12/97

SUPREME COURT OF VICTORIA

SPEEDYCOM PTY LTD v GRAPHIC COMPUTER SYSTEMS PTY LTD

O'Bryan J

15, 24 October 1996

CIVIL PROCEEDINGS – BAILMENT – GOODS RETURNED TO VENDOR – DAMAGED IN TRANSIT – LIABILITY – DUTY OF CARE ON BAILEE FOR REWARD – WHETHER STRICT LIABILITY – WHETHER BAILEE LIABLE FOR ALL RISKS.

Upon request, a computer was sent to SP/L; however, it was found to be inappropriate to SP/L's needs and was returned. When the computer was returned it was found to be in a damaged state. Subsequently, proceedings were taken against SP/L for the cost of the computer. At the hearing, the magistrate found that the agreement between the parties was a sale "on approval" and that SP/L was obliged to protect the other party against any damage which might have occurred during transport. Accordingly, an order was made on the claim with costs. Upon appeal—

HELD: Appeal allowed. Remitted for rehearing.
1. When the computer was delivered to SP/L, a bailment arose whereby a duty of care was imposed on SP/L to exercise reasonable care for the safety of the goods. The burden was on SP/L to prove that the damage to the goods was not due to any failure on its part to take due and proper precautions for the computer's safe and proper custody.
***Fankhauser v Mark Dykes Pty Ltd* [1960] VicRp 61; (1960) VR 376, followed.**

2. In view of the magistrate's findings, SP/L was liable for all risks, a duty much greater than the law imposes on a bailee for reward. It was not open to the magistrate to find a breach of a duty to hold safe the computer for the other party. Such a duty did not arise either in negligence or in the law of bailment.

O'BRYAN J: [1] This is an appeal from orders made in the Magistrates' Court on 2 April 1996 whereby it was ordered that the appellant (the defendant in the court below) pay the respondent (the plaintiff in the court below) the sum of $21,125 together with interest of $2,230 and costs and that a counterclaim be dismissed. Three main questions of law were raised in the order of Master Kings. The first question of law remains to be decided. The second question of law which related to the quantum of the respondent's loss and damage was abandoned by Mr Boaden of counsel who appeared for the appellant, as was the third question of law which related to dismissal of the counterclaim.

The first question of law asserts that the learned Magistrate erred in law in finding that the appellant had an absolute duty to hold the respondent safe from any damage to a computer which was returned to the respondent by the appellant in July 1995. Mr Colman of counsel argued that the learned Magistrate did not find that the appellant had an absolute duty to hold the respondent safe from any damage that was done to the computer during transport. If he did so, Mr Colman conceded an error of law was made and the appeal must succeed. I am of the opinion that the learned Magistrate fell into error and the orders made in the court below must be set aside and the claim re-heard before another Magistrate. A brief résumé of the facts is all that is necessary in the circumstances.

In May 1994, the appellant company carrying on business in Western Australia expressed interest to the respondent, a Victorian company, in purchasing a computer. The respondent forwarded to the appellant Terms and Conditions of Sale and a Loan Request Form. The Loan Request Form was completed by the appellant and returned to the respondent. Some discussion took place about insurance of the computer which was to be loaned to the appellant. A loan computer was dispatched to the appellant in Northbridge, Western Australia on or about 24 May and insurance was effected by the appellant. In due course the loan computer was returned to the respondent in good condition. **[2]** In June the appellant expressed an interest in purchasing from the respondent a computer known as Scorpion 10 for which a quotation had already been provided including terms and conditions of sale. On 14 June the respondent dispatched the

Scorpion 10 computer to the appellant and the appellant received it in good condition on 22 June. The respondent believed that the sale was complete and that property in the computer had passed. The appellant considered that the computer was on approval and after evaluation decided to return it as it was inappropriate to its needs.

It is unnecessary to determine the contractual issues. The respondent sued the appellant for the invoice price alleging that property in the computer passed to the appellant upon sale and the appellant defended the claim upon the basis that it had no obligation to pay for the computer because a sale was never completed. In mid July the appellant delivered the computer to a carrier, not a common carrier, in Western Australia for return to the respondent. Insurance was not effected by either the appellant or the respondent. The respondent's evidence was that the computer was dispatched back to it without prior notice and it had no opportunity to arrange insurance. No insurance was effected by the appellant, although it could have been effected by simply ticking a box on the consignment note to indicate to the carrier that insurance was required. On 18 July when the respondent took delivery of the computer from the carrier it was in a damaged state.

The claim of the respondent was pleaded and presented in court in alternative ways. Firstly, the respondent claimed the invoice price upon sale. The learned Magistrate found no agreement to sell was made, that the agreement was a sale "on approval" and that the appellant was entitled to return the computer when it found the computer was inappropriate for its intended purposes. The learned Magistrate found that the computer was never sold and property and risk remained with the respondent. However, upon delivery of the computer to the appellant "on approval" or "on sale or return" a bailment arose whereby a duty of care was imposed on the appellant. See *Fairley and Stevens v Goldsworthy* **[3]** (1973) 34 DLR (3d) 554. The appellant, as bailee, was under a duty to exercise reasonable care for the safety of the computer entrusted to it, including the return of the computer to the bailor respondent. *Halsbury* (4th Edition, Vol.2, para.1539) states:

> "Apart from special contract, the bailee is not an insurer (*Coggs v Bernard* (1703) 2 Ld Raym 909 at 918 per Holt CJ: 'He is only to do the best he can') and therefore, in the absence of negligence on his part, he is not liable for the loss of 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."

The burden was on the appellant to prove that the damage to the chattel occurred without any neglect, default or misconduct on its part or on the part of any servant to whom it may have delegated its duty. *Morris v CW Martin & Sons Ltd* (1966) 1 QB 716 at 726; (1965) 2 All ER 725; [1965] 2 Lloyds Rep 63; [1965] 3 WLR 276. In the Magistrates' Court the appellant contended:

> 1. That no special contract was made whereby the appellant became the insurer of the computer or was required to insure the computer.
>
> 2. That it was not negligent.
>
> 3. That in delivering the computer to a reputable carrier in sound condition it discharged its duty as a bailee.

The respondent contended:

> 1. That the agreement for "sale on approval" contained an implied term which required the appellant to insure the computer during the return of the computer to the respondent or to notify the respondent of the proposed return to enable the respondent to effect insurance.
>
> 2. That the appellant was negligent in failing to effect insurance or in failing to notify the respondent of the proposed return of the computer in time, or at all, to allow the respondent to effect insurance.
>
> 3. That the appellant was in breach of its duty as a bailee.

The above contentions may not all be found in the particulars of claim and defence but I believe that they were articulated and argued in the court below. **[4]** Certainly the evidence permitted the respondent to put its case in several ways and the appellant denied breach of the agreement and any liability in negligence or as a bailee.

What did the learned Magistrate decide? A comprehensive statement of the reasons for

decision is provided in Ex.K25. In the absence of any further material from the respondent I shall act upon Ex.K25. Mr Boaden has conveniently segregated the reasons for decision into numbered paragraphs. The following sixteen paragraphs are relevant for the purpose of the appeal:

> "1. An Agreement was arranged between the parties in relation to the provision of the Mark 10 Computer, that the computer was to be shipped to Speedycom Pty Ltd, whereby Speedycom could over 30 days decide whether it was satisfactory, or whether to reject that unit if appropriate.
> 2. No agreement to sell had been made. Transfer of the unit from Melbourne to W.A. was arranged.
> 3. Various documents were faxed in relation to the arrangements and it is submitted by the Plaintiff that the terms and conditions are to be read as to providing this unit that the risk would be with the Defendant.
> 4. Property always remains with the provider or owner in this style of agreement.
> 5. In these circumstances that risk always being with the Plaintiff.
> 6. The Plaintiff says that the Defendant was obliged to ensure that there was an insurance policy in place which protected the interests of the Plaintiff.
> 7. The Unit is expensive - $25,000.
> 8. The Plaintiff says it always insures units - freight insurance was in fact arranged by the Plaintiff.
> 9. There were arrangements between Managing Director of the Defendant and Managing Director of the Plaintiff – that in fact the unit would be returned - but no arrangements in respect of the return.
> 10. Mr Taylor made arrangements on behalf of the Defendant. Mr Taylor took it upon himself with the probable assistance of a Secretary or some other type of assistant to simply return the unit.
> **[5]** 11. It was understood and well known that there must be insurance on the return journey, and the insurance must be to the benefit of the owner, Plaintiff.
> 12. It was properly understood by Mr Taylor and the Defendant that the Defendant should have insurance with such insurance to be for the benefit of the Plaintiff, and the Defendant was obliged to protect the Plaintiff against any damage which may have occurred in the course of transport.
> 13. The Defendant had a duty to ensure [sic] insure the Plaintiff's interest in the property whilst that property was being transferred was protected – by insurance policy, or alternatively to act as insurer and hold the Plaintiff safe from any damage that was done to the computer during transport.
> 14. The obligation was for the Defendant to insure or hold safe the computer for the Plaintiff. This duty has been breached by the Defendant.
> 15. The Unit has been physically damaged. Once a computer is affected by trauma – is the warranty still in effect? Probably not. Pre-collision value less salvage costs appropriate.
> 16. It is accepted evidence that the real value of the unit at the time before damage was as per invoice, $22,725 – this figure to be used as to value prior to damage. After damage (1995) valued at between $800 to $1600."

Mr Boaden submitted that in paragraphs numbered 11 to 14 inclusive errors of law may be found. Firstly, Mr Boaden argued there was no foundation in the evidence for the finding "it was understood and well known that there must be insurance on the return journey". I shall not canvass the evidence of the respondent touching this finding as this appeal is not about findings of fact; more serious errors are apparent in paragraphs 12, 13 and 14. Paragraph 12 records the learned Magistrate said: "and the defendant (appellant) was obliged to protect the plaintiff (respondent) against any damage which may have occurred in the course of transport". On the face of it this meant that the appellant was liable for all risks, a duty much greater than the law imposes upon a bailee for reward. See *Halsbury* (supra). Paragraph 13 records the learned Magistrate said: "The defendant (appellant) had a duty ... or alternatively to act as insurer and hold the plaintiff safe from any damage that was done to the computer **[6]** during transport." So expressed, the duty imposed on the appellant was absolute liability, if it did not insure the plaintiff's interest in the property.

In *Fankhauser v Mark Dykes Pty Ltd* [1960] VicRp 61; (1960) VR 376 the Full Court considered the duty of care imposed upon a bailee for reward. Sholl, J, in whose judgment Lowe and Monahan JJ agreed, held that once a contract of bailment is proved to have been breached "it was then for the defendant to prove that the loss of or damage to the goods was not due to any failure on his part to take due and proper precautions for their safe and proper custody". There was no basis, apart from a contractual duty, to impose a duty on the appellant "to act as insurer and hold the respondent safe from any damage". Paragraph 14 records the learned Magistrate said: "The obligation was for the defendant (appellant) to insure or hold safe the computer for the plaintiff (respondent). This duty has been breached by the defendant (appellant)."

I infer that the learned Magistrate simply repeated in the first sentence in paragraph 14 what he said in the preceding paragraph. Which duty did the learned Magistrate find was breached by the appellant? It may have been open to the learned Magistrate to find in the evidence

an implied term which required the appellant to insure the computer during the return of the computer to the respondent. As this matter must be re-heard in the Magistrates' Court I express no opinion about the contractual issue and whether an implied term requiring the appellant to insure the computer could be found. If such a term existed breach was clearly proved inasmuch as the appellant admitted that insurance was not effected. Putting to one side a duty arising out of contract it was not open for the learned Magistrate to find breach of a duty "to hold safe the computer for the plaintiff". Such a duty clearly did not arise either in negligence or in the law of bailment.

Mr Colman submitted that the general duty of care owed by the appellant included a duty to insure or, alternatively, a duty to give the respondent an opportunity to insure the computer during the return journey. Reliance is placed upon the decision of the Court of Appeal in *Von Traubenberg v Davies Turner & Co Ltd* (1951) 2 Lloyd's List Reports 462. **[7]** Again, it is unnecessary for this Court to determine whether the claim can succeed in negligence. Mr Boaden submitted that the learned Magistrate failed to analyse the appellant's obligations, whether arising out of contract or out of negligence or as a bailee for reward, and wrongly concluded that the appellant's obligation was to indemnify the respondent against any damage to the computer on its return journey, howsoever and by whomsoever that damage was caused.

Mr Colman submitted that the passages extracted from the learned Magistrate's reasons for decision do not show that he imposed obligations on the appellant outside the contractual duty or the tort duty which required the appellant to effect insurance or to ask the respondent whether insurance was required before the computer was dispatched. I have to disagree. A fair reading of the reasons for decision has persuaded me that the learned Magistrate imposed strict liability on the appellant as an alternative to the alleged duty arising out of the contract or out of negligence.

The first ground of appeal is upheld. The orders in the court below, other than in relation to the counterclaim, will be set aside. The claim will be remitted to the Magistrates' Court to be determined according to law before a differently constituted court. The respondent shall pay the costs of the appeal. The costs of hearing in the court below will abide the outcome of the hearing.

APPEARANCES: For the Appellant (Speedycom): Mr R Boaden, counsel. Pearce Webster Dugdales, solicitors. For the Respondent: Mr D Colman, counsel. Jon Gorr, solicitors.
