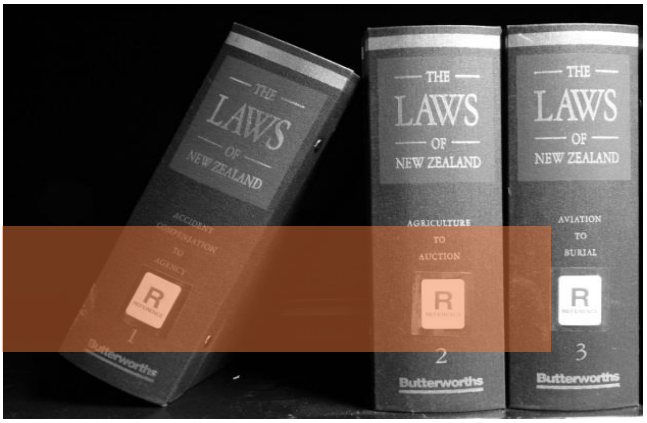

Insurance Case Law Update

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September 2016

Our Insurance Law team has written a new on-line publication for LexisNexis, known as Insurance Practical Guidance. It is the first on-line insurance product of its kind in New Zealand.

With that now complete, we provide our regular update on the latest decisions of interest to the insurance sector.

Summary of cases:

Case	Issues	Decision / Principle
Blackwell v Edmonds Judd [2016] NZSC 40	**Solicitors' negligence** Failure to enquire into client objectives	Supreme Court overturned Court of Appeal's finding that a law firm's negligence did not cause loss. The firm ought to have inquired into client's objectives for setting a low purchase price on the sale of a farm; advice on legal effect of transaction alone was insufficient. Firm liable to pay the $1m shortfall, plus interest.
Body Corporate 368533 v Napier City Council [2016] NZHC 1470	**s9 Law Reform Act 1936**	Leave granted under s9 of the Law Reform Act 1936 to make a claim directly against an insolvent party's insurer for alleged design defects. The insurer failed to show a sufficiently clear defence (based on a policy exclusion) to oppose its joinder as a defendant. The policy exclusion related to failures to meet or conform to the Building Code and any applicable standards for weathertightness. Not all of the plaintiff's claims arose from a failure of that type.
Body Corporate 78462 v IAG New Zealand [2016] NZHC 320	**Joinder**	Unsuccessful application by VXJ, a body corporate member, to be joined as a defendant or interested party. The proceedings were brought by the body corporate against the building's insurer over cover for earthquake damage. VXJ wanted to be heard on reinstatement issues as these stood to affect its hospitality business. The potential prejudice to the plaintiff's claim outweighed any harm to VXJ not being joined into the proceedings.

Case	Issues	Decision / Principle
Carter Holt Harvey Ltd v Minister of Education [2016] NZSC 95	Liability for **defective building products**	Supreme Court declined to strike out claims in tort and under the Consumer Guarantees Act 1993 against the manufacturer of an allegedly defective cladding system. The existence of a contractual chain, and the absence of a statutory duty, does not rule out a claim in tort. The 10-year longstop period under s 393(2) of the Building Act 2004 does not apply to the plaintiff's claim for defective products.
Emmons Developments New Zealand Ltd v Mitsui Sumitomo Insurance Co Ltd [2016] NZHC 1244	**Costs**	Award of costs against the insured following withdrawal of a summary judgment application. As it was clear the claim was not suitable for summary judgment, the usual rule, that costs should await the final outcome, did not apply.
Gidder v IAG [2016] NZHC 948	Enforceability of a **settlement agreement**	An agreement to proceed in good faith with rebuilding an earthquake damaged house was binding on the insurer in a summary judgment application. The agreement about how to move forward with the claim was reached after a protracted claims process. Subsequently, upon further scoping, the insurer sought to repair the house on the basis the cost of this fell outside the 80/20 rule for deciding whether to repair or rebuild. However, that role was not an implied term of the agreement and the insurer was committed to rebuilding.
Holler v Osaki [2016] NZCA 130	**Immunity of residential tenants** to claims for negligent damage.	Sections 268-270 of the Property Law Act 2007 apply to residential tenancies. The tenant is immune from suit by the landlord (or the landlord's insurer in a subrogated recovery) where the tenant negligently causes loss or damage to the rental property and the landlord is, or should be, insured. There are specific exceptions listed in s 269(3).
Hotchin v New Zealand Guardian Trust [2016] NZSC 24	Requirements for **coordinate liability**	Overturning the High Court and Court of Appeal, the Supreme Court (3-2) declined to strike out H's contribution claim against NZGT under s 17(1)(c) of the Law Reform Act 1936. H is seeking a contribution from NZGT towards a settlement with the FMA for alleged securities breaches in relation to Hanover Finance, for which the NZGT was the trustee. Taking a pragmatic approach, the majority considered that H and NZGT, as joint tortfeasors, were arguably liable for the "same damage", being the investors' losses. Their finding assumed NZGT should have intervened earlier, which would have to be proven at trial. The decision may encourage more contribution claims in multi-party disputes.

Case	Issues	Decision / Principle
Jarden v Lumley [2016] NZCA 193	**Multiple events** **Top-up cover**	Private insurer is not bound to accept an agreement between a home owner and EQC. The correct level of earthquake cover cannot be determined until (a) final repair costs, and (b) the monetary effect of any EQC apportionment, are known.
LWR Durham v Vero Insurance New Zealand Ltd 2016] NZHC 826	**Discovery** of insurer's reserves	Unsuccessful discovery application. The insurer's reserves were not relevant to the matters at issue. Their possible use in cross-examination did not justify an order for discovery.
Nand v Tower Insurance [2016] NZHC 1455	Insurer refused **summary judgment** Whether cover may be declined for **property damage caused by son**	Unsuccessful application for summary judgment by the defendant insurer. Cover declined after property destroyed by fire following methamphetamine cooking by son (the tenant). The son was not an "insured" and, in any event, the policy wording was not sufficiently clear to deprive an innocent co-insured of cover. A specific exception for deliberate damage by tenants prevailed over a more general condition not to cause damage.
New Zealand Fire Service Commission v Legg [2016] NZHC 1492	Whether **reasonable precautions** condition breached Whether **exclusion** for loss caused by business activity applied	Claim under Forest and Rural Fires Act 1977 to recover costs of fighting a fire which originated from a property belonging to the Leggs' and which also contained refuse from their business Evolving Landscapes Ltd (the defendants). The defendants sought indemnity from their respective insurers, who disputed cover. The insurers were unable to rely on "reasonable precautions" conditions; the insured's conduct was negligent but not reckless. Nor was the Leggs' insurer able to rely on an exclusion for loss caused by the business activities of Evolving since the fire would have likely started from the burning of domestic waste alone.
Prattley v Vero Insurance New Zealand [2016] NZCA 67 See our note on the High Court decision in the June 2015 update	Assessment of damage in **multiple earthquake events** Whether settlement based on **mistake** can be set aside	Court of Appeal declined to reopen / set aside a settlement agreement for an alleged misunderstanding about the entitlement under the agreement for earthquake cover. If there was a misunderstanding, Prattley had assumed the risk of a mistake in the agreement. The High Court decision was upheld. Leave has been given to appeal to the Supreme Court, with the hearing on 10-11 October 2016.

Case	Issues	Decision / Principle
Southern Response Unresolved Claims Group (suing by its representative *Preston v Southern Response Earthquake Services Ltd* [2016] NZHC 245	**Representative actions** in earthquake claims	Declined application for leave to bring a representative action on behalf of 46 insureds with unresolved earthquake claims. The group needed to be definable by reference to common issue(s) of fact and law, the resolution of which would fundamentally/materially advance the determination of each member's claim. The application/current proceeding was too wide to allow the Court to identify issues of liability on which the group could be aligned. The decision was made without prejudice to the group's ability to make a modified application curing the Court's concerns, so this may not be the last word on the matter.
Weaver v HML [2016] NZHC 473	**Costs uplift on Calderbank offer**	Defendant awarded 50% uplift on scale costs for the period following expiry of a Calderbank offer, which the plaintiff failed to beat at trial. The plaintiff's failure to respond to (let alone accept) the Calderbank was also considered unreasonable given: the defendants were willing to enter into settlement discussions; the Court encouraged the plaintiff to explore settlement; and the amount in dispute (for failure of building remedial works) was modest in comparison to the costs of multi-party litigation.
Quake Outcasts v Minister for Canterbury Earthquake recovery [2016] NZHC 1959	Judicial review of revised offers for **uninsured Canterbury properties**	The Crown's revised offer to purchase uninsured residential properties for 100% of land value (and nothing for improvements) was lawfully made. The Minister was within his rights to consider insurance status, including fairness to those in the red zone and those uninsured in greater Christchurch, and the moral hazard of dis-incentivising people to hold insurance when formulating a compensation offer.

A more extensive discussion of particular judgments is linked to the case names highlighted in the summary table. For further information on issues raised in this update, please contact the Hesketh Henry insurance law team.

Jarden v Lumley [2016] NZCA 193

Background

Mr and Mrs Jarden lived on a lifestyle property north of Rolleston. Their house, built in 1998, suffered damage in the Canterbury earthquakes.

The Jardens had a residential insurance policy with Lumley, which required Lumley to cover any loss occurring "as the direct result" of the earthquakes. However, this obligation did not commence until EQC paid (or agreed to pay) its statutory cap for each earthquake. In broad terms, Lumley's liability was to cover the difference between the actual cost of repair to the house and earthquake cover provided by EQC ($100,000 plus GST per earthquake). This is also known as 'top-up' cover.

The Jardens lodged claims with EQC and Lumley for damage to their house for two earthquakes (4 September 2010 and 22 February 2011), and subsequently brought proceedings after the claims were not resolved. Shortly before trial, the Jardens reached a settlement with EQC ($123,850 according to the Court of Appeal). EQC's payment was apportioned 90 per cent to the September 2010 earthquake, and 10 per cent to the February 2011 earthquake. As a result, EQC only paid its statutory cap for the September 2010 earthquake.

The Jardens' position was that Lumley's liability under the policy was triggered as soon as the repair costs to their house exceeded the amount of the EQC settlement. Lumley disagreed, and argued that it should not be automatically bound by the settlement that Jardens had agreed with EQC.

Decision

The Court of Appeal accepted Lumley's argument that a private insurer is not bound to accept an agreement reached between an owner and EQC regarding EQC's statutory obligations. Lumley was entitled to be satisfied that the amount paid (or agreed to be paid) by EQC equates with EQC's obligations under s18 of the Earthquake Commission Act 1993. Until the final repair costs to the Jardens' house had been determined and the monetary effect of the apportionment of the repair costs between the September 2010 and February 2011 earthquakes had been quantified, Lumley's liability to pay top-up cover could not be determined.

Those matters may be resolved by agreement between EQC and Lumley, but failing such agreement they will need to be determined by the High Court.

LWR Durham Properties Ltd (in rec) v Vero Insurance NZ Ltd & Ors [2016] NZHC 826

The High Court declined to order the discovery of insurer's reserving information. The decision considers the proper purpose of discovery in relation to insurance claims and the role of reserves.

Background

The plaintiff, LWR Durham Properties Ltd, brought proceedings against its insurers over damage to its buildings suffered in the 2010/2011 Christchurch earthquakes.

In a case management Minute the Court directed tailored discovery of six categories of documents (which did not include a seventh category, being "all reserves set by insurers", proposed by the plaintiff at the time). The plaintiffs subsequently applied for an order that its insurers disclose their reserves.

Reserving

An insurance reserve is the amount of money an insurer expects to pay for an individual claim. Insurers set reserves in order to forecast the total amount to be set aside for meeting current claims. Reserves are usually revisited during the life of a claim as further information becomes available.

Relying on *Prattley Enterprises Ltd v Vero Insurance Ltd* [2015] NZHC 1444, the plaintiff argued the reserves were disclosable because they evidenced the insurer's view of liability and went to the credibility of its witnesses.

The defendants maintained the reserves were not relevant to any issues in the proceeding, and that it would be improper to discover these for the mere reason of seeking to impugn a witness' credibility.

Decision

Matthews AJ held the reserves were not discoverable as they were "a relatively unsophisticated or inexact estimate of the possible financial consequences of claims as they are made, and as [the insurer] update[s] it". It might have some "scant value" as cross-examination material, but that was not a sufficient or proper basis for ordering its discovery.

Matthews AJ entertained the possibility the reserves could be relevant to the insurer's belief the plaintiff's claims for reinstatement were brought too late. His Honour suggested they might show an assessment of possible liability that may be relevant to the question of prejudice from not having had an opportunity to assess damage after each earthquake. However, this was dismissed on the basis that it was not subject to detailed argument.

Prattley was distinguished. It concerned the re-opening of a settlement agreement, meaning the insurer's knowledge at the time of the agreement was in issue. Discovery of the insurer's reserves was therefore relevant for reasons specific to that case, which did not apply here.

What is perhaps surprising about this decision is the apparent willingness of the Court to even consider what a party might think it may have to pay or be held liable for is discoverable (other than in limited circumstances, such as *Prattley*). Reserving is a long established balance sheet exercise by insurers, which should not normally be disclosable.

New Zealand Fire Service Commission v Legg [2016] NZHC 1492

Background

On 10 January 2015, a waste burn-off on a rural lifestyle block in Canterbury re-ignited and spread to neighbouring properties. The fire was originally lit almost a month earlier when the defendants, Mr and Mrs Legg, burned-off waste from the life style block and their business, Evolving Landscapes Ltd (**Evolving**), which also operated from the property.

A subsequent investigation found the heap had reignited because of deep remaining heat, coupled with high temperatures and strong winds, as opposed to having fresh materials placed or lit on the heap.

The NZSC and Selwyn District Council sought to recover the costs of fighting the fire from Leggs and Evolving under s43 of the Forest and Rural Fires Act 1977 (**Act**). The Leggs admitted liability prior to the commencement of the hearing) and Evolving (after the conclusion of evidence).

The main issue was therefore whether AMI (the Leggs' insurer) and Lumley (Evolving's insurer) were obliged to indemnify the defendants for their liability under the Act.

Evolving's indemnity claim

Evolving's cover was subject to a reasonable precautions condition (that it would take all reasonable precautions to comply with statutory obligations, bylaws or regulations imposed by a public authority for the safety of persons or property). Lumley argued that Evolving had breached this policy condition by placing flammable material on the fire heap in breach of fire restrictions that were in place at the time (so as to cause the heap to reignite).

In order for a claim to be declined based on such reasonable care conditions, more than mere negligence is required. Instead, there must be a significant or substantive failure by the insured akin to “recklessness" or "gross carelessness". A "reasonable precaution" to take depends on the particular circumstances. The greater the foreseeable risk of loss the greater the precautions which may be required.

In this case, more care could have been taken but the carelessness was not so gross as to breach the reasonable precautions condition.

Leggs’ indemnity claim

The Leggs also had liability cover. This too was subject to a reasonable precautions condition as well as an exclusion for liability arising out of *"business or trade not directly connected with* [their] *farming operations"*.

As with the Lumley policy, the Leggs believed the fire was out and any carelessness by them did not meet the recklessness standard required to breach the reasonable precautions condition.

As for the exclusion clause, the heap contained both domestic and business waste. AMI argued that cover was excluded by the presence of business waste from Evolving. In support of this, AMI relied on the *Wayne Tank* principle, which provides that where there are two proximate causes of a loss, and one cause is covered and the other is excluded, the policy will not respond (i.e. the exclusion prevails).

Nation J considered that the *Wayne Tank* principle is limited to situations where there are concurrent causes of liability and subject always to the specific policy wording. In this case, for the exclusion to apply, the Leggs’ liability needed to *"arise out of or be in connection with"* Evolving’s business activities. This meant it was not enough that burning business waste (in addition to domestic waste) might have been a contributing factor; AMI had to prove it was causative of the fire.

On the facts, AMI was unable to show the heap would not have re-ignited if the business material had not been burned. The fire was still of a size and nature that could have resulted from the normal use of the lifestyle block, meaning that the risk of fire was no greater than what AMI reasonably anticipated under the policy. The exclusion therefore did not apply.

The Court also considered (in obiter) s11 of the Law Reform Act 1977. Under s11 essentially, an insurer cannot rely on an exclusion clause if the excluded circumstances did not cause or contribute to the loss. If the exclusion clause here had been *prima facie* effective to exclude AMI’s indemnity obligation, s11 would not have applied. The burning of waste from Evolving’s business contributed to the fire that resulted in the Leggs’ liability.

Conclusion

The Court held that the Leggs and Evolving were entitled to judgment against AMI and Lumley respectively.

Nitya Nand & Sunita Nand v Tower Insurance Ltd [2016] NZCA 1455

This case concerned a defendant's summary judgment application by Tower against its insured, Mr and Mrs Nand. The Nands' policy contained an exclusion for losses arising from wilful acts or omissions by "you". Tower argued that "you" included the Nands' children, which entitled it to decline a claim for fire damage while the insured property was rented to their son. Tower's application was declined.

Background

In 1999, the Nands bought a rental property in Flatbush, Manukau and insured it with Tower. On 1 July 2012 there was a fire at the property and the house was extensively damaged. The Nands’ adult son had been living in the house with his partner and young child, allegedly as a tenant.

The Nands accepted that, without their knowledge, their son let other people on to the property who began manufacturing methamphetamine and that a fire was accidentally started as a result of something going wrong in the process.

Cover under the insurance policy - The meaning of "you"

The policy defined "you" to include "the insured, your spouse and your children normally residing" at the premises. Tower claimed the son was a child of the insured normally residing at the premises and therefore fell under the definition of "you" for the purposes of the policy. It followed, under Tower's reasoning, that the policy excluded cover since the fire damage was due to an "unreasonable, criminal and reckless or wilful act or omission … by you". Tower also relied on the policy conditions that the insured would "not cause or facilitate loss or damage … by any unreasonable, reckless or wilful act or omission".

The Court found the son was not an "insured" under the policy – the only property insured was that of the landlord, not the tenant.

Nonetheless, the Court considered what the situation would have been had the son been co-insured. With the possible exception of jointly owned property, misconduct by one insured will not deprive another innocent insured of cover (relying on *Maulder v National Insurance Co of New Zealand Ltd* [1993] 2 NZLR 351). In the present case, the Court concluded that, since the deliberate misconduct of an insured would not trigger exclusions depriving another innocent insured of cover, "the same must also apply when the person causing the loss is not insured under the policy at all".

Further, Tower could not rely on a breach of the requirement not to recklessly cause or facilitate loss or damage. That condition applied to "you and any person in charge of your property with your permission". This last language could have encompassed the son. However, such an interpretation would be inconsistent with the exclusion for deliberate damage caused by anyone residing at the premises, which contained a specific carve-out for damage deliberately caused by tenants. The more specific language of the exclusion and its exception was found to prevail over the more general wording of the policy condition.

Finally, there was insufficient evidence to meet the summary judgment standard that the son had caused or facilitated the fire by unreasonable, reckless or wilful acts of omissions.

The Court dismissed Tower’s summary judgment application and awarded the Nands costs.