IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 39 OF 1991
(High Court Civil Action No. 13 of 1990)

BETWEEN:

SUMMIT RETREADING COMPANY LIMITED — APPELLANT

-and-

COURIER DOCUMENTS PARCEL SERVICES LIMITED — RESPONDENT

Mr. David Whippy for the Appellant
Mr. Subhas Parshotam for the Respondent

Date of Hearing : 3rd August, 1993
Date of Delivery of Judgment : 13th August, 1993.

JUDGMENT OF THE COURT

The facts found by the Judge who heard this matter are fully set out in his reasons for judgment delivered by him on 16th May 1991. They are also referred in the reasons for judgment of this Court relating to an application made to it after the appeal was launched, and which was heard on 24th November 1992. The reasons for judgment in that application will be handed down at the same time as delivery of these. That application will be referred to later herein. It is therefore unnecessary to repeat the facts here. However, because some matters were stressed on the hearing of the appeal itself which were not relevant to the last mentioned application, we should advert to them.

The premises of the respondent where the truck was standing were fenced - "properly fenced and secured" according to the

accountant of the plaintiff, "well secured" according to the Manager of the defendant (record pp 28, 29). In fact the person or persons who stole the tyres broke in to the premises by breaking the gates before breaking into the truck.

Secondly, the defendant had been operating since 1945, and at Walu Bay since 1985, and there had been only one previous break in since 1945 (record pp 29, 89, 91). That had not involved the plaintiff in any way (record p 28).

Some evidence was given about the defendant's consignment notes and a clause in them limiting the liability of the defendant, but the learned Judge found against it on its defence relating to this, and there is no appeal from his finding on this aspect.

Under the common law the duty of care of a bailee in relation to the goods entrusted to him has been referred to in numerous cases. The common law requirement has been replaced in Fiji by ss. 30 and 31 of the Indemnity, Guarantee and Bailment Act Cap 232. Those sections are as follows:

> *"30. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed.*
>
> *31. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care of it described in section 30."*

It is not suggested that these sections require any standard of care to be exercised by a bailee different to that required under the common law. There was no suggestion made in this appeal that the learned Judge did not apply the sections correctly or the correct standard of care required. He said (record pp 101-2):-

> *"....whilst the private carrier is obliged to exercise reasonable care in the carriage of goods consigned to him as bailee he is only liable for damage, loss or delay of such goods resulting from negligence but the fact of loss, damage or non-delivery is prima facie evidence of negligence. .....Once goods consigned to a carrier or bailee for reward have been lost the onus is on the carrier to disprove negligence."*

Different standards of care may no longer apply to a common carrier in Fiji, but that is immaterial here.

Assuming a Judge is confronted with a problem of whether a bailee to whom goods have been entrusted is liable for their loss upon the basis of a breach of his duty of care, as was the case here, then he must apply the correct principle of law in a proper fashion to the facts as he finds them to have existed at the relevant time. As a result of that process the Judge reaches a conclusion as to whether or not the bailee has satisfied him that he took such care of the goods entrusted to him as "a man of ordinary prudence would under similar circumstances" have taken "of his own goods of the same bulk, quality and value as the goods bailed" (s.30 supra). Whatever the result, that is a finding of fact. If the correct principle of law has been properly applied to reach a conclusion, there is no error of law.

The point of this exercise is this. The plaintiff's claim was made in the Magistrates Court by writ filed on 23rd January 1990. It was heard by a Magistrate who gave judgment on 19th June 1990. He found in favour of the defendant, and dismissed the plaintiff's claim (record p 30). Incidentally, he also applied the correct principles of law. The plaintiff appealed to the High Court. That appeal was by way of re-hearing (Order 55 rule 3). As we said earlier herein, the learned Judge applied the correct principles to the facts (the parties appear to have accepted the findings of fact made by the Magistrate), and reached a conclusion. It was the same as that reached by the Magistrate, and he dismissed the appeal.

An appeal lies to this Court from a decision of a Judge in such a case as this. Section 12(1)(c) of the Court of Appeal Act provides:-

> *"12.-(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal-*
>
> .....
>
> *(c) on any ground of appeal which involves a question of law only, from any decision of the Supreme Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal."*

Subsection (2) is not applicable here.

That concludes the matter so far as concerns the question of the defendant's liability for the loss of the tyres based upon its

failure to discharge the onus lying upon it to take reasonable care. The learned Judge did not get the law wrong, and he reached a conclusion of fact. Caedit questio.

In his submissions before us Mr Whippy for the appellant plaintiff mainly stressed the absence of a watchman, or devices such as guard dogs or alarms on the premises. As he said "The case rested on the proposition that there was no one on the premises over the week-end". This argument was put to the Judge (record p 86). The Judge decided to the contrary. There is nothing that this Court can or would wish to do about it.

We should mention various other matters that were put to us.

One was the absence of insurance held by the defendant to cover any losses. If this was established as a fact, and we do not believe that it was, then it seems to us to have no bearing on the liability of the defendant. Any insurance would have covered the bailee's loss or liability. If the bailee took adequate precautions to prevent loss of the goods, as the Judge found it did, then it suffered no loss and incurred no liability. So the matter of insurance is irrelevant. We must not be taken as agreeing with what the Judge said about insurance at p 103 of the record, but it has no bearing on the matter anyway.

We are not sure whether the so called failure of the respondent to notify the appellant of the loss before it did so, namely on 10th April, some seven days after the loss was discovered, was relied upon before us or not. If it was then we are of the opinion that it is of no consequence. The cases, of which Coldman v Hill (1919) 1 KB 443 (CA) seems to be the leading authority, do not lay down any inflexible rule that as part of his duty to take care a bailee must not only show that he took all reasonable steps to keep the goods entrusted to him safely, but also that his duty extends to (i) taking steps to recover goods on discovery of loss and (ii) notifying the bailor of the loss. The duty of the bailee is not only to keep the goods safely, but may also extend to delivering them in accordance with the contract of bailment, if that was part of the contract, as it was here. These two aspects, i.e. recovery and notice, may form part of his duty, depending on the circumstances of the case, and they may continue to operate as part of a bailee's duty although the bailee has established that the goods were actually removed without fault on his part, that he performed his duty to keep the goods safely. The extension of his duty consisting of these two aspects is directed towards recovery of the goods, and they only apply where the taking of steps or notification might reasonably be expected to assist recovery, where he can "by taking some step which a reasonable man would take, restore them to his custody and so prevent the completion of the loss" (per Warrington L.J op cit at p 452). His Lordship went on:-

> *"Such a step it would be his duty to take. But as soon as it is proved that the loss is complete and it is a question therefore not of preventing the loss but of recovering the goods, then I think the burden is cast on the plaintiff of showing that the step in question would have resulted in such recovery."*

In the same case Bankes L.J said (p 450):-

> *"In such a case as the present it may be said that the goods are not lost in the sense of being completely lost, so long as they are recoverable by any reasonable act on the part of the bailee; and it is, I think, in this sense only that a loss without default on his part can be relied on by a bailee as a complete defence to an action for damages for loss of the goods.*
>
> *Care must of course be taken not to extend unduly the duty of a bailee by expecting him to take action which may involve him in unreasonable expense or trouble; but no such question arises in this case. As has often been pointed out, the onus of proof in the course of a case may be constantly shifting."*

Whether Scrutton L.J took a different view about the onus of proof is not material here. The case of Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642 must be read in the light of these statements.

The matter is, in any event, completely academic here. The theft was straightway reported to the police and there is no suggestion anywhere that reporting it also to the bailor would have made the slightest difference.

Some evidence was given about the defendant's consignment notes and a clause in them limiting the liability of the defendant, but the learned Judge found against it on its defence relating to this, and there is no appeal from his finding on this aspect.

The result is that the appeal will be dismissed with costs.

A formal Order on the motion will also be made. It is that the motion is dismissed. Costs of the motion to be costs in the appeal.

.....
Mr Justice Michael M Helsham
President, Fiji Court of Appeal

.....
Sir Mari Kapi
Judge of Appeal

.....
Mr Justice Gordon Ward
Judge of Appeal