IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2012-409-002486
[2017] NZHC 2694

BETWEEN	ROBERT BRUCE WALKER First Plaintiff
	PROPERTY VENTURES LIMITED (In Receivership and Liquidation) Second Plaintiff
	FIVE MILE HOLDINGS LIMITED Third Plaintiff
AND	AUSTIN JOHN FORBES First Defendant

Hearing: 1 November 2017

Appearances: J B M Smith QC and K Francis for Plaintiffs
W J Palmer for First Defendant
Second Defendant in person
R Raymond QC for Third Defendant
M J Wallace for Fifth Defendant
J Moss for Sixth Defendant

Judgment: 3 November 2017

JUDGMENT OF LANG J
[on application by plaintiffs for particular discovery and pre-commencement discovery]

This judgment was delivered by me on 3 November 2017 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

ALISTER SPEDDING JOHNSTON
Second Defendant

GORDON LEWIS HANSEN
Third Defendant

ADOLF DE ROOS
Fifth Defendant

DANIEL JAMES GODDEN
Sixth Defendant

VERO LIABILITY INSURANCE LIMITED
Third Party

[1] This proceeding is due to be the subject of a 12-week trial commencing on 12 February 2018. It involves claims by the liquidators of several companies against the former directors of those companies.[1]

[2] The plaintiffs have now sought particular discovery of any insurance policies held by the defendants. They also seek the same information by way of pre-commencement discovery in anticipation that they will need to commence proceedings against the insurers of the defendants under s 9 of the Law Reform Act 1936 (the LRA).

[3] The second, fifth and sixth defendants have reached agreement with the plaintiffs regarding the outcome of the application. They have agreed to provide the plaintiffs with declarations confirming they hold no relevant policies of insurance. Once the declarations have been provided the plaintiffs will not seek any further order and will not seek an award of costs against those defendants.

[4] The first defendant, Mr Forbes, has also reached agreement with the plaintiffs and no further order is required.

[5] The third defendant, Mr Hansen, acknowledges that he holds an insurance policy. He has declined to provide the plaintiffs with any details of that policy. The application has therefore proceeded solely in respect of the insurance policy held by Mr Hansen.

The application for particular discovery under r 8.19

[6] Rule 8.19 of the High Court Rules provides:

> **8.19 Order for particular discovery against party after proceeding commenced**
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not

[1] Claims against other parties, including the companies' auditors, have now been settled and discontinued.

> discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
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> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the party's control; and
>
> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
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> (b) to serve the affidavit on the other party or parties; and
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> (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

The plaintiffs' arguments

[7] Mr Smith for the plaintiffs submitted that in applying r 8.19 the Court needed to bear in mind r 1.2. This states that the objective of the High Court Rules is "to secure the just, speedy, and inexpensive determination of any proceeding". Mr Smith submitted that the combined effect of rr 1.2 and 8.19 was to require the Court in the present context to adopt a broad approach to discovery obligations. In particular, it enabled the Court to look beyond the pleadings and to take into account the ability of the plaintiffs to enforce any judgment they might obtain.

[8] Mr Smith acknowledged that the traditional view has been that the ambit of discovery is governed by the pleadings. In the present case this would preclude discovery of the insurance policy because none of the issues raised in the pleadings relate directly to the policy.

[9] Mr Smith candidly acknowledged that the preponderance of authority both in New Zealand and overseas is presently against the proposition that a defendant to a proceeding should be required to disclose details of any insurance policy that might respond to the plaintiff's claims. He submitted, however, that most of these cases were decided some time ago, and it is now appropriate that the Court take a "fresh look" at discovery in the present context. He submitted that many of the policy arguments underpinning earlier judgments may no longer be valid.

[10] Mr Smith pointed out that the traditional prohibition on the defendant being required to provide details of his or her financial position is already undermined by the existence of interlocutory remedies such as Mareva injunctions and Anton Piller orders. This demonstrates that a defendant may be required to provide information about such issues at an interlocutory stage even though they are not directly raised by the pleadings.

[11] Mr Smith submitted that the making of an order was necessary because it was not in the public interest for a plaintiff, and in particular a liquidator, to be required to proceed with a lengthy and expensive trial in circumstances where any judgment was likely to be of limited value because of the inability of the defendant to meet it. He also submitted that it was not in the public interest to require a litigation funder to fund such a proceeding, and that there was similarly little point in the Court being put to the time and expense of producing a judgment that could never be enforced because the defendants did not have the means to meet it.

[12] Next, Mr Smith submitted that if no order was made there will be a significant imbalance between the degree of information the plaintiffs and litigation funder have been required to provide regarding their financial position and that provided by Mr Hansen.

[13] Mr Smith also contended that the disclosure of the information would not provide the plaintiffs with an illegitimate advantage in relation to settlement negotiations because no insurer was likely to settle for an amount greater than that for which it perceived the insured may be liable to the plaintiffs. Furthermore, he submitted that disclosure of the information would assist in producing a settlement because it would provide the plaintiffs with accurate information regarding the ability of the defendant to meet the claim. This in turn would inform the plaintiffs' decision as to whether they should proceed to trial.

Decision

[14] I have not summarised Mr Raymond's arguments in opposition to the application because I largely rely upon them in determining the application and there is no point in setting them out twice.

[15] In short, I have concluded that the existing authorities in both New Zealand and other Commonwealth jurisdictions are firmly against the proposition that the plaintiffs seek to advance, and there is no justification for extending such a well-established principle.

[16] In New Zealand, the position was summarised clearly by Asher J in *Body Corporate 187242 v Auckland City Council.*[2] In that case the plaintiff sought discovery of all documents relating to any professional indemnity and/or public liability insurance policies held by a defendant. As in the present case, the application was made in circumstances where the parties were involved in settlement discussions. The plaintiff acknowledged, as do the plaintiffs in the present case, that knowledge of the defendant's insurance position would assist them with the negotiation process.

[17] Asher J observed that the benchmark against which to measure relevance was the pleadings because documents will only be discoverable if they are referable to the issues raised by the pleadings.[3] In the case before him, as in the present case, the pleadings did not disclose any issue relating to the defendant's insurance. For that reason the documents were neither relevant nor discoverable.

[18] The same approach has been taken at Supreme Court level in New South Wales and South Australia.[4] In Queensland the courts appear to have been prepared to require defendants to provide details of insurance cover in appropriate cases.[5] In England the plaintiffs' approach found favour in the High Court in *Harcourt v Griffin*,[6] but not in subsequent cases.[7]

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2 *Body Corporate 187242 v Auckland City Council* HC Auckland CIV-2005-404-1597, 20 July 2006.

3 At [20].

4 *Beneficial Finance Corporation Ltd v Price Waterhouse* (1997) 9 ANZ Insurance Cases 61-630 (Supreme Court of South Australia); *Commonwealth Bank of Australia v ACN 076 848 112 Pty Ltd* [2015] NSWSC 666.

5 *Treadstone Developments Pty Ltd v The Salisbury Group Pty Ltd (in liq)* [2014] QSC 109; *Company Solutions (Aust) Pty Ltd v Dennis* [2004] QSC 379.

6 *Harcourt v Griffin* [2007] EWHC 1500 (QB).

7 *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1296 (Comm); *XYZ v Various Companies* [2013] EWHC 3643 (QB); *Peel Port Shareholder Finance Company Ltd v Dornoch Ltd* [2017] EWHC 876 (TCC).

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[19] Furthermore, I consider that the application amounts to an attempt to require Mr Hansen to provide information regarding an aspect of his financial position. A plaintiff does not have any right to obtain such information other than in circumstances where the plaintiff can demonstrate a real risk that the defendant is dissipating his or her assets. In those circumstances a plaintiff may obtain a Mareva injunction or Anton Piller order but that will be subject to close supervision by the Court. There is nothing in the present case to indicate the existence of circumstances that justify a departure from usual principles.

[20] In addition, I do not consider that the objective set out in r 1.2 extends to settlement negotiations that take place outside the Court's procedures. It is designed to govern the process by which a proceeding is managed through to determination by the Court.

[21] I also take it to be for the plaintiffs and the litigation funder to determine whether it is worthwhile pursuing the defendants through to judgment. They must make that assessment based on their view of the merits of their claim, together with such knowledge as they can glean of the financial position of the defendants. In the absence of co-operation by the defendants, however, that knowledge is unlikely to include details of insurance cover that may respond to the claim.

[22] Likewise, I do not accept Mr Smith's submission regarding the unjustified imbalance between the information provided by the plaintiffs and the litigation funder regarding their financial position and that provided by Mr Hansen that will be created if the application is refused. The information that the plaintiffs and litigation funder have been required to provide is a direct consequence of the involvement of the litigation funder and the impact that this has on the proceeding as a whole. In particular, it has arisen within the context of the need for the plaintiffs to provide security for the defendants' costs. There is in any event no general requirement that there be a degree of balance between the level of information that parties provide in relation to their respective financial positions. This factor does not support the plaintiffs' argument.

[23] I take a similar view of the submission that the court should not be burdened with lengthy trials in which the defendants will never be able to satisfy the judgment. The role of the courts is to determine the cases that come before it. They must undertake that task without consideration of the likely value of the judgment to the parties. Many judgments are entered against defendants who have no prospect of satisfying them. It is not for the courts to consider whether it is worth their while determining such cases.

[24] It follows that I do not consider there are any policy factors that would justify a shift from the established principle that the issues raised by the pleadings remain the touchstone of relevance for the purposes of discovery.

[25] The application under r 8.19 is dismissed.

The application under r 8.20 for pre-commencement discovery

[26] Rule 8.20 provides as follows:

> **8.20 Order for particular discovery before proceeding commenced**
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> (1) This rule applies if it appears to a Judge that—
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> (a) a person (the **intending plaintiff**) is or may be entitled to claim in the court relief against another person (the **intended defendant**) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and
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> (b) there are grounds to believe that the documents may be or may have been in the control of a person (the **person**) who may or may not be the intended defendant.
>
> (2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—
>
> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the person's control; and
>
> (ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on the intending plaintiff; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.

(3) An application under subclause (2) must be by interlocutory application made on notice—

(a) to the person; and

(b) to the intended defendant.

(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[27] The plaintiffs seek disclosure of the details of Mr Hansen's insurance cover under r 8.20 on the basis that they may wish to bring a claim directly against his insurer under s 9 of the LRA. They say it is not possible for them to formulate that claim unless they know the identity of the insurer and the terms of the policy. The fact that the plaintiffs have applied for the information under r 8.20 distinguishes this case from the situation in *Body Corporate 187242,* where the plaintiff did not rely upon r 8.20 in making its application.

[28] I accept that jurisdiction exists to make the order that the plaintiffs seek. The issue is whether I should exercise my discretion in their favour.

[29] Several factors persuade me that I should not. First, it now seems reasonably clear that Mr Walker learned of the existence of the insurance policy as a result of information disclosed in communications sent on a without prejudice basis during recent settlement negotiations between the plaintiffs and the defendants. I consider it would be wrong in principle and very close to an abuse of the Court's procedures if the plaintiffs were now to be permitted to obtain orders under r 8.20 based on information obtained in that way.

[30] Secondly, Mr Smith submitted that the Court needed to approach this aspect of the application bearing in mind the principles recently enunciated by the Supreme Court in *BFSL Ltd v Steigrad.*[8] That case was concerned with the issue of whether an insurer could make payments under an insurance policy to meet legal costs

8 *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156; [2014] 1 NZLR 304.

incurred in defending a claim when the policy was subject to an existing charge in favour of the claimant under s 9(1) of the LRA. The Supreme Court held that the payments were made at the risk of the insurer because of the existence of the statutory charge. I see nothing in that decision to assist the plaintiffs' argument for present purposes.

[31] Thirdly, Mr Hansen's insurer is aware of the plaintiffs' claims. There is also no suggestion that Mr Hansen will fail to make a claim on his policy if he is found to be liable to the plaintiffs, and there is no indication that the insurer intends to decline any claim that Mr Hansen might make in that event. In addition, the policy is now subject to the charge created by s 9(1) of the LRA. All of those factors suggest that any application for leave to commence a proceeding directly against the insurer would be of little or no practical utility to the plaintiffs at this late stage in the proceeding.

[32] This leads me to conclude that the plaintiffs are not genuinely considering a claim against Mr Hansen's insurer. Rather, they have another motive for seeking to gain access to details of the policy. This is to be found in the following paragraph of the reply affidavit that Mr Walker filed on the day before the hearing:

> 23. Finally, I wish to make it clear that it is not the sole purpose of the plaintiffs' application to aid them in settlement negotiations. Another consideration of equal if not greater concern is the need for the plaintiffs to avoid the costs of pursuit of a judgment which if obtained is unable to be enforced due to lack of insurance held by any judgment creditor, the various defendants being individuals who otherwise would not be expected to have assets sufficient to meet a judgment debt equalling even a small fraction of the plaintiffs' claims.

[33] I consider this paragraph places the application in its true context. The plaintiffs want to obtain details of the policy to assist them in the settlement negotiations and to assist them to determine whether it is worth pursuing Mr Hansen to judgment. Neither of those objectives relates to a proposed claim against Mr Hansen's insurer. It follows that I do not consider the plaintiffs are genuinely motivated at this stage to commence a proceeding against the insurer, and that disclosure of the details would instead be for other purposes.

[34] These factors lead me to exercise my discretion against making the order that the plaintiffs seek under r 8.20.

Result

[35] The applications for particular and pre-commencement discovery are dismissed.

Costs

[36] Mr Hansen has succeeded and is entitled to costs on the application on a category 2B basis together with disbursements as fixed by the Registrar.

Lang J