IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-2194

BETWEEN	TIMTECH CHEMCIALS LTD Plaintiff
AND	QBE INSURANCE (INTERNATIONAL) LIMITED Defendant

Hearing: 26 November 2009

Appearances: Mr P McDonald for Plaintiff
Ms P Fee for Defendant/Applicant

Judgment: 21 December 2009 at 10 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***21.12.09 at 10 a.m.**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Mr P McDonald, Solicitor, P O Box 1495, Auckland – by email: pjmcd@xtra.co.nz
Jones Fee, P O Box 1801, Auckland – by email: phillippa.fee@jonesfee.com

Background

[1] The plaintiff's business is that of preserving timber. It treated timber in the course of its business for Carter Holt Harvey (CCH). CCH claim that timber that the plaintiff treated for it between October 2007 and March 2008 had been damaged. CCH withheld the sum of approximately $1,400,000 from what it would otherwise have paid to the plaintiff. It says that sum is the approximate amount of the loss.

[2] The plaintiff was insured by the defendant. One of the risks covered by the insurance was set out in the following extension to the policy.

> QBE shall, subject to the terms of this policy, indemnify the Insured for any Valid Claim as follows ...
>
> 2. **Consultants** Subcontractors and Agents. Claim for any act, error or omission committed by any consultant, subcontractor or agent for whose act, error, or omission the insured is legally liable. Provided always that this indemnity shall not extend to any such consultant subcontractor or agent.

[3] The plaintiff says that the breach of its contract with CCH and damage to its property was caused by the mistake of a consultant retained by the plaintiff, Dr Jeff Hann of the University of Melbourne. It is said Dr Hann wrongly advised on the setting of the design points of the treatment process including pressures at which treatment would take place. The plaintiff does not wish to proceed against Dr Hann but instead to invoke cover under the insurance policy it has with the defendant, which it claims extends to the alleged consultant's error made by Dr Hann. The argument before me assumed that the plaintiff could, if it wished, have redress against Dr Hann although that was not gone into in any detail.

[4] Dr Hann, through his lawyers, has denied that any error was made on his part. As I understand it, one of the matters he raises is that the moisture content of the timber submitted for treatment was unacceptably high and that that is a factor which caused the damage.

[5] In order for the plaintiff to establish a right to indemnity under the policy it has with the defendant, it will need to establish that: Dr Hann committed an error; that Dr Hann did so in advice which he gave to the plaintiff as a consultant; that the advice he gave was the cause of the defective treatment specification to which

CCH's timber was subjected; and that defective specification was the cause of property damage and resulting loss to CCH.

[6] As will be obvious from the fact the proceedings have been issued, the defendant has not paid out under the policy it has with the plaintiff. That is a matter that will be referred to later in the judgment because the plaintiff says that any rights which the defendant may have to be subrogated to claims that the plaintiff might have against Dr Hann are conditional upon, and do not arise until, the defendant has met the plaintiff's claim.

[7] The defendant now seeks to join Dr Hann as a party to the proceeding. The defendant brings its application which is opposed by the plaintiff on the grounds set out in Rule 4.56.

Arguments

[8] I express my gratitude to counsel for the very comprehensive and well thought out submissions that they presented to me. Essentially the defendant is concerned that it might pay out under the policy on the grounds that Dr Hann gave flawed advice, therefore bringing the case within the extension that I have set out above, only to find that in subsequent proceedings brought pursuant to subrogation to the rights of the plaintiff against Dr Hann, that the Court finds that in fact no error was committed. Ms Fee for the applicant pointed out that any conclusions of fact arrived at in the present proceedings in the absence of Dr Hann as a party would not be binding upon him by virtue of the doctrine of *res judicata*.

[9] Mr McDonald for the plaintiff invoked the right of the plaintiff to sue whom it wishes and not to be compelled to proceed against the defendant it did not want to have in its proceedings. Mr McDonald submitted that the defendant had chosen the wrong starting point for its claim to add Dr Hann. The correct starting point, he submitted, was to review the rights of the plaintiff as an insured party under general insurance law, which should prevail over "procedural" law.

Discussion

[10] I will start with the last point mentioned.

[11] By virtue of s 51 of the Judicature Act 1908 the practice and procedure of the Court in all civil proceedings shall be regulated by the High Court Rules. In other words, general and insurance law does not 'trump' the procedural rules contained in the High Court Rules.

[12] The application is brought on the basis of Rule 4.56 which provides as follows:

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—
>
> (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
>
> (b) the name of a person be added as a plaintiff or defendant because—
>
> (i) the person ought to have been joined; or
>
> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
>
> (2) An order does not require an application and may be made on terms the court considers just.
>
> (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[13] I accept that there may be cases where a defendant is added into a proceeding as a defendant even though the plaintiff may have no cause of action against that party. An example is *McKendrick Glass Manufacturing Company Limited and Another v Wilkinson and Others* [1965] NZLR 717. In that case the presence of an added defendant was justified on the sole basis that the party added would be bound into the taking of accounts in the proceeding.

[14] In my view, apart from cases like *McKendrick*, the paradigm case in which a defendant will be added is where one of the parties to the proceeding who seeks the

addition of the defendant has some cause of action against that party. I will return to that question in a moment in the context of this case.

[15] I next look at the question of whether the defendant has a cause of action against Dr Hann. The only way that such a cause of action could arise is if the defendant as insurer was entitled to subrogate itself to any rights that the plaintiff has against Dr Hann. Has that point been reached? In my view, it has not. The point at which the right of subrogation arises is stated in the following terms in the Part III of the "Insurance" volume of *Laws of New Zealand*, at paragraph 442:

> 442. Nature of the right.
> In the strict sense of the term, subrogation expresses the right of the insurer to be placed in the position of the insured so as to be entitled to the advantage of all the rights and remedies that the insured possesses against third parties in respect of the subject matter of the insurance. The precise nature of the third party's liability to the insured is immaterial; subrogation applies even to a statutory liability. If the third parties are insured, the ultimate liability for the loss falls on their insurers. The right does not arise until the insurer has admitted its liability to the insured, and paid the insured the amount of the loss. (footnotes omitted).[i]

[16] An illustration of the application of that rule is to be found in the case of *Santos Limited & Ors v American Home Assurance Company* (1987) 4 ANZ Insurance Cases 60-795. In that case certain companies with an interest in gas pipelines claimed that they had suffered damage which was covered under an insurance policy in that defective work done on their pipeline had caused them loss. The defective work was said to relate to the supply and installation of sub-standard components called annular flanges. The flanges were used to connect one section of pipe to another. The pipeline owners/operators alleged that the flanges actually supplied by the contractor were not capable of operating satisfactorily in the very cold temperatures in the pipeline. They said those flanges all had to be replaced at considerable cost and sought to recover the cost of that work from the insurance company. The insurance company took the position that the contractor who had supplied the flanges and then advised their removal and substitution with other flanges had given them the wrong advice. The insurance companies said that they had a complete defence to the claims of all plaintiffs who were the authors of their own losses since there was no 'damage'. In the alternative (if they failed in that

defence) their insurance companies asserted in a counter-claim that they brought against the contractor who they had joined to the proceedings, that that contractor had been negligent and in breach of contracts between it and the plaintiffs and it had caused the 'damage' in question. At page 74/877 White J, considered the issue of subrogation. He noted that the occasion had not arisen for the insurance companies to exercise their right of subrogation because they had not indemnified the insured fully. Because the occasion had not arisen to exercise the rights of subrogation there could be no declaratory relief against the contractor that the loss was due to his negligence. The insurance companies had not reached the point where they were entitled to stand in 'the shoes of the plaintiffs' where only fully indemnifying insurers may stand. The Judge would not allow the counter-claim to stand.

[17] In my view the same reasoning applies in this case. The proposed defendant, Dr Hann, is not a person who ought to have been joined in the proceedings in the first place. Nor is his presence before the Court necessary to adjudicate on and settle all questions involved in the proceeding. The liability of the defendant in this proceeding depends upon whether the events giving rise to Timtech's claim fall within the policy definition. The insurance company will only have a claim against Dr Hann if it first extends indemnification to the plaintiff. If and when that occurs, the plaintiff shall be entitled to seek a determination of the issue of whether Dr Hann negligently caused loss to the plaintiff. For those reasons, Dr Hann's presence before the Court in the insurance claim is not one that 'may be necessary' for the Court to adjudicate on the claim in this proceeding. No doubt Dr Hann's actions will be under scrutiny even in this face of the litigation. It seems probable that evidence will be forthcoming from him in the proceeding. But that will involve him as a witness not a party. That is a different matter from the contingency that the Rule covers in speaking of 'the presence [of an individual] before the Court. When it does so it to be taken as referring to his presence *qua* party.

[18] During the course of discussion there was an exchange between the bench and counsel as to whether a defendant should be added to make him/her amenable to discovery and interrogatories in other procedures that would be available against him/her once that person had acquired the status of a party in the proceedings. I do not consider that that would be an appropriate basis for adding a defendant. If that

were a basis upon which the power to add could be exercised, it would be difficult to see what limits there might be to adding defendants or third parties. Second, no authority has been cited which would justify the addition of a party for those types of reasons.

[19] Mr McDonald argued that even if the application were one which the Court had jurisdiction to grant in terms of the Rule, I should decline it on discretionary grounds because to now add Dr Hann as a party could seriously disrupt the trial schedule and the judicial settlement conference which has been scheduled. He pointed out that the judicial settlement conference is to take place later in November this year[ii] and the trial in June of next year. Notwithstanding the trial date, I consider that with an intelligent and cooperative approach by counsel, had Dr Hann been added it would have been possible to at least keep the trial on track.

[20] For those reasons in my view the application by the defendant ought not to be allowed. I would expect the parties to agree the matter of costs. If they cannot, they should advise the Registrar and I will allocate hearing time to resolve that issue.

_____

J.P. Doogue
Associate Judge

1 Which date has now passed. The JSC was vacated