Privy Council Appeal No. 11 of 1969

Gilchrist Watt and Sanderson Pty. Limited – – – *Appellants*

v.

York Products Pty. Limited – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JULY 1970

Present at the Hearing:

LORD HODSON
LORD GUEST
LORD DONOVAN
LORD PEARSON
SIR GORDON WILLMER

[*Delivered by* LORD PEARSON]

The plaintiffs, who are the respondents in this appeal, carry on in Sydney a business which includes the importation and sale within Australia of watches and clocks. In 1962 they bought two cases of clocks from German suppliers. The price and the freight were paid before shipment. The two cases were shipped in a ship called the "Regenstein" for carriage from Hamburg to Sydney and for delivery at Sydney. The bill of lading was to "order". The ship arrived at Sydney and on the 29th September 1962 berthed at a wharf belonging to the Maritime Services Board (which will be referred to as "the Board").

The defendants, who are the appellants in this appeal, carry on business at Sydney as stevedores and ships' agents, and in these two capacities they dealt with the cargo of the Regenstein including the two cases of clocks which the plaintiffs had bought. On the 2nd October 1962 the defendants unloaded the cargo on the wharf and sorted and stacked it in a shed on the wharf. This shed belonged to the Board but it was being used and controlled during working hours by the defendants. The key of the shed was kept by Customs officials during the night but was fetched by the defendants in the morning and returned by them to the Customs officials at the end of the day (or at the close of the night shift if there was one). The defendants' head stacking clerk had an office in the shed. As goods came off the ship he with the aid of other stacking clerks employed by the defendants placed the goods in appropriate positions in the shed and recorded in a book the goods and their positions. The defendants did the work of sorting and stacking them in their capacity as stevedores, and their charges for this work were paid by the plaintiff and other consignees of the goods. The defendants also employed a number of watchmen to protect the goods while in the shed or being taken to or from the shed. The defendants also employed at least one delivery clerk and a tally clerk for the purpose of effecting delivery of

the goods to the consignees. The wages of these clerks and of the watchmen were initially paid by the defendants, but the amounts of these wages and other expenses in respect of each ship were charged by the defendants to the shipowners concerned.

The Regenstein sailed away from Sydney on the 4th October 1962. On the 5th October 1962 agents of the plaintiffs paid 8s 9d to the Customs and obtained a Customs stamp saying " may be delivered " on the face of the bill of lading. On the 8th October 1962 they paid 10s 1d to the defendants for sorting and stacking, and obtained their stamp saying " Please deliver " on the face of the bill of lading. But when the agents of the plaintiffs sought to take delivery of the two cases of clocks, one of them was missing. It has not been recovered.

After some correspondence the plaintiffs commenced an action against the defendants on the 2nd July 1964. The Particulars of Claim contained three alternative counts. The third count, on which judgment was given for the plaintiffs, was in these terms:

> " AND the plaintiff also sues the defendant for that there were delivered to the defendant in Sydney certain goods of the plaintiff to be safely kept and taken care of by the defendant for the plaintiff and the defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid Yet the defendant kept the said goods in a negligent manner and took no care of the same WHEREBY the said goods were wholly lost to the plaintiff."

Then followed the claim for a sum of £967 14s. 7d., but judgment was given for £824 and there is no dispute now as to the amount. The first two counts, on which the plaintiff did not succeed, were in all material respects similar to the third count except that they contained after the words " to be safely kept and taken care of by the defendant for the plaintiff " the words " for reward to the defendant ".

The question at issue in this appeal, stated very shortly, is whether the defendants as bailees owed a duty of care to the plaintiff. If there was such a duty, the defendants committed a breach of it and thereby caused the loss. The learned trial judge found that the loss would not have occurred if the defendants had exercised reasonable care, and this finding has not been contested.

The learned judge held that there was a bailment of the goods by the plaintiffs to the defendants, although there was no express agreement of bailment. He made a finding that the defendants notified the plaintiffs that the goods had arrived. Then his view was that the defendants' duties as agents for the shipowners were completed when they notified the plaintiffs that they had the plaintiffs' goods on the wharf, and thereafter they held the goods with the plaintiffs' consent and retained possession and control of the goods (as it was in their business interest so to do) and thereby a bailment was created. The learned judge's view was contested by counsel for the defendants in this appeal on the ground that there was no evidence to support the finding that the defendants had notified the plaintiffs of the arrival of the goods, and also on the ground that in any case such notification would not have completed the defendants' duties to the shipowners, because such duties would include delivery of the goods on behalf of the shipowners to the plaintiffs. There was no direct evidence of the defendants having notified the plaintiffs of the arrival of the goods. Regulation 12 of the Board's Cargo Handling and Wharf Storage Regulations provided that " the owner of a vessel, from which goods have been unshipped on to any wharf, shall forthwith after the completion of the unshipment of any consignment of goods, cause the owner of such goods to be notified of such unshipment and at the same time furnish

him with particulars of such goods and their location on the wharf premises". Presumably it was for the defendants as agents of the shipowners to give such notification, and they may have done so, but in the absence of any direct evidence there is not sufficient ground for inferring that they must have done so.

In the Court of Appeal there was a difference of opinion. Asprey J.A., with whom Walsh J.A. agreed, said that the question in the appeal was whether there was any evidence on which the trial judge could find that at the time when the case of alarm clocks was lost the relationship of bailor and bailee existed between the plaintiffs and the defendants. In the opinion of Asprey J.A. there was such evidence. He held that when the goods were placed on board the ship in terms of the bill of lading the shipowners had physical possession of them and held them as bailees for the holder of the bill of lading, but when the goods after arrival of the ship at Sydney were taken from the ship by the defendants with the authority of the shipowners and placed on the wharf they came into the physical possession of the defendants and the shipowners ceased to have physical possession. He held that there was a sub-bailment by the shipowners to the defendants and that this sub-bailment determined the bailment to the shipowners. He referred to a provision near the end of Clause 4 of the bill of lading that " When the goods are discharged from the vessel, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility." He held that this provision was of general application and not limited to the special situations referred to in the opening portion of Clause 4. On this basis there would be a termination of the bailment to the shipowners. Moreover, as there were no charges for freight or otherwise owing to the shipowners, they had no proprietary interest in the goods and they had transferred the physical possession of them to the defendants as independent contractors, and, even if the shipowners had a subsisting contractual duty to effect delivery, the existence of that duty, unlike the relationship of master and servant, did not make the independent contractor's physical possession constructively possession by the shipowners. He said that by the very nature of the transaction and the provisions of the bill of lading the shipowners were entitled to discharge the goods on to the wharf at Sydney into the possession of some such persons as the defendants. He also said " I am of the opinion that at common law the duty of a bailee arises when one person, otherwise than as a servant, voluntarily takes into his physical possession goods which are the property of another ". He cited *Morris v. C. W. Martin and Sons Ltd.* [1966] 1 Q.B. 716, 731, 738 and *Chesworth v. Farrar* [1967] 1 Q.B. 407, 415.

Hardie A.J.A. took a different view and dissented. He considered that Clause 4 of the bill of lading applied only to the special situations referred to in the opening portion of it and was not of general application; that the shipowners' obligation under the bill of lading to deliver did not come to an end when the goods were unloaded from the ship but continued until delivery to the consignee; that the defendants' custody and control of the goods in the shed during working hours were referable to their duties as ship's agents, *i.e.*, to ensure compliance with and observance of the provisions of the Customs Act and Regulations and of the Maritime Services Act and Regulations, and to enable the shipowners to exercise their rights and perform their obligations under the contract contained in the bill of lading; that, although the shipowners were a non-resident corporation and the ship had left the port, the shipowners were represented by their agents the defendants; and that possession of the goods remained with the shipowners up to the point of time when it was assumed by the consignees. Hardie A.J.A. also said that the case

for the plaintiffs had been fought in the Court below on the one issue of whether the defendants had legal possession of the goods as bailees for the plaintiffs; that no claim was there made that, apart from bailment, the defendants were under an obligation to take reasonable care of the goods in question by reason of their having voluntarily assumed some such responsibility; and accordingly it was not appropriate to examine the question as to whether, in a case such as the present, the plaintiffs might have been able to establish a cause of action, apart altogether from bailment, *i.e.*, for negligence.

The shipowners have not taken any part in these proceedings, and it is not desirable (if it can be avoided) to give any decision as to the position of the shipowners, as it might prejudice other cases to which they might be parties. The question raised by this appeal as to the liability of the defendants to the plaintiffs can be decided without deciding questions affecting the shipowners.

Be it assumed in favour of the defendants that they were acting throughout as ship's agents, taking charge of the goods and keeping them and delivering them on behalf of the shipowners and generally doing the things which the shipowners were obliged to do or cause to be done under the bill of lading and the Board's Regulations. Be it assumed also that the bailment of the goods to the shipowners continued until delivery notwithstanding the provisions of the bill of lading that " The carrier shall not be liable in any capacity whatsoever for any delay, loss or damage occurring . . . after the goods leave ships's tackle to be discharged transhipped or forwarded ". It is conceivable that they might remain bailees although protected by this exemption from liability for delay, loss or damage: they might still have the obligation to deliver the goods (if not lost) to the holder of the bill of lading and be liable for refusal to deliver or for misdelivery. Nevertheless the defendants did take possession of the goods and keep possession of them pending delivery. They were not employees of the shipowners, but independent contractors engaged to do certain work of reception, temporary storage and delivery of the goods. It was not to be expected that the shipowners would themselves look after and deliver the goods at the port of discharge. They would naturally cause these things to be done, according to the ordinary and natural course of business, by engaging the defendants to do these things as ship's agents, so that the defendants would have the shipowners' authority to keep and deliver the goods before and after the ship's departure.

On these assumptions—which are the most favourable to the defendants—the bailment to the shipowners continued but there was a sub-bailment from them to the defendants. The defendants as sub-bailees were given and took possession of the goods for the purpose of looking after them and delivering them to the holders of the bill of lading who were the plaintiffs. Thereby the defendants took upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or attornment between the defendants and the plaintiffs.

The principal authority for the existence of such an obligation and ascribing it to bailment is the case of *Morris v. C. W. Martin & Sons Ltd.* (*supra*) which was cited by Asprey J.A. But there is some earlier authority for the existence of the obligation. There are two railway cases. In *Foulkes v. Metropolitan District Railway Company* (1880) 5 C.P.D. 157 the plaintiff at the London and South-Western Railway Company's Richmond Station took a return ticket to the defendants' Hammersmith Station. He was injured on the return journey in a train of the defendants. The plaintiff's claim succeeded both on the ground of contractual liability and on the ground of liability apart from contract. At p. 164 Baggallay, L.J.

said " It appears to me sufficient say to that . . . a duty or obligation was imposed upon the District Company, when they accepted the plaintiff as a passenger by their train, not only to carry him safely to the station where he was to alight, but to provide safe means for his alighting when he arrived at that station." At p. 168 Thesiger L.J. said " even assuming the contract of carriage from and to Richmond and Hammersmith to have been made between him and the London and South-Western Railway Company exclusively, the defendants are still liable in respect of the wrongful act which led to the plaintiff's injuries, by virtue of their actual reception of him in their carriage on his return journey from Hammersmith to Richmond."

The principle of *Foulkes's case* was applied to the carriage of passengers' luggage in *Hooper v. The London and North Western Railway Company* (1881) 50 L.J. Q.B. 103, where the plaintiff at the Great Western Railway Company's Stourbridge Station bought a ticket for his journey via Birmingham to Euston. The part of the journey from Birmingham to Euston was in a train of the defendants, and on that part of the journey the plaintiff's portmanteau was lost. The principle was explained and applied in judgments given by Denman J. and Lindley J. Denman J. at pp. 104-5 cited this passage from the judgment of Thesiger L.J. in *Foulkes's case*:

> " I think that the true principle in such a case as the present is that the carrying company, so far as it concerns its own line . . . and its own acts and omissions, is under the same obligations in reference to the security of the passenger as it would have been if it had directly contracted with him. That principle is a reasonable one, for underlying it is the fact that, more or less directly or indirectly, the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him; and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety? "

Denman J., said at p. 105, referring to the defendants:

> " It was their duty to protect and forward passengers' luggage entrusted to their care; and one cannot imagine how it can be said this loss was not due to their negligence. This being the evidence, I am of opinion the defendants neglected a duty which they owed to the plaintiff."

Lindley J. said in the course of his judgment at p. 105:

> " Whether there would be an implied contract with the defendant company may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and the fact of its not forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company, having received the portmanteau, are responsible for its loss, in accordance with the principle of *Foulkes v. The Metropolitan Railway* Company."

Also there are cases showing that the finder of goods, if he takes them into his possession, owes to the owner a duty of keeping them safely and returning them to the owner (if that is possible). In *Isaack v. Clark* (1615) 2 Bulstrode 306, 312 Coke C.J. said: " he which findes goods, (is) bound to answer him for them who hath the property; and if he delivers them over to anyone, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely." In *Newman v. Bourne and Hollingsworth* (1915) 31 T.L.R.209 the plaintiff, being in the defendants' shop as a customer on a Saturday,

left her brooch on a glass case. A shop assistant found it and handed it to the shopwalker, who put it in his desk. On the following Monday morning it could not be found. The County Court judge held that the defendants had not exercised that degree of care which was due from one who had found an article and had assumed possession of it. The Divisional Court, Ridley J. and Atkin J., held that the decision was right.

In Halsbury's Laws of England, 3rd edition, Vol. 2 at p. 99 the paragraph which refers to these cases of finding is headed " When finder of chattel is bailee." This expression is not etymologically accurate, because the word " bailee " is derived from the French " bailler " meaning to deliver or hand over, and there is no delivering or handing over to a finder. But there is a common element, because both in an ordinary bailment and in a " bailment by finding " the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods.

In *Thompson v. Nixon* [1965] 2 A.E.R. 741 the Queen's Bench Divisional Court had to decide whether a finder taking possession was a " bailee " for the purposes of the Larceny Act, and they were bound by a previous decision to give a negative answer, but they came to this conclusion reluctantly. Sachs J., with whom Parker C.J. and Browne J. agreed, said in the course of his judgment

> " In essence, the issue raised is whether the word ' bailee ' in the proviso includes all those cases in which a man has those special rights and duties that arise from lawful possession when he is not the actual legal owner, thus embracing all those who today are commonly referred to as bailees; or whether the word ' bailee ' there only refers to that limited class of persons who have received into possession goods from some other person on express or implied terms as to that possession . . . Had the point first arisen now that there is so general a view held by those with a wide knowledge of the common law that finders are by their own actions persons who constitute themselves bailees, I for myself would have so construed the word ' bailee ' even in a criminal statute as to include anyone who elected to take up the position of bailee by his own voluntary act."

With regard to the liability owed to the first bailor by a person taking possession under a sub-bailment, there is both old and recent authority. In *Pollock and Wright* " An essay on possession in the common law ", published in 1888, there is this passage at p. 169:

> " If the bailee of a thing sub-bails it by authority, there may be a difference according as it is intended that the bailee's bailment is to determine and the third person is to hold as the immediate bailee of the owner, in which case the third person really becomes a first bailee directly from the owner and the case passes back into a simple case of bailment, or that the first bailee is to retain (so to speak) a reversionary interest and there is no direct privity of contract between the third person and the owner, in which case it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the sub-bailment."

The principal modern authority as to the liability of a sub-bailee to the first bailor is *Morris v. C. W. Martin and Sons Ltd.* [1966] 1 Q.B. 716, where a mink stole sent by the plaintiff to a furrier to be cleaned was with the consent of the plaintiff sent on to the defendants as cleaning specialists for them to clean it under a contract between them and the furrier. The mink stole was stolen by a servant of the defendants whose duty it was to clean it. It was held that the defendants had a non-contractual liability to the plaintiffs. Lord Denning, M.R. at

p. 729, after citing the passage set out above from *Pollock and Wright*, said—" By which I take it that if the sub-bailment is for reward, the sub-bailee owes to the owner all the duties of a bailee for reward: and the owner can sue the sub-bailee direct for loss of or damage to the goods; and the sub-bailee (unless he is protected by any exempting conditions) is liable unless he can prove that the loss or damage occurred without his fault or that of his servants." Diplock L.J. said at p. 731 " Duties at common law are owed by one person to another only if there exists a relationship between them which the common law recognises as giving rise to such duty. One of such recognised relationships is created by the voluntary taking into custody of goods which are the property of another. By voluntarily accepting from Beder the custody of a fur which they knew to be the property of a customer of his, they brought into existence between the plaintiff and themselves the relationship of bailor and bailee by sub-bailment. The legal relationship of bailor and bailee of a chattel can exist independently of any contract . . . " Salmon L.J. said at p. 737 " Where the defendants received the plaintiff's mink stole from the furrier, Beder, for cleaning, they knew that this stole did not belong to him but to one of his customers. They did not know the customer's name. Nevertheless by taking the fur into their possession in these circumstances they became bailees to the plaintiff for reward."

The same principle has been applied in other recent cases relating to sub-bailees, *Global Dress Co. Ltd. v. W. H. Boase and Company* (1966) 2 Ll.L.R. 72, 76, 77. *Learoyd Brothers & Co. v. Pope and Sons Ltd.* (1966) 2 Ll.L.R. 142, 147, 148. *Moukataff v. British Overseas Airways Corporation* (1967) 1 Ll.L.R. 396, 412–16. *Lee Cooper Ltd. v. C. H. Jenkins and Sons Ltd.* [1967] 2 Q.B.1.

Both on principle and on old as well as recent authority it is clear that, although there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiffs' goods in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so (as found by the trial judge). The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this the obligation is created by the delivery and assumption of possession under a sub-bailment. In the English courts the word " bailment " has acquired a meaning wide enough to include this case. It may not have acquired such a wide meaning in the Australian courts. It is to be observed, however, that there is no express reference to bailment in Count 3 of the Particulars of Claim (set out above) on which the plaintiff succeeded. On a reasonable construction of that count this case falls within it. The plaintiffs have rightly succeeded in their action.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The defendants (appellants) must pay the costs of the appeal.

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