IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.137/86

MEDIUM PRIORITY

BETWEEN FRANKIPILE NEW ZEALAND LTD

Plaintiff

LR 188

A N D GUARDIAN ROYAL EXCHANGE ASSURANCE OF NEW ZEALAND LIMITED

Defendant

Hearing: 13 April 1987

Counsel: Harrison for Plaintiff in support
Dugdale for Defendant to oppose

Judgment: 22 April 1987

JUDGMENT OF SINCLAIR, J.

This claim arises out of certain work carried out by the Plaintiff at the Refinery extension project at Marsden Point, Whangarei. The Plaintiff claims indemnity under a contract of insurance which was effected through the Defendant company who are resisting liability on two grounds. In the policy of insurance in question, there was a proviso that the Defendant would indemnify the Plaintiff for the cost of replacing and/or repairing and/or making good any of the subject matter insured and/or any part thereof which shall be lost, destroyed or damaged in any manner and by any cause whatsoever not hereinafter excluded. So far as the Defendant is concerned, it firstly contends that the loss in respect of which the Plaintiff seeks indemnity does not fall within the indeminity provisions of the policy in that the claim is in respect of work carried out by the Plaintiff and does not fall within

the description of being subject matter lost, destroyed or damaged. Additionally, the Defendant contends that accepting for purposes of the present argument that the loss claimed does fall within the indemnity section of the policy, the Plaintiffs still cannot succeed as it falls within an exception clause which excludes liability in certain circumstances and in particular in respect of the "cost of rectifying defects in design, materials or workmanship or mechanical or electrical breakdown or derangement or any cost incurred by reason of betterment or alteration in design, materials or workmanship". It is in respect of the Defendants pleadings in relation to this particular exclusion clause that the Plaintiff seeks the further particulars. It is apparent from the pleadings that under the agreement in respect of which the Plaintiff contracted to do the work in question, the stormwater basin, on completion, was to prevent seepage in excess of 50 cubic metres per hour whereas in fact on completion the Plaintiff measured the seepage rate at approximately 100 cubic metres per hour, with seepage rates of up to 128 cubic metres per hour being observed. Paragraph 8 of the Amended Statement of Claim alleges that that seepage constituted a loss or damage to the works undertaken by the Plaintiff and that in accordance with its obligations under the contract, it had rectified the damage by constructing additional panels around the outside of and enclosing the panels lost or damaged in the west, north-west and north areas, and replacing the panels in the south-east area. As a result of further particulars which have been given by the Plaintiff, it was conceded that the shallow leakage

through the wall of the stormwater basin meant that the basin could be unstable under rapid drawdown conditions. In addition, it was stated that the cement content of the wall in the south-east and north areas was found to be 80%-90% below that specified in the design mix and in the worst areas there was an incomplete bonding between panels. Other particulars were also given.

For the Defendant, Mr Dugdale resists the Plaintiff's application for further particulars which was designed to elicit precisely what grounds in the exception clause the Defendant in fact relied upon, and adequate particulars in relation to those grounds so relied upon by specifying, for example, in what respect or respects was the design defective, what material or materials were defective and what aspects of workmanship were defective. In addition the Plaintiff sought particulars as to the allegations of betterment and particulars in relation to alteration in design, materials or workmanship. The simple answer to the request by the Plaintiff, according to the Defendant, is that the nature of the remedial work carried out by the Plaintiff was such that it must fall within one or other of the exceptions contained in that clause. In other words, the Defendant says that the Plaintiff did the original work, that that original work was faulty in some respect or other and in consequence the necessary repairs had to be carried out occasioned possibly by faulty design, faulty workmanship, possibly the use of faulty materials or possibly a combination of those aspects and that it ought not, in the circumstances be required to give further particulars.

Mr Harrison on the other hand says that it is not sufficient for the Defendant to just make the bald assertion that the claim fails because it falls within one or more of the aspects of the exclusion clause and says that the Plaintiff is entitled to know precisely upon which aspect or aspects of the clause the Defendant relies and that it is unfair to put the Plaintiff to the expense of having to deal with other possibilities which might exist under the exclusion clause.

In view of the attitude adopted by Mr Dugdale, it seems to me that he is simply saying that the Defendant is not in a position to give particulars and really relies upon the exclusion clause in its entirety as being an answer to the Plaintiff's claim and in a manner somewhat analogous to the res ipsa loquitor doctrine. If I have understood the Defendant's argument correctly, there will be no need for the Plaintiff to investigate any particulars in relation to the exclusion clause and it would simply be over to the Plaintiff to prove the loss and that that loss falls within the main ambit of the policy. It will then be for the Defendant to prove that the claim falls within the exception clause and if at that stage particulars are relied upon, then it would seem to me the Plaintiff would be entitled to an adjournment at the expense of the Defendant in any event to investigate those particulars and provide an answer. The Defendant, as I see it, has chosen to adopt a certain course of conduct in relation to the claim and it runs the risk that the Court will not uphold its bald assertion that the claim is barred by the provisions of the exclusion clause. In the circumstances,

it seems to me that it is now somewhat pointless to order particulars but I comment that I feel the Plaintiff was justified in making the application.

Accordingly the present application for particulars will be dismissed and the question of costs will be reserved. However, depending upon the course which is adopted in the future by the parties, I reserve leave to the Plaintiff to again apply for further particulars if that should become necessary.

P. D. W. J.

Solicitors:

McElroy Milne, Auckland, Solicitors for Plaintiff;

Kensington Swan, Auckland, for Defendant.