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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 329/83

1078

BETWEEN LEWIS MARTYN KEEGAN

PLAINTIFF

A N D HICKSON & RAVEN LIMITED

DEFENDANT

Judgment: 28 August 1984

Hearing: 27 August 1984

Counsel: S. C.Ennor for Plaintiff
J. M. Priestley for Defendant

ORAL JUDGMENT OF CASEY J.

Mr Keegan is a businessman with overseas interests involving residence and travel abroad. Ten years ago he brought a Partek Philippe watch in Fiji for 1,800 pounds Sterling and has worn it as his own personal watch ever since. A valuation obtained by him in Sydney in 1980 showed a figure of $A11,000. He also possessed two other valuable watches, a second Partek Philippe which he bought in Hong Kong for $U.S.6,000 I believe about seven years ago and a Rollex watch. The latter, he said, had been given to his godson around November 1981 while the one purchased in Hong Kong has been kept in safe custody there. His intention eventually is to leave one each to his two sons by his Will. He was due to go overseas in early November 1981.

Mr Keegan's practice has been to rely on an accountancy firm with branches overseas to attend to many of his personal and business details and the Auckland partner who looked after his interest was a Mr Valabh. His custom was to raise matters requiring attention from time to time by notes or conversations with this gentleman who made up a check list which they would go through on his visits to the firm. On

this occasion Mr Keegan saw Mr Valabh at his office round about 1st or 2nd November 1981, intending to go overseas on the 3rd of that month. He had previously raised with him the matter of insurance and Mr Valabh had introduced him to the Defendant firm of brokers, where he dealt with Mr Marsh and I think that they built up an efficient and friendly relationship. The latter had attended to Mr Keegan's travel insurance questions and other related business matters. A point especially involving his attention was medical cover for his visits abroad. That was arranged satisfactorily but Mr Marsh says that he mentioned the low limits of travel cover on individual personal items and evidently that problem had not been faced up to or dealt with by the time Mr Keegan was due to go abroad on this occasion.

At some stage before November he had raised in a memorandum to Mr Valabh the question of insurance for his watch, which he said was then uninsured, but I gather it had been the subject of some cover in the past, not through Mr Marsh. Mr Valabh did nothing positive at that stage but put the matter on the check list, expecting Mr Keegan to call before he left New Zealand which, of course, he duly did as I have related. This list was discussed between then and when they got down to the question of the watch, Mr Valabh arranged for him to phone Mr Marsh and Mr Keegan made the call on the spot from his office. That conversation, as Counsel recognise, is crucial to the decision in this case. Mr Keegan claims that he made it clear he was going overseas and wanted cover for the watch he was wearing. Mr Marsh accepted that he phoned, but his version of the conversation was rather different. As he recalls it, there were three watches involved; that a Partek Phillipe was worn only on important occasions by Mr Keegan and was otherwise kept in safety custody in New Zealand, and he understood remained in this country, and he also says he was told they would be kept for his sons. He therefore only arranged cover for the watches in New Zealand, and he said that he asked Mr Keegan for the valuation; he was

told of the Australian figure as the certificate was in Mr Keegan's possession in the office. He agrees he told Mr Keegan that he was covered and requested that the certificate for the valuation be sent to him, obviously for submission to the Monarch Insurance Company, which at that stage appears to be the one in which Mr Marsh was arranging all Mr keegan's insurance.

The latter left these details to Mr Valabh. He duly proceeded overseas and on 29th November this watch was stolen while he was in a hotel at Singapore. He reported it to the hotel authorities. On 2nd December he sent a telex to Mr Valabh asking him to inform the insurer of the circumstances. The latter cannot recall whether he did so then. Mr Marsh says that the first advice he had of the loss was on 23rd December, when he recalls a phone call from Messrs Keegan and Valabh from a restaurant. Mr Valabh never got around to sending the valuation certificate until 14th December and I must say that even allowing for the friendly relationship that appears to have existed between these gentleman, this seems to have been a curiously casual approach to a piece of business which involved some very valuable items.

After the matter was raised with Mr Marsh, he says he recalled a conversation in which the problem was discussed and he wrote to Mr Valabh on 12th January 1982 setting out his recollection of the telephone conversation of early November. In his evidence-in-chief Mr Keegan made it clear that he was quite certain of what he wanted, although he did not at first give a very detailed account of the conversation that he remembered having with Mr Marsh, saying in effect simply that he was going overseas, and that he wanted cover for the watch he was wearing. He mentioned the question of insuring the Rollex watch but says, after discussing it he decided this was a matter that could be left to his godson and he also recollected asking if the watch in Hong Kong could be covered under the same policy but was told that this would need

a separate cover. In cross-examination he stuck basically to this account of the conversation and its general tenor received some support from Mr Valabh although, as one would expect after so many years, hedid not lay claim to any accurate or detailed recollection of what was said. Mr Keegan was cross-examined about the figure of $6,000 which he placed on this watch in reporting its loss to the hotel management in Singapore at the time. He explained that this constituted the only accurate information he had about costs, being the price he paid for the similar watch bought in Hong Kong in the two or three years previously, as I understood his evidence. I find this part of his account a little difficult to understand, bearing in mind that he had the insurance valuation in his hand so shortly before in the office when he made the phone call to Mr Marsh.

He sues the Defendant brokers for the amount of that valuation at the time he claims the cover was issued, and in New Zealand terms the figure is fixed by Mr Ennor at $15,423 and he also seeks interest. The claim is in the alternative - negligence in advising the Plaintiff that he did have cover; or under contract for breach of the undertaking to obtain the appropriate insurance to cover the watch abroad. The Defendant accepts that if the instruction to furnish insurance of the type that would have covered this item in Singapore had been given and accepted, then liability would exist, and there was no dispute over quantum. The defence is that there was simply no such instruction given or received, nor was liability for this obligation accepted by the Defendant company through Mr Marsh.

He gave evidence and covered his general background in insurance brokerage. In 1974 he became a partner in what is now the Defendant company and said he was introduced about 1980 to Mr Keegan through Mr Valabh. He mentioned the discussions to which I have already referred about increasing the travel policy, but was not sure whether these took place in 1980 or 1981, and says he pointed out the

problem with the individual limits on various items, the maximum being $500 for any one. He said that Mr Keegan did not at that stage raise the question of valuable items like watches. He recalled the phone conversation of November and said that it opened by Mr Keegan's reference to two watches which he was keeping for his sons and then he mentioned the third Rollex watch. He was told that they were usually kept in a bank vault and were only worn very occasionally in New Zealand, and having regard to the value, this would not, I think, strike anybody as unusual. He denied that he had any advice or intimation that Mr Keegan intended to take the watch out of New Zealand and his understanding was that he was interested in getting cover over all three watches.

He asked for valuation certificates, and was given an estimate of the the Partek Philippe watches and he immediately contacted Mr Stubbs of the Monarch Insurance Company and made a note that the two watches were held covered and to be added to the existing domestic effects policy. However, there is some discrepancy between that note and what was related in his evidence because it refers only to two watches, but he explained that he went around to Mr Stubbs next day and saw his "held covered" book in which there was certainly a reference to three. He mentioned the problems and delays in getting the valuations from Mr Valabh and only received one on 14th December relating to the Partek Philippe, but it did have a pencil note on it about the valuation of the Rollex watch as well. He described how he was told on 23rd December in a conversation originating from the Bonaparte Restaurant of the theft and recalls that he was surprised because there was no claim under the travel policy which he knew was in force and intimated this accordingly to Mr Keegan.

He says once he learnt of this development he tried immediately to effect overseas cover for the other two watches, but found there were considerable problems and eventually only a very restricted cover would have been

available. He also went on to describe a meeting and the letter he wrote to which I have already referred. There was a discrepancy in his evidence of the date that he received the first information of the loss. He fixed quite definitely the 23rd December when he was phoned from the restaurant. It now transpires that Mr Keegan was overseas on that date and from the note in his diary it is, more likely that the real date was 16th December. There is certainly no dispute that such a phone call was made. Really nothing turns on this except as indicating a mistake on something Mr Marsh felt very sure about and this, of course, is something I can take into account in assessing what weight to put on his evidence in general.

It is certainly a well known fact that people tend to recall matters in all honesty in ways that tend to support their interest. In saying this I don't impute any moral blame to either Mr Keegan or Mr Marsh. It is simply something that the Courts encounter very frequently in situations where people are doing their best to remember events which took place a long time ago and which they had no particular reason to imprint on their memory at the time. I accept that the conversation on the evidence I have heard ranged over three watches, and safe custody and the sons were mentioned. From what I have heard from both sides, I think it was open for these two people - one firmly knowing what cover he wanted; the other with his mind turned to practicalities of insurance, - to reach different understandings of the effect of what was said or heard, without any fault on either side. I believe Mr Marsh did not at that time have a great deal of experience in this relatively new field. He now says that it is unlikely that such a cover could be arranged. As I have indicated, he says he tried to get it for the other two watches immediately after learning of the theft, but was unsuccessful in obtaining it, certainly on the terms that Mr Keegan would have wanted. However, in his letter of 12th January explaining the situation, he made a clear statement leading any reader to believe that had he been told of the real position,

he could have arranged cover immediately. In spite of Mr Priestley's explanation, such an assertion suggests a mind that might jump rather readily to a conclusion without adequate thought and this, like his confident assertions about the date of the restaurant coversation, constitute a pointer - but I emphasise, no more than a pointer - to a suggestion that such an attitude might have played its part in his understanding of what Mr Keegan was telling him.

I am faced with the problem of weighing up the evidence of these two gentlemen whose honesty I have no reason to question. My uncertainty is over its reliability. Surprisingly, there was no record or acknowledgment of the brief telephone conversation from either side, but Mr Marsh did record his account of what took place in his letter of 12th January. I do not think it was seriously suggested this was a fabrication and I would certainly not be prepared to make such a finding, particularly in the light of Mr Valabh's view of Mr Marsh's integrity. I really get little or no help from the other surrounding facts. Mr Marsh acted immediately in a way which was fully consistent with his understanding of the conversation, while Mr Keegan appears to have been in no doubt that he had cover from the terms of the telex he sent to Mr Valabh a month later and to which I have already referred. The latter was uncertain about whether he told Mr Marsh of the loss. I accept the evidence that this did not happen until the conversation from the restaurant, which it now seems took place on the 16th rather than the 23rd December. Indeed, I find this aspect and the delay over the valuation certificate an unsatisfactory feature of the Plaintiff's case,although Mr Valabh at the end of his evidence certainly mentioned Mr Keegan's statement that he spoke of the watch he was wearing for which he sought cover.

What emerges very clearly in this case is that there was a complete misunderstanding between these two men. I think it is a graphic instance of the confusion that can

arise when people rely on a brief phone conversation to do their business under circumstances of some pressure, bearing in mind that Mr Keegan wanted this matter fixed immediately because he was taking off next day. As I have mentioned, the understanding of each imay have been affected by their different points of view and experience. Summing up the matter at the end of the day, I have to say that I am left in such doubt by the conflicting evidence that I cannot conclude Mr Keegan has taken me to the stage of holding it is more probable than not that he made his requirements sufficiently clear to Mr Marsh, so that the latter understood and assented to them, or negligently advised him that the cover he wanted was available and accepted. To use Mr Priestley's expression, it is really a case where the parties simply sailed past each other on parallel courses and I do not think any blame can be laid at the door of either of them for what happened.

There must be judgment in these circumstances for the Defendant with scale costs for one day plus disbursements and witnesses expenses to be fixed by the Registrar. I make an order directing the return of the original valuation

Solicitors:

Glaister Ennor & Kiff, Auckland, for Plaintiff
R.L. Tringham, Auckland, for Defendant