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NZLR

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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.13/83

206

BETWEEN: ROBERT CHARLES MARTIN of Edgecumbe, Mill Worker
a n d
MARY ANN MARTIN of Edgecumbe, his wife

Plaintiffs

A N D: THE NATIONAL INSURANCE COMPANY OF NEW ZEALAND LIMITED a duly incorporated company having its registered office at Dunedin and carrying on business as Insurers

Defendant

Hearing: 12 and 13 March 1984

Judgment: 15 March 1984

Counsel: G R Joyce and T Willis for plaintiffs
J F Olphert for defendant

Judgment delivered

JUDGMENT OF GALLEN, J.

Deputy Registrar

In August 1982 the plaintiffs purchased a house property in College Road, Edgecumbe. The purpose of the purchase has some significance. Mr Martin's elderly parents were looking for a house property in consequence of the retirement of Mr Martin senior. He and his wife had previously had the advantage of rented accommodation provided by his employers, and with Mr Martin senior's impending retirement, re-housing was necessary. The purchase price of the property was $41,000.00 and this was raised by Mr and Mrs Martin senior providing the sum of $25,000.00 - effectively their life savings; $6000.00 being contributed

by the plaintiff, Robert Martin; and a first mortgage for $10,000.00 being arranged through the Metropolitan Life Assurance Company for a period of five years with a 14% interest rate. The reason for purchasing the property in the name of the plaintiffs was the fact that Mr Martin senior was not able to obtain a suitable mortgage advance because of his age.

There is evidence that the plaintiffs and Mr and Mrs Martin senior began tidying up the garden which apparently had been rather neglected. On the 9th September 1982 the plaintiffs and Mr and Mrs Martin senior worked at the property during the day. They were using a chain-saw and for that purpose had both petrol and oil with them. The evidence is that all four left the property somewhere between 2:30 and 3:00 p.m. Somewhere between 5:00 and 6:00 p.m. the plaintiff, Mr Robert Martin, was seen at the property by two witnesses, one of whom spoke to him. The plaintiff, Mr Robert Martin, is employed by the Tasman Pulp and Paper Company Limited at Kawerau, and at the time was working on the night-shift which effectively means starting at 12 midnight and working through until 8:00 a.m. the following morning. At approximately 3:45 a.m. the following morning the next-door neighbour, Mrs Anne Benge, was woken by what she described as "an explosion" next door. There was apparently a second explosion. She looked out of her window and saw the house next door to her, that purchased by the Martins, in flames. Mrs Benge then sought assistance, and the time is further confirmed by the fact that the Fire

Brigade logged the fire call at 3:50 a.m. The Edgecumbe Volunteer Fire Brigade attended the fire and managed to put it out, saving the house although it was very extensively damaged.

There was also evidence that the back door of the house had been forced at some time. It was normally secured, not by a lock but by a comparatively small bolt. When the Fire Brigade attended, the back door was not secure and subsequent investigation established that the hasp holding the bolt had been forced out of position. It appears that sufficient force was used to break the heads of the screws which held the hasp, but surprisingly there were no marks on the door itself to indicate the use of an instrument or how the force had been applied.

Following the purchase, Mr Robert Martin had arranged insurance cover over the house with a Mr Peter Gibbs, who was the agent for the defendant, the National Insurance Company Limited. Mr Gibbs had had some involvement in the purchase of the property. He did not inspect it but discussed the kind of policy which he regarded as suitable with the plaintiffs and, on his recommendation, a reinstatement policy for $45,000.00 was taken out by the plaintiffs with the defendant. Investigations following the fire established that there were suspicious circumstances, and there is no doubt on the evidence that the fire was deliberately lit and that substantial quantities of a flammable liquid had been spread throughout the house before the fire occurred.

In those circumstances, the defendant declined liability under the policy and put forward the positive defence in these proceedings that the plaintiff, Robert Charles Martin, had fraudulently set fire to the house himself.

I should say here that other defences were originally raised and a number of issues in contention. I am grateful to counsel for narrowing the issues and indeed for the succinct and careful way in which the evidence was put forward and the case conducted. This substantially shortened the hearing. Effectively, I am asked to decide whether the defendant is entitled to succeed on the positive defence that the plaintiff, Robert Charles Martin, in fact deliberately and fraudulently set fire to the house. In the circumstances, the defendant accepted the onus of proof and conducted the affirmative case.

The first question is the standard of proof which is appropriate. Both counsel agreed that the statement as to the legal position contained in the decision of the Court of Appeal in England in Hornal v Neuberger Products Limited /1957/ 1 QB 247 was applicable. This has been followed in a number of cases subsequently, including New Zealand decisions of which the most recent to which I was referred was that of the Chief Justice in Engel v South British Insurance Company Limited (unreported - 22nd April 1983, A.197/82 Wellington Registry). The general effect of those decisions is to establish that in a civil action involving fraud the standard of proof is proof on the balance of probabilities, rather than that required in criminal matters,

but that the degree of probability must be commensurate with the occasion and proportionate to the subject matter, so that when serious allegations of a criminal nature are made, although the decision in the end is on the balance of probabilities, great weight is to be given to the presumption of innocence and the counterweight necessary to tip the scales in favour of the plaintiff must be correspondingly heavy - see: Middleditch & Sons v Hinds (1963) NZLR 570.

Mr Olphert referred to what he described as the "arson triangle" - the necessity to establish, firstly, that a fire had been deliberately lit: secondly, that there was an opportunity to set or have that fire set; and thirdly, that there was motive.

As far as the first is concerned, there can in this case be no doubt. The evidence was overwhelming and not disputed that large quantities of flammable liquid were spread around, and a fire deliberately lit.

Mr Olphert says that there was opportunity for the plaintiff, Mr Robert Martin, to have set the fire. The evidence of Mr Shanahan, an expert called by the defendant, established that in all probability the fire must have been lit within a comparatively short time of the flammable liquid or material being spread around. This, effectively, means that it must have been lit some time after midnight. It has not been disputed taht Mr Martin was on duty at Kawerau from midnight. But Mr Olphert says it would have been

possible for him to leave his place of employment, set and light the fire, and return, without discovery.

I should say, first, that there is no evidence at all which suggests that Mr Martin did leave his employment or was in the vicinity of the house at the relevant time. Mr Olphert accepted that any connection of the plaintiff, Mr Martin, with opportunity or with the actual setting of the fire was wholly circumstantial. But I do not find there is any evidence from which I am justified in drawing any conclusion which, directly or indirectly, connects Mr Martin with the setting or lighting of the fire. Mr Olphert drew attention to the fact that when interviewed by the Insurance Assessor, Mr Campbell, the plaintiff Mr Robert Martin made no reference to having returned to the property in the early evening of the 9th September. Indeed, he stated positively that he had not returned after leaving with his parents. The evidence clearly establishes that Mr Robert Martin was present on the property between 5:00 and 6:00 p.m. on the 9th September, and Mr Olphert suggests that this failure to disclose his presence reflects upon the credibility of the plaintiff, Mr Martin. Mr Martin, in evidence, accepted that if the other witnesses said he was at the property at the time indicated he would have been, but that he has no recollection of having so returned. Mr Joyce placed some reliance on evidence that persons who were engaged on shift work were frequently disorientated, and suggested that this could explain Mr Martin's lack of memory. Whether this is so or not, the evidence establishes it is at least likely that the fire was not set until hours after this occasion. There is

no evidence at all to suggest that this visit had any connection with the fire, and in the circumstances I do not think I am entitled to reach any conclusions relating to the fire itself, based on Mr Martin's failure to recall the visit.

Mr Joyce made a number of submissions as to time. Evidence was given that the house at Edgecumbe is 21 kilometers from the mill at Kawerau. One witness said it was possible to drive that distance in a quarter of an hour. A second said that he normally took half an hour over the journey. Therewas evidence that it would take something in the vicinity of seven minutes to move from the car-park at Kawerau to the actual place of Mr Martin's employment. Assuming that Mr Martin left the mill, set and ignited the fire, and returned, it is extremely unlikely that he could have done so in less than an overall period of one hour. There is evidence of a telephone call made to the mill to inform him of the fire, made at approximately 4:15 a.m., and there is further evidence that Mr Martin was found without delay and telephoned Mr Walker's son in reply to the original call, some time between 4:00 a.m. and 4:30 a.m. Allowing for some inaccuracy, the times involved would suggest that it would have been a very difficult thing for Mr Martin to have set and lit the fire and returned within the limitations imposed by distance and the telephone calls. It is true that evidence was given he was on his own at various times during the shift. Mr David Walker, a foreman from the mill, was of the view that the absence of Mr Martin from the mill would soon have been noticed. Mr Gebert saw Mr Martin not long after midnight

and again about 2:00 a.m. However, most significantly, a detective attached to the Criminal Investigation Branch at Whakatane, Mr Russell Jeffery, was called by the defendant. He indicated in his evidence that Mr Martin had informed him that he would be unable to leave the Tasman site for any length of time without his absence being noticed. Mr Jeffery stated that that statement had been confirmed. He was not contradicted in any way regarding this, nor was any other witness called to give or produce contrary evidence. All these were defence witnesses.

The onus of proof is on the defendant. It must prove Mr Martin had an opportunity to set and light the fire. On the balance of probabilities I consider the evidence fails to establish that there was the necessary opportunity, and this conclusion is strengthened when regard is had to the presumption of innocence.

There is also the question of motive. Mr Olphert suggested that there was some advantage to be gained by having a new house for an old one. There was no evidence of any financial embarrassment, and the only positive evidence was to the effect that Mr Martin was concerned to see that his parents were housed and that they were looking forward to moving into the first home they had owned. There is no doubt that the whole family was involved in the development of the garden. Mr Martin stated on oath that the family was satisfied with the condition of the house, and there is nothing to suggest that it was in any way inadequate of unsatisfactory.

There is nothing to support the defendant's contention as to motive, but general assumption. I do not consider this is enough.

I cannot find that the defendant has succeeded in discharging the onus upon it to establish the affirmative defence it puts forward, having regard to the way in which the standard of proof required has been established by the authorities to which reference has been made. I can understand the concern of the defendant. The evidence establishes this as one of the clearest cases of arson that could be conceived, however the somewhat indirect benefit the plaintiffs receive is not enough to establish that the plaintiff, Robert Martin, was responsible.

I therefore find that the defendant has failed to establish the affirmative defence of fraud.

I am informed that it is likely that on such a finding the parties will be able to resolve remaining matters in issue themselves.

Leave is reserved for either party to bring the proceedings before the Court if it proves impossible to resolve the remaining matters in dispute, and in particular I am prepared to receive submissions on the question of costs.

R. S. Sallmann

Solicitors:

Bush & Faux, Whakatane, for plaintiffs

Dennett Olphert Sandford & Dowthwaite, Rotorua, for defendant