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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

A. 9/84

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BETWEEN: BRIAN DONALD EDWARDS, ROSS HADLEY EDWARDS and ROGER BRUCE EDWARDS all of Hastings, Farmers

First Plaintiffs

A N D: BRIAN DONALD EDWARDS of Hastings, Farmer and YVONNE SHIRLEY EDWARDS his wife

Second Plaintiffs

A N D: HAROLD WILLIAM EDWARDS of Taupo, Retired

Third Plaintiff

A N D: TERRENCE WILLIAM LEWIS of Hastings, Painter, carrying on business under the style or name of TWIN CITY PAINTERS

Defendant

Hearing: 19 June 1986

Counsel: A.K. Monagan for Plaintiffs
A.R. Burns for Defendant

Judgment: 30 JUN 1986

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JUDGMENT OF JEFFRIES J.

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Before the court is a motion filed on behalf of plaintiffs to obtain inspection of an assessor's report dated 25 January 1983 from McCormick Assessors Limited to the insurers of the defendants, namely, General Accident Fire & Life Assurance Corporation Ltd which company holds the public liability insurance for the defendant. The brief circumstances in which the report was obtained are contained in the following account of the facts. The first plaintiffs are the registered proprietors as tenants in common of a farming property situated at Maraekakaho near Hastings and known as Aomarama Station, which included a main homestead dwelling erected thereon. The first, second and third plaintiffs all owned chattels kept in the homestead on Aomarama Station. The defendant is a painter carrying on business under the name of Twin City Painters, and on 20 January 1983 it is alleged pursuant to a contract with the first plaintiffs, defendant was engaged in the burning off of the wooden exterior of the homestead prior to sanding down and repainting the same. The work had commenced some days beforehand. It is alleged that on the afternoon of 20 January 1983 the defendant was burning off paint from the front porch of the homestead using a blow torch for that purpose. Later in the evening of the same day a fire occurred which completely destroyed the homestead and the entire contents thereof.

The plaintiffs have issued proceedings against the defendant alleging there was an implied term in the contract that the defendant would perform the said work in a proper and tradesman like manner and, in particular, that he would take all usual and reasonable steps to prevent the outbreak of fire following or during the burning off. There is an allegation that the defendant was in breach of the implied condition for which there is a claim for the cost of reinstating the said homestead, and for chattels. There is a further cause of action in negligence and particulars are set out in the statement of claim. The proceedings were issued on 22 February 1984 and the defendant has filed a statement of defence denying liability.

An order for discovery was sealed by plaintiffs' solicitors and an affidavit of documents was filed by defendant. This affidavit, it was agreed, was defective and subsequently defendant supplied an informal list of the documents, and privilege was claimed for the assessor's report referred to earlier.

An application was filed by the plaintiffs seeking an order that the defendant produce for inspection certain documents contained in the informal list of documents prepared by the defendant and, in particular, those named in the application, of which the assessor's report is one. The other documents identified do not require a decision from this court.

The matter first came before me on Monday 9 June 1986 when it was adjourned to enable an affidavit to be filed on behalf of defendant's insurers who have taken over conduct of the litigation. An affidavit on behalf of the insurer was sworn by David William Trainor, Branch Manager of Palmerston North. He deposed that the fire, which is the subject of the proceedings, occurred on 20 January 1983 and it was reported to the defendant on 21 January 1983, and he lodged a claim form with his immediate insurer (a company associated with the General) on 22 January 1983. The claim form annexed to the affidavit of Mr Trainor indicates that it was a public liability cover for which the defendant was seeking indemnity perceiving the possibility of a claim against himself. The firm of assessors were instructed the day after the fire and on the same day insured first became aware of the event. On 25 January 1983 the assessor reported to the insurer. The written report was produced to the court and I have examined it. The affidavit of Mr Trainor states that the company regarded litigation as always likely and was at least expected from 2 February 1983. On 14 February 1983 plaintiffs' insurer wrote to A.A. Mutual (the associated company) giving notice of claim.

The obvious place to begin an examination of the legal principles on this privilege is Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart [1985] 1 NZLR 596 C.A. I wrote the judgment in the High Court from which the appeal was taken. I had in this court applied Konia v Morley [1976] 1 NZLR 455 and disallowed the claim for privilege. The Court of Appeal overruled Konia and upheld my judgment, but by replacing the Konia test of "appreciable purpose" with the English test of "dominant purpose" established by Waugh v British Railways Board [1980] A.C. 521; [1979] 2 All E.R. 1169. The new test is clear and stricter on the availability of privilege, but it is still substantially an issue of fact as McCarthy P. stated in Konia at p.459 of the Report.

In Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart the claim for privilege was being invoked against the insurer's own insured with whom it had a contract. In my decision to decline the claim for privilege that was regarded by me as an important factor. When a company is investigating a fire pursuant to a claim from its own insured, based on the contract, the purpose of the assessor's report could be manifold. The primary obligation of an insurer is to meet the insured loss and an assessor might be engaged solely to adjust the loss with liability to meet it a fait accompli.

In my view, the facts of this case are materially different. There is no insurance contract existing between the parties. The claim of the plaintiffs is, first, breach of an implied term of a contract to supply goods and services and, alternatively, negligence. The defendant named has a public liability cover and his insurer against this type of claim is responsible for the conduct of the litigation for apparently it has accepted the claim but denies its insured is liable in law to meet it. Mr Monagan for the named plaintiffs informed the court the plaintiffs have claimed against their insurer who has in its turn accepted the claim but exercised its right of subrogation.

On those facts the insurer of the defendant once it received a claim under the public liability policy must have carried out its investigation and obtained the assessor's report for the dominant purpose of litigation. The approach of an insurer under an indemnity policy dealing with a claim from its own insured is different from an insurer whose insured has with it a public liability policy. There the primary duty of meeting a claim based on a contract of indemnity does not exist. What exists for that insurer is a liability to meet a claim brought against its insured if he is found, or held to be, in breach of a contractual or tortious obligation. In such circumstances, in my view, it is entitled to claim legal privilege for the report of its assessor investigating such a claim. The application is dismissed.

I reserve costs.

Solicitors for Plaintiffs: Dowling & Co., Napier
Solicitors for Defendant: Carlile McLean & Co., Napier