

BETWEEN THE NEW ZEALAND INSURANCE
COMPANY LIMITED

Appellant

A N D GRAEME ROBERT HARRIS

Respondent

Coram Richardson J (presiding)
Bisson J
Hardie Boys J

Hearing 24 November 1989

Counsel J.O. Upton and J.H. Olphert for appellant
G.R. Joyce QC for respondent

Judgment 11 December 1989

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

These insurance proceedings arise from the destruction by arson of a 1978 Massey Fergusson 1200 tractor near Kinloch, Taupo on 15 December 1982.

In 1980 the respondent, Mr G.R. Harris, purchased the tractor intending to work part time as an agricultural contractor in his own right while initially continuing his employment with a contracting firm in Otorohonga. In August 1981 he and his wife moved to Taupo where he was employed by another contracting firm. He later brought the tractor to Taupo. He hoped to be able to earn money by using it there on a contract basis at weekends and nights. He also

contemplated selling the tractor and left it at the premises of a firm which dealt in tractors and similar machinery. It did not sell. The respondent used the facilities of the firm to work on the tractor so as to keep it in reasonable operating condition and on a comparatively limited number of occasions he used it for contract work. In August/September 1982 he renegotiated the terms of the loan which he had obtained from Marac Finance Ltd to purchase the tractor, substantially reducing the monthly payments required. At the same time, and having been told that the tractor was required to be insured, he arranged insurance through the appellant, The New Zealand Insurance Co Ltd. The cover was for \$25,000.

In December 1982 he entered into an oral agreement for hire with a Mr Couzins, a contractor who had hired the tractor on previous occasions. The hiring commenced with the collection of the tractor and was to continue until its return to the Taupo premises. The hire charge was to be fixed after the particular job on a farm near Kinloch had been completed. The tractor was to be driven by a Mr Meyer who was employed by Mr Couzins. Mr Harris discussed the tractor and the work with Mr Meyer and satisfied himself as to the work that was to be done and that Mr Meyer understood the tractor and had the ability to drive it. However, he did not refer the hiring to the insurer.

The work for which the tractor was hired was completed late on 14 December. It was not considered practicable to

return the tractor to Taupo until the following day. It was left parked in a depression on the farm along with another tractor and a bailer. They were parked about 200 yards off the road and could not be seen from the road. In the early hours of the next morning the respondent's tractor was destroyed by a fire which it is common ground had been deliberately lit. The other tractor was unharmed and the bailer in close proximity to Mr Harris's tractor suffered only scorch damage.

The respondent promptly claimed under the insurance policy. The circumstances of the fire were thoroughly investigated on behalf of the insurer. In the course of the investigation both the respondent and his wife were interviewed. The police also enquired into the matter. Mr and Mrs Harris had been at an Orchid Society barbecue on the night of the fire, and he denied any involvement in or awareness of the burning of the tractor. Then about July 1984, over 18 months after the fire and shortly after Mr and Mrs Harris, who had separated, became involved in a bitter custody dispute, she went to the insurer and to the police. She said Mr Harris had discussed with her arranging for two men to burn the tractor for \$500; that he had intended that the barbecue would provide an alibi for the night of the fire; and that afterwards he had expressed satisfaction and planned to pay the \$100 balance to the arsonists from a cheque he cashed that day. She gave evidence in these proceedings to the same effect. Both at the time and in his evidence Mr Harris completely denied his wife's allegations of his involvement in the arson, or that

he had ever made comments along the lines of those attributed to him by Mrs Harris.

The police had decided not to pursue the matter and the officer concerned indicated in his evidence that the provisions of the Evidence Act protecting communications between husband and wife were a consideration. The insurer denied liability to indemnify the respondent under the policy. It did so on two broad grounds which it put in various ways. The first, which relied very largely on Mrs Harris's account, was in essence that the claim was fraudulent, the respondent having been responsible for the fire. The second was that the respondent had breached a provision of the insurance policy which dealt with the permitted use of the tractor. The insurer accepted the responsibility of establishing the basis of each defence.

In a judgment now reported at (1987) 4 ANZ Ins Cas 60-817, Gallen J rejected both defences and held that the insurer was liable to indemnify the respondent. The parties were unable to agree as to quantum and that matter was subsequently determined by the Judge with judgment then being entered into in favour of the respondent for \$66,215-56 plus costs and disbursements.

The insurer now appeals on both liability and quantum.

The fraud defence: Gallen J's conclusions

The Judge reviewed all the evidence including that given by Mrs Harris and Mr Harris. There was some evidence of

motive on the respondent's part and a comment which Mr Meyer said that the respondent had made to him and which he took as a joke added some credence to what Mrs Harris had said. The Judge's clear view, however, was that the insurer's case stood or fell on her evidence. He proceeded to make an assessment of the evidence of Mrs Harris and Mr Harris respectively. On that assessment he considered that she was a convincing witness and that much of what she said had a ring of truth about it, and that cross examination did not show up any inconsistencies. On the other hand, he went on to say, Mr Harris was also an impressive witness who retained his consistency on cross examination. In short, as he put it, the Judge was faced with a situation where both Mr Harris and Mrs Harris had given evidence which was convincing and not shaken under cross examination.

Following that prima facie assessment the Judge went on to consider three factors which he felt he could not ignore. All three related to the reliability of her evidence. Earlier he had discussed the evidence relating to these matters in some detail, and he expressed his conclusions at this point in this way:

The first is that Mrs Harris did not make these allegations until a period of years after the incident occurred. While she has given an explanation for that, it is a fact of some significance. Secondly, Mrs Harris has conceded that she now suffers from alcoholism and that she was at least on occasions at the relevant period, drinking heavily. She insists that her condition had not become properly describable as one of alcoholism at the time when the incident occurred, but the evidence is clear that she was affected by alcohol on a significant number of occasions at about that time and this must raise the possibility that her recollection or understanding could have been affected by her condition.

Thirdly, the allegations were made at a time which coincided with a concern Mrs Harris had for the custody of her children and the evidence establishes that she considered the alleged behaviour of her husband a significant matter in the custody proceedings because she made these allegations in the most recent affidavit which she filed. It is therefore at least open to suggest that her motivation was affected by her concern over those proceedings.

His final conclusion in this part of the judgment was:

After anxious thought and having regard to those circumstances, I cannot find that the defendant has satisfied the onus which rests upon it in respect of the allegations of fraud. In respect of this aspect of the case, it follows that the plaintiff is entitled to succeed.

The fraud defence: the appeal

Mr Upton for the appellant made a detailed analysis of the evidence and in particular of the evidence of Mrs Harris and Mr Harris and other evidence tending to support or diminish the respective accounts. He rightly accepted the great advantage the trial Judge had in seeing and hearing the witnesses, and that there was weight in the three considerations which had influenced the Judge in reaching his final conclusion. Mr Upton submitted that nevertheless the Judge had failed properly to weigh and assess the evidence and that his decision on this branch of the case was wrong. In support he developed twelve points which on his analysis should have led the Judge to prefer Mrs Harris and uphold the insurer's defence. Mr Joyce made similar comprehensive analyses of the evidence and the judgment, but from the perspective of the respondent, and he responded point by point to the arguments advanced for the insurer.

It is with no disrespect to their careful arguments that we do not find it necessary to canvass the evidence and all the points they made. On his assessment of Mrs Harris and Mr Harris respectively as witnesses, and from the way they gave their evidence and responded in cross examination, the trial Judge considered that both were convincing witnesses, and he noted too that much of what Mrs Harris said had the ring of truth about it. Then, in determining in that situation whether the case for the appellant, which in the end rested on her testimony, deserved greater credence, he identified three factors which clearly concerned him as bearing on the reliability of her evidence; and testing her evidence in that way concluded that the onus of proof had not been discharged.

That is tantamount to a finding that on his overall assessment the Judge did not have sufficient confidence in Mrs Harris' credibility to conclude that the onus of establishing fraud on the part of the respondent had been discharged. Viewed in that way it is, we think, impossible for this Court, on appeal from a decision in a factual area which turns in the end on the Judge's assessment of the witnesses and their evidence, to say that the Judge erred in finding that her evidence and the case for the insurer were not sufficiently persuasive to satisfy him that the onus had been met.

We reject the first ground advanced in support of the appeal.

Permitted use condition and the Insurance Law Reform Act

The second defence for the insurer was that the respondent was in breach of the following condition of the policy relating to the use of the tractor:

Warranted that the vehicle hereby insured shall not be ... (b) let out on hire (but hire whilst being driven by the insured's driver is not excluded).

That warranty is contained in the description of use section of the policy providing for cover in respect of any use in connection with the specified business or occupation. As it happens the business or occupation was not specified in the policy. But in the proposal the respondent described himself for the purposes of the policy as self employed and his occupation as bush contractor.

The Judge accepted that the hiring by Mr Couzins commenced when he uplified the tractor in Taupo and continued until such time as it was returned to the premises in Taupo where it was stored by the respondent. It was common ground that Mr Meyer and not the respondent was the driver during the hire, and it followed that the respondent was in breach of the warranty at the time that the tractor was destroyed. In those circumstances the respondent relied on the ameliorating provisions of s.11 of the Insurance Law Reform Act 1977. That section reads:

11. Certain exclusions forbidden - Where -

- (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to

indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

- (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, -

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

The statutory provision is in the form recommended by the Contracts and Commercial Law Reform Committee in its report of July 1975 on "Aspects of Insurance Law". The Committee drew attention to the common practice of insurers of inserting non-causative exemption clauses in defining the circumstances making the cover inapplicable and to the use of the word "whilst" to convey a temporal rather than a causative connection. The Committee concluded that, while insurers were of course entitled to define the risks in respect of which they would indemnify by excluding circumstances that increased the risk, it was unreasonable for them to avoid liability on the grounds that the risk was increased where the loss resulted from some cause other than the circumstances relied on as increasing the risk.

Section 11 contemplates a two step enquiry where the contract of insurance excludes or limits the insurer's liability on the happening of certain events or the existence

of certain circumstances. The first is to determine whether the insurer's liability has been so defined because the happening of the events or the existence of the circumstances was in the view of the insurer likely to increase the risk of occurrence of the loss. That enquiry rests on an assessment of the bona fide view of the insurer in relation to the matter.

Even where the purpose of the limitation is entirely legitimate the insured is not necessarily disentitled to be indemnified. That is for consideration at the second step. The inquiry there is whether the loss in respect of which the insured seeks to be indemnified was caused or contributed to by the happening of the events or the existence of the circumstances. The onus of proof rests on the insured and the answer turns on the objective assessment of the Court or Arbitrator, not on the subjective views of the insurer. There is then a presumption of a causal link between the relevant events or circumstances and the particular loss.

At the first step the Judge found that the evidence established that the purpose of the definition of use in the policy was to retain a degree of control and to ensure that the use contemplated for the tractor be met by an appropriate premium. That was the gist of the evidence of the two employees of the appellant insurer who could be taken to speak on its behalf, Mr Thompson the branch manager at Rotorua and Mr Kelleher the senior claims investigator.

At the second step the evidence showed, the Judge concluded, that it was commonplace for vehicles to be left

unattended in circumstances such as these. In his view it was not enough that the existence of the hire meant that the tractor was left unattended in the paddock when otherwise it would have been back at the Taupo premises, and the particular fire loss would not have occurred. There was in his view no direct relationship between the two.

In construing a statutory provision of this kind designed for practical application on a day to day basis, refined analysis in terms of metaphysical enquiries into causation should be eschewed. Again, a simplistic "but for" approach would rob s.11 of much of its efficacy and deny its application in examples given by the Contracts and Commercial Law Reform Committee as requiring statutory reform (see para. 29). Rather it is a matter of determining, under a section concerned with exclusion from cover where the limitation has been included because the event or circumstance is likely to increase the risk of loss occurring, whether the loss actually sustained by the insured was caused or contributed to by the relevant event or circumstance. If the existence of the relevant circumstances did not in itself increase the risk of loss, there is no justification either in principle as the Contracts and Commercial Law Reform Committee emphasised, or under the statutory language, for denying the insured the protection of the cover.

It is commonplace for tractors and machinery to be parked overnight on farms where they are working, and Gallen J made an express finding to that effect on the

evidence before him. The policy does not stipulate that the tractor be kept under cover or at any particular location. It is common ground that the respondent would have been protected had he been working on the Kinloch farm and had parked the tractor at that spot. Further there is no suggestion in the evidence that there was anything in particular about where the tractor was parked or how it was parked in this paddock on this farm and on this occasion which was likely to increase the risk of fire loss to the insured. In this regard it seems there has never been any suggestion by the insurer that the respondent breached the further policy condition requiring him as the insured to take all reasonable steps to safeguard the vehicle from loss or damage.

We are satisfied that Gallen J was entitled to find that the respondent had discharged the statutory onus of proving that the loss he sustained was not caused or contributed to by non-compliance with the warranty.

The quantification of loss

The pre-fire value of the tractor was agreed by the parties to be \$22,000 and the quantification of the award of \$66,215 is not in issue if the entitlement of the respondent to damages for late payment of the \$22,000 is upheld. That higher sum was calculated on the basis (now agreed) that, if the appellant was liable to indemnify the respondent in respect of that loss, the appellant ought to have paid out

in respect of that loss by 31 January 1983. Had the \$22,000 been paid on that date to Marac as the financier whose interest was noted in the policy, in conformity with the terms of the finance agreement between Marac and the respondent and with the Hire Purchase Act 1971 there would have been an interest re-calculation and rebate for early repayment. No issue is taken by the appellant with the elements going to make up the projection of the \$22,000 as at 31 January 1983 to \$66,215 as at the trial in July 1986, and it is accepted that if the respondent is entitled to damages for late payment judgment was properly entered for that latter amount.

Mr Upton advanced three submissions on this branch of the case. The first was that the Judge had in effect awarded damages for consequential loss whereas the policy only insured the indemnity value of the tractor and excluded consequential loss with a specific exemption in respect of loss of use. There is nothing in this point. The extent of the cover is not in dispute. The claim by the respondent arises from the failure by the insurer to meet its liability in respect of that cover. In this respect it is for the breach of the duty to pay \$22,000 by 31 January 1983.

This raises familiar questions as to damages for breach of contract. The issue is whether under the contractual arrangements between the parties the respondent was entitled to recover damages for having been deprived of the \$22,000 between 31 January 1983 when it should have been paid by the

insurer and the date as at which judgment was entered against the insurer. Somewhat similar questions of principle arose in Broadbank Corporation Ltd v. Mosgiel Ltd [1985] 1 NZLR 257. In that case the parties' contractual arrangements explicitly provided a return to Broadbank for financial accommodation it provided to Mosgiel over a set period. It was held by this Court that it was in the reasonable contemplation of commercial men in the position of Broadbank and Mosgiel that if Mosgiel did not put Broadbank in funds on the maturity date Broadbank would, in meeting its obligations as an acceptor, either have to borrow at interest, or use its own funds which might otherwise have been profitably employed. The loss thereby suffered by Broadbank was recoverable as damages. That was a straight-forward application of the first limb of the rule in Hadley v. Baxendale (1854) 9 Exch 341 and, too, of the Cook v. Fowler (1874) LR 7 HL 27 line of cases which are themselves explicable in terms of the standard rules concerning remoteness of damages in contract.

It was not suggested that the reasonable contemplation test was inapplicable in this class of case. Mr Upton's argument (his second submission) was that the loss claimed was not within the contemplation of the parties. To that was added as his third submission that a specific exception against such liability contained in the policy established what was truly in the minds of the parties and precluded recovery.

The exception provision relied on provided:

The Company shall not be liable in respect of

....

- (2) any liability which attaches by virtue of an agreement but which would not have attached in the absence of such agreement.

It is clear from the context that the condition is directed to the liability of the insurer to indemnify the insured in respect of loss or damage to the insured vehicle and liability to third parties and that liability assumed by the insured by agreement with a third party for which the insured would not otherwise be legally liable is not covered. Not surprisingly the insurance contract prevents the insured from unilaterally expanding the cover by entering into a third party contract in which the insured accepts liability for non-negligent happenings or any other form of liability which would not arise otherwise.

The present enquiry arises at the next stage where a claim within the cover is made and the insurer, in breach of its obligation, fails to pay the amount due at the proper time. Here the insurer breached that obligation when it failed to indemnify the respondent in respect of the loss of the tractor by paying him the agreed value of \$22,000 not later than 31 January 1983. In that situation the respondent is entitled to recover damages that are of a kind within the reasonable contemplation of the parties. As Lord Wright observed in Monarch Steamship Co Ltd v. Karlshamns Oljefabriker (A/B) [1949] AC 196, 224: "... the question in a case like the present must always be what reasonable business men must

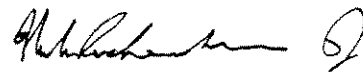
be taken to have contemplated as the natural or probable result if the contract was broken."

The parties here expressly recognised in the policy that a finance company, Marac, had a financial interest in the tractor and was entitled to receive payment of or from any insurance proceeds. The insurer may not have known the amount or details of the finance agreement, but as a reasonable business institution it must be taken to understand ordinary commercial and financial practice. The appellant must have known that finance agreements in relation to agricultural machinery were likely to provide for a finance rate far in excess of the 11% interest rate allowable under s.87 of the Judicature Act 1908 for delay in the payment of money. Such commercial institutions must be taken to appreciate that under standard provisions it is financially advantageous to make early payment to financiers. It must have been in the reasonable contemplation of these parties that failure to pay by 31 January 1983 the amount due in respect of the loss would cause loss to the respondent. It was a natural and probable consequence of the appellant's failure to pay by the due date that the respondent would lose the opportunity of profitably employing the funds by curtailing to that extent its actual and potential liability to Marac under the finance agreement.

That conclusion in principle is sufficient to dispose of the appeal as to damages in view of the agreement of the parties referred to earlier that if the entitlement of the

respondent to damages for late payment of the \$22,000 is upheld the Court is not required to consider the basis on which the respondent's liability to Marac had increased to \$66,215 as at the date of the trial.

For the reasons we have given the appeal is dismissed with costs to the respondent of \$2,500 plus reasonable disbursements as fixed by the Registrar including the travelling and any accommodation expenses of counsel.



Solicitors

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