IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-5383

BETWEEN	DYLAN DAE BONG JUNG AND YANG HEE SHIN Plaintiffs
AND	WARREN GEORGE CROFT TEMPLETON Defendant

Hearing: 22 June 2009

Appearances: D F Dugdale for plaintiffs
M O Robertson and H Twomey for defendant

Judgment: 23 June 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.00 pm on Tuesday 23 June 2008

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[1] The defendant applies for orders:

a) directing that a question be determined prior to trial; and

b) requiring the plaintiffs to give security for costs.

Background

[2] On 27 January 2003 the plaintiffs purchased an apartment in Cleveland Road, Parnell. The purchase was settled on or about 28 February 2003. They subsequently discovered defects in the construction of the apartment, and retained solicitors and counsel for the purpose of pursuing claims against those thought to be legally responsible. Proceedings were commenced jointly with a Mr Thomas, the owner of an adjoining apartment and also represented by the defendant as counsel. The statement of claim named the Auckland City Council as defendant. The plaintiffs sought a total of $430,000.

[3] Later, a Body Corporate became a plaintiff. A Mr Underwood trading as Abel Inspections was joined as second defendant, and a Mr Mulligan, a deck repairer, was joined as third party by the Council.

[4] On 19 March 2007 a mediation took place before Mr Warren Sowerby. It was aimed at a settlement of the extant High Court proceedings. The defendant attended, along with Mr Thomas and Dr Jung. The Auckland City Council, the Body Corporate and Mr Mulligan were all represented by counsel. Mr Underwood appeared on his own behalf. At the commencement of the mediation the parties signed a confidentiality agreement in conventional form. It reads:

> As the condition of my being present or participating in this mediation I agree that I will unless otherwise compelled by law preserve total confidentiality in relation to the course of proceedings in this mediation and in relation to any exchanges that may come to my knowledge whether oral or documentary concerning the dispute passing between any of the parties and the Mediator or between any two or more of the parties during the course of the mediation. This agreement does not restrict my freedom to disclose and

discuss the course of proceedings and exchanges in the mediation within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request I am present at the mediation including the advisers and insurers of that party provided always that any such disclosures and discussions will only be on this same basis of confidentiality.

[5] They also signed a mediation agreement, paragraph 5 of which reads:

> (i) The Mediator and the parties and all persons brought into the mediation by either party, will not seek to rely on or introduce as evidence in arbitral or judicial proceedings whether or not the proceedings relate to this dispute-
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> a) exchanges whether oral or documentary concerning the dispute passing between any of the parties and the Mediator or between any two or more of the parties during the course of the mediation (including preparatory steps); and
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> b) views expressed or suggestions or proposals made within the mediation by the Mediator or any party in respect of a possible settlement of the dispute; and
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> c) admissions made within the mediation by any party; and
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> d) the fact that any party has indicated within the mediation willingness to accept any proposal for the settlement made by the Mediator or by any party; and
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> e) documents brought into existence for the purpose of the mediation; and
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> notes or statements made within the mediation by the Mediator or by any party.
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> (iii) The parties and all non-parties brought into the mediation by any party shall sign a Confidentiality Agreement in the accompanying form.
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> (iv) Every aspect of and communication within the mediation shall be without prejudice.
>
> (v) This clause in no way fetters the legitimate use in enforcement proceedings or otherwise of any written and signed settlement agreement reached in or as a result of this mediation. Any constraints on disclosure included in such settlement agreement will have effect in accordance with their terms.
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> *Clause 5 is reproduced as it stands, with non-sequential numbering.*

[6] It is agreed that the mediation was successful, in that at about 8.30 pm on 19 March 2007 the parties executed a settlement agreement. The agreement itself is not in evidence, but the plaintiffs plead in the present proceeding that:

8. For the plaintiffs the consequences of signing the document of 19 March 2007 material to the present action were these:

(a) They abandoned their claim against the defendants named in their action and agreed to discontinue that action.

(b) In return, they and Mr Thomas were to receive $110,000.

(c) This amount of $110,000 was not to be paid by the plaintiffs or Mr Thomas but applied towards the cost of the repairs the subject of the claim.

(d) The effect of clause 7 of the document is to make the plaintiffs jointly liable with Mr Thomas for the cost of the remedial work redress in respect of which was claimed by all of the plaintiffs in the earlier action, such work to be carried out within 4 years.

(e) The document was silent on how the $110,000 was to be shared between the plaintiffs and Mr Thomas who subsequently agreed to share it $55,000 to the plaintiffs and $55,000 to Mr Thomas.

[7] Following the settlement, the plaintiffs became dissatisfied with the advice they had received from the defendant, both prior to and at the mediation. They commenced the present proceeding on 30 August 2007. In their amended statement of claim, dated 23 February 2009, they allege:

9. The conference was largely spent debating the assertions by counsel to the Auckland City Council that the plaintiffs' claim ought to be reduced by 100% because the plaintiffs (having received certain information) had not minimised their loss by exercising a contractual right contained in clause 15.0 of the agreement to terminate their purchase agreement (referred to in paragraph 2) by 4 pm on 4 February 2003.

10. In providing to the plaintiffs the services he did in preparing for the 19 March 2007 conference, in negotiating in the course of that conference and in advising the male plaintiff to sign the compromise agreement or not advising him not to sign the agreement, the defendant acted carelessly and unskilfully and in breach of the obligations pleaded in paragraph 5.

11. The allegations in paragraph 10 are particularised as set out in paragraphs 12 to 14.

12. The defendant ought either to have refused to permit the conference to continue on the basis of an assertion neither pleaded by the Auckland City Council nor properly particularised or to have responded to the Auckland City Council and to have advised the male plaintiff that the Auckland City Council's contention had no substance because neither by 4 pm 4 February 2003 nor by the date of completion of their purchase were the plaintiffs aware of the serious defects subsequently discovered that were the basis of their

claim in the previous action and because the plaintiffs were entitled to rely on a report from one Underwood that "the unit is in good condition".

13. The plaintiffs' repair costs and those of Mr Thomas and the circumstances of their claims differed substantially and the defendant ought not to have advised the male plaintiff to accept on behalf of both plaintiffs a written agreement that did not state with precision the share of the funds to be provided to which the plaintiffs were entitled or that made the plaintiffs jointly liable with Mr Thomas for the costs of all the repairs in respect of which all the plaintiffs in the earlier action claimed redress.

14. The defendant ought to have explored with the male plaintiff the question of whether the plaintiffs were able to procure the balance of moneys they needed to carry out the entirety of the work needed in respect of their unit within the time limit of 4 years provided by the document.

[8] The plaintiffs say that by reason of the defendant's alleged shortcomings they have suffered loss of $375,000, being the sum of $430,000 for which they sued in the first proceeding, less the amount of $55,000 recovered in consequence of the settlement of that proceeding. In addition, they claim to have incurred a contingent liability in respect of such sum as may be needed to repair Mr Thomas's property. Accordingly, they claim damages of $375,000, together with a declaration that they are entitled to be indemnified by the defendant in respect of that contingent liability.

[9] The defendant has filed a statement of defence but says he cannot plead to paragraph 9 because the negotiations at the mediation are confidential, and that the plaintiffs are acting in breach of the confidentiality clause in the mediation agreement.

[10] The proceeding is set down for an eight day hearing commencing on 12 October 2009. The defendant now seeks:

a) An order prior to trial directing that the Court determine in advance of the trial, the question of the extent to which the parties are entitled to refer in evidence to events at the mediation; and

b) An order directing the plaintiffs to pay security for costs.

Question before trial

[11] Mr Robertson maintains that the confidentiality agreement and the mediation agreement constrain the parties from referring in evidence to the course of events at the mediation. While he accepts that the parties to the present proceedings may give evidence about what passed between them, and about what was communicated by any party to the mediation that has waived confidentiality, no other evidence may lawfully be given about the mediation in the absence of an order of the Court.

[12] Counsel for the defendant has contacted all parties present at the mediation, and has asked whether they will waive compliance with the confidentiality provisions of the agreements. The following responses were received:

a) The Council's solicitors have, in a letter of 17 April 2009 to Mr Templeton's solicitors, advised as follows:

> Attn: Mr Robertson
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> Dear Michael
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> **Jung & Anor v Templeton - Auckland City Council claim**
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> 1. The Auckland City Council agrees to waive the confidentiality provisions in the mediation agreement for limited purposes and to a limited extent.
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> 2. The Auckland City Council consents to evidence being presented to the court in connection with the mediation but only the information that affects the position between your client Mr Templeton and the plaintiff. Any information in connection with the council and actions or agreements on the part of the council must be kept confidential within your client's proceedings.
>
> 3. If the parties in your claim agree that matters occurring at the mediation be kept confidential and if the court makes the appropriate order, then the council will have no objection to disclosure of relevant information.
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> 4. If such an order is made then there will be no need to refer the matter back to us or our client. If it is not possible to obtain such an order then you should specifically refer to us any matter which you wish to provide in evidence which may bring into question the confidentiality provisions of the mediation agreement. We will then obtain our client's instructions on those specific items.
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> 5. Please do not hesitate to contact us if you need to discuss the matter further.

b) The solicitors for the Body Corporate have no current instructions.

c) The mediator is concerned to maintain the equity of the mediation process but does not seek to involve himself in the present application.

d) Mr Underwood does not waive confidentiality.

e) Mr Thomas does not waive confidentiality but indicates he will co-operate if the Court makes an order having the effect of releasing the parties wholly or in part from the strict obligations imposed by the confidentiality agreements.

f) Mr Mulligan's solicitors have been unable to obtain instructions, but anticipate that their client would not consent to a waiver.

[13] Mr Robertson contends that without an appropriate order of the Court, Mr Templeton is constrained by the confidentiality provisions of the agreements from referring to all of those matters which are relevant to the defence of his claim. There is therefore a potential for injustice, he argues.

[14] Mr Dugdale says that the plaintiffs' claim is pleaded on a deliberately narrow footing, and that there is no need for the orders sought by the defendant because all of the issues relevant to the Court's determination at trial concern only the plaintiffs and the defendant (each of whom waives confidentiality), and the Auckland City Council, which likewise will not object.

[15] Counsel are however agreed that if the Court considers that the admissibility of certain evidence ought to be determined prior to trial, then an order under r 10.15 is the appropriate vehicle.

[16] That rule provides:

10.15 Orders for decision

The court may, whether or not the decision will dispose of the proceeding, make orders for—

(a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and

(b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[17] At the heart of the plaintiffs' claim in the present proceeding is the contention that Mr Templeton was negligent in respect of his response to, and advice upon, the argument that the plaintiffs were responsible for their own loss in whole or in part, because they had, prior to making their apartment purchase agreement unconditional, been in receipt of Mr Underwood's report which identified at least some of the problems that gave rise to the first proceeding.

[18] Mr Dugdale says that the point was taken at the mediation by or on behalf of the Auckland City Council, which has waived privilege. On the other hand, Mr Robertson says the Council was actively supported by Mr Mulligan and his advisers and Mr Underhill, neither of whom has waived privilege. Moreover, Mr Robertson argues, the extent of the plaintiffs' prior knowledge of the defects in the apartment was the primary topic at the mediation. All parties participated in the discussion. Mr Templeton's advice was given in the light of the mediation proceedings generally, and in the context of the stance adopted by each of the other parties. That being so, his advice to the plaintiffs must be considered at trial against the background of all of the arguments raised in the course of the mediation, and not simply those advanced by the Council.

[19] Paragraph 13 of the amended statement of claim pleads what is effectively a second ground of negligence arising from the way in which Mr Templeton advised the present plaintiffs and Mr Thomas, regarding their separate rights and obligations. Mr Thomas has not waived privilege, nor has he agreed to the disclosure of information falling within the provisions of the confidentiality agreements.

[20] In summary, Mr Robertson's argument is that, despite the relatively confined character of the plaintiffs' claim against Mr Templeton, the latter needs to be able to

refer to the whole of the proceedings at the mediation, in order to place his advice to the plaintiffs in its proper context, both in respect of the Council-led claim of prior knowledge of the defects on the part of the present plaintiffs, and in respect of the relationship between the plaintiffs and Mr Thomas. Mr Robertson advises the Court that the defendant may well wish to call one or more of the other participants in the mediation, but would be unable to do so by reason of the confidentiality agreements, unless there is an appropriate ruling from the Court. To be effective, such ruling would need to be made prior to the trial. A ruling during the trial would be too late.

[21] Despite Mr Dugdale's argument that no pre-trial ruling is necessary because the issues between the present parties are confined, I am satisfied that Mr Robertson has made out a proper case for the exercise of the Court's discretion under r 10.15. This is a case in which, in my view, it is desirable that the Court make a determination under s 69 of the Evidence Act 2006, so that the parties may know in advance of trial which witnesses may be called to give admissible evidence, and what evidence may be received by the Court without infringing the provisions of the confidentiality agreements. It would be unsatisfactory to leave in doubt until trial the shape and content of the evidence on either side.

[22] Accordingly, there will be an order under r 10.15 directing that the Court decide the following questions separately from any other question, and before the trial of the proceeding:

> Whether or not Dr Jung and/or Mr Templeton are entitled to rely on, or introduce evidence in this proceeding, relating to:
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> 1. The course of the proceeding *Jung & Ors v Auckland City Council & Ors* CIV 2005-404-5076 'the original proceeding' in the mediation and in relation to any exchanges oral or documentary concerning the dispute passing between any of the parties and the mediator or any two or more of the parties during the course of the mediation.
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> 2. Exchanges whether oral or documentary concerning the dispute passing between any of the parties to the original proceeding and the mediator or between any two or more of the parties during the course of a mediation on 19 March 2007 (including preparatory steps); and
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> 3. Views expressed or suggestions or proposals made within the mediation on 19 March 2007 by the mediator or any party in respect of a possible settlement of the dispute; and

4. Admissions made within the mediation on 19 March 2007 by any party; and

5. The fact that any party has indicated within the mediation on 19 March 2007 willingness to accept any proposal for the settlement made by the mediator or by any party; and

6. Documents brought into existence for the purpose of the mediation on 19 March 2007; and

7. Notes or statements made within the mediation on 19 March 2007 by the mediator or by any party.

Security for costs

[23] The defendant seeks an order under r 5.45 directing that the plaintiffs give security for costs in the sum of $60,000. Such an order may be made where a plaintiff is resident out of New Zealand, or there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding.

[24] Initially the defendant relied on both grounds. However, the residence ground has since been abandoned, Dr Jung explaining that although he is currently working in Australia, his family remains in Auckland and he maintains two properties here.

[25] Mr Robertson nevertheless argues that there is sufficient doubt about the plaintiffs' ability to pay costs if they fail in the proceeding, to justify the making of an order for security.

[26] The plaintiffs have placed before the Court evidence that they own two properties: one in Parnell, and one in Henderson. Their combined valuation is $795,000. They are currently subject to mortgages totalling about $387,000. That leaves an equity of the order of $408,000.

[27] Of course, the plaintiffs face significant repair costs in respect of the Parnell property. They recovered in the settlement of the earlier proceedings $55,000 towards those costs, but the evidence suggests that they need to find $375,000 in addition, that being the sum currently sought from Mr Templeton.

[28] Mr Robertson argues that, in effect, the plaintiffs' combined equity in the two properties is illusory because it will need to be applied in the payment of repair costs for Parnell.

[29] I reject that approach. There is nothing to suggest that the plaintiffs would apply their equity in the Henderson property to the repair of the Parnell apartment. The likelihood is that those repairs will be deferred until the outcome of the present proceeding is known.

[30] Mr Templeton seeks an order for security in the sum of $60,000. The equity in the Henderson property alone is significantly higher than that. I am not satisfied that the defendant has made out a case for security. Accordingly, his application for security for costs is dismissed.

Result

[31] The defendant's application for the determination of a question before trial succeeds. I have set out the terms of the order earlier in this judgment. The defendant's application for security for costs fails. Each party having been partly successful, there will be no order as to costs.

C J Allan J