IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2009-470-000182

BETWEEN	E R DECKE AND J R F TRUSTEE COMPANY LIMITED AS TRUSTEES OF THE R D & E R DECKE FAMILY TRUST Plaintiffs
AND	LEONARD THOMAS GREEN First Defendant
AND	ALMAO & GREEN LIMITED Second Defendant

Hearing: 12 November 2009

Appearances: Mr D Chesterman and Mr Hartnett for plaintiffs
Ms K Millington for defendants

Judgment: 12 November 2009

(ORAL) JUDGMENT OF LANG J
[on application for order setting aside claims of privilege]

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[1] On 6 March 2006 a building belonging to the R D and E R Decke Family Trust was completely destroyed by fire. It was the subject of an insurance policy and the Trust immediately made a claim on that policy. When the loss adjustors became involved, however, they discovered that the building was insured for much less than its full replacement value. The Trust had relied on a valuation provided by the second defendant in setting its insurance requirements. It alleges that that valuation was negligent in that it failed to take into account the proper replacement cost of the building. The Court will ultimately be required in this proceeding to determine whether that allegation is correct.

[2] I have been required today to determine an application to set aside litigation and/or legal privilege in relation to five documents that the first and second defendants have withheld from inspection. Evidence has been filed in support of the application by Ms Decke, one of the trustees of the Trust, and in opposition to the application by Mr Green, who is the first defendant and is a director of the second defendant.

When was the possibility of litigation apprehended?

[3] The evidence discloses that the first formal contact between the Trust and the defendants was a letter dated 18 April 2006 that the Trust solicitors sent directly to the second defendant. In that letter the solicitors said:

> 18 April 2006
>
> Almao & Green Ltd
> P O Box 295
> Tauranga
>
> Dear Sirs,
>
> **R D & E R DECKE FAMILY TRUST – 6-10 KOROMIKO STREET, TAURANGA**
>
> We act for the above trust in respect of their above building which you will be aware was recently damaged by fire.
>
> We have to hand estimates to replace the building from Crowther & Co, Fairclough & King and Pollock Developments. We **attach** copy of a letter from McLarens Young International setting up various estimates with supporting letters.

> We note you completed a replacement insurance assessment on 19 January 2005 in which you placed a replacement estimate for replacing the building at $935,000.00.
>
> In light of the estimates now received, we would be grateful if you would advise us the basis on which you made that replacement insurance assessment in order that we can properly advise our clients.
>
> We look forward to hearing from you as soon as possible.
>
> Yours faithfully
>
> COONEY LEES MORGAN
>
> P E WASHER
>
> Partner

[4] The defendants' position is that from this point on they were aware that litigation was a reasonable possibility. They say that the documents that are the subject of the present application were all created after they received the letter dated 18 April 2006. For that reason they say that the documents are protected by legal and/or litigation privilege.

[5] The Trust originally appeared to be of the same view. In her original affidavit sworn in support of the application Ms Decke deposed as follows:

> 4. The earliest date at which the Plaintiffs contemplated litigation against the first and second defendants ("the defendants") was in April 2006 when the Plaintiffs' then solicitors wrote to the defendants requesting details about the basis of the replacement insurance assessment. However, at this point no decision had been made to issue proceedings. Attached and marked "A" is a true copy of Cooney Lees Morgan's letter dated 18 April 2006.
>
> 5. The Plaintiffs did not decide to issue proceedings until approximately March 2008.

[6] In an affidavit filed just prior to the hearing Ms Decke modified her position somewhat. In this affidavit she deposes:

> 7. When in my previous affidavit I said litigation was contemplated in April 2006, by that I meant that it was merely a possibility. At the date of the Cooney Lees letter, we had not finalised matters with our insurers and did not understand why the Defendant's reinstatement estimate was lower than those we had received. I believe the first time litigation against the Defendant's [sic] was contemplated in a

> genuine manner was in August 2006. Annexed and marked as Exhibit "B" is a letter from Cooney Lees Morgan to me dated 8 August 2006. However, even after this letter it was quite some time before we decided to issue proceedings.

[7] In my view litigation became a distinct possibility for the defendants as soon as they received the letter dated 18 April 2006. Although litigation was not directly threatened, it is not surprising that the defendants were immediately aware that they were at risk because of the valuation they had provided. A realistic outcome of the enquiries that the Trust's solicitors were making was the institution of litigation against the defendants based on allegations of negligence. As I will shortly outline, the defendants certainly took the letter as meaning just that. I have concluded that both parties apprehended that there was a reasonable prospect of litigation ensuing as from 18 April 2006.

[8] I now turn to consider the application so far as it relates to the five documents with which it is concerned.

Documents 2.4 and 2.18

[9] Both of these documents are drafts of a letter that the second defendant ultimately sent to the Trust solicitors on 16 May 2006. That letter (in its final form) has been discovered in the present litigation and it responds directly to the matters raised in the letter from the Trust's solicitors dated 18 April 2006.

[10] The defendants claim privilege in relation to these two draft letters on the basis that litigation privilege applies and also on the basis that the draft letters amount to the provision of legal advice in circumstances where such advice was intended by the defendants to be confidential. In other words, privilege under both sections 54 and 56 of the Evidence Act 2006 is said to apply. I uphold the defendant's claim in relation to document 2.4. This draft of the letter shows the deletion of a material paragraph that could be taken to be an admission of liability by the defendants. That was clearly advice that was given in circumstances that were intended to be confidential. For that reason I am satisfied that privilege applies under s 54 of the Act. It also applies under s 56 of the Act for the reasons that I have given.

[11] Document 2.18 falls into a different category. It was a final draft of the letter that was sent on 16 May 2006, and the only suggested alteration to the letter is the correction of a typographical error which is obvious on its face. I see nothing in this to attract confidentiality. It is really a matter of no moment in the overall context of this proceeding and I rule that it should be disclosed for inspection.

Document 1.43

[12] This document is a file note created on 8 May 2006 by somebody within the firm of Almao & Green Ltd. I consider that it is most probably created by Mr Green himself, although he does not confirm this in his affidavit. In this document the author poses five separate questions. All but one of these deals explicitly with the possibility that the second defendant might be negligent in certain respects. It seems to me that the document was probably created as a discussion paper for a forthcoming conference with the defendant's solicitors. In those circumstances I have no hesitation in holding that the document is covered by litigation privilege.

Documents 1.51 and 1.52

[13] These documents are undated and Mr Green does not specifically discuss them at all in his affidavit. It seems to me that it is most likely that the document was created prior to the letter dated 18 April 2006. I say that because the letter dated 18 April 2006 encloses a letter dated 5 April 2006 and written by Mr Greg Taylor from McLarens Young International. McLarens Young International was the firm of loss adjustors appointed by the Trust to prepare estimates for the replacement of the building after the fire. It seems to me that it is likely that Mr Taylor contacted Almao & Green Ltd at some stage before he prepared his letter dated 5 April 2006 with a request for certain information. Documents 1.51 and 1.52 relate to that request. I cannot think of any reason why Mr Taylor would have been making further enquiries of Almao & Green Ltd after he had prepared his estimates and forwarded them to the Trust on 5 April 2006. In those circumstances I am not satisfied that litigation privilege attaches to these documents and I direct that they be made available to the Trust for inspection.

Costs

[14] Counsel for the Trust submits that this is a case in which increased costs should be awarded. He points out that the plaintiff's advisors wrote to the defendant's solicitors on several occasions before they filed the present application asking for the documents to be released for inspection. Counsel also points out that the description of many of the defendant's documents left a lot to be desired, and that it was difficult to tell exactly what individual documents were. He then points to the fact that, immediately after the application was filed, the defendants made nine out of the 14 documents that were the subject of the application immediately available for inspection. This left just five documents to be the subject of argument at the hearing. Then, of those five documents, the Court has ordered that two of them be produced for inspection.

[15] Counsel for the Trust therefore submits that the Trust has been successful in obtaining inspection of 11 out of the 14 documents that are the subject of the proceeding. He also submits that the Trust should never have been put to the expense of filing the application, and that in requiring this to be done the defendants acted unreasonably and caused the Trust to incur unnecessary cost.

[16] Counsel for the defendants submits that this is a case in which costs should lie where they fall. She points out that the court has upheld the claim to privilege in relation to three out of the five documents that were the subject of argument at the hearing. In those circumstances she contends that honours have been evenly shared, and that no award of costs should be made in favour of either party.

[17] Viewing the matter overall, I take a view that the Trust has succeeded substantially in relation to the application. It was required to file the application because the defendants would not release any of the 14 documents which were originally the subject of the application. The fact that nine were released shortly after the application was filed suggests that the defendants had not fully considered their position prior to that point. I also consider that Mr Green has not helped the defendant's cause greatly by the brevity of his affidavit. It would have been helpful, for example, for him to have explained the circumstances in which documents 1.51

and 1.52 came into being. It was not sufficient in my view for him to baldly state that all documents were created after April 2006. If he had intended to mount a serious objection to the production of these two documents, he ought to have explained the circumstances in which they were created.

[18] For these reasons I am satisfied that an award of costs is appropriate. The Trust is therefore to have costs on a category 2B basis, together with disbursements as fixed by the Registrar in relation to the present application.

Next event

[19] The next event in this proceeding is the judicial settlement conference scheduled for 8 December 2009. As a pre-condition to the conference proceeding:

a. The plaintiff shall file and serve a memorandum by **five working days prior to hearing;**

b. The defendant shall file and serve a memorandum by **three working days prior to hearing**;

Such memorandum shall provide the information requested and setting out (and properly answering) each of the questions below. Should any party fail to comply, the parties can expect the conference to be cancelled and the defaulting party will be at risk of costs.

INFORMATION

1. Attach a "will say" statement not exceeding three pages from each of your key witnesses other than expert witnesses (ie. "Witness A will say the following:.....".) Full briefs need not be completed unless otherwise directed.

2. Submit any experts' reports that you rely upon in your settlement negotiations or to substantiate your perspective. Highlight and tab those portions that you consider the most probative.

QUESTIONS

1. What are the issues in this litigation?

2. Which one (or more) of these issues is most significantly affecting your inability to settle?

3. Why?

4. Have you and the other party engaged in settlement negotiations? Please describe the nature of those negotiations.

5. What offers of settlement have been exchanged?

6. Upon what criteria was your settlement offer based (if one was made) or on what do you rely to support your present position (e.g. case law, industry standards, experts' report or findings, etc)?

7. What else do you believe that the settlement conference Judge should know about this matter that would enable him or her to work more productively with all parties participating in the conference?

<u>NB</u>: Settlement Conferences and papers filed in connection with them are treated as without prejudice and privileged save as to the recording of whether a settlement was reached or not. Thus memoranda of the kind required above are not part of the record and (unless it be requested by any party and agreed by all otherwise) will be destroyed, returned to counsel/parties, removed from the file or sealed up (eg. if conference adjourned) at the conclusion of the conference.

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Lang J