Supreme Court of New Zealand
Te Kōti Mana Nui

13 May 2015

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

NEW ZEALAND FIRE SERVICE COMMISSION v INSURANCE BROKERS ASSOCIATION OF NEW ZEALAND INCORPORATED AND VERO INSURANCE NEW ZEALAND LIMITED

(SC 57/2014) [2015] NZSC 59

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

This appeal raised two issues relating to the method of calculation of the fire service levy under s 48 of the Fire Services Act 1975.

The respondents sought declarations on the calculation of the levy on two types of insurance policy. The respondents succeeded in both the High Court and Court of Appeal and declarations supporting the respondents' position on both issues were made. This Court granted leave on the question of whether the Court of Appeal was correct to affirm the declarations made by the High Court.

The Court has unanimously allowed the appeal on both issues and set aside the declarations made in the Court of Appeal and High Court.

The first declaration related to "split tier" policies. In this situation the insured has cover for both a nominated indemnity sum insured and, in addition, excess of indemnity cover, which provides cover for the difference between the true indemnity value of the property and the replacement value of the property. There is an uninsured portion between the indemnity sum and the true indemnity value of the property.

85 Lambton Quay, Wellington
P O Box 61 DX SX 11224
Telephone 64 4 918 8222 Facsimile 64 4 471 6924

The High Court made a declaration that the levy was payable only on the insured portion of the indemnity value, and that the excess of indemnity cover was ignored for the purposes of the calculation. The Fire Service Commission opposed this. It argued that, where the indemnity sum insured and the sum insured in the excess of indemnity insurance exceeded the true indemnity value, the levy should be computed on the true indemnity value of the property.

The respondents argued that the excess of indemnity policy was exempt from the levy under s 48(7) of the Act, which states that the levy shall not apply on "any part of a contract of fire insurance" that "is limited to an excess over the indemnity value of the property". They argued further that the lack of an anti-avoidance provision in the Act meant that the statute allowed insurance structures which avoided paying the levy. The Commission argued that s 48(6)(c), which provides that the levy should apply to the actual indemnity value where an insurance contract provides insurance for a value "more favourable than the indemnity value", is predominant over s 48(7).

The Supreme Court found that the correct interpretation of s 48(6)(c) requires that the levy is payable on the true indemnity value of the property, as the sample policy provided insurance on terms more favourable than the indemnity value of the property. Section 48(7) does not exempt the excess of indemnity policy, except to the extent that it provides cover in excess of the true indemnity value. This better reflects the intention to set the levy to reflect the property owner's level of insurance cover, and an interpretive approach favouring greater universality of the levy, which is in the nature of a tax for a public service.

The second declaration related to a material damage and business interruption policy entered into in 2008 by the New Zealand Ports Collective ("Ports Collective") comprising eight port companies under which they obtained cover for "all Insureds collectively" in relation to fire damage. The leading underwriter was the second respondent. The declaration was to the effect that the policy was a single policy for which the levy should be calculated on the indemnity sum insured.

The Commission argued that the Ports Collective insurance policy, when viewed in light of practical realities and commercial expectations, should be treated as eight policies separately issued to the different port companies. The respondents argued that a number of cases from the United Kingdom and Australia supported the position that the contract forms a single, composite policy.

The Supreme Court has found that the levy should be computed on the basis that each of the eight port companies had an insurance contract on which the levy was payable. This finding was based on a number of features of the policy, including the fact that there is no insured property owned jointly by the ports collective, nor a joint interest in any insured property, but rather there are eight port companies with separately insured interests in different property. The policy also contained a

provision to the effect that it was to be interpreted as if it had been issued separately to each port company. These features distinguished this case from the ones argued before the Court.

Contact person: Gordon Thatcher, Supreme Court Registrar
(04) 471 6921