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**Kompani v. Baile**

Between  
Kompani, and  
Baile et al.

[1997] O.J. No. 6295

**Ontario Court of Justice (General Division)**  
**Coo J.**

January 2, 1997.  
(20 paras.)

*Insurance — The insurance contract — Interpretation of contract — Exclusions.*

Action by Kompani against his insurer on a personal property floater on a Rolex watch issued to him. A provision in the form of PPF read that there was no insurance regarding illegal property, meaning loss or damage to any property illegally imported. Kompani brought the watch from Hong Kong without declaring it at customs. The watch was lost. Kompani said that he did not read the above provision in the original policy or in the PPF coverage. He said that no one told him of the exclusion or made any reference to it when coverage was being arranged for the watch. He did receive correspondence from the broker in which there was reference to exclusions.

**HELD:** Action allowed. The insurance terms, including the exclusion regarding illegal importing relied upon by the insurer, were not, as they should have been by statute, provided to Kompani in connection with his watch. There was no relief from this obligation furnished to the insurer by section 124(2) of the Insurance act. The insurer was disentitled by statute from relying on its exclusion. There was probably nothing illegal about bringing a watch into this country. The Court was not prepared to conclude that there was an illegal importation.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. 43.

Insurance Act, R.S.O. 1990, c. I-8, s. 124(1), 124(2).

**Counsel:**

Samuel S. Marr, for the plaintiff.

Andrew A. Evangelista, for the defendant, Dominion of Canada General Insurance Co.

Mark M. O'Donnell, for the defendants, Andrew Baile and H.J.M. Insurance Brokers.

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¶ 1 **COO J.:**— This is a claim on a personal property floater ("PPF") on a Rolex watch issued to the plaintiff and added to a policy of insurance issued to the plaintiff and his twin brother. The watch was bought by the plaintiff in Hong Kong and brought back into this country without declaring it at customs,

since he wished to avoid paying duty on it. The watch was lost while the plaintiff was out at a nightclub.

¶ 2 There is a provision in the form of PPF relied on by the insurer as applicable to the watch, which reads:

We do not insure against loss or damage ... with respect to ... illegal property, meaning loss or damage to any property illegally ... imported ...

¶ 3 It is not suggested that the word "imported" is to be given some narrow or technical meaning. In that context, what the plaintiff did was to import the watch. For this I rely on the common understanding of language and particularly on the first two basic definitions of the word in the Oxford English Dictionary, last reprinted in 1978 in 12 volumes, with the two supplements that have followed.

¶ 4 The plaintiff says that he did not read this provision, either in the original policy wording, on which it is to be emphasized no reliance is placed by the insurer, nor in the PPF coverage wording, a copy of which it is conceded did not accompany confirmation of coverage on his watch, although of which a copy was sent and presumably received at the brothers' jointly occupied apartment in Toronto, when identical coverage was extended for his brother's two watches some time earlier.

¶ 5 There is no issue as to basic insurance coverage, the value of the watch, ownership and insurable interest, or loss in covered circumstances, apart from the exclusion. The whole case is to be determined by consideration of the impact on this claim of that exclusion wording.

¶ 6 The alternative claim against the insurance broker, which has triggered a cross-claim by the broker against the insurer, is to the effect that they had an obligation to take reasonable steps on behalf of the insured to see to it that the wording of coverage ultimately provided sufficed to cover the watch in the actual circumstances as they existed, or at least that the insured was warned about the exclusion with which we have to deal here. The broker was not told, and no one asked as to the circumstances in which the plaintiff came to be the owner of the watch, and who, and under what circumstances, had brought the watch into Canada.

¶ 7 I have no reservation at all in coming to the conclusion that the broker, in carrying out its obligations, performed reasonably and at a proper level of expertise and service to the plaintiff. There is nothing on the basis of which any other conclusion could be supported. I have the evidence of Mr. Baile himself, and also the opinions of a number of other insurance experts familiar with this field of endeavour, and all this evidence is supportive of the broker's position. There is no justification for any submission that the broker's representative ought to have made detailed inquiry as to where the watch came from, or the circumstances in which it crossed any Canadian border, and it would be to place much too high a burden on the broker to suggest that it had the obligation of taking the insured through all the coverage terms, assuming that they were identifiable as provisions applicable at the material time to coverage sought and obtained by the plaintiff.

¶ 8 The plaintiff's claim against the broker and its representative will be dismissed, as will the cross-claim of the broker against the insurer. The cross-claim will be dismissed without costs, since, if the plaintiff's claim succeeds against the insurer, there is no need for the cross-claim, and if it does not, there would be no justification for somehow allowing the cross-claim for indemnity if the claim against the insurer failed and that against the broker succeeded.

¶ 9 The plaintiff's position on coverage is that no one told him of the exclusion in the coverage, or

made any reference to it when coverage was being arranged for the watch, that he did not, nor did he have opportunity, to read terms applicable to his brother's coverage obtained for two watches that he wanted covered, that no terms were ever provided to him, in contravention of s. 124(1) of the Insurance Act, R.S.O. 1990, c. I.8, and that there was no agreement of the sort referred to in s. 124(2). It is further pleaded that in the circumstances a rectification order should be made, if required, although that suggestion was at no stage pursued at trial or in argument for the obvious reason that this is not a factual situation in which there would be any support for such relief.

¶ 10 He does concede that he received correspondence from the broker in which there was reference, in regard to coverage to be provided for the watch, to exclusions, with an invitation to discuss such matters with the broker. He also was aware generally that there would probably be expected to be exclusions to coverage, although it is implicit in what he had to say that if he had known about the specific exclusion as it is sought to be interpreted and applied here by the insurer, he would either have sought broader coverage apparently available elsewhere, or would simply have left the watch uninsured, and taken much more guarded care of it; although for some months after he bought it the plaintiff in fact took no special care of which he told us at this trial.

¶ 11 He assumes that the confirmation of coverage document with regard to his brother's watches was received in their apartment and that he could have looked at that package. He indicated that he did not, since it could readily be seen in the description of specifically insured goods that they were those of his brother; he therefore did not read the detailed coverage document attached, since it related to insurance for the brother. No such coverage information was in fact attached to what was later sent to and received by the plaintiff in regard to his watch.

¶ 12 The insurer simply puts it that all their policies are written with the exclusion, they would not have accepted coverage without it and that it clearly applies in simple language to the present facts.

¶ 13 There was disclosure to the court and to counsel for the insurer of the terms and conditions of a settlement agreement reached between the plaintiff and the broker, limiting the level of the plaintiff's recovery from those defendants, regardless of my disposition of the issues of liability and also limiting the plaintiff's right to pursue the co-defendant insurer if so to do would trigger recovery from the broker to a level beyond that limited by the settlement. The only thing not disclosed to this point is the dollar level of the limit of recovery. Counsel for the insurer was content that this was the correct and acceptable way to handle the matter.

¶ 14 The insurance terms, including the exclusion in regard to illegal importing relied on by the insurer, were not, as they should have been by statute, provided to the plaintiff-insured in connection with his watch. There is no relief from this obligation furnished to the insurer by s. 124(2), since the application for insurance and following declaration of coverage do not constitute the sort of agreement in writing envisaged by the section of the Act. The insurer is disentitled by statute from relying on its exclusion.

¶ 15 There is no case that decides the precise "illegal importing" issue presented in this case, albeit anything said on the subject is here obiter. There is the decision written by Griffiths J.A., as he then was, in *Shakur v. Pilot Insurance Co.* (1990), 74 O.R. (2d) 673, in which, in the absence of the word "imported" the Court of Appeal decided that the exclusion in the Pilot policy did not apply, in a case in which jewellery had been brought into Canada without being declared to customs.

¶ 16 As for the issue of "illegal importation", I am persuaded by the reasoning in such cases as *Ardekany v. Dominion of Canada General Insurance Co.* (1986), 32 D.L.R. (4th) 23, (C.A.), and

Zampiero v. Canadian Universal Insurance Co. (1983), 43 O.R. (2d) 257, (Co. Ct.), that the ultimate determination of what constituted an illegal importing has been quite carefully left by the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), with a series of officers or bodies, judicial and otherwise, and no such determination has been made. I do not think that it suffices to say that surely "we all know" that if one does not declare property brought in Canada there is automatically an illegal importing. There is very probably nothing illegal about bringing a watch into this country. What happens if there is no duty paid, then or perhaps at all, is to be dealt with in a complex series of steps that may involve a quasi-administrative decision, involvement of the federal judicial system and ministerial judgment, with ways in which the rights of the federal government and the position of the person bringing material across the border may be resolved in a number of ways, with at the very least prospects for resolution short of declarations of illegality in regard to importing. It is not a matter of this court stating that it is without jurisdiction to deal with the problem, but rather a scheme set out in detail through which such matters are to be resolved in a careful and possibly complex way.

¶ 17 There having been no resolution of the issue where it is to be resolved, I am not prepared to conclude that what happened here was an illegal importation.

¶ 18 I should go on to add that I am not attracted by the argument advanced that any illegal importing must be interpreted to be one going on at the time of loss. I can understand why such an interpretation might be placed on other wordings of a similar sort, but I am hard put to conclude that such a narrow use of language was intended in regard to importation. There are, of course, legitimate arguments to be advanced as to limits to be placed on the exclusionary language here involved, otherwise one might be haunted by inappropriate conduct in regard to a watch entering Canada years or generations before insurance coverage is placed. That is one more reason why my view about how the illegality should be resolved seems proper; otherwise it is possible that the watch here could never be insured in the future by any insurer who provides coverage with the wording of the present exclusion.

¶ 19 It has been put that in essence the insurer is arguing not about an exclusion but rather on the basis of the policy being void ab initio by reason of failure to disclose a material fact. It is sought to import into this case the well-known authorities which provide that if an insurer decides to rely on such a situation then it must elect what it is going to do, and if it decides to treat the policy as void, it must return the entire premium to the insured, and that it cannot at the same time retain an "earned" premium and maintain in defence of a claim on the policy that it was void ab initio. I have some reservations as to whether in consideration of the exclusion here the ab initio arguments have validity, but determination of that is not required. Certainly in terms of principled logic there is support for this argument.

¶ 20 The plaintiff's claim will succeed with costs after assessment thereof, on the basis that there is no exclusion on which the insurer has the right to rely and even if it could rely on the "illegal importing" language, that breach has not been made out. There should be an order for pre-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43.

QL Update: 20010425

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