

CITATION: *Dep Thi Huynh v Hoang Tran* [2009] NTMC 030

PARTIES: DEP THI HUYNH

v

HOANG TRAN

TITLE OF COURT: Local Court

JURISDICTION: Small Claims

FILE NO(s): 20718800

DELIVERED ON: 10 July 2009

DELIVERED AT: Darwin

HEARING DATE(s): 11 July 2008, 26 September 2008 and
30 January 2009

JUDGMENT OF: Mr Richard Wallace

CATCHWORDS:

Contract – bailment – bailee’s duty of care

REPRESENTATION:

Counsel:

Plaintiff: D Story
Defendant: J Davidson

Solicitors:

Plaintiff: D Story & Associates
Defendant: Maleys

Judgment category classification: B
Judgment ID number: [2009] NTMC 030
Number of paragraphs: 41

IN THE SMALL CLAIMS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20718800

[2009] NTMC 030

BETWEEN:

DEP THI HUYNH
Plaintiff

AND:

HOANG TRAN
Defendant

REASONS FOR DECISION

(Delivered 10 July 2009)

Mr Richard Wallace SM:

1. This is an intriguing case from the Small Claims jurisdiction.
2. The claim is for \$10,000.00, the jurisdictional limit. The plaintiff, Dep Huynh (Ms Huynh) makes this claim against the defendant Hoang Tran (Ms Tran) in respect of the value of a diamond. Ms Huynh's case is that she left a diamond ring with Ms Tran as security for a loan. When she paid back the loan, Ms Tran returned the ring, but Ms Huynh found that a false diamond had been substituted for the real one. The defence to the claim is that the ring was returned in the same state it was received.
3. When the hearing commenced before me on 11 July 2008, Ms Huynh was unrepresented and Ms Tran was represented by Ms Davidson. Having heard some evidence from Ms Huynh, it as apparent to me first, that she was scarcely able to conduct her own case, owing to language difficulties and secondly, that there were witnesses whom neither side planned to call, in the absence of whose testimony I would be poorly placed to reach a reliable

decision. These witnesses were one Polla Kway and a jeweller, whose name I believe I never heard. Ms Kway's importance in the matter was known to both sides, as is apparent from the first few pages of the transcript of 11 July 2008. As for the jeweller, in the event neither side called him: his testimony might, or might not have assisted one of the parties.

4. On the second day's hearing, Ms Huynh was represented by Mr Story. Polla Kway was available as a witness and was called by Ms Davidson in the defence case. As a result of these changes, I have been much better placed in deciding the case, although not all of the mystery had been dispelled.
5. The evidence was finally completed and I heard submissions on 30 January 2009.

THE CASE FOR THE PLAINTIFF

6. Ms Huynh's evidence tells a fairly simple story. The diamond ring in question had been purchased by her son. The son, Thanh Ngoc Thai, gave evidence on 26 September 2008, largely about his providing the funds for his mother to redeem the ring from Ms Tran. Ms Davidson did not cross-examine him at all. So it is not disputed that Ms Huynh's evidence, backed up by Ex 1, an invoice from a Cabramatta jeweller, written in Vietnamese, establishes that the value of the diamond was \$10,300.00, (or \$11,000.00 including the ring).
7. Ms Huynh received the diamond ring in 2006. In 2007, being short of ready money, she pledged it at Cash Converters. Ex 2 was identified as a document from Cash Converters evidencing that loan. It appears that the loan was for \$1,000.00, taken out on 12 April 2007 and intended to run for a month, with an interest rate of 30%. It also appears that the ring was in fact redeemed early, on 16 April 2007, by a payment of \$1,240.00 (including \$240.00 interest).

8. In her original evidence on 11 July 2008, in the absence of Ex 2 (which was one of the items that emerged in consequence of Mr Story's coming into the matter), Ms Huynh said that the ring was at Cash Converters for nearly two weeks. Evidently this was a mistake on her part and an innocent one as far as I can see. It would not be the last example of witnesses changing their minds about the dates when things happened.
9. Ms Huynh's reason for redeeming the ring from Cash Converters was not that her need for ready money had disappeared – far from it. Rather, she was distressed at the steep rate of interest and another cheaper source of finance had appeared.
10. Ms Huynh was acquainted with Polla Kway. According to Ms Huynh, Ms Kway was a mere acquaintance – the ladies saw each other occasionally at the Casino and that was all. Ms Huynh was of the view that Ms Kway was a close friend of Ms Tran. According to Ms Tran this was not so: she said Ms Kway was a mere acquaintance of hers and she was of the view that Ms Kway was a close friend of Ms Huynh. Ms Kway gave evidence on this point (and on many others) in accordance with Ms Tran's.
11. Every mystery about a diamond deserves to have a Lady de Winter and Polla Kway takes on that role in this case. Ms Kway was interviewed under caution by police in relation to the matter. A transcript of that interview became Ex C in the matter. On page 14 of that transcript, her interrogator, Senior Constable Gargan is moved to say:

“You're lying through your teeth – and I would not normally say that in a record of interview”.
12. I formed a very similar view of Ms Kway's credibility, on the issue of who was a friend, who an acquaintance and everything else she said. So I am left with Ms Huynh and Ms Tran, each saying Ms Kway was not a close friend of hers and each saying she believes that Ms Kway was a far closer friend of the other's. They could both be telling the truth about that. There are two

items which suggest that Ms Kway may be a closer friend of Ms Tran's. First, is the fact that Ms Kway took the trouble to return to Darwin to give evidence in Ms Tran's cause, at her own expense (she said), expecting no recompense (she said) apart perhaps being reimbursed her expenses if Ms Tran were successful in the action.

13. I suppose it is conceivable that a person in Ms Kway's position might be moved to put herself to the expense and inconvenience of diverting to Darwin on a journey between Cambodia and Brisbane, or come here from Cambodia by reason of this case alone, out of an abstract concern that justice be done, or out of a desire to clear her name from the kind of suspicions held by police, or a combination of these two motives, but it seems unlikely and especially so when the evidence she intended to give tended to portray Ms Huynh, her friend, as a cold blooded fraudster and support the case of her mere acquaintance, Ms Tran.
14. Secondly, it also seems to me to be of some significance that Ms Tran was able to get in touch with Ms Kway between the first hearing date and the second. I suppose, in the not huge Indochinese communities of Darwin it would not be surprising if Ms Tran was able, by asking around, to find someone who knew someone who knew Ms Kway well enough to locate her, so this is not a weighty item.
15. Whoever she was closer to, Ms Kway was able, one day when she met Ms Huynh at the Casino and heard her tale of woe as to Cash Converter's interest rate, to suggest that Ms Huynh might obtain a loan at a much more acceptable rate from Ms Tran. And so it came to pass. One evening – according to Ms Huynh, the evening of the same day she had redeemed the ring from Cash Converters, ie, 16 April – she went to meet Ms Tran at Ms Tran's place of business down at the wharf and there borrowed \$2,500.00 and left the ring with Ms Tran by way of security.

16. Ms Kway, according to Ms Huynh, had foreshadowed that Ms Tran's rate of interest would be 10% - over what period is not disclosed. In the event, it appears that no interest at all was charged. Such is the evidence of both Ms Tran and Ms Huynh, and I have no reason not to believe it. Ms Tran's evidence does not really explain her generosity in that respect, except by her saying that she took pity on Ms Huynh, who was crying, and who said she needed the money for her brother in Vietnam. Ms Huynh was not quite a perfect stranger – they knew each other faintly from the casino – but not so close to Ms Tran as to explain her kindness.
17. Ms Huynh's explanation of the interest free loan was that the term of the loan was that if the money was not repaid within two weeks, the ring would be forfeited (see p 5 of the transcript of 11/7/08 and p 11 of that of 26/9/08). Within the two weeks, she got together the \$2,500.00 (from her son, who had bought the ring in the first place), repaid Ms Tran and had the ring returned to her, together with a receipt (Ex 3) for payment. The receipt which it is agreed was written by Ms Tran, is undated.
18. Ms Huynh's evidence is that very soon after she redeemed the ring, she noticed that its diamond was no longer loose in its setting, as it previously had been. Ms Huynh immediately smelt a rat. She took the ring to Cash Converters where someone told her the stone was not a diamond. Unwilling to believe this, she took the ring to Venezia Jewellers in Darwin city, where a jeweller of Vietnamese origin works. This gentleman was able to confirm that the stone was indeed fake: he was able to assert that not so much as a matter of expertise, as that (she said he said) Venezia Jewellers had themselves substituted a fake stone for the diamond. (See p 12 of the transcript of 26/9/08 and p 5 of 11/7/08). According to Ms Huynh, the jeweller described the person who came in to have the stones swapped. The description matched Polla Kway.

19. Hearsay evidence is admissible in the Small Claims jurisdiction, but I would be reluctant to accept such hearsay evidence as this, going as it does to the commission of what really must be a crime. However, I have every reason to believe that Polla Kway did indeed take the ring to that jeweller at Venezia and have the job done – she has twice said so herself.
20. Ms Kway’s story, broadly, is this. Ms Huynh offered to sell her the diamond for \$3,000.00. Ms Kway agreed to buy it. As part of the deal, Ms Huynh wanted the diamond replaced with a fake stone. Ms Kway took the ring to Venezia to have that done. Venezia did not have a suitable false stone to hand, and would have needed three days to get one. Ms Huynh was pressed for time, needing the deal to be done urgently. Ms Kway was able to supply from her own possessions a suitable false stone (which she calls a “rabbit”) and had Venezia set that in the ring. She handed the changed ring back to Ms Huynh, with the \$3,000.00 and kept the diamond, which she ultimately gave to her mother in Cambodia.
21. The more circumstantial account by Ms Kway is the one she gave to police in the interview transcribed in Ex C, but her evidence was to much the same effect. With a witness so unreliable as Ms Kway, I must ask myself whether she might have another reason to claim to be the person responsible for switching the stones, but I can think of none. So I accept that it was indeed her.
22. Ms Huynh, having received this information from the jeweller, went to see Ms Tran and demanded back her diamond or its value. Ms Tran claimed to know nothing of the substitution. Ms Huynh soon afterwards – a day or two at most – made a complaint to police.
23. As a witness, Ms Huynh seemed open and honest, as far as I could tell and remembering that her evidence was veiled through the process of translation by an interpreter. There was an impressive consistency between the account she gave on 11 July, as an unrepresented plaintiff and that on 26 September,

after she engaged Mr Story. What differences exist between those two accounts are explicable as arising from Ms Huynh's becoming aware of the usefulness of certain documents to refresh her memory. I do not doubt that Mr Story played a leading role in focussing Ms Huynh's mind on locating these documents. But I did not see any sign of her having been schooled to recognise their usefulness. And it is very clear that these documents taken altogether tend to support her original account and to refute that of the defence.

24. I do not have much of an idea why Ms Huynh needed the money – be it \$1,000.00 or \$2,500.00 (and perhaps more, according to the evidence of Ms Tran who says she asked for further advances during the fortnight Ms Tran held the ring). The only explanations are (a) the one about someone, perhaps a brother in Vietnam (from Ms Tran) or (b) the casino (from Ms Kway). I do not understand why Ms Huynh should go to extortiate moneylenders if her son could, at a pinch, come up with \$2,500.00. Intriguing though these questions are, their existence does not, to my mind, impinge on Ms Huynh's credibility. The one item in her evidence that did immediately raise my suspicions was her claim that she came to suspect the substitution because the gem in the ring was no longer loose as it had been. This is a circumstance that seems almost too good to be true. But there is no reason why it should not be true. Otherwise her conduct – in confronting Ms Tran and going to the police and initiating this action – is exactly what one would expect from a person believing herself to have been robbed and swindled.

THE DEFENDANT'S CASE

25. Ms Tran gave her evidence on 30 January 2009. She told a very simple story. She knew Ms Huynh, very slightly, from a few occasions at the casino. She knew Polla Kway in the same way and to much the same degree.

26. One evening Ms Huynh came to her shop and asked to borrow money to support her brother in Vietnam. Ms Tran lent her \$2,500.00 on security of the ring. She put the ring in her bag and kept it there until Ms Huynh redeemed it about two weeks later.
27. At some point Ms Tran wrote a receipt (Ex 3). My impression was that this receipt was written when Ms Huynh pledged the ring, but the exigencies of translation leave me slightly in doubt about this. The receipt is undated. Mr Story suggested that Ms Tran's failure to discover the receipt book from which Ex 3 came, was suspicious. One presumes that other receipts from the book may have been dated and that, if so, it may have been possible to set some parameters around the date of Receipt No 13, Ex 3. By the time Ms Tran gave her evidence, it was apparent that issues in relation to the precise dates of events were very important. I too found Ms Tran's failure to produce this suspicious, and her account that she could not find it was not convincing.
28. The day after the ring was redeemed by Ms Huynh, she returned with her complaint that the stone had been changed. Ms Tran denied having done that and refused Ms Huynh's demand for \$11,000.00 (the value of the diamond). Ms Tran went on to say that she later spoke to Ms Kway about the matter and Ms Kway told her that she, Ms Kway, had had the stone changed before the ring was pledged, on 17 or 18 April.
29. A succinct version of this simple account also appears in Ms Tran's affidavit of 9 July 2008 (Ex B). In that affidavit, Ms Tran says she received the ring on 22 April 2007. In her evidence she was less certain, believing the date to have been between 20 and 22 April. Ms Tran works seven days a week. One day is very like another to her. Her reason for believing she can remember the date of this transaction is that it was very close to her birthday. Ms Tran says that 16 April is not close enough to accord with her memory of the closeness of her birthday.

POLLA KWAY'S EVIDENCE

30. Ms Kway was called in the defendant's case on 26 September 2008.
31. Her evidence in chief was that in April 2007 Ms Huynh had offered to sell her the diamond from her ring for \$3,000.00. A condition of the sale was that Ms Kway arrange for a fake stone to replace the diamond in the ring. Ms Kway accepted the offer, paid the \$3,000.00 and arranged for the jewellers to make the substitution. It is inherently unlikely that Ms Huynh would sell the diamond for this price – the original vendor in Cabramatta had warranted that he would buy it back for the price - \$10,300.00 – minus 10%. (See p11 of transcript of 26/9/08). Ms Kway accounts for this unlikelihood impliedly, by adverting to Ms Huynh's need for haste and secrecy.
32. Ms Kway had made an earlier statement, in an interview under caution conducted by Senior Constable Gargan on 31 May 2007, alluded to earlier in these reasons. A transcript of that interview is Ex C.
33. On p 5 of Ex C, it is asserted by Constable Gargan that Ms Huynh made her complaint to police on 1 May 2007. There is nothing in the evidence to contradict this date. On the same page of the transcript, Constable Gargan adverts to a statement from "Jane at Venezia Jewellers", to the effect that Ms Kway took the ring to the jewellers to have the stone changed on 18 April. Ms Kway, apropos of that date, responds that it was on 17 or 18 April that Ms Huynh approached her offering to sell the ring.
34. If I could be reasonably sure that Ms Kway took the ring to the jewellers on 18 April, then I could be just as sure that she did not do so as part of the alleged purchase of the ring from Ms Huynh. The reason for that is that I am satisfied on the evidence that Ms Huynh was out of town on 18 April, at least until very late in the afternoon. Exhibits 4 and 6, together with the evidence of Ms Huynh, satisfy me that on that day she was engaged in supporting her husband's work as a crabber, by driving down the track,

picking up a load of pet meat at Howard Springs (ie, bait for crab pots), driving that out to somewhere in the vicinity of Shady Camp, unloading it, picking up a load of mud crabs, conveying them to a seafood wholesaler and so on. Ex 4 relates to the purchase of the pet meat on 18 April. Ex 6 relates to the sale of crabs that same day and also to another sale after a similar day on 22 April.

35. These documents were brought into the case after Mr Story came to act for Ms Huynh. I have every reason to suppose that Ms Huynh had no idea that these documents might be of some significance in the case before that, and in particular, no idea that 18 April might be an important date. So it is quite impressive that these documents in effect refute Ms Kway's account of receiving the ring, swapping the stones and returning the ring to Ms Huynh all on that day, if that day were the 18th. However, even by the standard of evidence in the Small Claims Court, the evidence pinning these events to the 18th is flimsy. Constable Gargan quotes "Jane" in the context of a story (which Ms Kway denies) that has Ms Kway visiting the jewellers more than once to arrange the substitution. Ms Kway does not, on 31 May, agree to be pinned down to the 18th – she says 17th or 18th. In my opinion, Ms Huynh's absence from Darwin on the 18th, which is proved, is not in itself a knockout blow.

DECISION

36. On the other hand, Constable Gargan's stating that Ms Huynh complained to police on 1 May is a serious blow to the chronology put forward by Ms Tran. Ms Tran has it that she possessed the ring for two weeks, or nearly two weeks, from about 22 April. For Ms Huynh (who agrees she paid back the money after two weeks) to have gone to the police on 1 May, she must have redeemed the ring no later than 30 April. Few people would describe 8 or 9 days as "two weeks" or "nearly two weeks". Contrariwise, Ms Huynh's evidence that she pledged the ring with Ms Tran on the same day she

redeemed it from Cash Converters (16 April) fits the “two week” period perfectly.

37. Another reason to doubt Ms Tran’s timetable is that her preferred date for the loan, 22 April, is one of the days Ms Huynh did her work supporting her husband’s crabbing. That would not altogether prevent Ms Huynh visiting Ms Tran’s shop in the evening, but would leave her, as she convincingly said in her evidence, too tired to want to do any further business after delivering the crabs to the wholesaler.
38. It is in my opinion far more probable than not that Ms Huynh pledged her ring with Ms Tran on 16 April. That being so, there would hardly be time that day for her to have redeemed the ring from Cash Converters, come to town, find Ms Kway, do a deal with her and for Ms Kway to get her \$3,000.00 together (from where? as the police interview failed convincingly to show), take the ring to the jeweller, obtain her own replacement stone and hand the changed ring back to Ms Huynh so that she could go to see Ms Tran. It seems to me highly likely that Ms Kway arranged the substitution later than 16 April. The most likely day is 18 April, but the exact day does not matter.
39. I do not accept Ms Tran’s evidence that she kept the ring in her bag from the moment it was pledged until the moment it was redeemed. I find on the balance of probabilities that she put the ring into the hands of Ms Kway. Perhaps she was concerned to get an assurance that the stone was sufficiently valuable to cover the \$2,500.00 she had advanced and she had Ms Kway take it for appraisal, Ms Kway in this scenario taking the opportunity to steal the real diamond. Or perhaps Ms Tran and Ms Kway were in cahoots.
40. In the latter case, liability would be obvious. But even in the former case, where Ms Tran has trusted Ms Kway and Ms Kway has betrayed that trust, then in my opinion, Ms Tran is clearly liable for the loss. She is a bailee

and is either strictly liable for the safekeeping of the goods or owes a duty of care to the bailor, Ms Huynh, appropriately to care for the goods and proof of compliance with that duty is upon Ms Tran. Given that I do not believe her evidence touching on how she cared for the ring, she has not negated a breach of the duty of care and is accordingly, liable for the loss.

41. Accordingly, whether Ms Tran was herself a party to the fraud, or whether she was a victim of Ms Kway, there will be judgment for the plaintiff in the sum of \$10,000.00, plus the filing fee of \$72.00.

Dated this 10th day of July 2009.

RICHARD WALLACE
STIPENDIARY MAGISTRATE