

**IN THE DISTRICT COURT
AT MANUKAU**

**CIV-2016-092-002194
[2017] NZDC 10436**

BETWEEN ASSET INTERNATIONAL LIMITED
Plaintiff
AND BODYNEAT PANEL & PAINT LIMITED
Defendant

Hearing: 12 April 2017

Appearances: A Colgan for Plaintiff
G K Holm-Hansen for Defendant

Judgment: 25 May 2017

RESERVED JUDGMENT OF JUDGE R J McILRAITH

[1] Asset International Limited (“Asset”) purchases and imports motor vehicles from Japan. In early 2015 Asset had a relationship with Bodyneat Panel & Paint Limited (“Bodyneat“). This relationship was not recorded in writing.

[2] On 8 January 2015 an employee of Bodyneat collected a grey 2006 Toyota Landcruiser Prado from the premises of Asset and took it to Bodyneat’s workshop at 65C Crooks Road, East Tamaki. Bodyneat was to undertake a small amount of panel beating work on the vehicle.

[3] The vehicle was to be returned to Asset on 9 January. At lunchtime on 9 January, the vehicle was stolen from Bodyneat’s workshop by persons unknown. Mr Deo, the sole director of Bodyneat called the police straight after the theft and gave them as much information as possible about the situation. The vehicle was subsequently recovered in a damaged condition a considerable time later.

[4] In July 2016 Asset commenced this proceeding against Bodyneat. The proceeding involves a single cause of action, breach of bailment. It is common

ground that there was a bailment of Asset's vehicle and that the vehicle was stolen from Bodyneat's premises whilst in its possession.

[5] There are two issues for determination:

- (a) What was the scope of Bodyneat's duty to Asset while it was in possession of the vehicle and did it take appropriate care of the vehicle; and
- (b) Whether the arrangement under which the bailment arose was subject to terms that Bodyneat would not be liable for any loss resulting from theft or damage to vehicles whilst on its premises, even if it failed to take appropriate care of a vehicle.

[6] There was no disagreement on the legal principles involved and, in particular, the standard of care required by a bailee.

[7] The first point to note is, of course, that Bodyneat bears the burden of proof in relation to the issues in this trial. It is well established that where goods are lost or damaged in the custody of a bailee, the onus rests on the bailee to establish affirmatively that the loss cannot be attributed to its fault¹.

[8] The duties imposed on bailees are succinctly set out in the judgment of Kirby P in *Tottenham Investments Pty Limited v Carburettor Services Pty Limited*²:

- (a) The bailee has a duty to take such care of the bailed goods as is reasonable in the circumstances;
- (b) In the event of loss, the bailee bears the onus of showing that the loss is not the result of any negligence on its part;
- (c) The duty of the bailee is not that of an insurer. A bailee is not obliged to take every conceivable or possible precaution to prevent loss of the goods;
- (d) In respect of theft, the bailee must show that it took steps which were reasonable in the circumstances to keep out intruders;

¹ *Wilson & Horton Ltd v Attorney General* [1997] 2NZLR513

² *Tottenham Investments Pty Limited v Carburettor Services Pty Limited* [1994] Aust Torts Reports – 81 - 292

- (e) A bailee cannot wait until a theft occurs until it turns its attention to security; and
- (f) Steps taken after the event to enhance security do not evidence any negligence in the first instance. However, such steps may show that those steps were practicable in the first instance.

[9] I received evidence for Asset from a number of witnesses. These included Mr Christian, an investigations manager at Skope Investigations Limited, who had been hired by Zurich New Zealand Limited, the insurer of Asset's vehicle. Mr Christian explained the investigation which he undertook.

[10] Evidence was also given by Mr Baldwin the owner and managing director of Asset. His evidence predominantly related to Asset's relationship with Bodyneat and his visits to Bodyneat's workshop. He could not recall seeing any signs at Bodyneat's workshop regarding responsibility for bailed vehicles. He had never received any correspondence about such issues.

[11] I received evidence from Leanne Friedrich, the claims recovery manager for Zurich. Ms Friedrich outlined the motor vehicle insurance policy held by Asset with Zurich and the recovery of the damaged vehicle some time after its theft. The vehicle was sold by way of salvage to mitigate loss. It was sold at auction by Turners Group for an amount of \$3,515. The pre-incident value of the vehicle was assessed to be \$27,500.

[12] For Bodyneat, evidence was primarily given by Mr Deo, the sole director of Bodyneat. Mr Deo explained the nature of Bodyneat's business, and that there had been no theft from his workshop previously. In relation to the events on 9 January 2015, Mr Deo said that there were approximately 20 vehicles in the workshop being worked on at the time with another 30 parked in the two service lanes on either side of the workshop. The 20 vehicles in the workshop, including that of Asset, had their keys easily accessible in the vehicles.

[13] At around 1.15 pm four men opened the gate at the rear entrance to the workshop. Mr Deo said that the gate was closed but not locked at that time. The Asset vehicle was parked in the workshop near the rear entrance. While most employees were on their lunch-break, Mr Deo was at the front entrance of the

workshop having a cigarette with his wife. He could see the back entrance from where he was standing. He approached the four men as they entered the workshop. He said that they looked threatening. One of the men engaged him in conversation and while this was occurring one of the other men got into the vehicle, started it and drove away. Mr Deo had been distracted and did not realise until it had happened that the vehicle had been stolen. The other three men then ran out of the workshop and sped away in another vehicle. Mr Deo said that these events took place in the course of one minute.

[14] Mr Deo was adamant that at the time of the theft the gate at the rear of his workshop was closed, but not locked. He said that the gate had been pulled closed when employees went for lunch. On this occasion the gate was opened again by the thieves. He accepted, however, that the gate was not locked at lunchtime on this or any day.

[15] Mr Deo said that he did not have CCTV outside the rear entrance to the workshop. Mr Deo had advised Mr Christian that he intended to have this installed in the future.

[16] In relation to signage, Mr Deo was adamant that there were signs present in his workshop at the time that representatives of Asset had attended and, also, on the day of the theft. His evidence was, however, not clear as to exactly where he said such signs were placed. He ultimately said in evidence that signs would be in particular positions and then need to be taken down for painting and cleaning work and then replaced. He made reference to photographs. Mr Deo said that in hindsight he wished he had taken photos of the signs and dated them to demonstrate that signs were in fact present on the day concerned. The signs Mr Deo said were present stated (the exact wording):

Important Notice

All vehicles parked at owner's risk

We do not accept any responsibilities for loss, theft or damages of a vehicle while on the premises.

By Management (Bodyneat Panel and Paint)

[17] I also received evidence from Yogendra Murtie, Seungchul Park and Nilesh Maharaj. These people operate panelbeating businesses in East Tamaki. They confirmed that it was common practice for panelbeaters, at least in this area, to leave keys in the ignition of the vehicles they have in their possession whilst in the workshop. This practice is needed they say, in order to make sure that they can be efficient in their work, not make customers wait longer than necessary, and for health and safety reasons.

Decision

[18] The standard required of a bailee is to show that it took steps which were reasonable in the circumstances to both keep out thieves and safeguard property. In relation to the theft of Asset's vehicle, and the circumstances in which that occurred, I found Mr Deo to be a credible witness. The same cannot, however, be said in relation to his evidence regarding signage in the property and the attempts taken to bring that signage to the attention of customers.

[19] In relation to the theft, I find that the gate was indeed closed at the time of the theft, as Mr Deo said. The thieves opened the gate and gained access to the workshop. The problem is, of course, that the gate was not locked. I find that the practice of leaving keys readily accessible in vehicles in the workshop was not uncommon, and was not a breach of Bodyneat's obligations. However, the gate should have been locked at lunchtime. Lunchtime was clearly a time at which there was far less activity in the workshop with employees at lunch, and even if Mr Deo was frequently present in the workshop, such that it was not left entirely unattended, a reasonable and sensible precaution that should have been taken was to lock the gate during this period. For that reason, I do not consider that Bodyneat took appropriate care to prevent the loss of Asset's vehicle by theft.

[20] I note that Bodyneat argued that it would not have been possible to prevent the theft once the men arrived. However, I am not satisfied that that is necessarily the case and, in any event, case law referred to me establishes that this does not establish a defence to the breach of Bodyneat's obligations³.

³ *Securitas (NZ) Limited v Cadbury Schweppes Hudson Limited* [1988] 1NZLR 340

[21] For completeness, I note also that a failure to have CCTV cameras present, so as to provide a deterrent, was a further breach of Bodyneat's obligations.

[22] As noted, I am not satisfied by Mr Deo's evidence that there was the signage claimed by Bodyneat present in the office at the appropriate times. That includes in particular, the times at which Asset's representatives attended the premises. In addition, as noted to counsel during submissions, I would have expected that a provision of such importance would have been brought to the direct attention of Asset in correspondence. The danger of relying solely upon signage is highlighted by the failings in this case. For that reason, I find that Bodyneat has not established an affirmative defence. I am not satisfied that its contractual arrangements with Asset excluded any liability resulting from theft of vehicles in its workshop.

[23] Asset succeeds in its claim. Damages in the sum of \$23,985 are awarded, along with interest on that sum from 9 January 2015 until the date of judgment at 11%, in accordance with s 62B District Courts Act 1947. Scale costs on a 2B basis.

R McIlraith
District Court Judge