IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-001182
[2018] NZHC 204

BETWEEN	SUZANNE ROBIN Plaintiff
AND	IAG NEW ZEALAND LIMITED First Defendant
	CANTERBURY RECONSTRUCTION LIMITED Second Defendant
	ORANGE H MANAGEMENT LIMITED (formerly HAWKINS MANAGEMENT LTD) First Third Party
	ORANGE H GROUP LIMITED (formerly HAWKINS GROUP LIMITED) Second Third Party

Hearing:	30 January 2018
Appearances:	K J M Robinson and M Hills for Plaintiff N Gedye QC and O Collette-Moxon for First Defendant D H McClellan QC and S D Galloway for Third Parties
Judgment:	21 February 2018

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] The plaintiff (Ms Robin) owns a property in Fitzgerald Avenue, Christchurch. She purchased it in December 2014 from Creole Investments Ltd (Creole), which owned the property at the time of the Christchurch earthquakes in late 2010 and early

2011. At that time the house on the property was insured with the first defendant (IAG). When Ms Robin purchased the property she also received an assignment of the rights of Creole under its policy with IAG.

[2] IAG's response to a claim by Creole in relation to damage to the house was to appoint Hawkins Management Ltd (Hawkins Management) to act on its behalf in assessing the scope of works required to effect repairs and to monitor the repair work undertaken. Hawkins Management appointed the second defendant, Canterbury Reconstruction Ltd (CRL) to carry out repairs to the house on its behalf. Ms Robin says that the repairs have not been carried out to the standard required by the policy. She seeks an order that IAG specifically perform its duties pursuant to the policy by paying the cost to remediate defective repairs, or alternatively damages in the amount required to repair the house to a good standard of workmanship with all earthquake damage properly repaired. She also sues CRL in tort on the basis of a duty of care said to be owed to her to ensure that repairs to the house were carried out to a good standard of workmanship with all earthquake damage properly repaired, which she says CRL breached.

[3] IAG has joined Hawkins Management, now Orange H Management Ltd (OHML) as first third party, pleading that if Ms Robin's contentions are established, OHML failed in certain duties it had to IAG under a written contract between them. It has joined Hawkins Group Ltd, now Orange H Group Ltd (OHGL) as second third party under that contract in respect of the duties of OHML.

[4] IAG applies for an order that four parties be added as defendants. The first is OHML. The second is Houselifters Ltd which was a company engaged to carry out work in respect of the foundation of the house. The third is Max Contracts Ltd which carried out other work under a subcontract from CRL. The fourth is the Christchurch City Council which issued a code compliance certificate certifying that work on the property complied with the building consent which was granted in respect of those works. IAG says that all four of these entities owed duties of care to Ms Robin and, if she is correct in her allegations that the work on the property is not up to the standard required by the policy, responsibility lies with those parties.

[5] IAG brings this application under r 4.56 High Court Rules 2016, which provides:

> **4.56 Striking out and adding parties**
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> (1) A Judge may, at any stage of a proceeding, order that –
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> (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
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> (b) the name of a person be added as a plaintiff or defendant because –
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> (i) the person ought to have been joined; or
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> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
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> (2) An order does not require an application and may be made on terms the court considers just.
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> (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[6] The essence of IAG's application is that the proposed defendants carried out the work which is called into question (or, in the case of the Council, certified it), whereas IAG was an intermediary between the owner, who was entitled to the response provided for in the policy originally held by Creole, and those whom it appointed to ensure that its response complied with its obligations under the policy.

[7] Ms Robin opposes the application. She says the presence of the four proposed defendants is not necessary in order to adjudicate upon or settle any of the questions raised in this case. The basis of Ms Robin's claim against IAG is that the work carried out and paid for by IAG does not meet the policy standard as it was required to do. Specifically, this has occurred because of inappropriate methodology which was applied to the remediation of the foundations, and substandard workmanship on repairing the foundations. If IAG maintains, as it plainly does, that this was as a result of the actions of the four proposed defendants, it is for IAG to take whatever steps it thinks appropriate against those parties. It is not for IAG to tell her that she should sue them, thereby incurring additional cost and exposing herself to an adverse costs award should she not succeed against any one or all of those parties. Nor should she be required to establish claims against parties with whom she did not have any

dealings, for actions of which she has no knowledge. As matters stand, she need only establish that IAG has not carried out repairs up to the required standard in the policy and it is for IAG to take the matter up with others, as it may see fit.

[8] OHML and OHGL take a neutral stance in relation to the application to join Houselifters Ltd, Max Contracts Ltd and the Council, but oppose the joinder of OHML as a defendant. They say its presence before the Court as a defendant is not necessary for the Court to adjudicate on any question raised in the proceeding, and that it is already a party to this proceeding as the first third party. They say that the work it carried out for IAG does not form the basis of the claim by Ms Robin against IAG, which is directed specifically, and only, at whether or not IAG's response to the claim meets the required policy standard. It accepts Ms Robin's position that the adequacy or otherwise of its services is a matter between it and IAG, an issue to be measured against its contractual obligations.

Legal principles

[9] The way in which the Court is to apply the principles set out in r 4.56 was analysed in detail by Rodney Hansen J in *Fonterra Co-Operative Group Ltd v Waikato Coldstorage Ltd*.[1] The Judge rejected the proposition that the application of r 4.56 was restricted to cases where joinder is necessary to dispose of the precise issue arising between the present parties, that interpretation not being consistent with the purpose of the rule as his Honour saw it, or the way in which it has generally been applied.[2]

[10] His Honour found that r 4.56 should be read in conjunction with r 4.3.[3] Rule 4.3(1) provides that a defendant is a person:

> … against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.

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1 *Fonterra Co-Operative Group Ltd v Waikato Coldstorage Ltd* HC Hamilton CIV-2010-419-855, 22 December 2010.
2 At [11].
3 At [16].

[11] Thus the Court should permit the joinder as a defendant of any person who could have been joined in the first place provided the joinder serves the interests of justice. His Honour said:[4]

> It would be contrary to the object of the rule and, subject to considerations bearing on the exercise of the discretion, the interests of justice, to prevent a plaintiff joining as a defendant a person whom it could have sued in the first instance as of right. Joinder, in such circumstances, will avoid the need for further proceedings and ensure that all issues arising out of the subject matter of the litigation are disposed of.

[12] So far as the second limb of r 4.56(1)(b) is concerned, his Honour found that this may enable parties to be joined as defendants who would not come within the first limb. They might be directly or indirectly affected by an order in the proceeding but not be a person against whom the plaintiff could have claimed a right to relief under r 4.3, and thus would not be parties whom it could be said "ought" to have been joined.[5]

[13] Rodney Hansen J observed that once jurisdiction is established, a plaintiff's application to join defendants will normally be granted.[6] Plaintiffs seeking joinder of additional defendants are in a more favoured position than defendants seeking joinder of additional parties.[7] His Honour noted that it is for the plaintiff to decide whom he or she will sue.[8] That principle has been enunciated in numerous cases, for instance *Auckland Regional Services Trust v Lark*,[9] *Paccar Inc v Four Ways Trucking Inc*[10] and *Mainzeal Corporation Ltd v Contractors Bonding Ltd*.[11] That does not mean, however, that the wishes of the plaintiff cannot be overridden by the Court if jurisdiction is established, and the interests of justice direct that outcome.

[14] The Court of Appeal considered r 4.56 in *Newhaven Waldorf Management Ltd v Allen.*[12] Newhaven Waldorf is a body corporate management company. It brought a proceeding against a single unit title holder in a complex it managed, Mr Allen,

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4 At [16].
5 At [17].
6 At [19].
7 *McGechan on Procedure* HR4.56.11.
8 At [19].
9 *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 at 139.
10 *Paccar Inc v Four Ways Trucking Inc* [1995] 2 NZLR 492 at 496.
11 *Mainzeal Corporation Ltd v Contractors Bonding Ltd* (1989) 2 PRNZ 47 at 49 – 50.
12 *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204, [2015] NZAR 1173.

seeking declarations in relation to the rights and liabilities of certain bodies corporate in relation to title holders of units within the developments to which those bodies corporate related. None of the bodies corporate were sued by Newhaven Waldorf in its initial proceeding. The bodies corporate applied for orders that they be joined as additional defendants.

[15] The Court of Appeal recorded that the approach taken in New Zealand to joinder of parties has long been regarded as liberal.[13] The threshold for an order under r 4.56 is "fairly low".[14] The Court said:[15]

> A cause of action need not necessarily be advanced (or lie) against a defendant to be added. Indeed, where the plaintiff opposes joinder, a cause of action against the additional defendant may not be apparent unless the Court orders re-pleading by the plaintiff. It is the nature of the impact of the proceeding on the additional defendant's rights that is important. As *Pegang* and *Gurtner* make clear, these are not necessarily confined to legal rights, although the case for joinder may be stronger in such a case. Joinder for the defendant is not without risk, of course. It will be bound directly by an adverse outcome, and exposed to costs.

[16] The Court went on to find that as the pleadings asserted limits on the powers and duties of the bodies corporate who wished to be joined, to the extent that these claims may be upheld those bodies corporate would be directly affected by the orders of the Court. The Court therefore upheld the judgment of the High Court by which the bodies corporate were joined.

Discussion

[17] In the present case, each of the four parties IAG seeks to join as a defendant is a party which Ms Robin could have sued in the first instance as of right, if each of those parties could be said, on analysis, to have owed her a duty of care. Whilst this issue was raised in argument, Mr Gedye submitting that each of the proposed additional defendants owed Ms Robin a duty of care in the circumstances of this case, the point was not fully analysed. Mr Gedye says that a claim by Ms Robin against OHML and OHGL is tenable, being both orthodox and reasonably arguable. That, he

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13 At [44].

14 At [46], citing *Beattie v Premier Events Group Ltd* [2012] NZCA 257 at [24].

15 *Newhaven Waldorf Management Ltd v Allen*, above n 12, at [46]; citing *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 (PC); *Gurtner v Circuit* [1968] 2 QB 587.

says, is sufficient. The fact that there might be a subsequent application to strike out is not in his submission a reason not to join these parties in the first place. He also says that each of the proposed defendants is directly affected by the outcome of this case, because IAG foreshadows that in the event it is found liable to Ms Robin, IAG will by subrogation step into her shoes and then issue proceedings against these parties. He submits therefore that Ms Robin should do so now, thus avoiding the strong likelihood of a further set of proceedings.

[18] Mr Galloway points out, however, that the existence of a duty of care will depend on the particular circumstances of the case. In relation to a project manager, the role of OHML, Duffy J said in *Body Corporate 185960 v North Shore City Council*:[16]

> [102] In principle, I can see no reason why someone who takes on the task of managing the construction of a residential development should not incur the same liability as is imposed on contractors, architects and engineers. In this regard a project manager is no different from any other contractor or subcontractor who performs a role in the construction process that is capable of affecting the quality of the result. However, whether such liability arises in any given case will turn on the particular circumstances. An enquiry into the responsibilities attached to the particular role, as well as the actions and omissions of the person who occupied that role, will be necessary.

[19] An enquiry of this nature would need to be made in relation to establishing a duty of care to Ms Robin on the part of each of the proposed defendants, save the Council (see [35] below).

[20] In the circumstances of this case I find that Ms Robin could have sued each of the proposed four defendants, alleging breaches of duty of care to her. To that extent, the test enunciated by Rodney Hansen J is satisfied. That is not the end of the matter, however, because the Court must consider whether in all the circumstances it is in the interests of justice to do so.[17] It is also arguable that the presence of each of these parties before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding. Again, however, the interests of justice must be considered. The Court must look at the nature of the impact of the proceeding on the

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16 *Body Corporate 185960 v North Shore City Council* (2008) 2 NZTR 18-032.

17 *Fonterra Co-Operative Group Ltd v Waikato Coldstorage* Ltd, above n 1, at [16].

rights of each additional defendant.[18] It is appropriate in so doing to consider whether each of the proposed defendants, additional to OHML and OHGL who are already before the Court, could be brought before the Court by third party proceedings, and IAG's rights against those parties adjudicated upon accordingly. This would not, of course, place IAG in the shoes of Ms Robin as it could be, by subrogation, but that is not in my opinion necessarily determinative of the issue before the Court.

[21] Findings of fact in this case may impact the rights of each of the proposed defendants. The quality of the workmanship on the house is called into question in both the first and the second causes of action. In this way, the test enunciated in *Newhaven Waldorf* is also met. It does not necessarily follow, though, that joinder of these parties as defendants is inevitable; there is a pathway by which all but the Council can be before the Court to protect their interests, namely as further third parties. OHML is already a third party, and any liability it may have is already raised in pleadings.

[22] The starting point for discussion of this is the case as presently pleaded by Ms Robin. Her first cause of action is against IAG and is for breach of contract in relation to IAG's obligations under the policy over the damaged house. In the Amended Statement of Claim, Ms Robin pleads that "The repairs were not carried out to the standard required by the policy …". She then gives particulars. In these, she refers to the repair works which have been undertaken, alleging fault in four specific ways. She also pleads, as a particular, a failure to undertake a complete foundation rebuild.

[23] By these pleadings Ms Robin clearly raises the quality of the work undertaken on the house, and the methodology selected. Plainly she intends to engage in the assessment of necessary repairs and the repair process to substantiate her claim of breach of contract. This is evident, too, from the second cause of action (in tort) against CRL. After pleading that CRL owed her a duty of care to ensure that the repairs to the house were carried out to a good standard of workmanship so that all earthquake damage was properly repaired, she alleges breach of this duty and relies on the same

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18 *Newhaven Waldorf Management Ltd v Allen*, above n 12, at [46].

particulars as are pleaded in relation to IAG's breach of its alleged contractual obligation.

[24] Arguably, the particulars pleaded in relation to IAG should be particulars of how the finished product is not a satisfactory response to IAG's contractual obligation in the policy, rather than a summary of how the repairs were done. It is Ms Robin's right to receive the house in repaired condition, and IAG's obligation to ensure that appropriate steps were taken to bring this about. Analysed that way, it is for IAG not Ms Robin to take up responsibility for the alleged faulty end result with those who brought it about.

[25] In fact, it has. It has joined OHML, and OHGL as covenantor. So far neither of those companies has taken any step to join CRL as a fourth party. Their counsel indicated that this will be reviewed once the outcome of the present application is known. On the face of it though, there appears to be a chain of contractual obligations running from OHML through CRL to Houselifters Ltd and Max Contracts Ltd which, as I understand it, contracted with CRL. All could be joined sequentially. By that means all parties save the Council would be before the Court with the obligations of each, and their compliance with those obligations, being issues for determination. The presence of all parties who carried out relevant work on the house would be before the Court. It is necessary to consider, therefore, whether instead of this, and contrary to her wishes, Ms Robin should be obliged to bring all or any of these parties before the Court by causes of action in tort. I return to the Council later in this judgment.

[26] Mr Gedye says that IAG cannot sue House Lifters Ltd, Max Contracts Ltd or the Council in tort. For present purposes I accept that proposition. He gives that as the reason why, should IAG be found liable to Ms Robin, it may wish to issue tort proceedings against those parties adopting Ms Robin's causes of action (as he believes them to be) by subrogation. Thus the issue is whether the duplication of proceedings this would cause should outweigh Ms Robin's wish not to sue the proposed additional defendants.

[27] First, although the scenario outlined by Mr Gedye cannot be ruled out I think it is unlikely to occur. I think it is far more likely that, once this judgment is released,

there will be a sequential joinder of parties down the contractual chain. If that is the case and Ms Robin establishes a breach of contract against IAG, responsibility for that will be sheeted home to the party or parties responsible. With that having occurred, it is not clear to me why there is any likelihood of a further proceeding being issued by IAG.

[28] Secondly, Ms Robin does not have the information she would require to competently plead and present to the Court a case in tort against the parties concerned. She does not know, for example, the terms of any of the engagements, the instructions given to each, or who gave those instructions. She does not know what occurred on site. Although she has obtained professional reports on the condition of her house, that is all the information she has about it. Any further information would have to be obtained by her by way of discovery or interrogatories. In contrast to that, each of the contracting parties in the chain I have described will be in possession of the details it requires in order to establish the responsibilities of the next contracting party and place material before the Court to assess whether those responsibilities have been complied with. In *Paccar Inc v Four Ways Trucking Inc*, Barker J declined an application by a defendant to join defendants, one reason being that there was no evidence the plaintiffs could adduce proof against the proposed additional defendants.[19] That is the position here.

[29] Further, in each case she would have the onus of establishing that a duty of care was owed to her, not of itself a straightforward exercise.[20]

[30] Thirdly, I do not think it is a fair or accurate description by IAG of its role in this case as an intermediary. It is in fact a contracting party with clear written obligations in the policy document which it issued and for which it was paid. Whenever there is a claim against an insurer of substance, it engages others to advise, whether insurance assessors or loss adjustors, or (as here) parties with the skills to advise it on the correct policy response and the way it should be effected, as well as to manage the process in order to ensure that the correct response is achieved. In this very limited sense an insurer is an intermediary in such a process, but this description

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19 *Paccar Inc v Four Ways Trucking Inc*, above n 10.
20 See, for example, [18] above.

was given to me with an implication, as I understood it, that IAG was some sort of a conduit pipe between the insured and those who had the job of putting matters right. IAG's responsibility was considerably more than that and it is squarely pleaded in the first cause of action. I have not discerned in this case anything which might distinguish it from all other cases, where an insurer receives a claim and then engages others to advise and act on its behalf. It could not possibly be suggested that as a matter of principle, when repair work is inadequate for one reason or another, insured parties (or those in their shoes) should turn not just to their insurer but also to those who worked on their property.

[31] In my view the interests of justice are served in this case by Ms Robin suing her insurer and her insurer passing on liability through the contractual chain to which I have referred. In *Paccar Inc v Four Ways Trucking* Barker J declined a defendant's application to join further defendants. He referred to *Mainzeal*[21] and said:[22]

> I emphasised there, as here, the fact that the proposed defendants will be third parties in any event is a factor that is to be taken into account in support of the application …
>
> However, I am not convinced this is a case for displacing the prima facie presumption (I would call it no more than a presumption and not elevate it to the status of a rule) that the plaintiffs can sue whom the plaintiffs wish."

[32] If IAG cannot do so, for any reason (but perhaps particularly the terms of the contract it entered with its elected operatives OHML and OHGL) it is simply left with its primary responsibility to its insured and the insured's assignee. If it cannot pass that on, that is because of actions it took in setting up a response mechanism in the way it did, a matter which is not the responsibility of Ms Robin.

[33] Further, the impact on the proposed defendants, except the Council, of findings in relation to the work carried out on the house would be properly and fully aired before the Court in terms of their respective contractual obligations, thereby satisfying the issue referred to in *Newhaven Waldorf*.

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21 *Mainzeal Corporation Ltd v Contractors Bonding Ltd*, above n 11.
22 *Paccar Inc v Four Ways Trucking Inc*, above n 10, at 496.

[34] For the above reasons I find that it is not in the interests of justice, nor necessary in their interests, that OHML, Houselifters Ltd, or Max Contracts Ltd be joined as defendants to this proceeding.

[35] I turn now to the Council. For present purposes I assume that in the circumstances of this case Ms Robin has a cause of action in tort against the Council in respect of its issue of a code compliance certificate, and that she could have joined the Council at the outset of this case.[23]

[36] I think it unlikely that if IAG were found to be liable to Ms Robin, it would need to sue the Council by way of subrogation of Ms Robin's right to do so in order to recoup its loss. Quite simply, if the work was not code compliant, the contractor(s) responsible would be liable in this case to OHML, and OHML to IAG. If it was code compliant, but still substandard for a reason not related to code compliance, the Council would not be liable anyway.

[37] I find, therefore, that it is not in the interests of justice that the Council be joined as a defendant. Further, in terms of *Newhaven Waldorf*, the proceeding does not impact on the rights of the Council. It concerns the adequacy of IAG's response under the policy, and if found to be inadequate, the responsibility of those who brought that about. It cannot be said that the Council is involved in either of these issues. By the time it issued its code compliance certificate, the work was done.

[38] The application is dismissed.

[39] IAG will pay costs and disbursements to Ms Robin and to OHML and OHGL. OHML and OHGL sought an increase in costs on the basis of the application being made without merit. I do not think that threshold is met. Costs will be on a 2B basis.

J G Matthews
Associate Judge

[23] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190; *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83 [*Spencer on Byron*].

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