. Nor do I think Mr Rayner's enquiries would have conveyed any different impression to Mr Robinson. There was the unresolved question of the damaged stock which he himself admits was the main topic of the first conversation. His enquiries into the cause of the fire would have been quite consistent with the completion of a routine report. Like Mr Read, he kept his reservations about liability to himself.

Having regard to Mr Clotworthy's action in sending Mr Read in response to his request for somebody able to decide on the spot, Mr Robinson was entitled to assume the latter had appropriate authority, and he must have known that the Plaintiffs were arranging for the repairs in the belief that only the amount of the claim was at large. He was well aware of their concern for speedy reinstatement and their lack of finance was explained to him. I therefore conclude that his actions on the site on the morning of the fire and his discussions with Mr Robinson amounted to a representation that liability would be accepted. However, for a plea of estoppel to succeed, it must be shown that the Plaintiffs altered their position to their detriment in reliance upon that representation. They certainly went ahead with the repairs in the belief the claim would be met, but those costs were eventually paid in full by the Defendant under its obligation to the mortgagee, so they suffered no detriment on that aspect. The other area of loss was the orchid damage, but this never got as far as quantification, the figures being still at large when Mr Rayner's report went in, leading to liability being declined.

It is clear that Mr Robinson was made aware of the insurer's doubts over the claim some time before the decision to decline was made; as early as 26th May the note of his conversation with Mr Clotworthy suggests that he knew liability might not be as clear-cut as he had earlier assumed from Mr Read, and this is borne out by his letter of 27th May to the Defendant when he asked for an immediate assurance on reimbursement for stock damage. In his evidence he said that after arranging a temporary overdraft to pay for labour and materials in the repairs, he contacted two growers "and arranged for the purchase of stock, giving them some idea of approximate numbers. This was only approximate because the damage to stock at this stage was not fully known. I was given assurances that /of?/ a certain number." But there is no evidence that he spent any money or incurred any liability under this heading before he became aware that liability might be in question, or before the claim was declined. Indeed, the whole tenor of the claim for damages is that the consequential losses were incurred because the orchid stock was not replaced. I am not persuaded on this evidence that the Plaintiffs suffered any detriment under this heading either - or even altered their position - as a result of the representation about liability made by Mr Read. Accordingly the plea of estoppel fails also, and there must be judgment for the Defendant, with costs reserved as requested by its Counsel.

M.B. Casey J.

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