

IN THE SUPREME COURT OF NEW ZEALAND

SC 122/2013
[2014] NZSC 12

BETWEEN JOHN FRANCIS JACKSON
Applicant

AND IAG NEW ZEALAND LIMITED
Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: D A Webb and S E Goodwin for Applicant
G S A Macdonald and J M Hayes for Respondent

Judgment: 25 February 2014

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant is to pay to the respondent costs of \$2,500 plus all reasonable disbursements to be fixed if necessary by the Registrar.**
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REASONS

Background

[1] This case concerns a dishonesty exclusion in an IAG professional indemnity insurance policy. In order to apply, the exclusion required civil liability to another, a dishonest act or omission and a connection between the liability and the dishonesty.

[2] Mr Jackson, an insurance broker, negligently failed to arrange insurance for Mr and Mrs Marchand (home and contents, motor vehicles and a medical practice).

[3] On two occasions, (in July or August 2009 and in early 2010) Mr Jackson assured Mrs Marchand that they were insured, despite knowing that they were not. When Mrs Marchand made a claim in May 2010 for the loss of a pair of spectacles, Mr Jackson paid the claim himself. It was only after the first Christchurch earthquake that Mr Jackson attempted to arrange insurance cover.

[4] There was evidence that Mr Jackson has a depressive illness. He also had heart disease and was suffering from the side effects of treatment for prostate cancer.

[5] IAG applied for summary judgment against Mr Jackson, on the basis of the dishonesty exclusion, because of the conduct outlined at [3] above. This was declined in the High Court¹ but succeeded in the Court of Appeal.²

[6] Mr and Mrs Marchand had (before the judgment in the Court of Appeal) succeeded at trial against Mr Jackson with regard to their uninsured losses.³

Court of Appeal decision

[7] The Court of Appeal adopted a mixed objective-subjective test for dishonesty. The subjective element required the Court to consider Mr Jackson's knowledge, while the objective element required the application of that knowledge against normally accepted standards to establish whether Mr Jackson's conduct was objectively dishonest. The Court said:⁴

Although dishonesty is a subjective mental state, the law uses an objective standard to measure it: the person's subjective knowledge must make his or her conduct dishonest by normally accepted standards.

¹ *Marchand v Jackson* HC Christchurch CIV-2011-409-000810, 2 May 2012 (Associate Judge Matthews).

² *IAG New Zealand Ltd v Jackson* [2013] NZCA 302, (2013) 17 ANZ Ins Cas 61-982 (O'Regan P, Arnold and Miller JJ).

³ *Marchand v Jackson* [2012] NZHC 2893, (2012) 17 ANZ Ins Cas 61-955 (Kós J).

⁴ *IAG New Zealand Ltd v Jackson*, above n 2, at [18], citing *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 at [15]; adopted by this Court in *Westpac New Zealand Ltd v Map & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [26].

[8] On the facts, the Court of Appeal held that Mr Jackson's admitted contemporaneous knowledge that the assurances he gave the Marchands were false (the subjective element) made his conduct objectively dishonest.⁵

[9] The Court of Appeal also held that there must be some causal or consequential relationship between the dishonesty and the liability.⁶ Kos J, in his judgment referred to at [6], held that, if Mr Jackson had not hidden the truth from the Marchands, they would have secured cover elsewhere before the earthquake. There was therefore the relevant nexus.⁷

Discussion

[10] This is a decision where the Court of Appeal applied established principles to the particular facts of the case. There is no issue of general, public or commercial importance and no risk of a miscarriage of justice.

[11] Mr Jackson has not pointed to any matter that throws doubt on the Court of Appeal's conclusion that his conduct was objectively dishonest. Mr Jackson mainly relies on his physical and mental infirmities to negate any conception of dishonesty. Although the ailments may have had an effect on Mr Jackson's intentions and motivations, those subjective intentions and motivations are not relevant to the objective part of the test of dishonesty.

Result

[12] The application for leave to appeal is dismissed.

[13] The applicant is to pay to the respondent costs of \$2,500 plus all reasonable disbursements to be fixed if necessary by the Registrar.

Solicitors:
Lane Neave, Christchurch for Applicant
DLA Phillips Fox, Auckland for Respondent

⁵ *IAG New Zealand Ltd v Jackson*, above n 2, at [20].

⁶ See at [29].

⁷ At [30].