

NOT
RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND

29/10 CA 312/91

BETWEEN THE STATE INSURANCE
GENERAL MANAGER

Appellant

A N D PETER JOHN VAN DE VEN

Respondent

1918
1826
Coram: Casey J
Gault J
McKay J

Hearing: 30 September 1993

Counsel: J O Upton QC for Appellant
P G McMenamin for Respondent

Judgment: 26 October 1993

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Although in form an appeal, this matter comes before the Court as an application for special leave to appeal under r27 because, shortly before the hearing, respondent's counsel discovered that the security had not been paid in time. Having pointed this out to the other side on the preceding day, he submitted at the hearing that the appeal was deemed to be abandoned and opposed the appellant's application for special leave. It is plain that the delay in payment was due to a simple misunderstanding and there is no suggestion of prejudice to the respondent. We reserved our decision pending consideration of the merits of the appeal, which was then argued in the usual way by both sides.

It is brought by State Insurance against a judgment of Rabone J delivered in the High Court at Wellington on 21 August 1991 awarding the respondent \$48,500 together with interest on his claim under a motor vehicle insurance policy arising out of the theft and destruction by fire in February 1989 of his 1981 Mercedes Benz. It had been insured for that sum, but liability had been declined on the grounds that there were breaches of policy conditions.

Mr Van de Ven (who died after judgment was given) had been a successful contract driver for Mobil and at the time the car was taken he lived at Melling. He had purchased the car from a dealer about two years before, paying \$45,000 for it, trading in a new vehicle for some \$23,000 and providing the rest in cash. He said no finance was needed and he owed no money on the car. On the evening of 19 February 1989 he and his wife and two children travelled in it to a restaurant in Marjoribanks Street, Wellington, and left it locked and parked nearby. When they came out about 1½ hours later it was gone. They notified the police immediately and the next day Mr Van de Ven attended at the State Insurance office in Lower Hutt and filed a claim. He had insured it there when he bought the car, and had renewed the cover for the period from 13 November 1988 at the figure of \$48,500 nominated in the renewal notice by the insurer.

He said that when he received that notice he went to the office to query the amount of the cover because it had been only \$30,000 for the previous period. He was naturally concerned about paying a higher premium for cover which he might not necessarily receive in the event of a loss. He said he was reassured by the clerk with whom he discussed the position, claiming that she told him that the insurer set the figure and it would be accepted as the proved value of the car. On this assurance he paid the premium of \$733.47. He claimed to have no idea what the vehicle was worth at the time, but pointed out that he was only the third owner and

that it had been well kept and had a low odometer reading. On the other hand the appellant's local manager gave evidence that in the light of available market information he believed its value at the time of the loss would not have exceeded \$30,000.

A few days after its disappearance the partly burnt car was found near Greytown in the Waiohine Gorge, having been deliberately set on fire and pushed over a cliff. It was not economically repairable. Martin Gorbie of Masterton was convicted in December 1989 of receiving items taken from the car. It had been closely examined by the police and an insurance assessor engaged by the appellant and their evidence, supported by that of a locksmith, made it clear that whoever had taken it had used the "service key" to gain access and drive it away. Such a key is provided with Mercedes vehicles but it cannot be used to unlock the boot or glove compartment, thereby ensuring that access to them is not available to garage and service personnel. The Judge accepted that such a key was used. The other two standard keys which Mr Van de Ven received when he purchased the car were kept on the key rings belonging to him and his wife, and on their evidence they were careful with them.

In the course of their enquiries the police and the assessor discovered records of phone calls made by Gorbie to Mr Van de Ven's residence. His wife's adult son, Graham McGee, lived there, and worked in a Wellington restaurant to which calls from Gorbie were also traced. According to a police witness McGee had previous convictions for car conversion and in his evidence Mr Van de Ven made it clear that he did not get on with him. Both he and his wife denied any knowledge of Gorbie or of the phone calls emanating from him. McGee was known to have been visiting friends in the Mt Victoria area (i.e. in the same district as the restaurant) the night the car disappeared.

The insurer's suspicions were aroused by the fact that this valuable car, insured for much more than its apparent market value, was destroyed a few days after it was taken. Items stolen from it were of trifling value. Those circumstances fitted a familiar pattern of insurance fraud. The assessor (Mr Mearns) interviewed Mr and Mrs Van de Ven on separate occasions on 15 March 1989. By that time he was satisfied that access to the car had been obtained with the service key and he was concerned to find out as much as he could about it. He was not aware of Gorbie's phone calls until some time later. He spoke to Mrs Van de Ven in the morning and said in evidence that she told him she had a key on her key ring and her husband had one on his, but she did not think there was a service key. She looked in the kitchen where they kept surplus keys but was unable to find another for the Mercedes. He prepared a statement which she read and signed. He also told her he wanted to interview Graham McGee, who was already known to him from his previous experience in the police. He came back that evening at 7.30pm to speak to Mr Van de Ven, and there was an outright conflict of evidence over what took place on that occasion.

It was agreed that affidavits filed in an unsuccessful summary judgment application could be used in the substantive hearing at which oral evidence was also given. In his evidence (which accorded with his affidavit) Mr Mearns described his interview with Mr Van de Ven, saying he answered the questions put to him, although he took objection to those directed at his background. When asked about keys he said there were two, one each for him and his wife, and he thought nobody else had access to them. Mr Mearns asked in particular whether there was a service key and described what it was for. He said the respondent replied that as far as he knew there was no such key. He then prepared a written statement but Mr Van de Ven said he would not sign it until his solicitor had seen it. Mr Mearns said he did not object to any of the contents as being inaccurate.

He also told him he wanted to speak to Graham McGee who was not home at the time. Mr Hutchinson, a member of the assessor's firm, gave evidence of having been told by both Mr and Mrs Van de Ven on separate occasions on 22 March the Mr Mearns would not be allowed to speak to him. Mrs Van de Ven could not recollect such a conversation, while her husband said in evidence he had never objected to anyone interviewing his stepson.

The next development was a letter written on 6 April to the appellant by Mr Van de Ven's solicitors pointing out that he was "embarrassed and appalled" at the way the interview had been conducted by Mr Mearns. He was made to feel a criminal, and had felt so upset that he refused to sign the written statement. Neither he nor his wife were prepared to allow members of their family to be subject to the same ordeal. Accordingly they directed that there was to be no approach to any family member without prior written permission from either them or their solicitor. After some further discussions and correspondence the solicitors wrote again on 12 July complaining about the delays and indicating that Mr McGee could be interviewed by prior arrangement at their offices. No such interview was sought.

An impartial observer could be excused for feeling somewhat sceptical about Mr Van de Ven's stated reason for his reluctance to expose his stepson to the rigours of an interview with Mr Mearns. His description of Mr McGee in cross-examination on another matter is revealing - "but if you had someone you don't get on with too well.... 6'6" and weighs 20 stone.....you watch your words I can assure you." One can think of other more cogent reasons for his concern at the prospect of the assessor interviewing him, including the risk of disclosure of his past criminal history with cars.

However, in this as in other crucial matters, the Judge seems to have accepted Mr Van de Ven's evidence and rejected the insurer's contention that his

conduct was a breach of his obligation to act in good faith towards the insurer. He described the restriction on interviewing Mr McGee as "an injured response by a person who wished to protect himself and his household from what he regarded as unprofessional behaviour: it was not an effort to conceal information". Although Mr Upton asked us to reject this finding, in the end he accepted that the insurer could no longer rely on these matters in support of its disclaimer of liability. In fact, as the last letter from the solicitors demonstrates, Mr Mearns was free to interview Mr McGee. The requirement that this should be at their office could not be said to infringe any obligation under the policy. Mr Upton asked us, however, to take these exchanges into account as background to the real issue in the appeal, which was whether Mr Van de Van had lied to the assessor about the service key.

The evidence on this can be found in his affidavits in support of summary judgment and in the trial transcript. In the first affidavit of 27 April 1990 he referred to the meeting with Mr Mearns in general terms, deposing that he gave him all the information he requested about the circumstances surrounding the loss of the car. A second affidavit of 1 June was mainly in response to one by Mr Kelly, the appellant's branch manager, but Mr Van de Ven also commented on an allegation in the statement of defence that he falsely stated there were only two keys for the car when there were three. He said :

"When the investigators interviewed me at my home, they asked me to give them the car keys which I had. I gave them the two keys which were in my pocket. I was asked whether there were any more keys. I said no. I advised them there had been a third key (which I now know to be termed by the car trade a "service key" that is it serves only certain functions. For instance it didn't open the glove box or boot. I am unsure whether it operated the ignition). The third key had been destroyed up to 18 months before the theft of the vehicle. I had been a contract driver with Mobil Oil and had used the key in the course of my trade as a lever to open the fill points at various delivery sites."

It is not clear from that passage whether he was claiming to have told Mr Mearns at their only interview of 15 March 1989 that the third key had been destroyed in the manner described. The general tenor of his trial evidence was that he did not tell him. In his affidavit in reply of 7 June Mr Mearns stated what he said later in his oral evidence at trial - namely, that the respondent told him he had never had a service key and that he did not give him the explanation set out in his affidavit.

This produced a further affidavit from Mr Van de Ven of 13 June 1990 in which he emphatically denied telling Mr Mearns there were only two keys, and that both he and his wife told him there was also a service key and it was kept on a separate key ring with others for which he had immediate use, because it would not operate all the locks on the car. He confirmed that he used those keys to lever up the covers of petrol filling points at service stations in his work for Mobil until they became so distorted that they were no longer useful, and he disposed of them in a rubbish bag at Seaview. He deposed in two places in the affidavit that he told Mr Mearns about this.

In his evidence-in-chief he described being asked for the keys which he duly gave Mr Mearns, and said it was roughly at that time the latter brought up the question of the service key. That was the first time he realised that it was important. He said he stopped the interview and told Mr Mearns they would look for it. Both he and his wife went to the kitchen cupboard where the unused keys normally hung and they could not find it there. He said - "It was not until a later stage that I realised what had happened to that particular bunch of keys". They went back to the dining room and continued the interview with Mr Mearns. He refused to sign the statement the latter had prepared because he did not think it was a true and accurate record, although he said he did not bother to read the lot. This

explanation differs from the reason given by his solicitors in their letter of 6 April 1989, it being then alleged that he was so upset by Mr Mearns that he refused to sign.

When referred to Mr Mearns' statement in his affidavit of 7 July 1990 that he told him there were only two keys when he purchased the car, and that he had not subsequently had any cut, Mr Van de Ven said - "In a selective term he was not incorrect but when he asked me for keys I gave him two keys", and went on to say that he was only speaking about the keys he had, and that it was only afterwards that the service key came to the forefront. He concluded this part of his evidence - which is difficult to follow - with the assertion that if Mr Mearns said otherwise he would be lying.

Mr Van de Ven was cross-examined closely about the existence of the service key and what he had told Mr Mearns, but stuck to the account given in his evidence-in-chief. He reiterated that after searching unsuccessfully for the bunch of keys in the kitchen he remembered that they had been discarded from the truck he used on his rounds when clearing it out at Seaview some 18 months before, when it was being traded in for another vehicle.

It will be seen from this summary that there was a head-on collision between Mr Van de Ven and Mr Mearns over the information given about the service key. That was the subject of the only ground pursued in the appeal, based on breach of Condition 3 of the policy which provided inter alia that "if any false declaration or statement be made or used in support of any claim all benefit under this policy shall be forfeited". The appellant alleged in its statement of defence that in breach of this obligation and of his duty to exercise the utmost good faith towards the insurer, the respondent made false statements in support of his claim, and in particular that there were only two keys to the car when there were three.

Rabone J found that Mr Van de Ven received a service key when he bought the car; and that because it would not open the boot and glove box he put it on a ring of assorted keys sometimes kept in the kitchen; and that he used it in the course of his work as described in the summary above; and that when it became evident that its whereabouts was a real issue, he "came to the conclusion" that he had disposed of it in the circumstances already related. The Judge went on to say that the clear implication from the respondent's evidence was that at the time Mr Mearns' interviewed him on 15 March he believed the key ring of assorted keys was in the kitchen

"...and whilst he could not then locate them it was only afterwards that he and his wife 'racked our brains', and came to the conclusion that the key had been discarded at Seaview. Yet Mr Van de Ven says in his affidavit of 13 June 1990 "I told Mr Mearns about that", ie told him about the key being discarded at Seaview. Mr Mearns only had the one discussion with the plaintiff."

After referring to the contradictory evidence of Mr Mearns who said he was never told this, and that Mr Van de Ven said he only had two keys when he bought the car, the Judge went on to say :

"The explanation given by the plaintiff in paragraph 6 of his affidavit of 1 June 1990 was that the service key had been destroyed up to 18 months before the theft of the car.

I do not think that Mr Van de Ven, on 15 March 1989, gave Mr Mearns that description of the disposal of the service key. But nor am I satisfied that there was an emphatic denial by Mr Van de Ven to Mr Mearns that a third key had existed.

The Judge referred to various extracts from the evidence suggesting that Mr Van de Ven may have simply been unsure about the existence of the third key. He

concluded that he did not deliberately conceal from Mr Mearns the fact that he had received it, adding this comment :

"As was evident from his demeanour in the witness box, Mr Van de Ven could be emphatic in assertions, which he then went on to qualify."

The respondent might be thought fortunate in having such a favourable view taken of his credibility in the light of the circumstantial evidence involving his stepson. The inference was certainly open that he was motivated to protect him, either out of consideration for his wife's feelings, or in the belief that his own claim would be put at risk if Mr McGee's criminal background became known, and the fact that he had access to the car's service key. It should be emphasised, however, that it was no part of the insurer's case that Mr Van de Ven himself was implicated in the taking and destruction of the vehicle.

Mr Upton realistically accepted that in the light of the Judge's finding, based on his assessment of credibility, he could not maintain the allegation in the statement of claim that the respondent had lied about the number of keys. However, although it was not specifically pleaded, he submitted he had lied in his account of getting rid of the key some 18 months before the car was stolen. Although he was not counsel at the trial, he informed us that this alternative had been put to the Judge. The latter made no finding that Mr Van de Ven's account was false; he merely referred to it as part of the narrative in arriving at his conclusion that the respondent did not deliberately conceal his receipt of the service key, which was the only issue raised in the pleadings.

Mr Upton argued that once it was accepted the service key was used in the theft of the car (and the evidence supporting that was virtually conclusive) then Mr Van de Ven's account of throwing it away 18 months before the theft must be

false. There can be no rational possibility of somebody finding it in the rubbish at Seaview, connecting it with the car and using it 18 months later in its deformed state to gain entry and drive it off. Equally improbable is any suggestion that somebody made a copy of it before it was discarded and then waited all that time to take the vehicle.

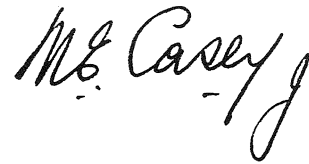
The problem for Mr Upton is that even if Mr Van de Ven's account of disposing of the key was false (and we think it plainly must have been), Rabone J did not think he told Mr Mearns - see the passage from his judgment cited at p9 above. Certainly Mr Mearns was emphatic that he was not told. Accordingly the appellant cannot rely on this as a lie told in making the claim.

Mr Upton endeavoured to overcome this difficulty by a belated submission that lies told in the affidavit to lead to summary judgment were also in breach of Condition 3. This point was never raised in the pleadings, nor at the trial, and it was not mentioned in the points on appeal.

As noted above, the Judge regarded Mr Van de Ven as a person prone to saying the first thing that came into his head and then qualifying it. The appellant's case is that what he said about the existence and disposal of the service key amounted to deliberate lies, which accords with the thrust of Condition 3. Mistake is not enough. There must be an intention to deceive, or recklessness in not caring whether the statements were true or false, and the onus is on the appellant to establish this. The respondent may genuinely have persuaded himself that the service key was among the bunch he threw away at Seaview. Similarly, by the time he swore his third affidavit of 13 June 1990, it is conceivable that he may have persuaded himself he did tell Mr Mearns about throwing it away.

Rabone J was not prepared to find against him in other areas where the circumstantial evidence appeared to support the appellant's claim that he had lied. He must have gained a favourable impression of Mr Van de Ven's integrity from seeing and hearing him give evidence, an advantage which is not available to us. Mr Upton's final submission requires us to find that he deliberately lied in his last affidavit and perjured himself. As an appellate Court we feel unable to reach that conclusion in the light of the Judge's assessment of his overall credibility.

We are satisfied that the circumstances justified the prosecution of an appeal, and leave to bring it out of time is granted. But for the reasons given above the appeal must be dismissed with costs of \$3,500 to the respondent, together with any disbursements as fixed by the Registrar.

A handwritten signature in black ink, appearing to read "M.E. Casey". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Solicitors:

Tripe Matthew's & Feist, Wellington, for Appellant
Gibson Sheat, Lower Hutt, for Respondent