

23/11
IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

BF 1291

A 83/84

BETWEEN JOHN GORDON YOUNG of
Palmerston North, Company
Director and KATHLEEN
VERONICA MULLINS of
Palmerston North,
Laboratory Technician

Plaintiffs

A N D COMMERCIAL UNION GENERAL
INSURANCE COMPANY LIMITED
a duly incorporated
company having its
registered office at
Wellington

Defendant

Hearing: 6, 7 and 8 August 1986

Counsel: C J Walshaw for plaintiffs
H S Lusk QC and G Paine for defendant

Judgment: 24 SEP 1986

RESERVED JUDGMENT OF GREIG J

At the beginning of the last war Mr Young's grandfather bought from a jeweller's shop in the Square in Palmerston North a silver tea service which comprised a teapot, a hot water jug, a milk jug, a sugar basin and a tray. The purchase price was reputed to be 500 pounds. The purchase was made as a twenty-first birthday present for one of the sons, Mr Young's uncle. He was to be 21 on 23 March 1940 and the tray and other articles were engraved with the young man's initials and the date of his birthday. It seems that before he became 21 he had gone overseas to serve in the Air Force and was killed in the Battle of Britain. The tea service was passed down to Mr Young's father and, on his death, to him. It was little used but was kept as a family heirloom to be handed on to one of Mr Young's own sons.

Some time after Mr Young obtained possession of the tea service he accepted the persuasion of his mother and Miss Mullins to insure the articles. Ultimately the insurance was provided by the defendant under a Domestic Insurance Package, so-called, a Shock Absorber insurance over household contents and personal effects. The silver tea service was described as a "specified item" in the insurance policy, at a figure of \$22,125. While that policy was in force, some time during the night of 7 July 1984 the plaintiffs' residence was broken and entered and the tea service, together with a number of items, was stolen. Neither the burglars nor the silver tea service have ever been seen again. A claim was made under the policy. There was a lapse of time after the claim during which the insurance company made investigations and there were numerous negotiations. The plaintiffs were dissatisfied about the attitude of the defendant to the claim and issued these proceedings on 19 October 1984, in which they claimed then the total of \$57,025 for their losses. Since then settlement had been achieved in respect of the claimed losses except for the silver tea service. The issue which remained for determination was the quantum of the sum payable for the loss of the tea service and the sum, if any, which should be payable for interest and costs.

The first issue was whether the policy was a valued or an unvalued policy.

The defendant's policy form comprises a schedule and a printed form of contract conditions. It is in a simplified form of words without some of the older jargon and detailed terms and conditions. That said, it is a usual form of insurance for household contents and personal effects which provides a global maximum sum to be insured, subject to a franchise or excess for each claim and subject to the exclusion of any item of more than five percent in value of the sum insured. The insurance then provides for specified items which

are listed under the schedule and in respect of each there is a sum of money. As I have already noted, the silver tea service was the one specified item in the schedule to the policy, at a figure of \$22,125. That figure is identical to the amount of a valuation made by Keith Plier Jewellers on 1 February 1980 and that valuation had been used for previous insurance policies and was used for this one as well.

The precise terms of the policy which are relevant to this issue are, first of all, the opening paragraph of the printed form:

"The Commercial Union General Insurance Company Limited ("the Company") agrees on payment of the premium to insure you for accidental loss damage destruction or liability as expressed in this Policy and Schedule ("The Policy") occurring during the Period of Insurance."

The property insured is described as:

"Household contents and personal effects belonging to or hired by you including up to:-

- (a) \$250 for money, negotiable securities and documents.
- (b) \$1,000 for stamp or coin collections.
- (c) \$400 for watercraft.
- (d) \$400 for any one bicycle."

There then follows exclusions of motor vehicles, aircraft, outboard motors and other similar items, sporting equipment, tools of trade, and:

"(c) More than 5% of the sum insured (exclusive of specified items or young persons amounts) for any unspecified item other than furniture, furnishings, household appliances and musical instruments."

Under the heading "Claims Settlement" there are these provisions:

"The Company has the option to settle up to the sum insured by payment, reinstatement or repair and will base settlement on:-

1. Replacement value for:

(a) Furniture, furnishings, and household appliances less than 10 years old other than carpets, floor coverings, blinds and curtains

(b) Carpets, floor coverings, blinds and curtains less than 5 years old but only in the room or rooms in which the damage occurs

If not replaced or repaired, settlement will be based on indemnity value.

2. Indemnity value for furniture, furnishings and household appliances 10 years old or more; carpets, floor coverings, blinds and curtains 5 years old or more; and all other household contents and personal effects.

In the schedule, which is attached to and forms part of the policy, against the general item of "Household Contents and Personal Effects", under the heading "Sum Insured" there was the entry \$35,000. The specified item, which I have already mentioned, does not in that part of the schedule include the phrase or description "Sum Insured". At the foot of the schedule there is an entry "Total Sum Insured \$57125", the sum of the \$35,000 and the total of the specified item.

I think it can be said that in non marine insurance a valued policy is unusual. It is a matter of construction of the policy as to whether it is a valued or unvalued one. The plaintiffs relied in their claim that this was a valued policy on the policy document itself, the proposal and other forms and

documents, including the jeweller's valuation form which had been created or entered into before the policy was issued. The plaintiffs did not rely on any other evidentiary material on this issue. To be a valued policy it must be shown that the insured and the insurer have agreed upon the value of the property and thereby have established the loss.

This is not, in my judgment, a valued policy. This is not a case where the parties have agreed the value of the item and have established the amount of the loss. It is an unvalued indemnity policy.

The defendant, like other insurers in this kind of insurance, offers a policy which limits the total amount of the indemnity to a gross sum and limits the indemnity of any individual item, in this case to an amount equal to 5 percent of the gross sum. The insurer, however, is willing to offer cover for specified items for a specified sum. It requires some evidence that that is a justified sum. It then calculates a premium based on the amount of the global insured sum and at a special rate for the specified items. It is, however, insuring for indemnity in respect of all items including those specified. That seems to be clear in this policy because of the terms of the claims of settlement. Moreover, the policy does not look like a valued policy.

The indemnity policy, where there is not to be actual reinstatement or replacement, requires the insurer to pay such sum as is the actual loss of the insured up to but not exceeding the amount specified in the policy, in this case \$22,125. As far as money can do this, the insured should be restored to the position he was in before the loss. That is the basic principle and the true basis for quantifying the amount to be paid. It is, however, of some difficulty when, as here, the item is second-hand, of some particular intrinsic value and partakes of the uniqueness of a work of art inasmuch as it cannot be duplicated precisely. There can be no question

that such matters as sentimental value and family historical interest are not the subject matter of compensation or payment by the insurer. It is in the application of the basic rule that there is difficulty because, depending on the particular circumstances, a market value may be appropriate or a reinstatement cost together with some discounting for the benefit of a new item for an old one, or some other valuation altogether may be appropriate.

I refrain from any lengthy reference to authority but, with respect, approve in particular the passage headed "Articles in use" at p 174 of E R Hardy Ivamy Fire and Motor Insurance (4th ed). I refer also to Gold Star Insurance Co Ltd v O'Brien [1985] 3 ANZ Insurance Cases 78, 681, when Quilliam J held that what an enthusiast would pay for a hot rod vehicle was the proper amount.

This tea service cannot be duplicated precisely. The plaintiffs cannot be restored to the identical position they were in before the loss. No sum of money can be produced which will allow them to buy the same tea service. The evidence satisfies me, however, that a reasonably comparable tea service can be obtained both as to age and quality, as well as size and weight. I think the appropriate amount in this case is that amount which will allow the plaintiffs to go out into the market of second-hand silver and purchase a comparable set. That in itself is going to be a slightly larger amount than the market value in the sense of the amount that can be obtained in the market on the sale of such an item either at public auction or to another dealer. The reason for that is that the vendor requires some additional amount. In other words, the appropriate amount is the market price to be paid by the willing purchaser to the willing seller.

The next and the principal issue in this case is the proper amount of that value. The tea service was a sterling silver tea service made in Sheffield in or about 1927. The

total weight of the service, including the tray, was 4,425 gms or 142.74 troy oz. The tray itself weighed approximately 2,500 gms or 80.65 troy oz. As I have noted, each item was engraved, and it was said to be heavily engraved, with the initials "R.B.M.Y." and the figures "23.3.40". That information, which I accept, comes from photographs which were taken by Miss Mullins some time before the burglary and loss, which display in very clear terms the size, excellent condition and general significance of the set. Her photographs included a close-up of the hallmark from which it can be shown that it is sterling silver, where it was made, when, and - indeed - by whom. The weights I accept, at least in total, come from the 1980 valuation. There was some criticism of that valuation and the details of the description. It may be that there was some confusion in ascribing to each individual piece the correct weight. I was impressed by Mrs Plier's obvious efficiency and experience and, while there may have been some slight mistaking of the individual weights, I am satisfied that the total weights are to be accepted.

The bulk of the evidence was from witnesses who spoke of their opinion as to the value of the articles from these photographs, the weights and their general knowledge and expertise about silver. None of the witnesses, except Mrs Plier, had ever seen or handled the tea service. I put aside, however, Mrs Plier's valuation. This was done on a simple arithmetical basis of \$5 a gram, on her understanding of the replacement cost to comprise the value of the silver content plus the cost of workmanship in making such a set. It was not founded on her opinion of the sale or purchase value of the actual tea service. On the other hand, for the plaintiff, Mr M J McKearney gave evidence based on his lengthy and extensive experience in the New Zealand antique business which includes the sale of sterling silver of all kinds. It was his opinion that to obtain a replacement of this service it would be necessary to purchase one in the United Kingdom and then ship it to New Zealand. It seemed that on to-day's figures and

values he thought that it would cost about 23 or 24,000 dollars to find a similar set in size, age and condition and import it into New Zealand. It was his opinion that in 1984 he would have sold the set for about \$12,500. That, I take it, was his opinion of the market value.

For the defendant there were two principal witnesses and, while I do not intend to deal with another witness called, who confirmed the view of the other two, it is not because I disregarded his evidence but merely because the other witnesses appeared to me to have a much greater experience. The first of those was a Mr Opie who has had a very extensive and detailed experience in the employment for some years of Sotheby's, the well known auction house and dealer in England. Clearly his time with that company, involving the assessment of all kinds of silver as well as many other sorts of personal property and objets d'art, gave him at least in European terms an experience which far excelled that of any of the other witnesses. In addition he had experience in New Zealand and had kept himself familiar with the market in articles including sterling silver in recent times here. It was his opinion that the tea service on his view of indemnity value was \$4,000 and on replacement value \$6,000. The other witness, a Mr P M Rhodes who conducts an antique dealing business in Palmerston North, has had considerable experience over a number of years and has kept closely in touch with the conduct of the public auction sales and communicates with other dealers. I think he would accept, if he did not in fact accept in evidence, that his experience does not rival that of Mr McKearney in scope, range or time, but he certainly has a considerable knowledge of the trade in sterling silver. It was his opinion that he would be able to obtain a similar service, including a tray, for about \$4,000.

There was clearly a very marked difference between the opinions of these various persons, all of whom were familiar with the trade in New Zealand. In the end I have preferred the evidence given by the defendant's witnesses.

Both Mr Opie and Mr Rhodes impressed me with their continuous and current acquaintance with sales of silver throughout the country. Both attended from time to time and kept themselves informed about auction sales outside their own particular residential and trading areas and kept an alert interest generally on the sales of sterling silver throughout New Zealand. They were able to produce in support of their valuation opinion a catalogue of a sale conducted by John Cordy's Ltd in July 1984 and of one conducted by Peter Webb Galleries Ltd on 15 August 1985. Although these did not include strictly similar items, there were a number of silver services and other items, including trays, which provided a comparative basis. Likewise there were publications which they produced which indicated other sales in the United Kingdom of more nearly comparable items and of other sales in New Zealand. Mr McKearney appeared to discount the value of the evidence of other sales in New Zealand, claiming that his experience in his own business was sufficient to justify his opinion. While his business may be large, I think he cannot logically justify his opinion in respect of the whole of New Zealand. I think it has to be remembered that in New Zealand there is a relatively small market and Mr McKearney's business must be just a part of that market. I think too that his views as to the cost of replacement were much inflated and were not based on any supporting material. Indeed, they were contradicted by the other written material which was produced before me.

Of the figures then, I think the appropriate one is the sum of \$6,000 as being the amount with which in 1984 the plaintiffs ought to have been able to obtain a comparable tea service. I have ignored in my decision the engraving and the discussion in evidence during the hearing of the costs of its removal. While on Mr Opie's evidence the cost of removal might be significant, and while there might be some indication that without removal the item would have a somewhat less value, I consider that these are speculative considerations and are of a

hypothetical nature. In the end the decision as to amount is the sum required to purchase a comparable but not identical tea service. It is not the amount of the sale value of the tea service that was lost. At all events, having regard to the other information in evidence before me, I am not at all satisfied that the engraving in this case would in any significant way affect the value of this service.

The plaintiffs on the principal part of their claim have in the result been unsuccessful. At the same time it is plain, I think, that the defendant was unwilling to settle the claim at an early occasion and had, it seems, some suspicions as to the validity of the claim and the circumstances of the loss. Even in respect to items other than this tea service there was considerable dispute and delay in settling the amount and final settlement on these other items was not reached until after the proceedings were issued. Without the issue of these proceedings there would, I think, have been further delay and there might not have been payment even of the amount which I think the plaintiffs are entitled to. At all events the plaintiffs have been without their tea service and without the payment contracted for under the insurance policy. The defendant has had the use of the money all this time and only now is compelled to pay. I think that the plaintiffs are entitled to interest and to an award of costs. I think, however, that both of these must be tempered having regard to the amount of the claim compared to the final amount payable. There can be no doubt that the inflated amount of the plaintiffs' claim extended the time by creating the wide disparity between the two claimed values. I think justice would be done if interest is limited to the sum of \$6,000 but I think that that should be paid from the date of the issue of the proceedings. I propose to fix an amount of costs in gross, having regard to the amount finally recovered.

There will be judgment for the plaintiffs in the sum of \$6,000 together with interest thereon at the rate of 11 percent

per annum from 19 October 1984 to the date of judgment. The plaintiffs will have their costs in the sum of \$1,200 plus Court fees and other disbursements paid and witnesses' expenses, as fixed by the Registrar.

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