RJA 1612 MSR [redacted]

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.P. 259/88

SET 3

36

BETWEEN HINO DISTRIBUTORS (NZ) LTD

Appellant

A N D R PIPER trading as RAY PIPER PANELBEATERS

Respondent

A N D M F KING & CO LTD

Second Respondent

Hearing: 7 February 1990

Counsel: C R Langstone for Appellant
Megan Gunderson for First Respondent

Judgment: 7.2.90.

JUDGMENT OF JEFFRIES J.

This is a civil appeal but before outlining the position of the parties to the appeal, I first outline the facts. Plaintiff in the lower Court is appellant and will be described as such in the judgment. Appellant is a motor vehicle dealer in Lower Hutt specialising in heavy vehicles. First respondent in this Court is a panelbeater and has performed work for the appellant over many years. Second respondent is a light engineering firm operating from premises in Petone. The first and second respondents have had

an arrangement whereby panelbeating work done by first respondent for his customers has been carried out on the premises of the second respondent. Between these two there has been a commercial practice whereby payment is made for use of second respondent's premises when work was performed there by first respondent. Apparently on occasions invoices for first respondent's customers would originate from second respondent. Appellant was very familiar with the system and when entering into contracts for the performance of services which it often did with first respondent, understood they would be carried out at the premises of second respondent. It was accepted in the lower Court that there was not a contractual relationship between appellant and second respondent for the work about to be described. The Court specifically found the contract was between appellant and first respondent for it to be performed on the premises of the second respondent at Petone Avenue.

Appellant on 24 June 1986 engaged the services of first respondent to carry out panel repair work to a Hino model FT truck owned by it. On that day first respondent was given possession of the vehicle and it was placed in second respondent's yard which fronts Petone Avenue and is adjacent and contiguous with the premises of first respondent.

Petone Avenue is situated in the industrial area of Petone and is a linking street between two main thoroughfares in the township. Respondents called expert evidence on security from a very well qualified person who had spent approximately 16 years in the New Zealand Police, leaving in 1977 and has since then been extensively involved in security work. He has formed his own company and is adviser and consultant on security to many commercial undertakings. He described the premises in the following way:

> "On the 29th of July last I visited the yard in question and carried out an inspection of it. It is bounded on almost three complete sides by the high walls of

adjacent buildings and for the remainder one side and the total frontage there is a wire mesh and galvanised pipe fence some 2.7 meters high. The fence is made of steel pipe, either 50mm or 75mm in diameter and the top of the fence comprises three separate strands of barbed wire. At the time of my inspection the fence appeared to be in good repair and I understand that there have been no alterations or improvement to the fence since July 1986. The gate to the premises is a sliding gate and it is secured with a strong link chain and security profile keyway padlock. The fence has pipe rails top and bottom which the chain mesh is affixed to throughout its length. A fence is inhertently more stronger if there is a pipe or rail at the bottom to which the mesh is affixed. Many fences do not have this pipe or rail and merely retain the bottom links of mesh by running a piece of wire from one post to another. This means that the bottom of the fence can very often be easily pulled out enabling people to crawl underneath it or alternatively the single strand of wire can be open at any point and that means that the whole bottom of the fence is insecure. This is not the case in regard to the fence in question. There is a street light immediately opposite the fence on Petone Avenue and I have visited the premises at night and this appears to give quite adequate lighting into the yard. A light inside the the yard would not necessarily add anything to the lighting from the street lamp because that would only tend to create more shadows and any security lighting should face into a yard not out of it. The premises front on to Petone Avenue which is used as a short cut from Hutt Road to Jackson Street, Petone, and consequently has moderate to heavy traffic."

On the night of 2/3 July 1986 the premises of the second respondent were broken into by means of cutting the wire mesh fence on the short side which was at right angles to the street and effectively from the open courtyard of the first respondent's premises. The site chosen for the entry was the one which provided the most cover along the total fenceline. Photographs were produced which showed the wire netting rolled back in a vertical line. The entry operation would have taken about 5-10 minutes, it was calculated. Once inside the yard the thieves jacked up appellant's truck and removed seven wheels with tyres and two batteries. The truck was still on the jacks when discovered which suggests the criminals might have been interrupted. It was thought fairly certain there would have been more than one to perform the

physical work of removal and it would probably have taken about 1 1/2 to 2 hours to complete. The quantum of loss at $7675.23 was agreed.

Appellant issued proceedings in the District Court to recover the loss. Against the first respondent it pleaded three causes of action in contract, bailment and negligence. Against the second respondent it pleaded a sub-bailment and negligence.

I turn now to the judgment which is the subject of the appeal. The learned Judge canvassed the facts which have alreay been outlined in this judgment and about which there were no disputes. There is no issue of credibility of witnesses which is not unexpected in the circumstances already outlined. There was no conflict on the evidence. Appellant in the lower Court called only one witness, being a principal in the appellant company and he even conceded at one stage in his evidence he did not believe the first respondent was negligent. The issues for decision both in the lower Court and here are primarily legal ones and findings and inferences to be drawn from almost entirely uncontested facts.

The decisions of the learned Judge were as follows. First, it appears that the Judge more or less compartmentalised the case against the first respondent between contract on the one hand, and bailment on the other. It was found there was a contract between appellant and first respondent for the panelbeating to be carried out by him at the premises of the second respondent. As stated earlier in the judgment this was a practice which had existed for some years and was entirely understood and accepted by all parties. The learned Judge in the circumstances specifically implied a term into their contract that appellant's truck would be stored either in the building or in the yard of the second respondent whilst it was in first respondent's custody. It was then stated in the judgment:

> "I cannot see how it can be said that the first defendant breached any duty to take reasonable care when he kept to his contractual terms?"

I will need to return to this issue for appellant's counsel at the appeal hearing took exception to this approach which he argued was never pleaded and nor was it a live issue at the trial. He further argued it was a finding of waiver or estoppel against the first defendant which ought not to have been made. It probably is more accurately described as assumption of risk and I will return to that.

The judgment then continued:

> "In the event this case may be taken further, I should add if I had not made a finding of an implied contractual term I would have held the first defendant failed in his obligation to take reasonable care as a bailee."

The judgment then outlined reasons why in the alternative the first defendant was in fact liable as bailee. I might add there was never any dispute there was a bailment for reward as between appellant and first respondent. As stated earlier only one expert witness was called and he was for the respondents. His evidence was extensive and his qualifications beyond reproach. In his opinion the security arrangements were adequate by examination of the premises, by comparison with similar premises in the district coupled with incidence of burglary cases in the area. The learned Judge dealt with his evidence in detail but rejected it. The main finding was that a detector system at a cost of $10,000 per annum was warranted for a yard that stored valuable vehicles and had been the subject of one previous break-in in the last five years. The overall finding was that the bailee had not established he took all reasonable care in the circumstances.

It is not easy to reconcile the findings in contract and bailment outlined above. It seems to the Court the learned

Judge made a specific contractual finding which it held was dispositive of appellant's case against the first respondent. It would appear the contractual finding was on the basis that because appellant knew where the vehicle would be stored whilst work was being carried out on it there was thereby an acceptance of the risk of damage through burglary and theft. By virtue of its knowledge as aforesaid it was held it somehow at law yielded up the right to complain later there had been a breach of conditions of bailment. The situation is made all the more poignant for appellant for it obtained findings on the straight bailment issue in its favour but to no avail for judgment was given for the first defendant. The learned Judge treated the bailment cause as subsidiary to the contract issue and not as an equal alternative.

Allegations were made by appellant against first and second respondents in negligence and it was dealt with in the judgment in the following way:

> "As for the claim in negligence, Mr Higgs was at all times aware of how the truck would be stored in the second defendant's premises. Mr Higgs was also fully familiar with the security arrangements of the yard. If there were any risks involved then the plaintiff must be deemed to have accepted to take those risks."

On the claim against the first and second respondents in tort that is a straight finding of volenti non fit injuria. The finding is consistent with that made on the contractual cause. The claim in tort can be put to one side as not really material to the issues to be decided between appellant and first respondent.

It is appropriate here to dispose of the second respondent. The allegation was that it was a sub-bailee and negligent. The Judge held the possession of the truck never passed to the second respondent at any stage. In any event appellant abandoned its appeal against the second respondent.

An appeal is brought by appellant against the actual decision in the District Court giving judgment for the first defendant which in practical terms is the finding on the contractual issue. The first respondent has cross-appealed against the finding in the alternative on the bailment issue in case that becomes relevant. The first respondent supported in argument the contractual finding and appellant supported the finding on bailment and seeks to succeed in this Court on that issue.

Bailment is an obligation and when it is a bailment for reward it is nearly always associated with a contract. Bailment has been described as "a relationship sui generis." See Cheshire Fifoot and Furmston's Law of Contract 11th Edn. page 83 and Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1965] 1 ALL ER 163, 167 and Morris v
C W Martin & Sons Ltd [1965] 2 ALL ER 725, 734. The case before the Court might be described as a very common and conventional one in that there was a contractual relationship between the parties that necessitated for its performance the passing of a chattel upon which work was to be done into the possession of the contractual party who had undertaken to perform the work for which he expected to be paid. That created the bailment relationship which was concurrent with the contractual relationship by virtue of the passing temporarily of possession of the chattel. It is a bailment of mutual benefit to the bailor and the bailee and is categorised as a bailment for reward. The bailee owes a common law duty to the bailor in such circumstances.

Strictly speaking the dispute which has arisen between the parties does not stem from the contract for services but out of the possession/custody part of the facts which places it in the realm of bailment. It is permissible for the parties to affect the bailment relationship by their contract at the time of its conclusion. That is not the case here on the evidence. For the purposes of this precise transaction they

did not by terms alter in any way the practice that had existed over many years whereby appellant passed the chattel to first respondent on the understanding it would be worked on and stored in the nominated premises. First respondent said there had never been any specific arrangements discussed with Hino as to security of the vehicles as far as he knew. Earlier in the trial Hino's witness said he did not actually speak to first respondent about risks. It seems the Judge not only implied a term about which there was no dispute, but then elevated it to the level of an actual agreement between the parties that appellant assumed the risk and therefore at law it is unable to recover for an injury to which it assented. In other words that it voluntarily agreed to expose itself to the danger and fully appreciated its significance. The evidence simply does not support such a finding.

There is ample authority that bailment predates contract in the history of the law. See Palmer on Bailment at page 14. It is possible to analyse the obligations of the bailee to bailor in these circumstances by implied contractual terms but the clearer and simpler path is to examine the fact pattern in terms of obligations arising out of the bailment relationship. That is the issue before the Court which has caused the dispute and the law on bailment in this area is well settled and perfectly adapted to give the legal answers. See Peterson v Papakura Motor Sales Ltd [1957] NZLR 495; Conway v Cockram Motors (Christchurch) Ltd [1986] 1NZLR 381 and Faesenkloet v P Coutts & Co Limited (unreported C.A. 178/88, 8 June 1989).

If the foregoing analysis is correct then with respect to the learned Judge magnetic north was followed instead of true north which entailed an analysis of the fact pattern in terms of bailment obligations. Undoubtedly there was agreement and knowledge of the storage facility for the work to be carried out but that does not end the matter and preclude of itself

the argument that the bailee did not fulfil the obligations imposed upon him by the situation.

The judgment is attacked on both sides as set out above. Appellant's argument against the contractual decision is mainly one of law and first respondent's argument against the judgment is on the application of the facts to the law in bailment. The contractual issue has been resolved in favour of appellant's argument but that leaves the substance of the case on the bailment still to be decided.

In normal circumstances a Court sitting on appeal will not interfere with findings of fact from the lower Court, especially if there are credibility issues to be decided upon and conflicts in the evidence to be resolved by the tribunal of fact. The reasons for that appellate reticence are so well known authority need not be cited. However, there is relaxation from the rigidity of that rule when there are no issues at all of credibility, where there are no conflicts in the evidence and the deciding factors are in reality inferences to be drawn from the uncontradicted testimony and all the circumstances as revealed by the evidence. Maynard v West Midlands Regional Health Authority [1985] 1 All E.R. 635 (HL) Lord Scarman at page 637. Having said that the Court after an appraisal of the evidence comes to the view the learned Judge in the District Court was correct in the findings on the duties of the bailee in these circumstances and therefore the actual decision of that Court is reversed and the appeal allowed. This Court now says why.

In law the issue is one of reasonable care by the bailee of the bailor's goods entrusted to him. The onus is on the bailee to prove that the loss was not due to his failure to exercise the care required by the law. See Port Swettenham Authority v T W Wu & Co (M) SD BND [1979] AC 580 (JC). An important aspect of the defence, already mentioned, was the adoption at the premises of a general practice that has

apparently been followed in the industry over an appreciable length of time. See Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552.

There is one other aspect which might be mentioned and it is the expert testimony of a witness. A person is qualified to testify as an expert if he has sufficient special knowledge, skill and experience to give the evidence. Experts may give their opinions on questions in controversy at a trial. The tribunal is not bound to accept an expert opinion as conclusive but should give to it the weight to which it is entitled. In this instance the trial Court carefully appraised the expert evidence but in the end disregarded the opinion which the Court was entitled to do, and which this Court on appeal thinks was justified.

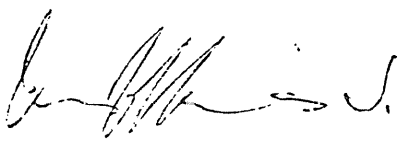
The Court does not deny the decision itself whether there was a breach on the part of the bailee is a close call. The criminal is notorious as devious, clever and not infrequently well equipped and sophisticated. There is not imposed upon a bailee that premises where he stores chattels are to be protected to a degree so as to resemble a citadel practically immune from penetration. The first line for security of property are lights, locks and the law. The law in the form of physical police presence by patrol is unrealistic today and of itself not strong. Lights still are a very powerful deterrent for security in an outside yard, especially if they are positioned high above the yard beaming as near as possible straight downwards so as to minimise shadows. With respect to the expert I think his evidence that street lighting was sufficient was not convincing. No criminal likes to contemplate the possibility of engaging in dismantling and removal work for up to two hours under the glare of powerful lights. It is to be remembered criminals usually case a premises for suitability well before commission. It is very often at this point the lights work as a first line of security for the reason already stated,

and properly lit premises are thereby abandoned as a prospect for burglary.

The other powerful deterrent is strong locks. However, it is not realistic to look at locks alone in isolation from the construction of the gate and fencing. In this case the lock may have been stout and adequate enough to prevent an opening of the gate but little else. The perimeter of the land was protected by a chain mesh fence which in the matter of a few minutes was penetrated, no doubt by wire cutters, and simply rolled back, probably by hand. The Maginot Line offered little protection to France for the invaders simply marched around it.

Therefore putting aside police presence as not the responsibility of the bailee, nevertheless on lights and locks, broadly defined, there was in my view a failure in the exercise of reasonable care. In addition the trial Court Judge found, not unreasonably, that some alarm system ought to have been installed. It was not denied in the end the only protection comprised a high fence of moderately strong construction, but which was broken through in a matter of minutes by wire cutters.

The appeal is allowed and judgment is given for appellant on the agreed sum. The cross appeal of first respondent is dismissed. Appellant is awarded $500 costs.



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A.P. NO: 684/89

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