14/12 (3) FW NZLR X

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M. 61/84

1540

BETWEEN MICHAEL CHARLES BAYLEY
of Hastings, Surveyor

Appellant

A N D NORWICH WINTERTHUR INSURANCE (N.Z.) LIMITED a duly incorporated company having its registered office at Wellington, Insurer

Respondent

Hearing: 28 November 1984

Counsel: D.H. McDonald for Appellant
J.R. Parker for Respondent

Judgment: 10 December, 1984.

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JUDGMENT OF ONGLEY J.

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This is an appeal against a decision of the District Court at Hastings given on 23 May 1984.

The plaintiff claimed to be indemnified by the defendant in the sum of $11,530.00 under a contract of insurance in terms of an all risks policy covering, inter alia, articles of equipment used by him in his calling as a registered surveyor. Two conditions of the policy numbered 2 and 8 respectively were stated in these terms:

"2. The insured shall take ordinary and reasonable precautions for the safety of the property insured."

"8. The observance and fulfillment by the insured of the terms and conditions of this policy and any endorsements which may be made hereon shall be a condition precedent to the insureds right to recover hereunder....."

The defendant repudiated liability upon the ground that the plaintiff had been in breach of condition number 2.

The Judge found the facts to be as follows:

"The insured owned a 1972 Chrysler Valiant station wagon which he had owned since 1976. He used to carry his surveying equipment in and about the back seat of that vehicle. It was his custom, at the end of the day, to park his station wagon on his residential property at number 915 Outram Road, Hastings. A driveway runs from the road in a straight line to a garage at the rear of the property. The driveway makes a right angle turn to the left (when viewed from the road) providing a parking place in the front of the house. When the insured so parked the vehicle it was still visible from the road some 20 ft to 25 ft away although the vehicle, at all times, remained partly obscured from the roadway by trees and foliage. The garage, at the end of the straight driveway, being too small to fully accommodate the Valiant station wagon, housed the 1970 Mini car used by the wife of the insured. The windows on that vehicle were unable to be locked or secured.

The lock on the drivers door of the Valiant station wagon had been out of order for at least 2 years. The lock had been repaired earlier than that but after it broke again the insured did not have it repaired.

The insured, when he parked his Valiant at home at night, used to leave his surveying equipment (which was bulky and heavy and occupied the whole of the back seat) in the rear of the vehicle as its removal into the house would involve trips occupying about 5 minutes.

> On the evening of the 18th April 1983 the insured parked his Valiant station wagon in the usual place, being the driveway directly in front of the house. As usual, too, his surveying equipment was left on or about the back seat. Early in the evening he went out - whether in the Valiant he does not now remember - and returned home about 9 p.m. His wife also went out that evening, returning at about 10.30 p.m. On the following morning, Tuesday 19 April 1983 at about 8 a.m. it was discovered that three expensive items of value of $11,530 had been stolen. The remainder of the items of surveying equipment, as well as an expensive pair of binoculars of the insured, had not been taken. The insured immediately informed the police of his loss. The missing items have not been recovered. The insured has no inkling as to the identity of the thief or thieves. This was the first loss of surveying equipment suffered by the insured in the years that he had left the equipment in the rear of his Valiant outside his house. He has since had the door lock in the Valiant fixed."

The Judge applied to the issues the principles to be found in Roberts v State Insurance [1974] 2 N.Z.L.R. 312. Mr McDonald expressed a preference for the subjective test of recklessness for which support is to be found in Fraser v Furman [1967] 3 All E.R. 57 and Mason v Century Insurance [1973] 2 N.Z.L.R. 312. I believe that the District Court Judge acted correctly in relying upon dicta in the judgment of McMullin J. in Roberts v State Insurance to the following effect:

> "While in my view in a number of cases in which a condition of this kind is invoked by an insurer an element of recklessness in the subjective sense may be established, there may be others where what is done or is not done by an insured may be of such a character that it amounts to much more than mere inadvertence although it falls short of a deliberate disregard for an appreciated risk. Indeed, I think that it would be wrong to insist on

> the importation of a subjective test into cases of this kind. It is not difficult to imagine cases where an insured, although not adverting specifically to a risk, has nonetheless acted in a way which would be thought to be grossly irresponsible. On an application of what I will call the Diplock test, such a person would be able to claim indemnity because he had not adverted to the risk. Is it not more consonant with such a policy condition and the intention of the parties that there should be no indemnity where the consequences can be shown to have been so apparent and the risks attendant upon them so gross that an insured ought to have recognised them. I would for my own part, therefore, prefer the adoption of a test which does not require the demonstration of a subjective element on the part of the insured." (p.317/11)

and later at p.319:

> "To interpret the relevant condition in the present policy in terms of recklessness involving a recognition of the risk and a turning aside from it is to read into the policy a condition that the parties have never agreed upon themselves. If the parties had intended that only subjective recklessness was to abrogate the indemnity, they could have said so themselves. In my opinion a construction which excepts from the indemnity acts or omissions which the insured either knows of or chooses to disregard or which ought to be so obvious to the ordinary man as to be inescapable is a proper one. It gives some meaning to the requirement that the insured shall take reasonable care to avoid loss but at the same time does not enable an insurer to withdraw the umbrella of indemnity on a rainy day."

Approaching the matter on the basis that it was necessary for there to have been gross carelessness or gross negligence on the part of the insured in order to deprive him of the cover, the Judge then examined the question whether, in the terms of condition number 2, the plaintiff had taken ordinary and reasonable precautions for the safety of the property insured. He concluded that he had not and that he was therefore in breach of the condition.

Mr McDonald challenges some of the Judge's finding of fact on the ground that they are not supported by the evidence and he submits that his final conclusion that the plaintiff had been grossly careless was wrong.

Not every matter which was relevant in the view of the Judge appeals to me in the same way as it appears to have been regarded by him. I do not find it necessary to go through his detailed findings or to review the conclusions which he reached. This is a rehearing and I am entitled to reach my own conclusion on the facts which I regard as being sufficiently proved. I do not think it necessary to examine the refinements of the evidence as to what sort of thief would be likely to be attracted by this sort of property or what knowledge the plaintiff may have had of the type of and number of thefts that were being committed in the area. It seems to me that a reasonable person applying ordinary common sense would appreciate that there was a risk that a marauder might enter onto the premises at night to investigate the possibility of stealing property from a motorcar. Whether or not the motorcar was visible from the road is not a very important aspect. I think it is common knowledge that thieves enter residential sections from time to time in order to ascertain what they may take without knowing the exact situation that they will encounter. Here there was nothing to hinder access to the land or to the motorcar parked on it. The size and special

nature of the equipment might deter some criminals but it would be quite unsafe to rely on those factors as being a deterrent to all. Some thieves take property from motorcars and do nothing other than smash it up or throw it away. The circumstance that no one had previously taken equipment from the motorcar is a very slender prop upon which to rely as a safeguard against future depredations. The plaintiff may have been lulled into a sense of security by these various factors but to my mind an objective appraisal shows that there was a risk of loss so long as the equipment was left in an unlocked motor vehicle on a residential property to which access was unhindered. I think that unarguably it was a careless thing to do. Had it been done inadvertently it may have amounted to no more than carelessness but when it was done deliberately with full opportunity to appreciate the risk which would have been apparent to a reasonable person I am of the opinion that it was a reckless act.

In my view the plaintiff was in breach of condition 2 of the insurance contract and I haven't the slightest doubt that the breach was responsible for the loss of the property.

The appeal is dismissed. The respondent is allowed the sum of $200.00 costs.

Solicitors

Bisson, Moss, Robertshawe & Co., P.O. Box 549, Napier for Appellant.

Hogg, Gillespie, Carter & Oakley, P.O. Box 241, Wellington for Respondent