

2. This claim was commenced on 26.2.2004, by a writ of summons. Leave was granted to have notice of the writ served by publication in newspaper. The defendant lived in New York, USA. He entered appearance, but failed to file a defence. On 12.4.2005, default judgment was entered against the defendant. By consent order, the default judgment was set aside on 27.6.2005.

3. Pleadings were resumed, but under the 2005 Rules of Court, which had come into effect on 1.4.2005. Case management conference was conducted by the Registrar on 1.3.2006. Pretrial review was listed for 22.6.2006. On that date attorney for the claimant attended; the defendant or his attorney did not attend. It was apparent that the case was not ready for trial; case management conference orders had not been complied with. I directed that the case management conference orders be complied with and the case be listed for trial on 08.12.2006.

4. There is no record of what happened until the case was listed on 26.5.2009, for hearing two applications, one by the claimant and the other by the defendant, for court orders to have some witness statements filed and served late. The applications were granted. Also

permission was granted to amend the statement of claim and if desired, the defence. So the claim really returned to pleading stage in 2009, until it was relisted for trial on, 23.4.2010. It was tried in one day.

5. It seems to me that parties might have reached a settlement, had they sufficiently identified the issues. The facts were largely common ground. The claim was based on bailment of a caterpillar. The only crucial question of fact was whether when the claimant, the bailor, who had lent his caterpillar to the defendant, agreed to oversee the repair of the engine of the caterpillar during the absence of the defendant, also agreed to receive the caterpillar back, and the bailment ended.
6. If the claimant was receiving the caterpillar back, that is, receiving redelivery from the bailee, then the defendant would be liable only for the cost of the repair of the engine, in excess of the sum he gave to the claimant for the repair. If the claimant was not receiving the caterpillar back, then the question to be resolved would be whether the caterpillar was not returned owing to the fault of the defendant, the

bailee. If the return was not possible because the caterpillar had been stolen or cannibalized, then the defendant would have to show that the theft of the caterpillar or of parts of it was owing to no fault of his, that is, it was not due to failure by the defendant to live upto his duty as a bailee to deliver back the caterpillar, or to take reasonable care of the caterpillar, as he would take care of his own goods.

7. ***The Facts.***

A summary of the facts which are largely not in dispute, is the following. The claimant and the defendants were Belizeans who were friends from their days in New York, U. S. A. They used to drive back together to Belize to sell vehicles. In about the year 2000, they returned to Belize intending to remain permanently.

8. The defendant brought a 225 caterpillar and established a heavy equipment business. He excavated for sand and landfill and sold lorry loads. The defendant acquired a ten acre farmland by a river, and worked it. In about February, 2002, the defendant borrowed and the claimant lent his caterpillar to the defendant. The defendant needed the caterpillar for excavating for sand from the river for his own

benefit. The claimant did not charge the defendant for the use of the caterpillar.

9. After over two months, the claimant reported to the claimant that the engine of the caterpillar had broken down. He had already got the repair work started, he had the engine taken to a workshop at a certain Mr. Wiltshire's home, and instructed a certain Mr. Thompson, an experienced mechanic, to reassemble the engine. The defendant confirmed his responsibility for the repair of the engine to the claimant and Mr. Thompson. But he also told the claimant in the presence of Mr. Thompson that, he (the defendant) had to take his child to school in the U.S.A. He gave some money to the claimant for the repair of the engine, and requested him to oversee the repair. The claimant agreed. The caterpillar was on the defendant's farm or at a river nearby. The defendant left for the U.S.A, and did not return until two years later, and only for the purpose of answering this claim.
10. Mr. Thompson completed the repair of the engine, but it has not been installed. The claimant went to the defendant's farm to see the caterpillar. He said that many parts had been removed from it. The

defendant said in court that the caterpillar was no longer on his property, but his testimony also suggested that he had not been to see it.

11. The claimant claimed: (1) “\$75,000.00 being the replacement cost of his caterpillar...”; (2) “\$500.00 per day for 24 months...” income lost when the claimant could not use his caterpillar; (3) any other relief that the court may grant; and (4) costs.

12. The defendant admitted that the caterpillar broke down in his custody, he accepted responsibility for the repair of the engine. He testified that when the engine was to be reassembled he had to travel to the U.S.A. for an “emergency”. He said, he agreed with the claimant that the claimant would oversee the completion of the repair work and the installation of the engine onto the caterpillar, and that he gave \$1,500.00 to the claimant for the purpose. The defendant also said that the claimant agreed to take the caterpillar back after the repair, from the defendant’s property.

13. *Determination.*

From the evidence I concluded that, the claimant and the defendant agreed that while the defendant would be away, the claimant would oversee the repair and installation of the engine of the caterpillar. But I also concluded that, they did not agree that when the claimant took over responsibility for overseeing the repair he also took delivery back of the caterpillar. On the evidence, I was unable to infer that the parties understood that by agreeing to the arrangement about overseeing repair, the claimant accepted the delivery of the caterpillar back from the defendant.

14. The first reason for the above conclusions is this. The claimant said in court that, the defendant told him that the defendant was to travel to the U.S.A, to take his child to school. On the other land, the defendant was content with referring to the reason for his travelling to the U.S.A simply as, “an emergency”. In crossexamination he explained that, the mother of his children had called him and told him that he needed to go to New York to have the children go to school to start the school year. In my view, the inference from those two versions, would be that the defendant would need only a short time in

the U.S.A; the claimant would be entitled to assume that he would be responsible for overseeing the repair of the engine for only a short time until the defendant would return. That is far from handing over back, and receiving the caterpillar back.

15. The second reason for the conclusions is that, in his witness statement the defendant did not say that he handed over back the caterpillar, or that they agreed that he was handing over back the caterpillar at the time that the claimant was to take over the responsibility for the repair. I accepted that the defendant said: "I requested a meeting with the claimant and the mechanic, and it was agreed that the claimant would be fully responsible for the machine". In my view, that was merely his one sided storey or even conclusion. To be fully responsible for the machine did not, on the evidence, mean returning the caterpillar. The meeting which included the mechanic must have been about repair, overseeing repair and payment, not about the return of the caterpillar to the claimant. Moreover, an occasion for the return of the caterpillar would involve some sort of general inspection to ascertain whether the caterpillar was being returned in the same good condition as it was lent.

16. The third reason for the conclusions is again an inference from what the defendant said. In crossexamination he said: “It was agreed that Mr. Usher was to follow through with the repair and installation. We agreed payment would be by me. Parts were paid for by me...” The defendant did not mention return of the caterpillar as part of the said agreement. Indeed he did not mention it at all in his testimony.

17. The primary point of law is that the defendant became a bailee of the caterpillar lent to him. The principle of law is that a bailee has a duty when called upon, to deliver the goods. If he cannot deliver, he must show that the goods cannot be delivered through no fault of his. If the bailee can deliver the goods, but not in a good condition, the bailor must show that the damage to the goods, or otherwise bad condition of the goods was caused by the negligence of the bailee. There may be circumstances in which the bailee may contend that even if he had exercised reasonable care, the damage would not have been avoided. The rule is that the burden of proving that contention is on the bailee.

18. The above three rules were explained in great detail in the three Court of Appeal (UK) judgments in, *Coldman v Hill [1919] 1K B. 443*. The action was brought in detinue and negligence. In the action, the claimant placed his cattle with the defendant, an agister, on his land. Two of the cattle were stolen through no fault of the defendant. The theft was discovered by the defendant's stockman 16 hours after the theft, and he informed the defendant. In the mistaken and unwarranted belief that the claimant took the cattle, the defendant did nothing about the missing cattle; he did not report to the claimant or to the police, and he did not search for the cattle. Three weeks later the claimant went to collect back his cattle and discovered for the first time that the cattle were missing. He brought an action for detinue of the cattle, and for negligence on the part of the defendant as a bailee for reward. He was successful at the County Court, but unsuccessful on appeal to the Divisional Court.

19. The Court of Appeal restored the decision of the County Court that the claim on the ground of detinue could not succeed, it was a complete answer to the claim that the cattle could not be delivered because they had been stolen owing to no fault of the defendant. The

court held further that, there was a duty arising out of the contract of agistment, to give notice of the theft to the claimant; and further still that, when the defendant established that the cattle were stolen owing to no fault of his, the onus to prove act of negligence connected with the loss of the cattle shifted and rested with the claimant. About the contention by the defendant-respondent that even if he had not been negligent the loss would have occurred, the court held that the onus of proving so rested on the defendant. The appeal was allowed, the defendant-respondent was held liable for the loss of the claimant-appellant on the ground of negligence.

20. The duty to deliver the goods and to take reasonable care of the goods until delivery, had been developed in earlier cases such as, *Broadwater v Bolt, Holt N.P. 547, Ranson v Platt [1911] 2.K.B. 291 and Travers (Joseph & Sons v Cooper [1915] 1 K.B.73*. Often failure to deliver is the consequence of failure to take reasonable care of the goods.
21. The duty to take reasonable care may require providing reasonable security against theft or damage, and attending to preservation of the

goods such as by maintenance and repair. Bailment of vehicle and equipment in hire purchase or other credit sales where ownership does not pass immediately are examples – see *Tappenden v Artus and another* [1964] 2 Q.B. 185, and *Albemark Supply Company Limited v Hind and Company* [1928] 1 K.B. 307.

22. In summary it is my decision that the defendant was a bailee, he had a duty to deliver the caterpillar when called upon. He was not called upon to deliver the caterpillar when it was undergoing repair. He was subsequently called upon to deliver and he failed to deliver. The evidence was inconclusive regarding where the caterpillar was at the time of trial. It was not clear whether the caterpillar was still on the defendant's property or had been taken for scrap value by the claimant. It was upto the defendant to show where caterpillar was, since it was in his custody.

23. It is also my decision that the defendant was negligent in the keeping of the caterpillar, and because of that, parts of the caterpillar were stolen from it. The evidence showed that the defendant did not arrange for the security of the caterpillar, it was exposed to theft.

24. Although the heads of law under which the claimant made his claim were not specified by name, the facts outlined in the amended statement of claim pointed to the old action of detinue, now simply return of possession of goods, and also negligence. I hold the defendant liable for the return of possession of the caterpillar. In the event that the defendant has collected back what remained of his caterpillar, I hold the defendant liable in negligence.
25. Although no receipt was produced to prove the purchase price of the caterpillar, and no valuation report was produced, I consider the sum of \$75,000.00 claimed a reasonable replacement value of the used caterpillar, which was in serviceable condition when lent to the defendant. I award that sum as damages to the claimant.
26. I also award \$30,000.00 which I calculated as lost business income for two years. To award more than two months income in this claim would be to make an award to compensate for impecuniosity of the claimant, an award which is not available in law.

27. Costs of the claim to be agreed or taxed, are awarded to the claimant.

28. Delivered this Friday 21st day of May 2010
At the Supreme Court
Belize City

Sam L. Awich
Judge
Supreme Court