IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2015
[2015] NZSC 168

BETWEEN	HEARTLAND BANK LIMITED (FORMERLY MARAC FINANCE LIMITED) Applicant
AND	VERO LIABILITY INSURANCE LIMITED Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	R J Hollyman and T P Mullins for Applicant C T Walker for Respondent
Judgment:	3 November 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Costs of $2,500 are payable by the applicant to the respondent.

REASONS

Introduction

[1] Heartland Bank Ltd applies for leave to appeal against a Court of Appeal decision,[1] setting aside a decision of Courtney J in the High Court on liability[2] and on the quantum of liability[3] under an insurance policy.

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1 *Vero Liability Insurance Ltd v Heartland* [2015] NZCA 288 (Randerson, Stevens and White JJ) [*Marac* (CA)].

2 *Marac Finance Ltd v Vero Liability Insurance Ltd* [2013] NZHC 2525, [2014] 2 NZLR 93 [*Marac* (HC liability judgment)].

3 *Marac Finance Ltd v Vero Liability Insurance Ltd* [2014] NZHC 1974 [*Marac* (HC quantum judgment)].

Background

[2] In 2000 Marac Finance Ltd had made available to Rapson Holdings Ltd a revolving credit facility. By mid to late 2003 Marac had determined that future funding to Rapson was only to be provided on the basis of back to back letters of credit. In October 2003 a new revolving credit facility was set up by a Marac manager, Mr Atkinson. Various unauthorised advances were made to Rapson under this facility. In early 2010, the unauthorised advances were discovered and Marac claimed under its Crime Insurance policy `with Vero Liability Insurance Ltd.

The policy

[3] The operative clause of the Policy with Vero provides that:

> The **Insurer** shall indemnify the **Insured** for their direct financial **Loss** sustained any time consequent upon a single act or series of related acts of … dishonesty … committed by any **Employee** … which is:
>
> (i) Committed with the clear intent to cause the **Insured a Loss**, and
>
> (ii) Discovered by the Insured during the Policy Period – …

[4] Endorsement 4 of the Policy provides:

> It is noted and agreed that the **Insurer** shall not indemnify the **Insured** for any **Loss** sustained at any time consequent upon a single act or series of related acts of … dishonesty … committed more than 48 months prior to the **Discovery** of the **Loss**.

Judgments

[5] In the High Court, Courtney J held that Mr Atkinson acted dishonestly from 2005.[4] From that point he realised that what he had done was beyond his authority and "an honest person would have come clean about the problem to his superior".[5] As to whether there was a clear intent to cause loss (as required by the policy), the Judge held that there was.[6] While recognising that there were indications to the contrary, she concluded that, from about mid-2005, "the advances that Mr Atkinson

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4 See *Marac* (HC liability judgment), above n 2, at [68]–[76].
5 At [68].
6 At [109].

made were made knowing that they would cause Marac loss and intending, though not necessarily desiring, that outcome".[7]

[6] In the quantum judgment, Courtney J held that the correct approach to calculating Marac's loss, taking account of endorsement 4 of the Policy, was to identify the direct financial loss flowing from advances made after 8 February 2006. However, monies received by Marac should first be applied in reduction of the earliest advances.[8]

[7] The Court of Appeal overturned both the liability and quantum findings. As to liability, the Court was "not persuaded that [Marac] proved that Mr Atkinson recognised the inevitability of loss through his actions".[9] Instead, "Mr Atkinson's conduct was directed towards recovery of [the debt owed by Rapson], however inadequately he may have approached his duties".[10] The Court held that Mr Atkinson's "conduct was consistent with a belief (most likely misguided) that through continued trading and Rapson's Australian operation the debt would eventually be repaid. That was the course the Credit Committee had authorised him to pursue".[11]

[8] As to quantum, the Court of Appeal considered that the real issue in terms of the policy wording was whether direct financial loss had resulted from the acts of dishonesty committed after 8 February 2006.[12] The Court held that it had not.[13]

Grounds of Appeal

[9] The applicant submits that the appeal raises two matters of general commercial significance:

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7 At [109].

8 Applying the rule in *Devaynes v Noble* (1816) 1 Mer 572, 35 ER 781 (Ch) [*Clayton's Case*]. The rule in *Clayton* is now accepted as being based on the presumed intention of the parties and is liable to be displaced by evidence that shows a different practice as between the parties: *Re Registered Securities Ltd* [1991] 1 NZLR 545 (CA) at 553. See the Court of Appeal's summary at [96]–[98]: *Marac* (CA), above n 1.

9 *Marac* (CA), above n 1, at [83].

10 At [83].

11 At [83].

12 At [101].

13 At [102]–[104].

(a) Whether proof of intention requires that the person must subjectively desire the result, or whether it is sufficient that the result is the natural and probable consequence of the person's actions?

(b) How is loss to be assessed where loss is consequent upon a series of acts; where *Clayton's Case* may apply;[14] and where the series of dishonest acts span a cut off date under the policy?

Discussion

[10] We accept Vero's submission that the Court of Appeal did not import a requirement that the dishonest employee subjectively desire loss to be incurred by the employer.

[11] Effectively, the difference between the High Court and the Court of Appeal was factual: how the particular clause[15] applies in the particular circumstances of this case. As such, it cannot be a matter of general or public importance or of general commercial significance.[16] Nor is there a risk of a miscarriage of justice.[17]

[12] Leave must therefore be declined on the first question posed by the applicant. This means that the second question falls away.

Result

[13] The application for leave to appeal is dismissed. Costs of $2,500 are payable by the applicant to the respondent.

Solicitors:
LeeSalmonLong, Auckland for Applicant
Gilbert Walker, Auckland for Respondent

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14 *Clayton's Case*, above n 8.

15 The Court of Appeal accepted and applied the High Court's interpretation of the policy with regards to "intent to cause loss": see *Marac* (CA), above n 1, at [69].

16 Supreme Court Act 2003, s 13(2)(a) and (c).

17 For the meaning of "miscarriage of justice" in the civil context, see *Junior Farms Ltd v Hamptons Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].