IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-6941

BETWEEN	PEGASUS GROUP LIMITED Plaintiff
AND	QBE INSURANCE (INTERNATIONAL) LIMITED First Defendant
AND	AMERICAN HOUSE ASSURANCE COMPANY Second Defendant

Hearing: 27 April 2009

Appearances: Mr Tingey & Mr Vizor for plaintiff
Mr Robertson & Ms Twomey for first defendant
Ms Harkess for second defendant

Judgment: 27 April 2009 at 2.00 pm

Reasons: 10 July 2009

JUDGMENT OF WINKELMANN J
[application to amend statement of defence]

This judgment was delivered by me on 10 July 2009 at 2.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Bell Gully, Auckland
Shieff Angland, Auckland
McElroys, Auckland

[1] On 22 April 2009, five days before the commencement of a three week trial, the first defendant QBE Insurance (International) Limited (QBE) made application for leave to amend its statement of defence. The grant of leave was opposed by the plaintiff, Pegasus Group Limited (Pegasus) on the grounds that the proposed amendments contained three new and affirmative defences, there was no adequate explanation for the delay in pleading the defences, and Pegasus would be irremediably prejudiced if the amendments were allowed. I allowed one proposed amendment, but declined the application for leave in respect of two of the proposed amendments. I now give my reasons.

[2] Pegasus, an importing and wholesaling company, is suing its insurer, QBE, for breach of its contractual obligation to indemnify Pegasus for material damage arising from what Pegasus says is theft of stock, and for business interruption caused in large part by that stock theft. On Pegasus' case the theft of stock occurred whilst the stock was being stored at a warehousing facility run by New Zealand Express Ltd (now in liquidation) (NZE).

[3] The second defendant, American Home Assurance Company (AHA) was the insurer of NZE. Pegasus sues AHA pursuant to the provisions of the contract of insurance that NZE had with AHA, which was capable of responding to the claim that Pegasus has against NZE in relation to the lost stock. Pegasus relies upon s 9 of the Law Reform Act 1936 to enforce NZE's contract of insurance directly against AHA.

[4] The proposed amendments can broadly be described as follows:

(1) An allegation that Pegasus knowingly or recklessly made a statement in support of, or as part of its claim on the insurance policy which was material and false. The allegation relates to a letter written by Pegasus' solicitor, Bell Gully, (the solicitors charged with the conduct of these proceedings), to QBE's solicitors Shieff Angland, setting out Pegasus' answers to concerns expressed by the NZE liquidator that Pegasus' claim for missing stock was inflated. It is alleged that

because of this false representation, QBE is entitled to treat the policy as void and/or avoid liability under the policy. This on the basis of an alleged breach of the insured's duty of utmost good faith, or of provisions in the contract of insurance requiring that Pegasus be truthful in statements and answers in connection with its claims.

(2) In paragraphs 10(c) & (d) of the proposed amended statement of defence, QBE pleads that an excess (of $1,000 in respect of the 2004 policy and $2,500 in respect of the 2005 policy) is to be deducted from each and every claim for any one event of theft when calculating QBE's liability.

(3) In paragraph 10(a) of the proposed amended statement of defence, QBE pleads that Pegasus' claim for missing stock should be reduced by any amount that is recovered from NZE by way of set-off against fees rendered by NZE to Pegasus for the warehousing and logistic services provided.

Principles applying

[5] The application is brought under r 7.77 of the High Court Rules. Rule 7.77 provides in material part:

> (2) An amended pleading may introduce, as an alternative or otherwise,—
>
> - (a) a fresh cause of action, which is not statute barred; or
> - (b) a fresh ground of defence.
>
> (3) An amended pleading may introduce a fresh cause of action whether or not that cause of action has arisen since the filing of the statement of claim.
>
> (4) If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been served on the date of the filing of the application for leave to introduce that cause of action.
>
> …
>
> (9) This rule does not limit the powers conferred on the court by rule 1.9.

(10) This rule is subject to rule 7.18 (which prohibits steps after the setting down date without leave).

[6] Because of the timing of the application, it was not dealt with until the day the trial was scheduled to commence. It was common ground that cases concerning both r 7.77 and r 1.9 (which deals with applications to amend during the course of trial) are of assistance. *McGechan on Procedure* notes in its commentary to r 1.9 (at para HR1.9.04) that:

> Determination of the real controversy is the fundamental yardstick for all amendments under r 1.9. … In *Wright Stevenson & Co. Ltd v Copland* [1964] NZLR 673, Wilson J said that the Court was not limited to the mere correction of defects and errors, but should allow all amendments necessary to determine the real controversy unless satisfied that the applicant was acting in bad faith or that the order would cause some prejudice which could not be remedied by an appropriate award of costs.

[7] *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 involved an application to amend the statement of claim on the 63rd day of the hearing during final submissions. The High Court, with whom the Court of Appeal agreed, said of applications to amend pleadings during the course of trial:

> The general approach … is that even at this late stage the Court should make the amendments sought if they are necessary for the purpose of determining the real controversy between the parties, but even if that may appear to be so, the application should still be declined if making it at this stage is likely to result in an injustice to one or more of the defendants.

[8] In the Court of Appeal, Cooke P referred (at p 385) to the statement of Lord Griffiths in *Ketterman v Hansel Properties Ltd* (1987) 2 WLR 312 that:

> There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

[9] He identified the three "formidable hurdles" that an applicant must surmount to obtain leave to make a belated amendment to a pleading as follows:

a) Whether the amendment is in the interests of justice;

b) Whether the amendment will significantly prejudice the other party; and

c) Whether the amendment would cause significant delay.

[10] Also of assistance is *Fordham v Xcentrex Communications Ltd* (1996) 9 PRNZ 682 where Fisher J said (at p 685) in relation to applications under r 7.18:

> One must weigh the injustices likely to be caused respectively to the defendants and to the plaintiffs to see where the justice lies.

First proposed amendment: Application to add an affirmative defence that contract void or able to be avoided

[11] QBE seeks to plead as a defence that Pegasus breached a duty to QBE not to make any false or untrue statement knowingly or recklessly in support of a claim. QBE pleads that Pegasus made a statement in support of and/or as part of its claim that was materially false, in the following manner:

a) By a letter dated 21 June 2006, Bell Gully wrote to QBE's solicitors Shieff Angland on Pegasus' behalf setting out Pegasus' answer to concerns expressed by the NZE liquidator that Pegasus' claim had been inflated;

b) In that letter, Bell Gully described the process by which Pegasus said it ensured the claim was accurately quantified;

c) In paragraph 2.1(g), Bell Gully said: "Pegasus did not have access to the stock in the building until after Monarch had completed its count". Monarch was the warehousing company that took over management of Pegasus' stock a matter of days after NZE went into liquidation. Before it took over control of the warehouse, the stock had been stored at NZE's premises.

d) Bell Gully stated that Pegasus' claim against QBE was quantified as the difference between the Monarch count and Pegasus' own records of stock stored at NZE's warehouse as at the date of liquidation.

[12] It is pleaded that the statement that Pegasus did not have access to the stock in the building until after Monarch had completed its count was false, and that Pegasus' director Mr Harrison knew that. It was false because between the date of liquidation and 31 May 2005, somewhere between 18,533 and 78,383 Pegasus stock items were shipped (comprised in 24 to 283 orders). Further, between 1 June 2005 and 29 July 2005, somewhere between 9,208 and 30,602 (27 to 45 orders) Pegasus stock items were shipped.

[13] QBE seeks leave to add as a defence that as a result of the false statement made by or on behalf of Pegasus, QBE is entitled to avoid liability under the policy.

Background and amendments

[14] QBE says that the obvious purpose of the assurances given in the 21 June letter was to provide QBE with comfort that the level of stock counted by Monarch was accurate and could be relied on to calculate loss without further investigation, thereby eliciting payment of Pegasus' claim.

[15] QBE said that it discovered that the statements made in the June 2006 letter might not be correct in early 2008 when it received draft briefs of evidence as part of a mediation process. The draft report of one of Pegasus' experts, Mr Cregten, referred to approximately "20 orders" being despatched by Pegasus in May 2005, a date prior to Monarch completing its count.

[16] QBE says it did not immediately amend its pleading because it did not know whether the 20 orders might comprise 20 stock items or 10,000 stock items. It needed to establish the materiality of the amount of stock. QBE began corresponding with the solicitors for Pegasus, requesting information it says would have enabled it to determine how much stock had been moved. By letter dated 28 April 2008, QBE requested "soft copies" of Pegasus' documents for stock movements between the date of liquidation (6 May 2005) and the date Monarch took responsibility for Pegasus' goods. They also requested Monarch's documents relating to goods received into and goods sent out of NZE's warehouse between the

date Monarch took responsibility for Pegasus' goods and 29 July 2005 when the final stock count report was provided to Pegasus.

[17] By letter dated 29 April 2008, QBE sought a copy of Pegasus' transaction records from the date it started storing goods with NZE until Monarch took over responsibility for Pegasus' goods and/or produced a final stock-take (whichever was the later). The letter asked that the records include every transaction for every product, including inward and outward movement stock adjustments and other adjustments.

[18] On 12 May 2008, in response to these requests Pegasus' solicitors provided data to QBE. QBE says that the information it had requested was not in that data. QBE's expert, Mr Kane, provided an affidavit, served and filed only on the morning that the application to amend was to be heard, in which he said that the data provided did not contain the information requested by QBE, in particular, details of outward goods movements.

[19] At that point, QBE says it decided to be more specific in its requests, and so requested the invoices and packing slips in relation to the 20 orders (by letter dated 2 July 2008). Bell Gully responded that Pegasus was collating a copy of the requested invoices and packing slips (letter dated 20 August 2008).

[20] On 3 September 2008, Shieff Angland wrote to Bell Gully saying that although Pegasus had initially represented that it did not have access to its stock in the warehouse until after Monarch had completed its count, it had now become apparent that stock had been moved between the date of liquidation and the completion of the Monarch count. Shieff Angland said that Pegasus' packing slips and invoices had been requested but not provided, and asked that they be provided urgently.

[21] On 3 September 2008, Bell Gully responded that Pegasus was collating copy invoices and packing slips, but that it was taking longer than expected.

[22] In October 2008, Bell Gully wrote saying that it had been attempting to obtain the information requested, but that it was not currently in a reasonably accessible form to enable it to be provided to Shieff Angland. Bell Gully said:

> It is still contained in transaction data form, i.e. in the same format that has been supplied already. This information needs to be exported by purchase order in order to provide it to you. Our client would need to employ a consultant to complete this task. Our client estimates the costs of $1,000 to $2,000 would be incurred in this process. Please confirm that your client will meet this cost.

[23] Further correspondence ensued between Bell Gully and Shieff Angland, with Shieff Angland saying that it would not pay the costs for the extraction of that information.

[24] The relevant documents (invoices/sales summaries) were not provided to QBE until 27 March 2009 in the draft agreed bundle of documents. QBE says that these reveal that not only were goods shipped prior to completion of the Monarch count, but also that a significant number of stock items were shipped "before" Monarch took over the warehouse, contrary to any suggestions that Pegasus did not have direct access to the goods. QBE says that as soon as it was established that these stock movements were substantial, QBE moved to amend its defence. Until it knew whether these so-called "20 orders" related to 20 items or 10,000 items, QBE could not responsibly amend its defence, given that it concerned a serious allegation, in effect of fraud.

Counsel's submissions

[25] Pegasus opposes the amendment on the grounds that the proposed defence is entirely new; it has not been raised in any form prior to one week before the commencement of the trial. It notes the request for the information relied upon, but emphasises that that correspondence occurred in the context of preparation by the parties for two mediations. At no point did QBE tell Pegasus that it was investigating whether misrepresentations had been made by Pegasus in the course of making its claim that might disentitle Pegasus to cover.

[26] Pegasus emphasised that it had been open with giving information to QBE from the commencement of its claim process. The information that Shieff Angland was requesting had been included in the discovery provided in accordance with the time-table. QBE was requesting a particular format of some of the information provided in discovery, effectively in digital form, and in that context Pegasus' request for payment for the extraction of that information in a particular format was reasonable.

[27] Pegasus also argued that the defence has no prospect of success. The natural meaning of the words contained in the letter of 21 June and what Ms McKinley intended the statement to mean (confirmed in her affidavit filed in opposition to this application) was that Pegasus was not able to gain direct access to its stock to remove it from NZE's warehouses. It could only do so through the liquidators of NZE or through Monarch. That was a correct statement of fact. The statement was not an assurance that no goods were removed, but rather that any goods removed would be included in and properly accounted for in stock records. That this was what was intended would have been apparent from subsequent correspondence between the solicitors. For example, in a letter dated 21 April 2008, Ms McKinley said that Monarch had operated a "log store policy" in respect of the warehouses under which Pegasus could remove its stock from the warehouses only if following strict protocols designed to ensure that all stock movements were accounted for. On 16 June 2008, that position was further confirmed in respect of the period during which the liquidator was in control.

[28] Pegasus submitted further that even if the statement had created a misleading impression, that falls well short of what QBE would have to prove for the defence to succeed. Ms McKinley has filed an affidavit in which she says that the mistake was her own and was, (she believes based on her usual work practices rather than any memory of particular events), likely not expressly authorised by Mr Harrison. Nor would Mr Harrison have known it would be made. Given a concession by QBE that Ms McKinley did not know the statements to be misleading, it is not open to QBE to aggregate Ms McKinley's allegedly incorrect statement, and Mr Harrison's knowledge of the true circumstances, to come to a conclusion that Pegasus had knowingly made a false statement.

[29] Pegasus relied on *Awaroa Holdings Ltd v Commercial Securities and Finance Ltd* [1976] 1 NZLR 19 in which it was held that a principal would not be liable where the agent has made a false representation innocently, and the principal knows the true facts but has not authorised a representation, nor known that it would be made.

[30] The other principal ground of opposition was that irremediable prejudice would be suffered should the amendment be allowed. It was common ground between the parties that if it were allowed, Ms McKinley would be required to give evidence. The state of mind of the maker of the statement, and the circumstances in which the statement is made, are clearly relevant where it is alleged that the statement is made deliberately, falsely or recklessly. Relevant also would be the involvement of Pegasus in the making of the statement, something Ms McKinley would be expected to give evidence on. Pegasus referred me to r 13.5.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 which provides:

> If, after a lawyer has commenced acting in a proceeding, it becomes apparent that a lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the Court and, unless the Court directs otherwise, cease acting.

[31] In this case, it was argued that Ms McKinley's evidence would be key in relation to QBE's affirmative defence. Her evidence would be controversial in the sense that she will be challenged on her account and subject to significant testing. I could not then, Pegasus' submitted, reasonably authorise Bell Gully to continue to act. If Bell Gully were prohibited from acting, significant prejudice to Pegasus and delay would result as:

a) It would be necessary to adjourn this hearing, likely resulting in significant further delay in having Pegasus' claim heard; and

b) Significant costs would be incurred by Pegasus in having to instruct new lawyers.

Discussion and decision

[32] In considering this application by QBE, I took into account that Mr Kane's affidavit was filed and served on the morning that the application was to be heard. The information contained there was material because it purported to provide an evidential basis for QBE's submission that QBE did not have adequate information prior to March 2009 to allow it to assess the materiality of the 20 orders. Mr Tingey for Pegasus opposed the affidavit being read, because Pegasus did not have an opportunity to respond to it. I received the affidavit, but took Pegasus' inability to respond to the affidavit into account when weighing the evidence. Ultimately, I did not consider the contents of Mr Kane's affidavit determinative of the application.

[33] Pegasus also submitted that QBE's affidavits and submissions contained extensive reference to what it argued was without prejudice correspondence, generated in the context of preparation for mediation. Mr Robertson accepted that some of the material objected to was truly without prejudice, but said that the bulk of the material was not. It was agreed that the application would proceed on the basis that I received the material in question, but for the purposes of this application only. I made no determination of the claim to privilege, but in discussion doubted that privilege could be as extensive as Pegasus argued. It was agreed by all parties that reference to the correspondence in the course of this application would not to amount to a waiver of any privilege Pegasus could claim. This was a pragmatic course of action, since were I to have heard argument on the admissibility of the documents, that would likely have taken days, and in itself jeopardise this fixture.

Inexcusable delay?

[34] QBE inevitably accepted that the application to amend was made at a late stage, but sought to attribute this to a failure by Pegasus to provide QBE with the necessary information to assess the materiality of the 20 orders. I do not consider that characterisation of the chronology to be correct. Mr Kane does not dispute that the full electronic record of Pegasus' transactions provided on discovery contained the information that was required by QBE to assess the materiality. His evidence

was that the subset of data provided in response to QBE's request did not contain that information. Pegasus says that the information requested by QBE was always available to be extracted from the electronic discovery. Pegasus offered to extract the information but required payment of a minimal fee of $1000 to $2000 to obtain the particular format of the information requested. For some reason, not before the Court, Shieff Angland declined to pay that fee. Pegasus is correct in its view that it is not obliged to provide information in a particular format without the ability to recover its reasonable costs of providing the copies requested. In this case, to extract the material requested from the electronic record, it needed the assistance of its IT expert. Alternatively, QBE could have engaged its own IT experts to obtain the information in the particular format it required.

[35] Finally, and most significantly, at no time did QBE properly state the reason why it wanted the information. It is apparent from the correspondence that all requests for the information were made on the basis that it was information required for the purposes of preparing for mediation. QBE did not tell Pegasus that it was investigating the possibility that Pegasus had made a misrepresentation in the course of making its claim which would entitle QBE to avoid liability under the policy.

Prospects of success

[36] Were the amendment to be allowed, for the affirmative defence to succeed, the Court would need to determine whether there had been any misrepresentation. However, when read within the context of the letter as a whole, it is difficult to read the representation as false, or even as creating a false impression. Pegasus did not have access to the stock in the building. It had to proceed through the liquidator or Monarch to fulfil orders. Mr Robertson submitted that there was no evidence that Pegasus was prevented from direct access to the stock. He had to accept, however, that he did not know if they did have direct access as he had not pursued that factual inquiry with Pegasus, the liquidator or Monarch. Mr Tingey for Pegasus referred me to document 111 in the bundle, which I accepted provided an evidential basis for concluding that the liquidator did put in place a control on stock leaving the premises.

[37] I also consider subpara. (b) in the letter to be significant. There, it is said on Pegasus' behalf, "immediately after the liquidation, Mobil NZ obtained a lease on the building and installed security – any movements of stock in or out of the building were recorded by Mobil". This suggests that there was movement of stock in and out of the building. When the paragraph is read as a whole, it communicates that there was control over movement of stock and records of movement of stock such that QBE could have confidence in the records.

Prejudice to the defendant/to Pegasus

[38] If QBE were to be able to plead this affirmative defence, and if it were successful, it would be a complete answer to Pegasus' claim. But, since the prospects of success of the defence must be assessed as low, that detracts from the weight to be attached to this aspect of prejudice.

[39] The prejudice that Pegasus submitted would accrue to it flowed from the consequential inevitability of an adjournment of the trial. QBE conceded that if the amendment were allowed, an adjournment would be inevitable. Indeed, QBE would have needed an adjournment since to succeed with its affirmative defence, it would have to collect substantially more evidence than it currently has, including additional discovery in relation to security systems operating during the course of the liquidation. Although QBE noted the Court's ability to allow Pegasus' solicitors to continue to act even in circumstances where a member of the firm is required to give evidence, this point was not pressed by QBE. I would not in any event have been prepared to make such an order. The evidence that Ms McKinley would give would be contentious. Her evidence would likely be relied upon by QBE as the evidential basis for its allegation of misrepresentation against her client, and relied upon by Pegasus as its answer to that defence.

[40] In *Greenmount Manufacturing Ltd v Southbourne Investments Ltd* (2008) 19 PRNZ 58, Doogue AJ held that r 13.5.2 creates a presumption that a lawyer will not act in the circumstances with which that rule is concerned. He said that unless the character of the evidence the solicitor intends to give is non-controversial or uncontested, or unless there is some other compelling reason, a solicitor who intends

to give evidence at trial should not act as the solicitor for the party who intends to call him to give evidence. That decision was the subject of a successful application for review, but the Associate Judge's comments as to the policy underlying the rule were approved (*Greenmount Manufacturing Ltd v Southbourne Investments Ltd [Review]* (2008) 19 PRNZ 84.

[41] The comments of Doogue AJ in relation to the policy behind the rule are worth setting out in full here:

> [29] … The policy underlying r 13.5.2 is founded on a clear recognition that, presumptively, to concurrently act as a solicitor in proceedings and to give evidence in the proceedings involves a conflict which must be resolved in favour of the obligations that the witness assumes to the Court. To this extent the rule is consistent with the approach that Courts have taken when considering whether counsel should be restrained from acting in a particular case. In *Beggs v Attorney-General* [2006] 2 NZLR 129 Miller J said :
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> > [20] *Black v Taylor* involved counsel who was said to have a conflict of interest in that he had received confidential information about the party against whom he proposed to act. However, the decision established that the jurisdiction is not confined to such cases. It is available where the public interest in the administration of justice, which transcends the particular case and includes maintenance of public confidence in the judicial system, requires that the Court intervene. That typically occurs where there is a conflict between counsel's duty to the Court and his or her duty to the client or self-interest, but there is no limit on the conduct that may qualify. The question in any case is whether removal is necessary to safeguard the future conduct of the litigation
> >
> > (*Clear Communications v Telecom Corporation of New Zealand Ltd* (1999)
> >
> > 14 PRNZ 477 at p 482).
>
> But the rule would now seem to go further. It would appear to reflect an assumption that, absent special circumstances, the continuation of a solicitor/client relationship is inimical to the duties that the lawyer who intends to give evidence owes to the Court.

[42] Because of the nature of the evidence that Ms McKinley would be required to give before the Court, her situation would be invidious should her firm continue to act as solicitors for Pegasus. If Bell Gully were to continue to be the solicitors on record on the file, the risk of a conflict between the duties of the solicitor to its clients and the solicitor's duty to the Court, could not be ruled out. I would add to that in this case a potential conflict between the solicitor's own interests and her duty

to the Court. The evidence she would have been required to give had the potential to strain relations between Bell Gully and Pegasus and also, perhaps, between Bell Gully and Ms McKinley. For the policy reasons that are traversed by Doogue AJ, I am not prepared to dispense with the requirements of 13.5.2.

[43] A change of solicitor would inevitably result in a lengthy adjournment of this trial; given the complexity of this litigation, a new solicitor would take some time to become familiar with the evidence and issues.

[44] Another issue is whether the prejudice caused by a lengthy adjournment could be met with an appropriate award of costs, including the prospect of indemnity costs assessed by some appropriate formulation? Mr Tingey submits that no such orders could meet the prejudice. Pegasus' is impecunious, its very solvency is at issue. It would not be able to continue to fund the litigation should it be further adjourned.

[45] There was no evidence before me as to Pegasus' impecuniosity, but that it was in a very difficult financial situation was not at issue in argument. Earlier in the proceeding QBE brought an application for leave to seek security for costs on the grounds of Pegasus' impecuniosity. That leave was declined, because of the lateness of the application. But Mr Robertson for QBE said that it was accepted that Pegasus was in straitened financial circumstances. I proceeded on the basis argued for by Pegasus, that Pegasus' financial situation was precarious, and that it was likely that it would not be able to continue to fund the litigation were the present three week trial adjourned. QBE did not seek to challenge that factual premise.

[46] For the following reasons I therefore declined the application to amend the statement of defence:

a) There was no proper excuse for delay;

b) The affirmative defence had little prospect of success; and

c) Pegasus would be prejudiced should the amendment be allowed, and costs or other ancillary orders could not adequately remedy that prejudice.

[47] I make clear that even if I had assessed the defence as having some prospect of success, I would not have allowed the amendment. QBE's delay in raising this defence was inexcusable. It kept from Pegasus that it was considering raising the defence; at no time did it tell Pegasus that its investigations were focused on this issue. Further, it did not make proper efforts to resolve the factual uncertainty it says stood in the way of raising the defence. QBE could have been in no doubt as to the likely implications for a scheduled three week trial of the late pleading of such a claim.

Second proposed amendment: application to plead excess

[48] Paragraph 5 of the proposed amended defence set out a number of express terms in the insurance policy, including at paragraph 5(a) an express pleading at clause 21.3.1 regarding the excess:

> The company shall not be liable for the excess stated in the summary of insurance and which amount shall be deducted from the adjusted loss in respect of each and every claim for any one event.

[49] In paragraphs 10(c) and 10(d) of the proposed amended statement of defence, QBE sought to plead that an excess applied in respect of each and every theft. It was argued in support of that application to amend that the express pleading of particular sections of the policy would not cause any prejudice to Pegasus as it had been aware from the outset that QBE relied on the terms of the policy in full, given that QBE's previous defence expressly pleaded (at paragraph 5):

> The first defendant relies on the terms of the contract of insurance as if pleaded in full.

The full terms of the policy of course included the excess provision.

[50] It was argued that this was not an affirmative defence as it was for Pegasus to prove the period over which the stock was stolen, the number of times that stock was

stolen and the value of stolen stock on each occasion of theft. In order to establish any insurance entitlement it was argued that Pegasus must prove each event in which stock was lost and on what date. Once it was established what stock was lost and on what particular dates, the usual process of applying the excess to the particular events of physical loss suffered by Pegasus would naturally follow. Therefore the excess was not raised by way of affirmative defence. It was not put forward by QBE as a ground for declining the claim. Rather it was argued that it was common ground that the excess applied to the claim, and must accordingly be accounted for. This was recognised in Pegasus' evidence which applied only one excess to the entire claim. QBE must be entitled, it was argued, to put forward an alternative application of the excess provision in the policy.

[51] The application to amend was opposed on the basis that the exclusion had not been previously raised by QBE. The delay in introducing the particular application of the excess now pleaded would cause significant prejudice to Pegasus and require an adjournment. The evidence in relation to theft adduced by Pegasus to the date of the application in briefs of evidence already served, was not specifically directed towards whether the thefts were one event or more. Were the amendment to be allowed, Pegasus argued that it would need the opportunity to consider what further evidence needed to be led in relation to the issue. Pegasus did not have sufficient time to properly consider those issues, make their inquiries in relation to them, and adduce further evidence including recasting experts' briefs of evidence.

[52] During argument before me Mr Robertson confirmed that the insurer had not raised with Pegasus prior to the application to amend, the possibility that there might be multiple applications of the excess to this claim. That omission is startling, and I infer is only explicable if up until this point in time the insurer has been proceeding upon the same basis as the insured, namely that there was only one excess applying for each policy period. If that were not so, then the insurers failure to raise this issue is inexcusable, since if it is correct in its analysis of the application of the excess, Pegasus' claim becomes unviable.

[53] There is plainly an argument to be had as to how the excess should apply. I note in favour of Pegasus' case that the summary of insurance refers to the excess

applying in a way which suggests a global claim of "$1,000 for burglary and $2,500 for theft losses". It is also in the nature of losses arising from theft that it would in most circumstances be impossible for the claimant to prove the particular occasion of loss. Theft almost by definition occurs in a manner which makes it difficult to detect the fact of theft, and then to be particular as to the occasion on which it occurred.

[54] If QBE is correct as to its claim, Pegasus would have to be provided with an opportunity to reformulate its claim to meet the obstacle that QBE now seeks to place in its way. But for the reasons I have already traversed, were I to allow the amendment and adjourn the fixture, that would most likely mean the end of Pegasus' claim. For these reasons, I consider that this application to amend should also not be allowed.

Application to plead set-off

[55] Paragraph 10(a) pleads that Pegasus' claim for missing stock should be reduced by any amount that Pegasus has recovered from NZE by way of set-off against fees rendered by NZE to Pegasus. QBE argues that the consequences on Pegasus' claim of its retention and set-off of monies otherwise payable to NZE in respect of the missing stock is a matter of law and, as a result, it is not expressly required to plead the set-off. The effect of a retention is to reduce the net amount of Pegasus' alleged loss. QBE has denied quantum, and accordingly, Pegasus has to prove this loss. Moreover, pursuant to the operative clause of the policy, Pegasus could only recover the amount which it requires to indemnify it for loss, but which does not overcompensate it in respect of its claimed loss. If it has relied on the loss as the basis of a set-off, that must be taken into account.

[56] Pegasus argues that the amendments in relation to set-off should not be allowed because it is an affirmative defence which should have been pleaded. If allowed, Pegasus would wish to dispute whether there was a debt owing by Pegasus to NZE.

[57] I accept QBE's submission that the effect of any set-off on Pegasus' claim is a matter of law. But it should have been pleaded as it is also an affirmative defence.

But I also consider that Pegasus should be able to deal with this late amendment without suffering unfair prejudice. As Mr Tingey confirmed, Pegasus' principal answer to it is that any set-off matter between NZE and Pegasus in relation to payment of storage fees is irrelevant to the indemnity claim under the insurance policy. A second and subsidiary point is that the liquidator has no claim against Pegasus for the storage fees, so Pegasus has not been advantaged by its failure to pay on a disputed claim for those fees. However, even in relation to that second argument, disputes as to whether the sum is actually owing are capable of being dealt with within the context of this trial at the level of principle. I have therefore determined that the application to amend the statement of defence to add in this affirmative defence should be allowed.

[58] Pegasus is entitled to costs on this application, irrespective of the outcome of the proceeding. I will deal with any issues as to the appropriate level of costs if the parties cannot agree on that, at the same time as issues of costs on the proceeding are dealt with.

Winkelmann J