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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.121/83

971

IN THE MATTER of the District Courts Act 1947

A N D

IN THE MATTER of an appeal against a final determination of the District Court made on the 1st day of August 1983

BETWEEN MOLYNEUX RENTALS LIMITED a duly incorporated company having its registered office at Dunedin

Appellant

A N D JOHN ASHLEY BROSNAN of Dunedin, Ministry of Works employee

First Respondent

A N D JEAN CAMPBELL LOGAN of Gore, registered nurse

Second Respondent

Hearing: 19 July 1984

Counsel: D.J. More for Appellant
R.P. Bates for First Respondent
A.J. Logan for Second Respondent

Judgment: 20 AUG 1984

JUDGMENT OF HARDIE BOYS J.

In the District Court the second respondent, Miss Logan, sued the first respondent, Mr Brosnan, for damage caused to her motor vehicle when near Cromwell it was involved in a collision with a vehicle being driven by him and which he had obtained on hire from the appellant Molyneux Rentals Ltd. His defence of

contributory negligence failed and judgment was given for Miss Logan for the sum claimed, but an application for interest was refused and Miss Logan has appealed against that refusal.

Mr Brosnan joined Molyneux Rentals Ltd as a third party in the action, claiming that he was entitled to be indemnified by it pursuant to an insurance provision in the hire contract. The Judge held in favour of Mr Brosnan and gave judgment for a full indemnity in his favour. Molyneux Rentals Ltd appeals against that judgment. The questions raised by the two appeals are entirely separate and I will deal with them in turn.

Is Miss Logan entitled to interest?

The proceedings were issued on 25 March 1982. The statement of claim contained the following allegation:

> " As a result of the collision it was found that the plaintiff's vehicle was uneconomic to repair and the value of the vehicle at that time was $7,049 less salvage value of $1200 plus an assessor's fee of $40 making the total sum $5,889."

There then followed a prayer for judgment in the sum of $5,889 together with "interest thereon at the rate of 11% per annum in accordance with s 87(1) of the Judicature Act 1908 from 12 June 1981 down to the date of judgment".

Counsel had agreed that the plaintiff's loss was properly calculated at $5,889 and that it was unnecessary for evidence to be called to prove that loss. No doubt for this reason, there was in fact no evidence at all as to what happened to the vehicle after the accident or as to what steps if any Miss Logan took, and if she took any what financial resources she used, to replace it. Nor was there any evidence

as to the significance of the date of 12 June 1981 in the claim for interest. The Judge said:

> " I was not told the significance of the date of 12 June 1981 but I assume that is supposed to be the date payment of the account for repairs was made. Because, however, there was no evidence when the amount was paid and therefore no evidence of how long the plaintiff had been out of her money, I am not prepared to allow the claim for interest."

A later attempt to obtain a rehearing in relation to interest so that further evidence could be given was unsuccessful.

Since the summons was issued, s 4 of the District Courts Amendment Act (No 2) 1982 has, by adding a new s 62B to the principal Act, made it clear that a District Court has in an ordinary action the same discretion to award interest as is conferred on the High Court and the Court of Appeal by s 87 of the Judicature Act 1908. It is important to appreciate the purpose for which that discretion is conferred. It was stated by Lord Wright in Riches v Westminster Bank [1947] AC 390, 400 in these words:

> " ...the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation..."

And by Lord Denning M.R. in Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447, 468 thus:

> " It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

The fact that the plaintiff has not been out of pocket does not of itself prevent interest being awarded (see Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394, 411-412), but of course it will be a relevant factor in the exercise of the discretion.

In the present case, the discretion had to be exercised in the light of all the circumstances known to the Court. Whilst the evidence was wanting, the Court was aware of the amount of the agreed loss and was entitled to look to the statement of claim which showed that that loss was calculated on the basis that the car was damaged beyond repair. Whether she chose to buy another vehicle or not, the plaintiff was entitled to immediate compensation for the loss she sustained, but she did not receive it. Instead the defendant had the use of the money himself. It is in my view a plain case for an award of interest.

Mr Bates submitted that Miss Logan should not have interest because she was insured. He did not cite authority, but I see that that was the view of the Court of Appeal in the Harbutt Plasticine case. However that decision was explained by that Court in H. Cousins & Co Ltd v D & C Carriers Ltd [1971] 2 QB 230, and it is clear that it does not apply where the insurer has the usual rights of subrogation. But in this

case, for the very reason that the Judge refused to allow a rehearing, there is no evidence that Miss Logan was insured and so the point cannot even arise.

The general practice is for interest to be awarded from the date the proceedings were issued: see Tauranga Harbour Board v Clark [1971] NZLR 197 and I think that is appropriate in this case. Accordingly, the second respondent's appeal is allowed, and I order that the judgment entered in the District Court in her favour against Mr Brosnan be varied by the addition of a sum representing interest at 11% on $5,889 from 25 March 1982 to 1 August 1983. The first respondent is ordered to pay the second respondent $100 on account of the costs of the appeal together with any disbursements approved by the Registrar.

Is Mr Brosnan entitled to an indemnity from Molyneux Rentals Ltd?

Mr Brosnan was employed by the Ministry of Works and Development in Dunedin. He had been sent with others to the Cromwell district to conduct a traffic survey. The provision of transport for the party was the responsibility of Mr Hill, an officer of the Ministry in Alexandra. He was unable to provide them with a departmental vehicle and accordingly arranged to obtain one from Molyneux Rentals Ltd. He had dealt with that company over some years and had developed a useful working relationship with its staff, particularly Mr McLean the manager. The relationship was obviously valuable to Molyneux Rentals Ltd and Mr McLean always sought if he could to meet Mr Hill's requirements. Thus if a rental vehicle was required and none was available, a vehicle would be supplied on loan and without charge from the stock of Molyneux Motors Ltd an

associated company with adjoining premises of which Mr McLean was also the manager.

On the occasion in question here, no rental car was available for Mr Brosnan and his party. Accordingly a vehicle belonging to Molyneux Motors Ltd was provided for them. Unfortunately no one in the Ministry was told that this was being done so that when Mr Brosnan called to collect the vehicle arranged for him he assumed it to be a rental car. And due to some confusion in Molyneux Rentals Ltd's office, he was asked to complete and sign a rental agreement which had already been partly filled out. This he duly did, except that he omitted to complete that portion of the form by which the hirer indicates whether he wishes the company to indemnify him in respect of third party property damage. There is of course an additional charge for this. Because it was normal for the Ministry to avail itself of this benefit, when the clerk prior to Mr Brosnan's arrival was filling out some of the details on the form, she included the cost of the insurance cover in the column in which the total hire costs were recorded. Mr Brosnan said that he noticed that the insurance charge had been written in but no one told him to complete the insurance application itself. He merely signed where he was told to sign. Mr McLean said that the Ministry usually took out accident insurance and that even if on any occasion the form were not completed in that respect the Ministry would be debited with the insurance charge and it would be paid. He also said that cars in Molyneux Motors Ltd's stock were covered by insurance except where they were let out for hire or reward. That is why no charge was made when they were lent to the Ministry. It was

implicit in his evidence that that insurance cover extended to the use of such vehicles when they were on loan to the Ministry; in other words it was part of the loan arrangement that the Ministry would be indemnified in respect of any accident occurring whilst a vehicle was on loan to it. But that indemnity was provided by Molyneux Motors Ltd whose vehicle it was and whose insurance cover applied, not by Molyneux Rentals Ltd, for its insurance cover could not extend to such a vehicle.

It was a breach of Molyneux Rentals Ltd's rental car licence to hire out the car which Mr Brosnan was given, and as soon as Mr McLean learned what had happened he telephoned Mr Hill and told him that the vehicle Mr Brosnan had was not a rental vehicle, but that it could be retained on loan until a rental vehicle was available the following morning and that Mr Brosnan should return the car then. It is clear that this was agreed to by Mr Hill and that both parties understood that thereafter the vehicle was on loan and not on hire. Unfortunately Mr Brosnan was involved in the accident with Miss Logan before Mr Hill was able to communicate with him and instruct him to return the vehicle.

It was Mr Bates' submission in the lower Court that Mr Brosnan was the hirer of the vehicle and that accordingly his contractual rights could not be altered by any discussion between Mr McLean and Mr Hill. The Judge held that the hirer was the Ministry and in my view that was correct. Mr Brosnan was simply the driver. The Judge also held that the rental agreement included the contract of insurance: it arose out of the general arrangement between the Ministry and the company

rather than from the agreement itself, although the inclusion of the insurance charge was confirmatory of the existence of the arrangement. He did not however find it necessary to determine whether as a result of the conversation between Mr Hill and Mr McLean the hire contract had been cancelled, for it was his view that even if it had been the insurance provision had not; and that, being severable from the hire contract, it continued in force. It is in my opinion clear from the evidence of both Mr Hill and Mr McLean that the hire contract was indeed cancelled and that it was replaced by a contract of loan. But that did not affect the indemnity, for it applied whether the vehicle was hired or lent, but it now attached to Molyneux Motors Ltd, not Molyneux Rentals Ltd.

In his argument in this Court Mr More raised questions of illegality and mistake. It is however unnecessary to go into these questions. Whatever may have been the position before Mr McLean spoke to Mr Hill, from that time on there was a contract of loan between Molyneux Motors Ltd and the Ministry, which would be quite unaffected by any impediment to the effectiveness of the earlier hire contract.

The position therefore is that at the time of the accident Mr Brosnan was the driver of a car lent to the Ministry by Molyneux Motors Ltd under an arrangement whereby the Ministry was indemnified by that company against third party property damage. However Miss Logan did not sue the Ministry. She sued Mr Brosnan. And whilst he might have rights of indemnity against the Ministry he did not pursue them. The Ministry was not a party to the action.

The Judge, on the basis that the indemnity in the hire contract had remained in force, held that Mr Brosnan's right to be indemnified by Molyneux Rentals Ltd arose by virtue of the contract of hire: not expressly, but by necessary implication from the fact that the contract recognised that Mr Brosnan would be the driver. Logic requires that conclusion, for if it were otherwise the effectiveness of the indemnity would depend on whether the third party chose to sue the hirer or the authorised driver and that cannot have been within the contemplation of the parties. The same argument commends itself in the situation which in fact pertained, where the car was lent by Molyneux Motors Ltd. Yet such has not been the law, except in limited circumstances or as the result of particular legislation. In New Zealand the position is now covered by the Contracts (Privity) Act 1982, but before that it was as established by the Privy Council in Vandepitte v Preferred Accident Insurance Corporation of New York [1933] AC 70. In that case it was held that a policy expressly extending to indemnify any person driving with the assured's authority "confers no rights on such a person either at common law or in equity unless there was an intention on the part of the assured to create a trust for such person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf": per Goddard J in Tattersall v Drysdale [1935] 2 KB 174, 180. A claim by such a person was admitted in Kelly v Cornhill Insurance Co [1964] 1 All ER 321 and in Digby v General Accident Fire & Life Assurance Corporation Ltd [1943] AC 121, but the first was a case from Scotland where the law was different and the second was a case under specific legislation. The best

hope lay in a claim by the assured himself that his driver be indemnified: see e.g. Williams v Baltic Insurance Association of London Ltd [1924] 2 KB 282.

With respect, I therefore doubt that the Judge was right in concluding that Mr Brosnan was entitled to an indemnity from Molyneux Rentals Ltd under the hire agreement. But I do not need to decide that, for if Mr Brosnan has any such right it can only be against Molyneux Motors Ltd, which is not a party to these proceedings.

This case went wrong because the wrong parties were before the Court. It is to be hoped that the correct parties may now be able to resolve the matter so that Mr Brosnan will not personally have to satisfy his liability to Miss Logan under the judgment in her favour.

The appellant's appeal is allowed and I order that judgment on the third party notice be entered in the District Court for Molyneux Rentals Ltd, with the usual consequences as to costs in that Court. Mr More having indicated that he did not ask for costs in this Court, none will be allowed.

Solicitors:

Quelch McKewen Tohill & More, DUNEDIN, for Appellant
Crown Solicitor, DUNEDIN, for First Respondent
Ross, Dowling, Marquet & Griffin, DUNEDIN, for Second Respondent.