

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.418/83

404

BETWEEN CLIFFORD ANDREW RODGER
late of Flat 3, London
Street, Christchurch
now of Lakeland Regency
Hotel, Queenstown,
Painter

Appellant

A N D DOMINION TELEVISION
RENTALS LIMITED a duly
incorporated company
having its registered
office at Auckland

Respondent

Hearing: 23 March 1984
Counsel: R. Fee for Appellant
G. Venning for Respondent
Judgment: 28 MAR 1984

JUDGMENT OF ROPER J.

This is an appeal in civil proceedings in which Dominion Television as Plaintiff in the Court below obtained judgment against the Appellant for arrears of rental of a television set and the value of the set, which was not returned at the conclusion of the hiring.

It is not disputed that on the 19th December 1979 the Appellant hired the television set and failed to return it but his contention is that he is entitled to rely on this provision in the hiring agreement:-

" The Subscriber shall use the equipment in a careful and proper manner and shall indemnify the owner against all loss of or damage to the equipment (fair wear and tear, loss by burglary following forcible and violent entry of the Subscriber's premises or by fire excepted)."

The Appellant claimed that the set had been stolen so bringing him within the burglary exception.

A Mr Leftwich of the Respondent company said that his company lost contact with the Appellant after the 19th December. He left his address in London Street without leaving a forwarding address, and the company did not come across him again until the 21st July 1980 when the Appellant said that the set had been stolen from his flat between the 1st March and 3rd April 1980. Mr Leftwich was able to confirm that a complaint of theft had been made by the Appellant to the police at Rotorua on the 23rd May, although the Appellant claimed in evidence that an earlier report had been made to the Police in Christchurch but not pursued.

The owner of the flat - a Mr Price, repossessed the flat on the 20th March for non-payment of rent, the Appellant not then being in residence. He saw no signs of a break-in whatsoever and there were personal belongings of the Appellant still in the flat. There was no television set in the flat. Thereafter Mr Price occupied the flat himself. The Appellant said in evidence that in February 1980 he went to Te Anau on a painting job and before he left he nailed up the windows, and generally made the flat secure. He said that he did not know how long he was to be in Te Anau but in the event was there three months. He said he returned to his flat at the end of April but could not gain entry. The windows were still

boarded up as he had left them but his key would not fit the lock. (There was no evidence from Mr Price that he had changed the lock and indeed he was not questioned on that issue.) The Appellant said he rang the Police in Christchurch and told them of his suspicion that someone had broken into his flat although why he should have reached that conclusion is not clear. He then left for Rotorua and has never been back to the flat since. He did report a theft to the Police in Rotorua.

The learned Trial Judge rejected the Appellant's story out of hand in these terms:-

"However, the exact date is quite immaterial because I did not find the defendant's evidence credible to any degree whatsoever. I reject it entirely. I gained the impression he was a most untruthful witness. There is not the slightest evidence to suggest that the flat was broken into, nor that the TV set was stolen by some person other than the defendant."

Mr Fee submitted that the Trial Judge was not justified in making his finding of credibility against the Appellant but I cannot agree with that submission. Even on the printed record the Appellant's testimony does not inspire confidence. Even the Appellant's apparent election to continue with the hiring when he knew he could be away from his flat for a period running into months requires some explanation, as does his failure to pay rent for the flat where he alleged he had \$1400 worth of property, none of which has been recovered by his account.

Apart from that, even if the Appellant's evidence was accepted in its entirety it does not establish "burglary following forcible and violent entry".

I see no merit in this appeal and it is dismissed with costs to the Respondent of \$130 and disbursements (if any) as fixed by the Registrar.

A handwritten signature in black ink, appearing to be 'R. J. King', written in a cursive style.

Solicitors:

Lane, Neave & Co., Christchurch, for Appellant

McVeagh Fleming Goldwater & Partners, Auckland, for Respondent