IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
INSURANCE LIST

Not Restricted

S ECI 2017 00067

OWNERS CORPORATION 630063L — Plaintiff

v

CGU INSURANCE LTD (ACN 004 478 371) — Defendant

JUDGE:	HARGRAVE JA
WHERE HELD:	Melbourne
DATE OF HEARING:	2 February 2018
DATE OF JUDGMENT:	9 February 2018
CASE MAY BE CITED AS:	Owners Corporation 630063L v CGU Insurance Ltd
MEDIUM NEUTRAL CITATION:	[2018] VSC 34

COSTS – Proceeding settled on terms defendant will pay plaintiff's costs on a standard basis, or indemnity basis if ordered by the Court – Application for indemnity costs – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R A Harris	Harris Carlson
For the Defendant	Mr A G Uren QC with Mr M I Ravech	Holman Webb

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HIS HONOUR:

1 On 9 February 2015, there was a catastrophic fire at the apartment building owned by the plaintiff. The defendant insurer admitted liability to indemnify the plaintiff for the costs necessary to reinstate the apartment building in accordance with the terms and conditions of the applicable insurance policy. In the course of the claims process disputes arose between the parties as to the extent of the insurer's liability to indemnify in respect of identified parts of the building, which the insurers contended had not been constructed in accordance with applicable government or local authority by-laws. In summary, there was a dispute about the scope of the works to be undertaken at the insurer's cost.

2 As expert reports were received by or on behalf of the parties, the disputes gained complexity and became protracted. In this context, the patience of the plaintiff and the individual apartment owners ran out, and this proceeding was commenced on 16 March 2017.

3 The issues in the proceeding included: the proper interpretation of the policy wording and whether rectification of the policy was necessary; whether the policy excluded cover for any of the damage to the building; whether the insurer was estopped from, or had waived, reliance upon the basis of settlement clauses in accordance with its proposed interpretation; whether the insurer had breached its duty of good faith in handling the plaintiff's claim; whether the insurer was liable for any unpaid rent to apartment owners who had been displaced from the building; the extent of the insurer's continuing obligation to pay rent to displaced apartment owners; whether the policy required the plaintiff to enter into the building contract for reinstatement of the building; and critical issues surrounding the scope of works necessary to reinstate the building in accordance with the insurer's obligations under the policy.

4 The trial commenced on 13 November 2017. There were detailed openings over three days. At the end of the openings, the Court referred the proceeding to judicial mediation before an associate justice. The proceeding was settled at mediation on

the basis of terms of settlement which required the insurer to procure a builder to enter into a building contract with the plaintiff to reinstate the building in accordance with drawings, specification and scope of works which were annexed to a joint expert report dated 30 October 2017. The insurer agreed to pay all amounts payable by the plaintiff under that contract. There were other operative terms, including that the insurer would pay the individual apartment owners' rental costs until the building works were complete and a certificate of occupancy was issued in respect of the entire building.

5 The terms of settlement included a clause requiring the insurer to pay the plaintiff's costs of the proceeding, in the following terms:

> 9. The Defendant will pay to the Plaintiff the costs of the proceedings to be taxed in default of agreement on a standard basis, provided that the plaintiff reserves the right to make application for such costs on an indemnity basis and/or a fixed sum basis, but also provided that in no circumstances shall the costs be on anything less than a standard basis.

6 There has been no agreement as to the amount of costs which the insurer should pay. The plaintiff makes application under the provisos to clause 9, as follows:

(1) an order that the defendant pay its costs of the proceeding on an indemnity basis to be taxed in default of agreement, including an order that the indemnity costs payable by the insurer include an uplift of 25 per cent (**indemnity costs application**). The uplift is sought on the basis of a 'no-win, no-fee' agreement between the plaintiff and its solicitors and counsel;

(2) an order that the insurer pay some specified disbursements, to counsel and expert witnesses, on a fixed (or gross) sum basis (**gross sum application**).

Indemnity costs application

7 In *Ugly Tribe Co Pty Ltd v Sikola*,[1] Harper J identified some of the circumstances which had, to that time, been held to be sufficient to warrant the making of an

[1] [2001] VSC 189.

indemnity costs order.[2] Harper J stated that the categories of special circumstances which may justify the making of an indemnity costs order are not closed, and the Court's discretion remains unfettered.[3] In *PCI Investments Pty Ltd v National Golf Holdings*,[4] Chernov JA reviewed the authorities and stated that, although the categories of special circumstances are not closed, it is generally the case that the special circumstances will only be present 'where the losing party has misconducted itself in relation to the proceeding'.[5] However, pre-litigation misconduct may make conduct during the course of litigation harder to justify.[6] In *NMFM Property Pty Ltd v Citibank Ltd (No 2)*,[7] Lindgren J noted that a party's knowledge of his, her or its past conduct may be relevant to an assessment of the party's conduct as a litigant.[8]

8 In this case, the plaintiff relies upon the following conduct by the insurer as constituting special circumstances justifying the making of an indemnity costs order against it, notwithstanding that there has been no trial on the merits:

(1) In July 2015, the insurer stated that it would not provide indemnity for reinstatement of building works which did not comply with applicable legislation and by-laws when constructed (**non-compliance issues**). The non-compliance issues were pleaded in paragraph 20(a) of the insurer's defence filed 9 May 2017, but no particulars were ever given of the relevant facts despite numerous requests.

(2) In August and September 2016, the insurer advised the plaintiff that the foundations of the apartment building were non-compliant with applicable legislation and by-laws and, as a result, reinstatement of the building was not possible without removing the foundations; and that the insurer would not pay for that building work (**the foundation issue**). This led the insurer to

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2 Ibid [7].
3 Ibid [8].
4 [2002] VSCA 24.
5 Ibid [36].
6 *Ali v Hartley Poynton* [2002] VSC 292 [9]–[10].
7 (2001) 109 FCR 77.
8 Ibid 92–3 [56]–[58]; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)* [2012] VSC 399 [18] (Croft J).

offer to settle the plaintiff's claim on a cash basis, with the settlement amount not including the non-compliance or foundation issues. The foundation issue was pleaded in paragraph 20(b) of the insurer's defence, but again no particulars were given despite requests from the plaintiff.

(3) The insurer abandoned the non-compliance and foundation issues on 26 September 2017, when it withdrew paragraph 20 of its defence.

(4) The failure of the parties to agree on the scope of works which are the subject of the indemnity under the insurance policy, led to the plaintiff commencing this proceeding. Thereafter, the insurer's conduct in failing to provide particulars of the non-compliance and foundation issues, prevented the parties from reaching a sensible compromise of the proceeding. It was only after the Court intervened and ordered joint expert reports be filed that the available alternatives for the scope of works could be stated with sufficient certainty to enable a sensible compromise.

(5) In these circumstances, when the Court ordered a mediation following the detailed oral openings over three days, the terms of settlement evidence that the insurer agreed to pay the cost of reinstating the building on the existing foundations and without deduction for the previously alleged non-compliance issues. In other words, the issues which had delayed agreement on the scope of works were wholly abandoned by the insurer by the terms of settlement. Further, the insurer agreed to pay all of the rental costs of apartment owners until the completion of the reinstatement works. In essence, the insurer capitulated completely and agreed to provide an indemnity in the form sought by the plaintiff from the time it made its claim.

(6) The non-compliance and foundation issues raised by the insurer, both before the proceeding was commenced and in its defence until abandoned on 26 September 2017, unreasonably delayed the settlement of the proceeding and caused loss of time to both the Court and the parties.

9 The insurer contends that its conduct should not be classified as misconduct as a litigant. It disputes that the settlement which was reached involved a complete surrender on its part. However, even if it did, that does not make its conduct of the case so unreasonable as to constitute special circumstances justifying an indemnity costs order. Indeed, by settling the claim the insurer acted reasonably in the light of the relevant joint report which was to hand a few days earlier. Moreover, the insurer stresses that: (1) its non-compliance and foundation issue defences were based on expert advice and, even if wrong, were raised in good faith as genuine issues; and (2) the defence that the policy required the plaintiff to incur the reinstatement costs, by entering into the necessary building contract, was a genuinely raised defence which is reflected in the terms of settlement.

10 The insurer's contentions should be accepted. First, the scope of works was agreed as essential component of the terms of settlement. That agreement was facilitated by the joint report prepared by the respective experts employed by the parties. The joint report contained options for the scope of works and a recommendation which was dependent upon the acts of a third party, namely, a building surveyor certifying that the foundations would be suitable to enable the scope of works ultimately agreed upon to be undertaken. That certification was not obtained until shortly before the mediation.

11 Second, there were other significant issues in the proceeding which will never be determined because the parties had the good sense to compromise the proceeding. These issues include the proper interpretation of the policy and the serious allegation that the insurer failed to act in good faith in the course of the claims process when assessed as a whole. Each of these issues had the potential to cause the insurer great embarrassment if adverse findings were made against it. The relevant policy wording was potentially the subject of embarrassing findings that the insurer has been conducting business on policy wording which is obviously mistaken and/or incomplete. The risk of a finding of bad faith in the claims handling process obviously had the capacity to affect the insurer's reputation. The

Court should not speculate as to why the insurer took the course it did in settling the proceeding.

12 Third, the plaintiff is in substance asking the Court to assess the merits of the case for the purposes of determining whether the plaintiff's costs should be paid on a basis other than the agreed basis. The fact that there is a proviso in the terms of settlement enabling them to make the application, is not to the point. The Court should not be required to assess the merits of a proceeding involving many issues, especially where the allegations include that the insurer failed to act in good faith, in circumstances where the settlement has made all of the issues moot.

13 My conclusion shows the undesirability of settlement agreements which provide for the Court to determine the appropriate basis on which costs are to be paid. The parties take the risk that, in such cases, it will be inappropriate for the Court to fix the basis for payment of costs. In this case, the parties had the good sense to agree on the basis which was to apply in the absence of any contrary order of the Court.

14 The application for an order that the plaintiff's costs be assessed on an indemnity basis is refused.

15 I turn to consider the gross sum costs application.

Gross sum costs application

16 The gross sum costs application relates only to certain disbursements in the proceeding. Given that I have not made an indemnity costs order in favour of the plaintiff, I do not think that this is an appropriate case to exercise the Court's discretion to make the gross sum costs orders sought. This would involve dealing with costs on a piecemeal basis, as agreement or taxation will still be necessary in respect of the remaining standard costs. Moreover, there is a dispute about the reasonableness of the expert's fees, and I do not have the evidence, submissions or costing experience to enable me to fix counsel's fees.

17 For the above reasons, all of the plaintiff's applications are dismissed. The terms of

settlement provide the basis upon which costs should be agreed or taxed by the Costs Court. I will hear the parties as to the form of the Court's orders disposing of the proceeding, and as to the costs of the applications.
