Date: 19970707
Docket: C940385
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

1997 CanLII 2098 (BC SC)

BETWEEN:

JESSIE BAINS, JASPREET BAINS, and GURMIT BAINS

PLAINTIFFS

AND:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

DEFENDANT

AND:

JEFFREY KUSCH

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiffs: S.R. Chamberlain, Q.C.

Counsel for the Defendant: D.J. Bilkey and D.G. Blois

No one appearing for the Third Party

Place and Dates of Hearing: Vancouver, B.C.
January 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, February 3, 4, 1997

[1] The plaintiffs were insured under a homeowners' insurance policy issued by the defendant. Their house and its contents were destroyed by an incendiary fire in the early morning of January 24, 1993. The arsonist — the third party, Jeffrey Kusch — pled guilty to a resulting criminal charge and has served his sentence.

[2] The defendant refused coverage under the policy and the plaintiffs seek judgment in the amount of their alleged loss. They also claim compensatory and punitive damages.

[3] It is not disputed that the plaintiffs have made out a *prima facie* case for indemnity. The parties have reached agreement as to the amount of some elements of the loss and have agreed on a process for resolving the others out of court. The remaining issues, which concern the extent of the loss and the claims for damages, do not arise unless the defendant fails on the threshold issue, that is, whether the defendant's refusal to indemnify the plaintiffs was justified.

[4] The defendant pleads that indemnity should be denied on two grounds. First, the defendant says that the plaintiff Jessie Bains procured the arson and that the loss is therefore excluded from coverage by a term of the policy that says:

> *We do not insure against loss or damage*
> *(A) caused by . . .*

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> *11. INTENTIONAL OR CRIMINAL ACTS, meaning any loss or damage resulting from:*
>
> - *the intentional or criminal acts or failure to act*
> - *by, or at the direction of,*
> - *any person who is insured by this policy;*

[5] Alternatively, the defendant contends that the proofs of loss submitted by the plaintiffs pursuant to the provisions of the ***Insurance Act***, R.S.B.C. 1979, c. 200, s. 220, statutory condition 6, were fraudulent, and that their claim is therefore nullified by statutory condition 7. Statutory conditions 6 and 7 state, so far as they are relevant:

> ***6. REQUIREMENTS AFTER LOSS***
>
> *(1) Upon the occurrence of any loss of . . . the insured property, the insured shall . . .*
>
> *(b) deliver . . . to the insurer a proof of loss verified by a statutory declaration . . .*
>
> ***7. FRAUD***
>
> *Any fraud or wilfully false statement in a statutory declaration . . . shall vitiate the claim of the person making the declaration.*

[6] If it is found that the plaintiffs' claim is valid, the defendant seeks indemnity from Mr. Kusch in the third party action, which was undefended.

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BACKGROUND FACTS

[7] For narrative convenience, I will refer to the plaintiffs and witnesses by their first names at times.

[8] The plaintiff Jessie Bains, a computer operator, came to Canada from India as a young boy. His mother, the plaintiff Gurmit Bains, followed in 1974. Jessie and Jaspreet Bains were married in October, 1990, and have two children, a son and a daughter, who were, respectively, two years old and seven months old at the time of the fire.

[9] Jessie has been involved in real estate development, both as a builder and as a buyer and seller of homes, since about 1980. Many of his ventures were financed by his mother. With her financial assistance, he built three houses in Surrey, B.C., of which the insured house was the last. In each case, he listed the house for sale immediately after completion, and the Bains family, including Gurmit, resided in it until it was sold. The net proceeds of sale of each house, which he claimed included substantial profits on the first two, were invested in the next.

[10] Jessie arranged the purchase of the lot for the house in question in early 1992. He had title registered in the names of Jaspreet and Gurmit. Using the net proceeds of sale of their previous home, money contributed by Gurmit, and a loan

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secured by a mortgage on the property, which he guaranteed, and acting as his own general contractor, he had the house finished by about May, 1992. The family took up residence and he put the house on the market.

[11] The circumstances said to incriminate Jessie in the arson began in the summer of 1993 with events affecting his financial condition. First, he took the property off the market in July, 1993, as it had not been sold. At about the same time, he arranged with his insurance agent for an increase in the insurance provided by the defendant, effective July 21, 1993, on the dwelling, personal property, detached buildings, and additional living expenses.

[12] As well, in July and August, 1993, Jessie invested $30,000 in a tutoring business which, he said, was to be operated by the wife of his best friend, Charn Deol, and in which he was to be a 50% partner. He borrowed $12,500 of that sum in August, 1993, and incurred a repayment obligation of $100 per month.

[13] Then, at about the end of August, 1993, Jessie and his mother had a violent argument. She had resided with Jessie and Jaspreet and their family since they were married and had regularly contributed her pension of $900 per month toward the family's expenses. However, as a result of her quarrel with Jessie, she left their home and went to stay with her daughter, Manjit Dyal. She closed her bank account, on which Jessie had

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signing authority, and, on September 1, 1993, she returned to India.

[14] On September 15, 1993, Jessie, Jaspreet, their two children, Jaspreet's mother, and their eight-year-old niece — the daughter of Jessie's sister Bhupinder Kang — left for California. While they were away, on the morning of September 24, 1993, their house was destroyed by the fire set by Mr. Kusch.

[15] Jessie, Jaspreet, and Gurmit delivered proofs of loss sworn respectively on November 2, November 25, and December 3, 1993. Each assigned payment of the claim to Jessie. To each was attached a schedule itemizing the personal effects said to have been destroyed and their respective replacement costs, which totalled $191,135.

[16] The defendant rejected the proofs, and the plaintiffs commenced this action on January 20, 1994. The plaintiffs subsequently delivered a revised schedule and their claim at trial was based upon this document. It is much more detailed than the schedule attached to the proofs, and differs from the original schedule, both with respect to the items allegedly lost and with respect to replacement values.

[17] Shortly after the fire, Jessie, Jaspreet, and their children moved into rented accommodation, where they lived

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together until early February, 1996, when Jessie and Jaspreet separated. Jaspreet and the children remained in the rented premises, and Jessie moved into the home of his friend, Charn Deol, where he resided until the summer of 1996. His place of residence thereafter was not disclosed in the evidence, but he returned to his family about one week before this trial.

[18] On February 15, 1996, Jessie assigned himself into bankruptcy. As his trustee in bankruptcy is not a party to this action, I assume he has been discharged.

[19] I now turn to consider the issues joined by the parties in the light of that background.

ANALYSIS AND CONCLUSIONS

1. Burden and standard of proof

[20] The defendant bears the burden of proof with respect to the allegations of arson and fraud. The standard of proof is the balance of probabilities, but the degree of proof must be commensurate with the gravity of these allegations: ***Hanes v. Wawanesa Mutual Insurance Co.***, [1963] S.C.R. 154; ***Continental Insurance Co. v. Dalton Cartage Co.***, [1982] 1 S.C.R. 164.

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2. Complicity in the arson

[21] To avoid the policy on the basis of the exclusion for intentional or criminal acts, the defendant must prove that the fire was started by the plaintiffs, or at their request. Counsel agree that the complicity of one plaintiff will defeat indemnity for all plaintiffs. The inquiry to be undertaken is described by the Ontario Court of Appeal in ***Rizzo v. Hanover Insurance Co.*** (1993), 103 D.L.R. (4th) 577 at 583 as follows:

> . . . whether, on all of the evidence inculpatory of the insured, including motive and opportunity, the insurer has proven the defence of arson according to the standard of proof appropriate to the establishment of that defence in a civil case.

[22] It is not disputed that the fire in question was deliberately set and that Kusch was the arsonist. The defendant's position is that Jessie Bains hired one John Lau to arrange the arson, and that Lau contracted the job to Kusch. It is therefore instructive to examine the connections between these three men.

[23] At the material times, John Lau resided in a suite in the home of Charn Deol. Jessie and Charn have been friends since they were small children. Jessie said Charn is like a brother to him. The closeness of their relationship was confirmed by Gurmit, who said Charn is like a son to her.

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[24] Lau, too, was a friend of Charn Deol, and of Charn's son, Roger. John Lau, Charn Deol, and Roger Deol were also acquainted with Jeffrey Kusch. Although he denied knowing Kusch before the Bains fire, Charn visited with him on occasion while he was serving his sentence for that arson.

[25] Roger Deol did not testify at the trial, nor did Lau, although unsuccessful attempts were made by the defendant to procure his attendance.

[26] Kusch, who was called as a witness by the defendant, testified that the arson had its genesis in a visit he paid to Lau in Lau's residence in the Deol home. He said he was in Lau's suite when, through a door that opened to the Deol residence, he overheard Roger Deol say that "Jessie" and his family were going on vacation. He testified that Roger later told him that "Jessie" was Jessie Bains, and that he "weaseled" the address out of Roger so he could burgle the vacant home.

[27] On September 23, 1993, a Delta police constable observed an automobile travelling in the neighbourhood of the Bains house at 1:50 a.m. He stopped the vehicle, which belonged to Lau, and spoke to the driver, who was Kusch, and the passenger, who identified himself as John Hoyle. He observed a ten-gallon container of gasoline in the back of the automobile. After questioning the occupants, he let them go on their way.

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[28] Kusch set the Bains house afire at approximately 1:00 a.m. on the morning of September 24, 1993, using gasoline as an accelerant. Again, he used Lau's automobile to travel to and from the house.

[29] Kusch testified that he was alone at the time and that, after tearing a glove in the course of robbing the house, he started the fire for the purpose of obliterating his fingerprints, using some gasoline he found in the garage. However, he acknowledged that he testified on his examination for discovery that he premeditated the fire and that he started it with the gasoline in the ten-gallon can seen by the police constable on the previous morning in the back of Lau's automobile. His explanation that he was confused on his examination for discovery was patently unbelievable.

[30] Further, Kusch did not give a believable explanation at trial for the presence of the gasoline in the back of the automobile the previous morning, nor for his presence in that neighbourhood at that early hour. As well, I do not accept his testimony that he borrowed Lau's automobile on both occasions for a purpose unknown to Lau.

[31] Kusch's account of the circumstances of the arson was unconvincing. In my opinion, the evidence demonstrates that he was on his way to burn the Bains house the previous morning

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but, as he was interrupted by the police officer, he merely postponed the crime for a day.

[32] That conclusion is supported, in part, by evidence offered by the defendant of earlier statements made by Kusch and on his behalf. As the admissibility of this evidence is challenged by the plaintiffs, I will next deal with that issue.

[33] In an information sworn February 14, 1994, Lau and Kusch were charged jointly with four counts of arson pursuant to s. 434 of the ***Criminal Code***. The dates of the alleged arsons and the properties allegedly burned were:

> Count 1: October 8, 1993, a dwelling house at 502 Chatham Street, Vancouver, B.C.;
>
> Count 2: September 24, 1993, the Bains house;
>
> Count 3: December 11, 1993, a storage warehouse at 8654-120th Street, Surrey, B.C.;
>
> Count 4: August 8, 1991, farm buildings at 1375 Hale Road, Pitt Meadows, B.C. ("the Purewal Farm fire").

[34] Kusch, who was then nineteen years of age, pled guilty to all four counts. He was sentenced on January 27, 1995, to a total of twenty-two months in custody to be followed by a term of probation. Counts 1 to 3 were stayed against Lau. He pled guilty to Count 4, the Purewal Farm fire, on November 15, 1994, and was sentenced on February 28, 1995, to fourteen months in custody and a subsequent period of probation.

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[35] Kusch testified at this trial that Lau hired him to set the Purewal Farm fire. He denied that Lau was implicated in any way in the destruction of the Bains house. However, during submissions on sentence, Kusch's counsel told the Provincial Court judge that Lau had hired Kusch to set all of the fires in respect of which Kusch pled guilty. Counsel portrayed Kusch as an impressionable teenager taken advantage of by Lau, a sophisticated adult. Although a copy of a transcript of the sentencing proceedings was marked in evidence by consent, the admissibility of this particular evidence was challenged by the plaintiffs on the ground that it is hearsay.

[36] As defence counsel was speaking at the sentence hearing as Kusch's authorized agent and in Kusch's presence, his statements must be taken as Kusch's statements. The issue, therefore, is whether the transcript satisfies the tests of necessity and reliability so as to make it admissible evidence of the fact that Lau hired Kusch to set the fire at the Bains house. As stated in ***R. v. K.G.B.*** (1993), 79 C.C.C. (3d) 257 (S.C.C.) at 296:

> In the case of prior *inconsistent* statements, it is patent that we cannot expect to get evidence of the same value from a recanting witness or other sources: as counsel for the appellant claimed, the recanting witness holds the prior statement, and thus the relevant evidence, "hostage". The different "value" of the evidence is found in the fact that something has radically changed between the time when the statement was made and the trial and, assuming that there is a sufficient degree of reliability established under the first criterion, the trier of fact should be allowed to weigh both statements in light of the witness's explanation of the change.

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[37] The necessity requirement is met here by the fact that Kusch has recanted the statements in question. At trial, he testified variously that he did not remember his lawyer saying that Lau was the organizer of the Bains fire, that he did not know what he said to his lawyer about that, that he lied to his lawyer when he said Lau was the author and organizer of the Bains fire, and that it is not true that Lau hired him to set the Bains fire.

[38] Admissibility therefore turns on an assessment of the reliability of the evidence, which must be proven on a balance of probabilities.

[39] The traditional testimonial safeguards of an oath, contemporaneous cross-examination, and observation of demeanour are absent here. Moreover, the statements were made by an agent, and the hope of a light sentence was an incentive for Kusch to shift responsibility for the crime to Lau and to make himself appear to be a victim of Lau's machination. These factors weigh against the reliability of this evidence.

[40] However, the absence of the conventional precautions is not conclusive, and the threshold level of trustworthiness of hearsay statements may be established by circumstantial indicia of their reliability: ***R. v. K.G.B.***, *supra*, at 294.

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[41] Here, there is such circumstantial evidence. First, a criminal connection between Kusch and Lau is established by Kusch's testimony at this trial that he was hired by Lau to set the Purewal Farm fire and by their respective pleas of guilty to charges of arson arising out of that fire. Second, Kusch is an incredibly knowledgeable and proficient arsonist, who was found by the police to possess what they considered to be the largest laboratory in Canada at the time for the illicit manufacture of explosives. Moreover, he pled guilty to two arsons committed within the three months following the Bains fire. These facts support the suggestion that Kusch was hired for this fire and weigh against his explanation that he set it impulsively in the course of a burglary. Third, Kusch was driving Lau's car in the neighbourhood of the Bains house the morning before the fire, carrying a ten-gallon can of gasoline. These facts are consistent with the propositions that he premeditated the arson and that Lau hired him to carry it out. Fourth, Kusch used Lau's car to travel to and from the Bains house, and the fire was started by the ignition of gasoline. Finally, Kusch said he learned the address of the Bains house and of the absence of its occupants when he was visiting Lau in Lau's home. Although each of these facts in isolation may be unremarkable, taken together they support the truth of Kusch's prior statement that Lau hired him to set the Bains fire.

[42] Moreover, the impugned statements are remarkably consistent with statements made by Kusch in December, 1993, to

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Constable Lemay of the R.C.M.P. Similarity of pre-trial statements is a circumstance indicating reliability and may justify their admission into evidence: see ***R. v. F.J.U.*** (1995), 101 C.C.C. (3d) 97 (S.C.C.), where the striking similarity between the impugned statement of the accused and a statement made by the complainant was a sufficient circumstantial guarantee of the trustworthiness of the former to permit its reception in evidence despite the absence of the customary safeguards.

[43] Constable Lemay was involved in a covert R.C.M.P. investigation of the Purewal Farm fire, of which Lau, Kusch, and Hoyle were suspects. I found Constable Lemay to be a credible and reliable witness and I am satisfied that he accurately recounted what Kusch said to him. Posing as a biker involved in organized crime, he befriended Kusch and induced Kusch to believe that he would find a place for Kusch in his organization if Kusch could satisfy him that he had made criminal use of his skills. Kusch told Constable Lemay that he had committed the four arsons to which he subsequently pled guilty. He took Constable Lemay to the scene of each and explained to him in detail how he had set the fires. He told Constable Lemay that Lau had hired him for all of the fires. Again, he recanted at trial, testifying that he did not remember saying to Lemay that Lau had hired him to set the Bains fire. He added, "I don't think I said that."

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[44] Kusch's statements to Constable Lemay suffer from the usual hearsay dangers. Further, they were made in circumstances where it was to Kusch's advantage, from his perspective, to boast about his criminal activity.

[45] On the other hand, much of what Kusch said has been shown to be true. He subsequently pled guilty to the arsons he described to Constable Lemay. His statements to Constable Lemay that he had placed a propane tank on the second floor of the Bains house, that he had opened the valve to the propane tank, and that he had placed a can of gasoline on the main floor and caused it to explode to ignite the fire were confirmed by Kusch in his testimony and were supported by the findings of the fire investigators. As well, he told Constable Lemay about being stopped by the police the morning before the fire while driving in the neighbourhood with a can of gasoline in the back of the vehicle. Further, he led Constable Lemay to the scene of each of the four arsons to which he confessed.

[46] Thus, while there was an incentive for Kusch to overstate his criminal exploits, it turns out that he did not do so.

[47] The similarity of Kusch's statements — through his counsel to the sentencing court and to Constable Lemay — and the other circumstantial evidence of trustworthiness I have mentioned together supply the necessary degree of reliability to justify

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the reception of both statements as evidence that Lau hired Kusch to set the fire at the Bains house.

[48] The defendant also offered a transcription of a lengthy interview of Lau by members of the R.C.M.P. I need not deal with the necessity criterion in this regard, as the evidence does not meet the threshold level of reliability. Lau made these statements while he was in custody, and while he was in the course of attempting to trade information in exchange for favourable treatment by the Crown. They therefore lack circumstantial trustworthiness and are inadmissible.

[49] Kusch was an unimpressive and unreliable witness, and I do not believe much of what he said. While my disbelief of Kusch does not weigh in the balance, I am nevertheless satisfied on a preponderance of the evidence, including Kusch's previous statements and the circumstantial evidence supporting their truth, that Lau hired Kusch to burn the Bains house.

[50] The next question to be answered is why Lau hired Kusch for that purpose and, in this regard, it is instructive to turn to the relationship between Lau and the plaintiff Jessie Bains.

[51] Jessie Bains has known Lau since at least the late 1980's. He said he first met Lau when he and Lau worked for Charn Deol in a blueberry processing plant. He employed Lau as a photographer at his wedding to Jaspreet in October, 1990. As

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well, he hired Lau in the summer of 1993 to prepare brochures for the proposed tutoring business, which was to be operated by Charn Deol's wife, who was Lau's landlady. Thus, Jessie Bains and Lau were doing business with each other near the time of the arson. Further, Jessie engaged Lau in early 1994, at about the time that Lau and Kusch were charged with the arson of his house, to prepare campaign literature for him in his bid to be elected to the board of directors of a local credit union. They worked closely together on that project.

[52] Moreover, Jessie was a frequent visitor at the Deol home, where Lau lived, before and after the fire. Following his separation from Jaspreet in February, 1996, Jessie resided at the Deol home for several months. For part of that time Lau resided there too, having returned to his suite after his release from gaol. This association was remarkable, as it occurred after Jessie had attended Kusch's sentencing proceedings and had heard Kusch's lawyer say that Lau had hired Kusch to burn the Bains house, and after he had learned what Kusch said to Constable Lemay about Lau's involvement in the arson.

[53] Although he moved from Charn Deol's home in 1996, Lau continues to receive his mail there and he and Charn Deol still communicate from time to time, at least by telephone.

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[54] Another curious connection between Jessie, Charn Deol, Lau, and Kusch is a letter found in a safe in the master bedroom of the house after the fire. All that remains of the letter is a photograph taken by the defendant's investigators. The letter was addressed to the Ministry of Agriculture and was in substance an anonymous report by someone in "close relationship" that Purewal Farms — the farm in respect of which both Kusch and Lau pled guilty to arson charges — was defrauding a crop insurance program. Jessie admitted that he had access to the safe, but denied any knowledge of the letter and said the safe and its contents belonged to Charn Deol. Charn said that Jessie gave the letter and the other contents of the safe to him after the fire, but said he did not read the letter and had no idea what it said. Despite that, he described it as "garbage" and said he threw it away. His explanation that the letter could have been placed in the safe by persons unknown was unconvincing.

[55] I do not believe that Jessie had no knowledge of the letter, and its presence in the safe in his master bedroom, considered with all of the other evidence, leads to an inference that he had some connection to the farm that Lau hired Kusch to burn and that he likely had knowledge of the involvement of Lau and Kusch in that fire.

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[56] In addition to his close connection to the perpetrators of the arson, Jessie is inculpated by the circumstances surrounding the event.

[57] The fact that Jessie increased the insurance coverage on the house and contents just weeks before the fire is an incriminating circumstance. I reject his explanation that he did so because of a reassessment of the value of the home and contents.

[58] Moreover, the trip to California just before the fire is very suspicious. It was impulsive and unplanned and was Jessie's idea. I do not believe the explanation given by Jessie and Jaspreet that its purpose was to provide a holiday for their children. Among other things, their young ages belie that suggestion. In my view, Jessie's purpose was to provide an alibi for himself when the house was burned.

[59] Further, a telephone call made from California on Jessie Bains' telephone on September 23, 1993, the day of the fire, to the home of Charn Deol, where Lau was resident, is suspicious, and no satisfactory explanation of it was given. When first asked, Jessie denied making the call. When confronted with his telephone records, he attempted to assert that the call was placed on September 24th. When he was forced to agree that it occurred on September 23rd, he denied any recollection of it and said that it was possible he called Charn because "I always

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let him know where we are." However, his telephone records from September 17th to September 24th show that his first communication with Charn Deol's telephone number during that period was the call on September 23rd. I do not believe Jessie's testimony in this regard. Charn Deol said he had no recollection of receiving the call, and it may be that the recipient of the call was John Lau. Charn testified that the door between his residence and Lau's suite was always left unlocked. The temporal proximity of the telephone call to the fire, taken with the other suspicious circumstances, leads me to conclude that it was made by Jessie for the purpose of ascertaining the status of the criminal enterprise.

[60] There were a number of calls placed to and from Jessie's telephone on the day following the fire. Several involved conversations between Jessie, Jaspreet, and Bhupinder Kang. Their descriptions of those conversations do not accord with reasonable probability.

[61] For example, Jessie, Jaspreet, and Bhupinder testified that Bhupinder telephoned Jessie in California at 3:30 a.m. on September 24, 1993, and awakened him. According to them, she said he must return home immediately because their home had been broken into. They were adamant that she said nothing about the fire. Bhupinder said she withheld that information from Jessie, and from Jaspreet in a telephone conversation a few minutes later, because she did not want Jessie to become

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"panicked." She did not explain why she thought that news of a burglary would be accepted with more equanimity than news of a fire. There was no valid reason for Bhupinder to hide from Jessie and Jaspreet the fact that their home had been burned, and I do not believe their evidence that she did so. Jessie's testimony that he had to persuade Bhupinder's husband to tell him the truth in a telephone conversation that afternoon is unconvincing and was unsupported by Mr. Kang, who did not testify. In my view, this testimony was contrived to give the appearance of distancing Jessie from any knowledge of the fire.

[62] Further, the records of other calls from Jessie's telephone that day raise questions that went unanswered in the evidence. At 5:29 a.m., when the family were en route home, a telephone call was placed to Jaspreet's brother, Jatinder Sidhu, that lasted for five minutes. That number was called again at 6:11 a.m. for one minute, and at 6:12 a.m. for six minutes. Then, at 6:52 a.m., Jessie called Charn Deol's number and spoke for three minutes. At 2:16 p.m. a call was placed to Bhupinder Kang's number and a conversation of four minutes duration ensued. At 2:40 p.m. a call to Jatinder Sidhu's number resulted in a four-minute conversation. That was followed by another call to Charn Deol's number at 2:58 p.m. and a conversation of three minutes.

[63] It is improbable that the purpose of those calls was, as Jessie testified, to find out more about what had happened to

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the house than what Bhupinder allegedly told him in the first call that morning. The number and duration of the calls discredit that suggestion. As well, it is unlikely that Charn Deol, who lived in Richmond, several miles from the Bains house and from Bhupinder Kang, would also tell Jessie only that the house had been broken into, as Jessie said he did. Further, if Charn had misled his friend Jessie about what had happened, and if Jessie had tried to persuade Charn to give him more information, as Jessie testified, it is likely that Charn would have recalled these conversations. Yet, he testified that he had no recollection of them. Moreover, in a statement given to the defendant's adjuster on October 5, 1993, Jessie spoke of his conversations with Bhupinder and of calls to her and other relatives in Surrey to get more information, but he did not mention the two calls he placed to Charn Deol. His explanation that he saw no reason to tell of those calls was unimpressive.

[64] I do not believe Jessie's testimony about these telephone conversations. I think it is likely that at least some of them concerned the fire and its aftermath.

[65] The conduct of Jessie and Jaspreet on their return to Canada was unusual and suspicious also. They went directly to Bhupinder's home and spent approximately four hours there socializing with family and friends. They did not go to their own home until after midnight, when they drove past it without stopping. It is significant that police and firefighters were

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at the scene of the fire that evening. When Jessie and Jaspreet returned early the next morning, no police or firefighters were present and they stopped and went into the house. In my view, Jessie stayed away from the house on the night of his return to avoid being questioned about the fire.

[66] Jessie Bains was not an impressive witness. He was evasive and non-responsive at times during cross-examination. As well, his testimony was at times inconsistent with his previous statements, with other evidence that I accept, and with reasonable probability.

[67] His credibility was further eroded by his influence of a witness who might have incriminated him. Manjit Dyal, Jessie's sister, was called as a witness for the defendant. She was present at Bhupinder Kang's house on the evening of September 24, 1993, when Jessie and his travelling companions returned from California. She later gave a statement to the defendant's insurance adjuster in which she implicated Jessie and Jaspreet in the fire. She said Jessie was joking about the fire that evening, and about what he would do with the insurance proceeds. She said he did not go to look at the house because he was told by a relative that the police were still there. She said Jaspreet told her that she had placed all of her gold jewellery, including her gold wedding ring — items the plaintiffs listed as lost on the schedule to the proofs of loss

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— in a safe deposit box at a bank before they went to California.

[68] Manjit acknowledged that she made the statement but she recanted it at trial. In her direct evidence, she testified that she said those things because she was angry at Jessie for past slights. She said she had no proof of what happened, and that she wanted to believe those things. She denied that her recantation was the result of conversations with anyone. In cross-examination, she agreed with the suggestion that a psychic had told her that Jessie set the fire and that she believed that at the time.

[69] Jessie said he told Charn Deol about Manjit's allegations and that Charn telephoned her on his behalf. He said he was present while Charn spoke to her and that Charn made notes of what Manjit said. He said Charn said to her, "Why lie, why do this to your own mother and brother and his wife? What have they done to you for you to do this sort of accusation?" Jessie denied counsel's suggestion that Charn told Manjit to change her statement. He said Charn "asked her if she'd be willing to see my counsel regarding the statement. Not to change it, to go see my lawyer and explain the statement to him." Thereafter, Manjit attended upon Jessie's lawyer, who was not plaintiffs' present counsel, and swore an affidavit in which she recanted her allegations.

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[70] Charn testified that he spoke with Manjit twice about the allegations she had made. Curiously, he did not support Jessie's testimony in this regard. When asked what he said to Manjit about the allegations, he replied, "I made no comment." When asked what he said to her about her formal statement, he responded, "I didn't say anything to her about that." He said he merely let her talk and listened to her.

[71] I do not believe either Jessie, Charn, or Manjit as to the content of these conversations. However, the fact that the conversations took place, juxtaposed with Manjit's earlier implication of Jessie and Jaspreet in the arson and her later execution of a contradictory affidavit prepared on Jessie's instructions, leads me to conclude that Jessie was untruthful in his testimony about this event and that he was instrumental in causing Manjit to recant her statement implicating him in the arson. It was not suggested that Manjit's earlier statement can be received for the truth of her allegations. However, the circumstances in which she recanted her allegations are relevant in that they reflect adversely on Jessie's credibility.

[72] Thus, Jessie Bains had a connection with the arsonist, the circumstances surrounding the fire incriminate him by reasonable inference, and his credibility is wanting. I turn now to the question of motive.

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[73] Jessie Bains was under financial pressure at the time of the fire. He had invested in the tutoring business and was obligated to make payments of $100 per month on the loan he incurred for that purpose. His mother had closed the joint bank account and returned to India, depriving him of her savings and of the $900 per month pension income she had customarily made available to him. The outstanding balance on the mortgage was approximately $140,000, on which he was required to make payments of $485 bi-weekly. Despite offering the house for sale for over a year, he had been unable to sell it. He was obligated as well to make payments of $200 per month on a credit union loan. He had three credit cards, each of which was at or near its borrowing limit. He agreed in cross-examination that his monthly debt repayment obligations exceeded $1,500. He also agreed that he regularly spent between $1,000 and $1,100 per month on family expenses, and that his total monthly expenditures exceeded $2,500.

[74] On the other hand, his net employment income was $2,200 per month. He had no other source of income and he was the sole source of support of his family. I do not accept his unsupported assertions that his income was more than $3,000 per month at the time, and I am satisfied that his net monthly earnings were exceeded by his required monthly expenditures.

[75] I conclude that Jessie Bains had a sufficient motive to arrange for the arson of the Bains house. The only other

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person suggested to have a motive that would exonerate him is Jeffrey Kusch, and that motive — to destroy fingerprints that might link him to a burglary — has already been discredited.

[76] No evidence was led to suggest that Lau had a motive to burn the Bains house apart from the inference that he was hired to arrange it. There is nothing in the evidence to identify anyone who would have had a reason to destroy the Bains house except Jessie Bains.

[77] There are many other circumstances that tend to support the complicity of Jessie Bains in the arson, but I do not find it necessary to canvass all of them. The web of circumstantial evidence enmeshes Jessie Bains and leads inexorably to the conclusion that he arranged for John Lau to hire the professional arsonist, Jeffrey Kusch, to burn the house.

[78] Having concluded that Jessie Bains was a party with John Lau and Jeffrey Kusch to an agreement to destroy the house, I return to the testimony of Constable Lemay, where I find further support for that conclusion. Counsel for the defendant sought to have admitted statements made by Kusch to Constable Lemay that Lau told him that all but the Purewal Farm fire were set for the purpose of collecting insurance, that the owners of the Bains house paid Lau for the arson of that house, that the owners were East Indian, and that the owners had left a can of gasoline at the house for him to use as an accelerant. At

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trial, Kusch denied that he said these things to Constable Lemay.

[79] I have already concluded that Kusch's statements to Constable Lemay meet the reliability test for admission as hearsay evidence. However, counsel for the plaintiff objects that to admit this evidence of what Lau said to Kusch for its truth would be to admit hearsay upon hearsay, and that such evidence is not admissible even under the so-called principled approach to the admission of hearsay evidence.

[80] I do not agree that Lau's statements to Kusch engage the rule of evidence excluding hearsay. That the owners of the house paid Lau to have it burned and that the owners are East Indian are statements of matters within Lau's knowledge and contain no element of hearsay. That the purpose of the arson was to collect insurance and that the owners had left a can of gasoline for Kusch to use were statements made by Lau in the course of hiring and instructing Kusch to commit the arson, that is, in furtherance of the conspiracy. They were, therefore, made as the agent of Jessie Bains, his partner in the conspiracy: see ***Great West Uranium Mines Ltd. v. Rock Hill Uranium Mines Ltd.***, [1955] 4 D.L.R. 307 (Sask. C.A.) at 312; ***Koufis v. The King*** (1941), 76 C.C.C. 161 (S.C.C.) at 168.

[81] It follows that Kusch could have testified that Lau made these statements to him, and that they would have been

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admissible against Jessie Bains. As Kusch has recanted this evidence, and as his statements to Constable Lemay are reliable and necessary in the circumstances, the evidence of Lau's statements to Kusch may be led through Constable Lemay for their truth. Weighing this evidence with the other evidence I have already referred to, I accept Lau's statements as true. That finding reinforces the conclusion that Jessie Bains was a participant in the arson of the house.

[82] In the result, insurance coverage is excluded by the term of the policy relating to intentional and criminal acts.

3. Fraud in the proofs of loss

[83] That is sufficient to dispose of the action and it is not necessary to deal in detail with the allegation that the proofs of loss were fraudulent. Suffice it to say that the schedule of personal effects attached to the proofs of loss included property that was not owned by the plaintiffs. It included property that was not lost in the fire. It grossly overstated the value of many items. I am satisfied that Jessie Bains knowingly falsified and exaggerated the claim for personal effects with the intention of misleading the defendant. Whether Gurmit and Jaspreet Bains were knowing participants in the fraud or not, they were content to swear to what Jessie prepared. The claim is therefore vitiated by operation of statutory condition 7.

[84] Accordingly, the action is dismissed.

"K.Smith, J."

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