IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A 477/79

SET 2 Lloyd Kirby's Carriers

BETWEEN HANNAH ELLEN LLOYD of Christchurch, Widow

First Plaintiff

A N D VIVIENNE NANCY STAFFORD of Christchurch, Nurse

Second Plaintiff

A N D KIRBYS CARRIERS LIMITED a duly incorporated company having its registered office at Nelson and carrying on business there and elsewhere inter alia as storers

Defendant

Hearing: 6 and 7 September 1982

Counsel: P F Whiteside and R B Venning for plaintiffs
C B Atkinson and I J D Hall for defendant

Judgment: 11 OCT 1982

RESERVED JUDGMENT OF GREIG J

The defendant, which is a subsidiary of TNL Group Ltd, is a substantial household removal Company. On the night of 24 April 1979 the defendant's premises in Christchurch on the corner of Gasson and Byron Streets was destroyed by fire, together with substantially all of the furniture and other chattels stored in the premises. The plaintiffs had stored in those premises some of their furniture and chattels which were destroyed.

The plaintiffs bring their claim in bailment for reward and claim that there was a term of the arrangement that the defendant should have insured the chattels. At the opening of the trial the plaintiffs abandoned their claim other than the claim for bailment so that the matter proceeded as a claim confined to bailment for reward. The defendant admitted the bailment for reward, agreed that the amount of the loss was as claimed by the plaintiffs and accepted that it had an onus and therefore opened its

case and called its evidence first.

The sole issue in the hearing was the liability of the defendant and that means in this case whether the defendant established that the fire occurred without any lack of care on its part.

There was no dispute as to the duty of care on the part of the defendant. That duty is expressed I think correctly in the following passages:

> "A custodian for reward must exercise due and reasonable care for the safety of the article entrusted to him. The standard of care and diligence imposed on him is that demanded by the circumstances of the particular case, and is higher than that required of a gratuitous depositary; it should be the rather greater care that a reasonable man would take of other people's articles lent to him at his request for his convenience.
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> ....
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> The bailee is not, apart from special contract, an insurer and therefore, in the absence of negligence on his part, he is not liable for the loss or damage to the chattel due to some accident, fire, the acts of third parties, or the unauthorised acts of his servants acting outside the scope of their employment."

2 Halsbury's Laws of England (4th ed) para 1539.

> "The bailee is not liable for accidental fire unless special circumstances have made him an insurer of the goods; nor is he bound to furnish an accurate explanation of how the fire occurred. But the damage or destruction of the goods by fire casts upon him a duty to establish, on the balance of probabilities, that this was not caused by a breach of his duty of care. If he cannot do this, the court will infer that he has broken that duty

and that the breach precipitated the loss."

N E Palmer, Bailment (1979) p 451.

There was some argument as to the onus of proof on the defendant in a case such as this. The defendant submitted that the initial onus was on the defendant but once the evidence and explanation from the defendant was given the final legal burden remained on the plaintiff.

That that may have been a live issue in the past may be accepted but, at least by 1971, Windeyer J in Hobbs v Petersham Transport Co Pty Ltd 45 ALJR (1971) p 356 at 364, expressed the view that whatever anomalies might arise from it the rule that the final legal onus remained at all times with the defendant was too firmly established to be affected by the demands for consistency with the rules of res ipsa loquitur in other situations. The matter has been finally put to rest by the decision of the Privy Council in Port Swettenham Authority v T W Wu & Co (1979) AC 580. That was a case which involved the construction of a Malaysian ordinance codifying the law as to bailment but which required a consideration of the common law for the construction of that ordinance. Lord Salmon, delivering the judgment of their Lordships, at p 590, said this:

> "The undisputed facts of the present case already recited in this judgment establish that the defendants were clearly bailees for reward. However this may be, in their Lordships' view the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping. Accordingly the onus of proving that the loss of the goods deposited with the defendants for safe custody was not caused by

the negligence or misconduct of their servants in the course of their employment, without any doubt, lies on the defendants."

Immediately after that passage His Lordship distinctly rejected a contrary view that the plaintiffs might have a residuary onus as expressed, obiter, in Dwarka Nath v Rivers Steam Navigation Co Ltd AIR (1917) PC 173.

There may be another issue which is still a live issue in regard to the burden; that being the standard of proof which the bailee has to meet. Whether that is the balance of probabilities or the test that the bailee has shown that there was no reasonable chance that the loss would not have been incurred had he taken reasonable care was not argued in this case. It may be that in the end and in this case nothing depends upon any distinction between those tests: see the judgment of Sachs LJ in British Road Services Ltd v Arthur V Crutchley & Co (1968) 1 All ER 811, at 825 C.

The defendant's premises in question was a large brick building with two gables supported on steel. The gables were supported on a row of pillars which bisected the building from east to west. Those premises had been occupied by the defendant since about 1975 and the premises contained an office area and a workshop occupied by Williams G Watkin Ltd, a Company operating a motor repair business which is also an associated company in the TNL Group. Those motor repair premises were divided off from the main store area by a corrugated iron subdividing wall to a height of 8 feet and beyond that to the roof by a heavy duty plastic material which was transparent. In addition there was a further subdivision of the storeroom area by a corrugated iron partition of about one-third of the total floor area. That partition was on a north/south direction and extended from the floor to the roof. In that smaller part of the store was kept the longer term storage items including, it appears, the plaintiffs' furniture and chattels. In the main area was stored the furniture removal items. These were stored on a shorter term pending their removal to their final destinations.

For separation of the various stored items the defendant used a large number of wooden containers measuring approximately 6 feet by 6 feet by 6 feet. In the smaller permanent storage area these were piled in rows with access between and were closed with a door or lid on the side of each container. In the main store area the same containers were used but they were so placed as to create various bays or sections in which goods for various parts of New Zealand were stored separately. It appears that the containers apparently left open were placed in squares with their open ends facing in to the centre of each square thus, for example, goods destined for the North Island were contained within the wall of containers in one particular area.

There were three main access doors into the storeroom area; one into the smaller permanent storage area off Byron Street and two into the main temporary storage area from Byron Street and Gasson Street. Each of these doors were large sliding doors made of wood with steel frames which allowed access to motor vehicles. There were similar doors giving separate access from Gasson Street into the motor repair shop. At least two of these large doors into Gasson Street had smaller wicket doors separately locked. In addition to these doors there was an outside door giving access to the office part of the premises from Gasson Street.

On the day in question, which was the day before Anzac Day, the manager of the defendant at Christchurch at that time left the premises about 5.30 p m. ; a senior employee left at about 6 and another employee came into the office and then left at about 6.30 p m. Each of these employees was fully entitled to be in the premises and had keys. The evidence shows that the doors from which they left the premises were locked and there was no evidence of any fire or the beginnings of a fire at that time.

The fire call to the local Fire Service in Christchurch was made at 10.40 p m, apparently by some passer-by in the street. When the Fire Brigade arrived about five minutes later the fire had a good hold of the

building and in spite of the efforts of the Fire Service the fire was not extinguished until the building and most of its contents had been destroyed.

The place at which the fire started was a matter of some dispute but I am satisfied from the evidence of Mr Semple, a retired Fire Safety Officer, that it started outside the office in the main storage area in that part occupied by the North Island removals. That has some significance in the wider consideration of this matter.

The cause of the fire is unknown. There was considerable speculation about the possibilities of the cause of the fire but there was no evidence on either side which went beyond conjecture. Even Mr Semple who had considerable experience and who was at the scene of the fire during the next morning and made an inspection of the damaged building and contents was unable to determine the cause.

One of the possible speculative causes was an electrical fault. This seems to be ruled out because there was no electrical terminal at the point at which the fire started. There were electrical points and plugs in the office but that is not the place at which the fire started and there is no suggestion that a fault occurring there could have transferred to the place beyond the office at which the fire started. The other nearest place at which an electrical fault could have occurred was a group of plugs which had been installed to allow the storage of domestic deep freeze units in continuing operation pending their further removal. There was no evidence that there had been an electrical fault there and that again was some distance removed from the point at which the fire started.

The second possible cause was a cigarette butt left by a smoker. The evidence satsified me that there was a prohibition on smoking in the storeroom and that this was generally adhered to. The staff employed in the premises included four administrative staff engaged, as it appears, in the office, two staff members who were

engaged in the storerooms and some sixteen drivers. Only six people then could on any regular basis be in or about the storerooms. I think it highly unlikely that smoking or a discarded cigarette butt could have been the cause of the fire. My view on this is reinforced by the fact that at 6 p m and at 6.30 p m some of the staff were in the premises and I consider that it is highly unlikely that they would have failed to see some signs of the beginnings of a fire from that cause.

The third possibility was vandalism or arson by some third party. There was no suggestion that any of the staff of the defendant might have deliberately caused the fire. This possibility requires the entry of a third party into the premises some time after 5 at the earliest and 6.30 at the latest. Because of the damage caused by the fire it was not possible to ascertain whether any unauthorised entry had been made through doors or windows. I am satisfied from the evidence, however, that the doors were properly secured and that it is highly unlikely that any person made an unauthorised entry and then caused the fire.

The fourth matter is described as spontaneous combustion and it was suggested that it was possible that some material created sufficient heat itself to cause a fire. No mechanism for that was suggested. I accept that the storage of furniture and furnishings is a moderate to high fire risk but there was no suggestion that any material, particularly in the North Island bay, was a material which in itself might create sufficient heat to cause a fire. I am satisfied on the evidence that by far the greatest part of the North Island bay comprised furniture and furnishings which had been packed by the defendant. The evidence shows that with local removals a considerable proportion is packed by the owner and thus the defendant can have little control over what is packed into boxes or other containers. On the other hand, when it packs itself, the defendant ensures that dangerous materials, that is, with a particular fire risk, are excluded. An example of this given in evidence was that motor mowers received for storage or onward removal are

drained of their petrol and other inflammable contents before being taken into the storeroom. In those circumstances it is all the more unlikely, in my view, that there would have been in the North Island bay where the fire started any material which could have caused a fire spontaneously.

As I say, the fire cause is unknown and must in my view be treated as accidental and I so find.

I have already mentioned the care which the Company exhibits in relation to the cause of the fire in the storeroom. That includes the prohibition against smoking, the control over the goods, and particularly inflammable or fire risk goods which are taken into the store and, as it appears to me, the responsibility of the staff in relation to the securing of the doors. In addition to that the defendant Company, being conscious of the risk of fire, has taken additional steps against that risk. Shortly after it took possession of these premises in 1975 and, as it appears, as a result of advice from its parent Company, it installed in the two separated parts of the store areas two hose reels long enough to reach every part of the two partitioned areas. Of course a hose reel has no effect against a fire unless there are staff present but it does, in my view, underline the consciousness of the Company in this area. In addition to that the Company engaged a security service which for some years had made three random calls during the night, namely, after 5 p.m when the store normally closed and before 7.30 a m when the store usually opened. The manager at the relevant time for the defendant, Mr Arthur Sutherland, gave detailed evidence about this and he clearly placed reliance on this security inspection as a prevention or detection of fire before any strict security aspect. Needless to say, random inspection for a period of some 14 hours will only by chance detect a fire in its earliest stages but it certainly must have some effect in that regard and again underlines the consciousness of the defendant Company in this area.

The emphasis of the plaintiffs' case was that the Company had not taken adequate steps by way of prevention or detection and evidence was called by a senior Fire Service officer in Christchurch as to the steps which might have been taken by the Company in this regard.

His first suggestion was that the Company ought to have subdivided the store area in two smaller areas each separated by fire resistent material. The evidence was that the subdivisions within the building were of little use in resisting or delaying the spread of fire. It is clear that that suggestion would be expensive and I do not consider that it could be a reasonable step for the defendant Company to take. The evidence satisfied me that other removal firms throughout New Zealand have not taken any such precaution and there was no real suggestion that any similar operation had gone so far as that.

The second suggestion was for some automatic alarm or sprinkler system. An alarm system provides for detection of heat or smoke and gives an alarm which may be connected directly to the Fire Service, thus providing an immediate response at the earliest stage. A sprinkler system incorporates a detection and alarm system but, in addition, on detection of the smoke or heat delivers a quantity of water which will delay and may even extinguish the fire. In a building such as the defendant Company's store such a system could have been introduced and without very substantial cost. The additional advantage of such a system is that the Fire Service not only has a direct alarm but also has keys to the premises and a knowledge of the interior so that it can more speedily find a fire on the fire appliance's arrival at the site.

On the evidence such an installation would be unusual in premises such as the defendant Company's. I am satisfied that no other household removal firm, except one, has any such detection or sprinkler system and there may be some doubt even as to that one. There is certainly no requirement for any such installation. Neither the

size of the premises nor the number of employees, nor the type of activity, fall within the provisions of Acts or Regulations which require detection or sprinkler systems. As an indication of the ordinary standard, the evidence of the Senior Fire Service Officer indicated that in Christchurch no more than ten percent of larger buildings in Christchurch had any such system. Furthermore, while it was conceded that the storage of furniture is a moderate to high fire risk, there was no evidence to indicate that there were frequent fires in such storage and indeed the implication that I take from the evidence is that such fires are infrequent in spite of the lack of detection and sprinkler installations.

The final suggestion was that there might have been installed in the roof one or two or more readily destructable panels which on the build-up of heat or a fire would allow the venting of the hot gases, thus preventing their build-up in the premises and the possible increase in the speed of the fire destruction. My conclusion from the evidence on that was that there was little likelihood of that achieving any relief in a fire such as occurred in this case. Again there was no evidence to suggest that that was a common or accepted means of fire prevention or fire damage reduction.

While no doubt the New Zealand Fire Service and its officers, as an ideal, consider detection sprinkler systems and subdivision of premises as advisable, I am not persuaded that the installation of these or any of these was required by the defendant in pursuance of its obligations as bailee to the plaintiffs. On the evidence it appears to me that the defendant Company was naturally conscious of the risks of fire and took steps as I have already recounted to limit the causes and the results of such a fire. Clearly what they did did not prevent this fire or prevent its continuation and destruction of the premises and its contents. On the other hand, I do not consider that the evidence shows, at least on the balance of probabilities, that any further steps as suggested would have prevented this fire or would have prevented the resulting destruction. As I have found, this was an

accidental fire but at the end of the day it is my view that the defendant Company, while it has not been able to explain the fire or its cause, has in the circumstances of this case met the standard of care on it and has thus established that the cause of the fire and its results are not its responsibility and are not caused by any breach of its duty of care.

In the result then there will be judgment for the defendant Company. It is entitled to costs according to scale, together with disbursements, and I certify for second counsel and the second day of hearing.

Solicitors for the plaintiffs: Wynn Williams & Co (Christchurch)

Solicitors for the defendant: Weston, Ward & Lascelles (Christchurch)

A 477/7

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