IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2018
[2018] NZSC 35

BETWEEN		PAUL GEOFFREY MYALL Applicant
AND		TOWER INSURANCE LIMITED Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: N R Campbell QC and K P Sullivan for Applicant
M C Harris and S S McMullan for Respondent

Judgment: 17 April 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500.

REASONS

[1] Paul Myall's house in Christchurch was damaged beyond repair in the earthquakes of 4 September 2010 and 22 February 2011. The house was insured with Tower Insurance Ltd (Tower). The area of the house recorded in the certificate of insurance was 650m^2 but its actual area was 799m^2. Under the policy and in terms of the elections which the parties made, Tower was liable for what it would cost to rebuild the house "… to the same condition and extent as when new and up to the same area as shown in the certificate of insurance".

[2] A number of issues associated with the assessment of the rebuild cost were the subject of dispute in the High Court and Court of Appeal.[1] The proposed appeal relates to only two of them; the amount which should be allowed for professional fees and the adjustment to be made for the area discrepancy.

[3] On the basis of the findings in the Courts below, the full rebuild cost of the house is at least $6.3m. This is before any adjustment is made for the area discrepancy.

[4] On the first issue, Mr Myall's position at trial, advanced through his quantity surveyor, Mr Harrison, was that professional fees should be allowed for on the basis that they would amount to 15 per cent of the construction cost. Tower's position, as advanced at trial though its expert witness, Mr Eggleton, was that a lower figure amounting to approximately 9.85 per cent of the construction cost was appropriate. Both the trial Judge and the Court of Appeal preferred the approach of Mr Eggleton. Unfortunately:

(a) One of the reasons given by the trial Judge for her conclusion was wrong. This is because she attributed to Mr Harrison a concession that Mr Eggleton's figures were reasonable when the concession actually made related to architectural fees rather than the total fees for all professions.

(b) Of the three reasons given by the Court of Appeal, two were wrong. This is because, in two respects, the Court mistakenly assumed that evidence given in respect of a quite separate issue – the allowance for contingencies – was referable to professional fees. That the Court of Appeal reasons were, in these respects, erroneous is conceded by Tower.

[5] The third reason given by the Court of Appeal involved reliance on Mr Harrison's concession in respect of the architectural fees. The architectural fees

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1 *Myall v Tower Insurance Ltd* [2017] NZHC 251 (Dunningham J) [*Myall* (HC)]; and *Myall v Tower Insurance Ltd* [2017] NZCA 561 (Harrison, Miller and Clifford JJ) [*Myall* (CA)].

allowed for by Mr Eggleton represented approximately 75 per cent of his total allowance for professional fees.

[6] On the adjustment question, the approach taken by the Judge, and upheld by the Court of Appeal, was that Mr Myall was to be paid out 650/799 of the estimated cost of rebuilding his house. In doing so, they rejected the contention that what was required was the costing of a house which, save for area, would have been the same as the insured house, and thus a house which had the same number of bedrooms, bathrooms and reception rooms (and thus the same number of expensive fittings and fixtures) as the house which was insured. The cost of constructing such a house would have been appreciably more than 650/799 of the cost of rebuilding the insured house.

[7] On this aspect of the case, Mr Harrison's evidence was conclusory and he did not provide his workings to demonstrate how he arrived at the figure which he contended for. He did not, for instance, come up with a credibly designed house of 650m^2 which had all the features he allowed for and to which his cost calculations were correlated. As well, Mr Myall's counsel did not cross-examine Mr Eggleton on the issue.

[8] On this point, the Judge concluded:[2]

> Mr Myall contracted to insure a large stately home with the general characteristics of his home, but which was to be 20 per cent smaller than his house actually was. Realistically, such a home would have commensurately fewer bathrooms, bedrooms, and reception rooms and therefore proportionately fewer structures … fewer fittings, and less joinery, without its function being compromised.

The Court of Appeal adopted the same approach.[3] Both Courts recognised that in different circumstances (particularly where the area discrepancy is less) a different approach would or might be appropriate.[4]

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2 *Myall* (HC), above n 1, at [98].
3 *Myall* (CA), above n 1, at [30].
4 *Myall* (HC), above n 1, at [101]; and *Myall* (CA), above n 1, at [30].

[9] We see both issues as being very particular to this dispute and heavily referable to the evidence which was led. They therefore do not give rise to any questions of public or general importance.[5]

[10] We have given anxious consideration to whether the mistakes made by the High Court Judge and Court of Appeal in respect of the professional fees allowance engage the miscarriage ground, but nonetheless consider that the conclusion reached was open to both Courts and that leave should be declined in this respect as well.

[11] Accordingly, the application for leave to appeal is dismissed. Costs of $2,500 are awarded to the respondent.

Solicitors:
Succeed Legal, Wellington for Applicant
Gilbert Walker, Auckland for Respondent

[5] Supreme Court Act 2003, s 13(2); and Senior Courts Act 2016, s 74(2).