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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

RONALD LEWIS TRADING AS R L SERVICES

Plaintiff;

and

McNICHOLL AND HUGHES LTD

First-named Defendant;

and

MR EUGENE McNICHOLL

Second-named Defendant.

Mr Lavery (instructed by Shaw & Co, Solicitors) for the Plaintiff
Mr Gibson (instructed by Reavey & Co, Solicitors) for the Defendants

McBRIDE J

[1] The plaintiff, Ronald Lewis trading as R L Services seeks damages from the defendants in relation to the loss of a Manitou 1740 Fork Lift Truck ("the vehicle") which was owned by the plaintiff and was destroyed by fire whilst at premises owned by the defendants. The claim is based both on negligence and breach of contract.

[2] The plaintiff is represented by Mr Lavery of counsel and the defendants were represented by Mr Gibson of counsel.

The Evidence

[3] The court heard evidence from Mr Thomas Walsh of Green City Contracts Ltd, Mr Ian Lewis, Mr Ronald Lewis and Ms Crothers, Mr Maars and Mr McAllen on behalf of the plaintiff. On behalf of the defendants the court heard evidence from

Mr Eugene McNicholl and Mr McGarry, Consultant Engineer. In addition, the court had before it the agreed evidence of Mr Eric Spiers which was contained within an affidavit sworn by him on 5 August 2014.

[4] There was a large measure of agreement in respect of the facts and therefore it is unnecessary to rehearse the evidence of all the witnesses in this regard.

Agreed facts

[5](a) The plaintiff is a sole trader whose business includes hiring out plant and equipment to building contractors. Mr Ronald Lewis is the principal in the firm and his son Mr Ian Lewis is an employee who is actively involved in hiring plant machinery. Ms Crothers is the daughter of Mr Ronald Lewis and she did some invoicing and book work on a part time basis for the firm.

(b) The defendants are a director and his company.

(c) Mr Eugene McNicholl was carrying out works of construction at his private address at 72 Ballynahinch Road, Carryduff. The construction works were being carried out under the auspices of his limited company.

(d) The defendant, Mr Eugene McNicholl, engaged Mr Eric Spiers, who according to his affidavit evidence is a structural steel estimator. He was asked by Mr McNicholl in September 2013 to supply steel beams and to erect structural steelwork. As the erection of the steelwork required a specialist contractor who had the use of a telescopic forklift truck Mr Spiers approached Mr Walsh of Green City Contracts Ltd to carry out this work. Mr Walsh was paid in respect of this work by Mr Spiers.

[6] Green City Contracts Ltd hired the vehicle from the plaintiff. On 4 November 2013 Mr Walsh on behalf of Green City Contracts Ltd entered into a written hire agreement. This hire agreement provided as follows:

“R L Services, 2 Cross Lane, Maze, Lisburn
Forklift Trucks Commercial and Agricultural Vehicles

Short Term Hire Agreement

Name: Green City Contracts ...
Name: Thomas Walsh
Make: Manitou ...
Hire period: From 4 November 13 to 5 November 13
Rate: £300 weekly
Transport: £50
Value: £30,000

Conditions of Hire

1. This machine must be added to your insurance for all risks cover for the value stated above.
2. The hirer will indemnify R L Services (the company) against all claims and demands of whatsoever kind, and by whomsoever made upon the company. The hirer or any employee of either/or any other person interested in the use of the truck arising directly or indirectly, but of such use notwithstanding any neglect or default on the part of the company or any employee of the company or any defects on the truck when hired or arising during the hire.
3. The hirer will indemnify the company against loss or damage caused to the truck while on hire and until return to the company ...

Signed on behalf of the hirer: Thomas Walsh

Date: 4 November 2013"

[7] Green City Contracts attended the site and carried out the steel structural work over a two day period. When they had completed this work Mr Eric Spiers contacted Mr Walsh on behalf of Mr McNicholl and asked for the vehicle to be left on site as Mr McNicholl wanted to continue to use it. Mr Walsh then contacted Ian Lewis and advised that Mr McNicholl wanted to use the machine on the site. Mr Lewis agreed to this proposal. Mr Walsh then phoned Mr Spiers and advised him that the plaintiff had agreed to the proposal. He then left the keys of the vehicle with the Site Foreman Mr Benny Doyle.

[8] Mr Lewis did not get any paperwork completed in respect of the transaction.

[9] The vehicle was left on the site and was thereafter used by or on behalf of the defendants.

[10] The site was bounded on three sides by houses and hedges. The remaining side was secured by Heras fencing which is commonly used in the construction industry.

[11] On 11 November 2013 the machine was destroyed by fire.

[12] Emergency services attended the site and the unchallenged evidence of Mr McNicholl was that they had to break a lock to gain access to the site.

[13] The two possible causes of the fire were identified as electrical fault and/or vandalism. The fire report stated under cause of fire “faulty fuel supplies – electricity” and under additional incident notes “cause undetermined no sign of forced entry to site.”

[14] The plaintiff engaged Mr Maars a partner in TBM Consultants as an expert witness and the defendants engaged Mr McGarry Consultant Engineer who both commented on the cause of the fire. Notwithstanding the contents of their reports when the experts met they signed a joint minute which stated:

“Neither engineer is in a position to determine the cause of the fire based on the information available.”

[15] The morning after the fire Mr Ronald Lewis attended at the site and spoke to Mr McNicholl. Mr Lewis asked Mr McNicholl about the presence of insurance and he was provided with assurances that Mr McNicholl had insurance.

[16] The quantum of the plaintiff’s claim has been agreed at £35,000.

Central disputed issues

[17] The plaintiff claims the defendant hired the vehicle and under the terms of the hire contract he is liable for the loss of the vehicle. In the alternative the plaintiff submits that the vehicle was destroyed by reason of the negligence of the defendant whilst it was in his custody and control.

[18] In his pleadings and in evidence the defendant denied hiring the vehicle from the plaintiff. He did however accept it was in his custody and control when it was destroyed but he denied that he had acted negligently in any way.

[19] The central issues in dispute therefore are:

- (i) Whether the vehicle was hired by the defendant.
- (ii) If so, the terms of the hire.
- (iii) Whether the terms were breached.
- (iv) If the vehicle was not hired, whether the defendant’s negligence caused the loss of the vehicle whilst it was in his care and custody.

Discussion

Did Mr McNicholl hire the vehicle from the plaintiff?

[20] Mr McNicholl gave evidence that he did not know the machine was owned by the plaintiff. He said there was nothing on the machine to show that they owned it and it was his belief that it was owned by Green City Contracts Ltd and that he was “just getting the lend of it.”

[21] I am satisfied on the basis of all the evidence that Mr McNicholl did enter into a contract for the hire of the vehicle from the plaintiff for the following reasons:

- (a) I did not find Mr McNicholl to be a credible witness. Whilst giving evidence he changed the answers he gave in respect of a number of what I consider uncontroversial matters, for example, when asked whether he knew Mr Walsh initially he said he did know him but later rode back from this saying he would not recognise him. Further he gave contradictory evidence in respect of a number of matters which I will refer to later in this judgment.
- (b) Although Mr McNicholl initially claimed he was getting “the lend of the vehicle” he later admitted when pressed in cross-examination that he had hired the vehicle albeit he said that he had hired it from Green City Contracts Ltd.
- (c) During the course of his evidence he said that he had completed a claim form. When I asked him about this he then corrected himself and said that it was an incident report which he had completed. As this document had not been provided on discovery the court requested that it be produced. After a short adjournment the defendant then produced a claim form which he had sent to his insurers. He did not however produce the accident report form. The claim form was filled in by the defendant and signed by him on 12 November 2013. In response to the question “is the item owned by insured?” he stated “no.” In response to the question “is it hired in, state from where hired and attach details of hire contract, if available” he stated as follows:

“Hired from R L Services, 2 Cross Lane, Maze, Lisburn
BT28 2TH telephone number 028 92621127 mobile
number 07971 187117.”

[22] It is clear from this document that the defendant was accepting that he hired the vehicle from the plaintiff. At that date he was aware of the details of the hirer’s name, address and telephone numbers. Under cross-examination he was unable to give a satisfactory explanation why he had completed the form in this way if in fact he had not hired the vehicle from the plaintiff. I consider that this contemporaneous document is very strong evidence indicating that the defendant did hire the vehicle

from the plaintiff and therefore undermines his credibility and the evidence that he gave to the court that the vehicle was “lent to him by Green City Contracts.”

[23] I further consider that the fact Mr McNicholl hired the vehicle from the plaintiff is confirmed and corroborated by the affidavit evidence of Mr Spiers who stated at paragraph 8 of his affidavit as follows:

“McNicholl Hughes had taken over the use of the machine and subsequently requested that they take over hire of the machine.”

[24] Ms Crothers also gave evidence that there would have been a large sticker on the side of the cab indicating the ownership of the vehicle by the plaintiff. I found her to be a clear, honest and consistent witness and in all the circumstances I am satisfied that there was such a sticker on the machine. Mr McNicholl who was present on the site on his evidence at least twice per day I find would have been aware of the owner’s name.

[25] Ian Lewis described “cross hire” as being a situation where the original hirer phoned him and he then agreed to hire the vehicle to the third party. What normally happened in situations of “cross hire” was that the plaintiff firm entered into a written contract with the new hirer. In this case no paperwork in relation to the hire of the vehicle to the defendants was completed by Mr Ian Lewis. His evidence was that this was because there was no email facility. I find however that it was more likely due to, as his sister Ms Crothers stated, the fact he was “lazy with paperwork.” I am satisfied however that even though there was no paperwork there was still a contractual relationship between the plaintiff and Mr McNicholl. In normal circumstances a new written contract would have been drawn up between the plaintiff and the new hirer. Even though no written contract was entered into in this case I am still satisfied the circumstances of Mr Walsh phoning Mr Ian Lewis and then ringing Mr Spiers back to confirm that the plaintiff was agreeable to the arrangement to leave the vehicle on site all demonstrate that notwithstanding the lack of paperwork, the plaintiff and Mr McNicholl had entered into a contractual relationship for the hire of the vehicle.

[26] Further corroborating evidence indicating Mr McNicholl hired the vehicle from the plaintiff is found in the correspondence which indicates that he told police at the site that he was hiring the vehicle.

[27] In addition Mr Walsh’s evidence was that when he called to see Mr McNicholl on 21 January 2014, which conversation he recorded in his diary the defendant accepted that he had hired the vehicle.

[28] For all these reasons I am satisfied that there was a contractual relationship between the plaintiff and Mr McNicholl for the hire of the vehicle.

What were the terms of the hire contract?

[29] It is accepted by all the parties that the terms of the contract were not contained within a written document. In these circumstances it is necessary for the court to consider what the express and implied terms of the contract were.

[30] Mr Lavery on behalf of the plaintiff submits that the court should imply terms on the basis of custom and practice. In particular he submits that the defendant was bound by the terms contained within the hire contract made to Green City Contracts and/or in the alternative that the defendant was bound by the model conditions for the hiring of plant set out by the Construction Plant Hire Association.

[31] The basis for implying terms on the basis of custom and practice is that they are notorious, certain and reasonable.

[32] When Mr Lewis met Mr McNicholl he assured him that he had insurance. I am satisfied that this indicates that he was accepting the terms of the insurance covered him for the liability that he had agreed to enter into when he took on the hire of the vehicle. Further, I am satisfied that he was someone who had been involved in the construction industry over a long period of time and had industry knowledge of the custom and practice which applied to the hire of vehicles. In particular I am satisfied that he would have been aware in broad terms of what the construction plant hire conditions were.

[33] It also appears from the evidence of the other witnesses that the construction plant hire model conditions were standard throughout the industry and indeed the insurance brokers indicated that the insurance covered situations to which the construction plant hire conditions applied.

[34] The construction plant hire conditions state as follows at clause 13:

“Hirers responsibility for loss and damage

- (a) For the avoidance of doubt it is hereby declared and agreed that nothing in this clause affects the operation of clauses 4, 5, 8 and 9 of these conditions.
- (b) For the duration of the hire period (which for the avoidance of doubt includes the time plant is left on the site during a holiday period) the hirer shall, subject to the provisions referred to in subparagraph (a) make good to the owner all loss or damage to the plant from whatever cause the same may arise, fair wear and tear accepted and accept as provided in clause 9 herein and shall also fully

and completely indemnify the owner and any personnel supplied by the owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the storage, transit, transport, unloading, loading or use of the plant during the continuance of the hire period ...”

[35] Mr Gibson on behalf of the defendants submitted that even if these conditions did apply there was a limitation of liability set out in clause 12 of the Construction Plant Hire Conditions. Clause 12 states:

“Limitation of liability

Except for liability on the part of the owner which is expressly provided for in the contract (including these clauses):

- (a) The owner shall have no liability or responsibility for any loss, or damage of whatever nature due to or arising through any cause beyond his reasonable control.”

[36] I am satisfied that clause 12 relates to the liability of the owner and not the hirer of the vehicle. In these circumstances I consider that it does not act as a limitation of liability in respect of the hirer’s responsibility. Clause 13 clearly states that the hirer’s responsibility for loss and damage is to make good to the owner all loss of or damage to the plant “from whatever cause the same may arise.” Such liability is therefore not limited to the owner proving that in some way the hirer acted in a negligent manner.

[37] Given my findings in respect of the terms of the contract it is not necessary to consider the interesting factual and legal submissions about whether the defendant acted negligently in or about the care of the vehicle whilst in his care and/or to consider the cause of the fire.

Conclusion

[38] In light of my findings of fact I am satisfied that the defendants entered into a contract with the plaintiff for the hire of the vehicle. The terms of the contract included the construction plant hire conditions and in accordance with clause 13 of these conditions the defendants were liable for the loss “howsoever arising.” Given that the vehicle was destroyed by fire I find liability attaches to the defendants.

[39] In all the circumstances, I make an award of agreed damages in the sum of £35,000.

[40] I will hear the parties in respect of costs.