

Briefcase

Ritchie v EQC and Lumley The Rule of Uncertainty (High Court)

This case concerns the way in which a homeowner should plead the case against EQC and/or their insurer where the homeowner is uncertain regarding proper apportionment of liability.

Key Points

- If the homeowner, EQC and the private insurer cannot agree apportionment, then the homeowner is able to invoke High Court Rule 4.3(4) and sue both the EQC and the private insurer and have the Court determine the issue;
- If that Rule is pleaded, then the EQC is not entitled to further particulars about apportionment or to have the pleading struck out;
- The homeowner needs to make a prima facie case against the EQC and/or private insurer, but does not need to prove this issue conclusively by its own evidence against any one of the defendants;
- Provided the homeowner succeeds with their claim against the EQC and/or the private insurer, then the liability for costs can be resolved by the unsuccessful defendant paying the successful defendant's costs.

Background

The plaintiffs own a home that was damaged by the Canterbury Earthquake Sequence. The plaintiffs issued proceedings against both the EQC and their private insurer, Lumley,

regarding liability for earthquake damage to their home. The parties did not agree apportionment.

The EQC made interlocutory applications seeking:

- Further particulars from the homeowner regarding the alleged apportionment of damage; or
- The proceeding be struck out because of insufficient particulars.

Apportionment of damage is a complicated but very important issue for homeowners, the EQC and private insurers because:

- The relationship between the EQC and the private insurer regarding liability;
- The vast majority of homes damaged by the earthquakes were not repaired between each earthquake. So, the parties need to retrospectively determine the amount of damage caused by each earthquake;
- If a homeowner settles with the EQC for an amount that the private insurer considers to be less than the EQC's liability for the damage caused by one or more of the earthquakes, then the homeowner could be left with a shortfall for the cost to repair their earthquake damage.¹

¹ *Jarden v Lumley General Insurance (N.Z.) Limited* [2016] NZCA 193 at [26]

The Rule of Uncertainty

HCR 4.3(4) provides:

A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining-

- (a) Which (if any) of the defendants is liable; and
- (b) To what extent

The Court recognised the complexities for parties trying to determine their respective positions on apportionment. Therefore, unless the parties can agree apportionment, it is reasonable and appropriate for a plaintiff to rely on this rule and sue both the EQC and the private insurer; and have the Court apportion the amount of damage caused by each earthquake and the defendants' respective liabilities.

In order to rely on this rule the plaintiffs must:

- Plead it;
- Prove that there is genuine doubt as to the persons against whom they may be entitled relief from; and
- Prove their case against one or both of the defendants. They are able to rely on the defendants' evidence on apportionment as well as their own to do this.

Importantly, we note that this rule only allows a plaintiff to plead that they are unsure whether the EQC or their private insurer is liable for the reinstatement costs for the earthquake damage to their home. It does not enable them to file pleadings with no or vague particulars about the alleged nature and extent of damage, reinstatement methodologies and proper causes of action against the defendants. Proper particulars in those circumstances are still required. It also does not reverse the onus of proof.

If the plaintiff succeeds against one defendant, but not the other, then the issue of costs can be resolved with *Sanderson* and *Bullock* orders (which provide for one defendant paying the other's costs). Though a costs application will not be straight forward and the Court will determine "*the overall justice of the matter as between the three parties concerned*".

Practical Considerations

In practice, all parties should continue to exchange apportionment evidence and try to reach agreement on this issue at the earliest stage with all parties. This often requires all parties to make pragmatic decisions about apportionment based on limited information.

For any further information regarding this please contact Peter Hunt or Kristal Rowe

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