

IN THE COURT OF APPEAL OF NEW ZEALAND

12/6

CA 203/90

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BETWEEN ROYAL INSURANCE FIRE AND  
GENERAL (NEW ZEALAND) LTD

Appellant

A N D GERALD WILLIAM NAIRN

Respondent

Coram: Richardson J  
Gault J  
Anderson J

Hearing: 29 May 1992

Counsel: A.K. Monagan and Stacey Devoy for Appellant  
G.W. Calver for Respondent

Judgment: 29 May 1992

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**ORAL JUDGMENT OF THE COURT DELIVERED BY ANDERSON J**

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In August 1986 the respondent was, and for some years had been, the proprietor of workshop premises with associated plant and equipment situated at Wairoa. On 7 August 1986 the premises were destroyed by fire causing a loss in the sum of \$144,330. The respondent claimed indemnity from the appellant pursuant to a contract of insurance which had been entered into in September 1982 and renewed annually until the year in which the loss was suffered.

The appellant caused enquiries to be made, in consequence of which it declined the respondent's claim on two grounds. First, non disclosure of material

matters affecting the risk, and, second, that the fire was the consequence of a conspiracy between the respondent and others effected with the intention of making fraudulent claims against the appellant. The respondent sued on the contract of insurance. On 13 October 1985 Heron J made an order under Rule 418 of the High Court Rules that the issue of material non disclosure be tried separately. The trial of that issue took place in the High Court at Napier before Gallen J over a period of five days between the 21st and the 25th of May inclusive 1990. Gallen J found that the appellant had not discharged the onus of proving material non disclosure and gave judgment on the issue for the respondent. The issue of alleged conspiracy has not yet been tried. The appellant appeals against Gallen J's judgment.

No contested issues of law arise on this appeal, the essential issue being whether Gallen J made an error of fact in concluding that information had been sufficiently disclosed to the appellant. The resolution of that issue required the trial Judge to make a finding as to credibility as between Mr Paul Joseph Gavin, who gave evidence on behalf of the respondent, and Mr Bruce Gordon Buxton, who gave evidence on behalf of the appellant.

Between 1979 and 1982 Mr Buxton was the appellant's resident inspector based in Napier. Over the same period Mr Gavin was a life assurance and fire and general assurance agent for the Commercial Union Insurance Company. Mr Gavin had knowledge of the respondent's history of insurance cover and claims both with the Commercial Insurance Company and other insurers with whom the respondent had been covered. Mr Nairn's insurance dealings with Mr Gavin commenced in respect of a pleasure craft called the Shantaine which was covered by the New Zealand Insurance Company in March 1979 when the vessel was badly damaged in an accident in Napier harbour. An assessor for the New Zealand Insurance Company advised that company in May 1979 that because of the hull's dangerous condition the New Zealand Insurance Company should terminate the risk, which it

duly did. Mr Nairn consulted Mr Gavin who arranged cover with the Commercial Union. Mr Gavin's evidence was to the effect that he had considerable diffidence whether the Commercial Union would in fact accept the risk but that after a discussion with that company the risk was accepted. In December 1979 the Shantaine was again damaged whilst in use and the Commercial Union indemnified the respondent.

Mr Nairn's long history of propensity for accidents continued with a fire to another vessel he owned. He claimed for this loss from the Commercial Union and in September 1981 received a payment of \$600. The Commercial Union cancelled some of Mr Nairn's policies almost immediately afterwards. This left the respondent without insurance cover in respect of his residence. He consulted Mr Gavin who had delivered the Commercial Union's notice of cancellation. Mr Gavin knew that the appellant was represented in Wairoa by Mr Buxton and he advised the respondent to approach Mr Buxton through his solicitor. A meeting was duly arranged and a proposal was completed with the appellant on 13 September 1981. This proposal contained a common declaration as to disclosure of material information and as to the fact of any insurer having declined to insure, cancel or refuse to renew, or where any insurer had required special terms. It also contained a common form of questionnaire concerning previous claims for the past five years. There is no dispute that the terms of the proposal did not amount to material disclosure. The respondent's case, however, is that both Mr Nairn and, to a greater extent, Mr Gavin had supplied Mr Buxton with sufficient information as to amount to compliance with the respondent's duty of disclosure. The appellant's case at trial and on appeal is that information said to have been conveyed by Mr Gavin to Mr Buxton was not conveyed and that Mr Buxton's evidence to this effect should have been accepted by the trial Judge in preference to the evidence of Mr Gavin.

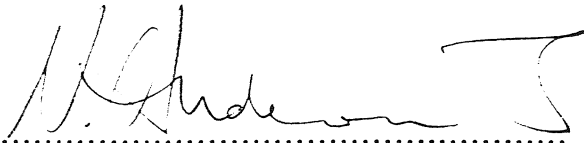
In his careful and detailed submissions Mr Monagan acknowledges the appellant's difficulty in seeking to persuade an Appellate Court that a trial Judge's findings of fact based on the assessment of the reliability of witnesses whose evidence is in conflict was wrong. This necessary concession recognises the singular advantage of the Court at first instance in being able not merely to assess the reliability of witnesses in terms of demeanour, but also being able to evaluate the weight and relevance of evidence as the trial develops. An Appellate Court cannot recapture those matters from a written record and before an Appellate Court can be justified in taking a different view of reliability or credibility an appellant must clearly show that the trial Judge's assessment must be wrong. The appellant has not done so in this case. To some extent the implications of either Mr Buxton's or Mr Gavin's omission to pass on to his respective principal certain information was examined by counsel in terms of serious dereliction of responsibility. It should be remembered, however, that it is somewhat easier to assess materiality with the benefit of hindsight in the context of the actual occurrence of a risk than it is to weigh the importance of information at the time business is being sought by insurance agents or employees. Fairness to Mr Buxton requires that such observation be made.

The trial Judge had to decide between Mr Buxton, whose memory of events which occurred almost 10 years before was candidly acknowledged by him to be imperfect, and Mr Gavin, whose evidence, if untrue, could only amount to deliberate perjury for the benefit of a person with whom he had no business dealings and whose interests were plainly unconnected with his own. Mr Buxton, Mr Nairn and Mr Gavin each gave evidence before the trial Judge for the best part of a day. The Judge's opportunity to assess those witnesses in terms of reliability was considerable.

Mr Monagan's method of challenging the essential finding was to test it against inferences. Thus he submitted that in the light of the evidence if Mr Gavin had in fact passed on relevant information to the Commercial Union, the Commercial Union would not have accepted the risk on the boat either at all or without modification of the scope of the risk or the amount of the excess. Since the Commercial Union did not modify the risk, the inference must be that Mr Gavin did not pass on the information, wherefore his credibility is by that fact demeaned. He also submitted that a person as experienced in insurance business as Mr Buxton could not have failed to pass on the information conveyed by Mr Gavin and if he had passed this on the appellant would not have accepted the relevant risk. Since the appellant did accept the risk, the inference must be that Mr Buxton had not been informed of the matters Mr Gavin gave evidence about.

Those submissions, of course, were not without weight but they were urged upon the trial Judge as they were on this Court. In the result the trial Judge's assessment of reliability favoured Mr Gavin. We have not been persuaded that the trial Judge's assessment in that respect is wrong.

We have, of course, examined the helpful detail of Mr Monagan's submissions before us but, in the end, the issue is as refined and as determinative as we have found. The appeal must be dismissed. The respondent is entitled to costs which we fix at \$3500 together with reasonable disbursements as fixed by the Registrar, including travelling and accommodation costs for counsel.



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N.C. Anderson, J.

Solicitors

Carlile Dowling, Napier for Appellant

Gresson Grayson & Calver, Hastings for Respondent