File No: 08-21982
Registry: Vancouver

In the Provincial Court of British Columbia

(CIVIL DIVISION)

BETWEEN:

GROUNDHOG CONSTRUCTION (2007) LTD.

CLAIMANT

AND:

BROADWAY WELDING SHOP (1976) LTD., NICK BYBLOW, ACCURATE EFFECTIVE BAILIFFS also doing business as ACCURATE BAILIFFS AND COLLECTIONS AGENCY LTD., and ABSOLUTE BAILIFFS INC.

DEFENDANTS

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE FERBEY

COPY

Counsel for the Claimant:	C. Martin
Appearing on his own behalf and on behalf of the Defendant Broadway Welding Shop:	Nick Byblow
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	August 6, 2009

[1] THE COURT: This action arises from a dispute over the repair of the claimant's excavation equipment by the defendants, and damage incurred to the equipment while it was at the defendants' premises.

[2] The claimant alleges that the defendants failed to honour a verbal agreement to effect repairs for the sum of $500, that the required repairs were not done properly, and that the defendants negligently caused damage to the equipment. The claimant further says that the defendants submitted an inflated bill and unlawfully seized the property when the claimant refused to pay. The claimant seeks damages for the negligent acts and for wrongful seizure.

[3] The defendants reply that the vehicle was properly repaired and that it was lawfully seized pursuant to a repairer's lien as the claimant had refused to pay the bill. They counterclaim for debt in the amount of $4,696.16 for labour and materials.

[4] The issues are as follows. What agreement, if any, was reached as to the scope and cost of the work? What was the cause of the damage that occurred in the defendants' shop? Was the defendants' bill justified? Was the defendants' seizure of the property lawful? If damages are due, what

should be the measure of damages?

[5] These are the facts that are not in dispute. The claimant is a small excavation company which is contracted to dig holes for BC Hydro. The business was started in the fall of 2007. In November 2007, it purchased in Texas a year-old excavation truck for the sum of $175,000.

[6] The equipment on the truck is somewhat unique. It uses water in a pressure-washer-like manner to loosen dirt and debris in an excavation and to suction dirt, debris, and water out of the excavation by a hydraulic piston into a holding tank. The truck is then driven to a dumpsite and the tank is mechanically lifted in order to empty the debris. The vehicle and its equipment is central to the company's day-to-day operations.

[7] On July 6th, 2008, after an excavation job, the principals of the claimant company, Julian Bentall and Glenn Biddle, could not get the excavation truck mechanism to lift the tank at a dumpsite. The piston, which was normally attached to a frame, had broken free from the frame and they were forced to empty the tank manually.

[8] The next day, Bentall attended the defendants' repair shop for the first time and spoke to an employee, Cameron

Cater. Cater viewed the equipment and told Bentall to return the following morning for the repair. Bentall and Cater discussed the cost of $500 for the repair. Only Bentall and Cater took part in this conversation, and no one else was present for the entire conversation.

[9] On the morning of Tuesday, July 8th, 2008, Cater and another employee, Joey Swane started the work. Cater was told that there was a crew waiting to use the equipment and he agreed that the work would be done by the end of the day.

[10] Cater was not called as a witness, nor was Joey Swane, who had assisted Cater with this repair. No written quote, estimate, or credit application was ever prepared in relation to this repair.

[11] Later that day, when Bentall telephoned the shop, he was reassured that they would have the truck finished that day. He was asked to come in to operate the tank-lifting mechanism for them. With Cater and Swane present, Bentall operated the lift so as to bring the tank up to its full evacuation position. Cater and Swane inspected the weld. Cater said he needed 30 to 45 minutes more to finish the work. They continued to work on the equipment.

[12] Suddenly, the tank fell over backwards crashing loudly

to the ground. The tank landed where Bentall and the others had just been standing. The mechanism holding the tank had been sheared off and hydraulic fluid was spraying everywhere. Bentall scrambled to turn off the engine and managed to shut off the valves.

[13] Byblow approached the scene and began, with his staff and others, to attempt to right the tank and clean up the mess. This operation took quite a while and required the hiring of a HIAB mechanism and operator to lift the tank from the ground. The tank was eventually righted, and Cater manually removed the hydraulic fluid because the piston could not be retracted.

[14] When the HIAB operator had finished the job of righting the tank, Byblow asked Bentall to produce the $150 to $200 cash to pay him for his services, but Bentall refused.

[15] Cater apologized to Bentall. Byblow offered to have the hose shop next door make up new hydraulic lines and said he would have the truck back on the road by the end of the next day, Wednesday. Some remedial work was done on Wednesday and on Thursday, July 9 and 10.

[16] Cater eventually handed Bentall an invoice handwritten by Byblow showing that the amount of $4,696.16 was owing.

Bentall was shocked at the amount of the bill, because most of it pertained to damage that was sustained in the garage. On the preprinted invoice form are the words "Terms net 30 days." Bentall left in the truck without paying the invoice. He told Cater that he would discuss the bill with his partner and would get back to him. Byblow was not present when Bentall drove away.

[17] The truck had been in the shop for a full three days. Bentall was relieved to get the equipment away from the defendants despite the fact that all of the damage had not yet been rectified.

[18] It is admitted that everyone in the defendants' shop was acting under Byblow's authority.

[19] On Friday, July 11th, 2008, Bentall telephoned Byblow about the bill saying his company was only prepared to pay $500, as the rest of the bill related to damage caused by the defendants' negligent acts. On July 16th, Byblow filed a lien. On July 18th, he telephoned Bentall and left a message saying he needed the full amount of the bill.

[20] Bentall contacted counsel. On July 21st, Bentall dropped off a letter and a cheque made payable to the defendants in the amount of $500 for the "welding services

as quoted." Byblow refused to accept the cheque insisting on full payment. He threatened to seize the truck and sell it in Mexico.

[21] Later the same day, the claimant's lawyer couriered a letter to the defendants reiterating the claimant's position that the claimant had paid for the services it had been quoted and had authorized, and pointing out that the alleged debt had been disputed rather than acknowledged. The truck was, nevertheless, seized by a bailiff at the defendants' behest late on the night of July 21st, 2008.

[22] On July 22nd, the claimant's counsel, with no assistance from the defendants, arranged with the bailiff to secure release of the truck in exchange for a sum of money representing the amount of the invoice, plus $778.23 to cover bailiff's fees, on the bailiff's undertaking to hold the funds minus fees in trust pending resolution of a legal action against the defendants.

[23] There are material conflicts in the evidence. My findings of fact turn on the evidence of Julian Bentall, a principal of the claimant company, and Nick Byblow, a principal of the defendant company. It is important to note that a material witness, the defendants' welder, Cameron Cater, was not called to testify. I am asked by the

claimant to draw an inference adverse to the defendants from their failure to produce Cater as a witness.

[24] I found the evidence of Nick Byblow to be contradictory, evasive, vague, and self-serving. Where his evidence differs from that of Julian Bentall, I accept the evidence of the latter and reject the former.

[25] It is Byblow's position that there was an agreement between Bentall and Cater based on a preliminary examination only and representations made by Bentall, that Cater tentatively estimated a fee of about six hours at a shop rate of $80 per hour, that it readily became apparent and was explained to Bentall that much more work would be necessary, that Bentall disregarded the defendants' advice to have a new bracket built and installed, that the resulting crash was Bentall's fault, and that the claimant was bound to pay the bill as presented.

[26] What was the agreement regarding the cost and scope of the repair? Bentall testified that he told Cater the bracket was not attached and that it needed to be repaired. Cater responded that the welding job to reattach the parts would cost about $500 and Bentall agreed.

[27] Bentall insisted that Cater did not tell him until

after the crash that he needed a new bracket, nor did he mention that a new bracket would be preferable to rewelding and replacing the old one. It was only after the crash that Cater told him, "We need to build a new bracket. Rewelding the old one will not work."

[28] Byblow testified that he, himself, explained to Bentall on the Tuesday morning that a welding job would not be sufficient and that a new bracket should be built and welded in place. He says that Bentall ignored the advice and wanted a cheap fix. I reject this evidence and find that no such conversation occurred until after the crash. I accept Bentall's evidence that he did not even meet Byblow until after the crash had occurred late Tuesday afternoon.

[29] Others were present for only bits and pieces of the various conversations between Bentall and Cater. Byblow spoke to Cater about the job, but Bentall was not present at that time. Cater was the only person privy to the agreement on the defendants' behalf.

[30] Cater and Swane left the defendants' employ in July 2008. Byblow did not ask them to testify nor did he inform claimant's counsel that he had decided not to call them, after all, until the morning of trial. Under the circumstances, it is appropriate to draw an inference

adverse to the defendants. While it is possible that Cater did mention an hourly shop rate and that he only gave a tentative estimate of the cost, there is no written evidence and precious little other admissible evidence of this.

[31] Bentall's evidence, accordingly, is the best evidence available as to the discussion of the cost and scope of the repair. I conclude that a weld job was to be done for $500. This was the scope of Cater's authority. After the crash, when it was obvious that a new bracket would be necessary, the defendants had to build a new bracket in order to make the equipment usable.

[32] What was the cause of the damage that occurred in the defendants' shop? There is no expert evidence and I am left to speculate as to the cause of the crash. It is the claimant's theory that Cater's weld failed.

[33] Byblow denies this and offered several alternative theories:

1. The tank had earlier been overloaded by the claimant.

2. The tank had not been emptied properly by the claimant.

3. The tank was lifted up before the welding was complete.

4. Bentall brought it in to get it repaired and intentionally broke it to get the job for free.

5. Bentall lifted the tank up too high. The angle, including the angle of the driveway, caused undue stress on the mechanism.

6. The design of the mechanism was bad to begin with.

[34] I accept Bentall's evidence that Cater asked him to operate the lift mechanism and that he did so under Cater's instructions. I find that after the tank had been lifted to the maximum level upon Cater's instruction or at least with his approval, Cater and Swane went underneath the tank in order to inspect the weld and to continue the work. Bentall was several feet away when the crash occurred.

[35] It is clear that the old bracket was being reattached and that the tank had been lifted to its highest position in order for the welding to be completed. I find that neither Cater nor Byblow gave Bentall any special instructions about the lifting of the tank and that Byblow did not, in fact, see the lifting or the crash of the tank. He had not even

met Bentall at that point.

[36] I find, in particular, that Bentall was not given any warnings or special instructions about how far to lift the tank. It is reasonable to conclude that Cater had asked for the tank to be lifted prematurely, before it was safe to do so. He was still working on the equipment and it is reasonable to conclude that he negligently failed to take reasonable precautions to secure the tank or otherwise avoid a mishap until the job was done and the mechanism was safe to operate.

[37] Furthermore, this was a bailment for fee. The onus of proof where property damage arises during a bailment was described in the case of ***Punch v. Savoy's Jewellers Ltd. et al***, [1986] O.J. No. 2925, from the Ontario Court of Appeal. There, the following was stated:

> In ***Morris v. C.W. Martin & Sons, Ltd.***, [1965] 2 All E.R. 725, Lord Denning M.R. confirmed that when goods are damaged or lost while in the possession of a bailee, the bailee must prove either that he took appropriate care of them or that his failure to do so did not contribute to the loss. If the goods are lost or damaged while they are in possession of the bailee, the burden is on the bailee to show that the damage occurred without any neglect, default or misconduct on the part of himself or any of his servants to whom he delegated a duty. To escape liability, he must demonstrate that the loss was without any fault on his part or the part of his servants. Only if he satisfies the owner that he took due care to employ trustworthy servants and that he and his servants exercised all diligence

will he be excused from liability.

[38] As tradespeople for hire, the defendants held themselves out to have special knowledge, skills, and experience. Furthermore, they had a special duty to take care of the claimant's property in performing the repairs. It was reasonable for the claimant to rely on the expertise and to expect a high duty of care.

[39] As tradespeople and as bailees for fee, the defendants have the onus of proving that they were not negligent. They have failed to do so. Accordingly, they are liable in negligence for the collapse of the tank and the consequent damage to the equipment.

[40] Was the defendants' bill justified? According to the defendants, the debt of $4,696.16 is due and owing and the debt was lawfully secured against the equipment pursuant to the ***Repairers Lien Act***. The invoice dated July 10th, 2008, purports to charge for hoses; fittings; a new bracket, $500; the HIAB lift; replacement oil; 20 hours of shop time for $1,600; hazmat cleanup for $500; and taxes. With the exception of building and installing the new bracket, Byblow admits that everything on the bill is as a result of the crash.

[41] I conclude that the claimant owes the defendants $500 for the new bracket. As Mr. Byblow has failed to tender any cogent evidence about the amount of time spent fabricating and installing the bracket as opposed to the amount of time spent on the other repairs, I decline, under the circumstances, to award more than $500 plus any applicable taxes.

[42] Was the defendants' seizure of the property lawful? There was little in the way of submissions and no case law cited on this point. In evidence are the ***Repairers Lien Act*** registration dated July 16th, 2008, and the seizure notice dated July 21st, 2008, regarding the "amount now due and owing by reason of a certain repairs agreement."

[43] The defendants were unable to produce any written evidence of the contract or acknowledgement of the debt. Byblow states that the claimant acknowledged the debt by tendering the cheque for $500. I reject this evidence. I find that it was crystal clear to Byblow that the bill was, in fact, being disputed. Furthermore, the printing on the bill itself implies that the claimant had a 30-day term to pay the bill.

[44] The onus is on the defendants, I conclude, to show that the seizure was lawful. I find that they have failed to do

so. Mr. Byblow appears to have acted prematurely and impetuously out of anger. This conclusion is supported by the tone of his communications with the claimant and claimant's counsel. I conclude on all of the evidence that the premature seizure was not authorized by law.

[45] What should be the measure of damages, first, for the property damage sustained in the crash? Glenn Biddle gave evidence of the damage done to the equipment, but there was little useful evidence regarding the proper measure of damages. Any claim for loss of income as a result of the damage has been abandoned by the claimant.

[46] It is obvious that the equipment suffered substantial damage in the crash. The tank, the flange, the drainpipe, the boom, and some of the electrical equipment, at least, were damaged and the hydraulic lines were severed and broken. The defendants rebuilt the bracket, tried to straighten the bent flange, repaired the hydraulic line, and worked on the boom. The tank was repaired by the defendants so that at least it was usable.

[47] The claimant has replaced some of the damaged parts, I understand, so as to be able to make use of the truck and tank. They have, in fact, been using it. While the equipment is functional, it is not 'fixed'. The claimant

alleges that due to the damage, the equipment does not work as it should. Hand-digging is required about 50 percent of the time whereas before the crash occurred, hand-digging was only necessary for six-inch or bigger rocks.

[48] The claimant alleges that about $25,000 U.S. would be needed to cover the cost of four replacement components alone. A replacement tank would cost over $20,000 in Canadian funds. It is alleged that not all of the necessary repairs have been done to date because it would be necessary to transport the truck to Texas for the parts and repairs, and the claimant cannot afford to transport the equipment to Texas and pay for the required work and materials. Tab 18 shows an invoice, of sorts, from Texas.

[49] No evidence regarding the cost of the diminished usage or the substandard operation of the equipment has been tendered that would allow me to properly quantify the damages. Furthermore, there is no evidence of the value of the equipment in contradistinction to the value of the 2006 Model 7400 International Truck Chassis.

[50] It seems that the equipment was well used by the claimant for many months before the damage was sustained. There is little evidence as to its condition before the damage was sustained. There is no evidence regarding

depreciation or wear and tear and the degree to which the equipment has been adversely affected, other than what amounts to opinion evidence on the part of the claimant.

[51] The fact is that the claimant has been using it without having the damage completely repaired or the damaged components replaced. I recognize that this shows they have attempted to mitigate the damages.

[52] I conclude, however, that it would not be appropriate to compensate the claimant for brand-new components. Consequently, the total sum of $8,000 is awarded to compensate for the damage caused in the crash.

[53] What should be the measure of damages for the unlawful seizure? Bailiff's fees should be paid by the defendants in the amount of $778.23, so that amount is owing to the claimant. The claimant was without the use of the property for about a day, but there is no loss of use claim and the claimant has abandoned the allegation of conversion. I conclude that $1,000 should be awarded for the wrongful seizure of the property.

[54] On the claim, there is judgment for the claimant. The amount that is being held in trust, $4,696.16, will be paid to the claimant. The defendants will pay bailiff fees to

the claimant in the amount of $778.23. The defendants will pay $8,000 to the claimant for the repairs to the property. The defendants will pay the claimant $1,000 for the seizure. The total amount, therefore, that is due by the defendants to the claimant is $14,474.39.

[55] With respect to the counterclaim, judgment is allowed in the amount of the debt of $500 plus applicable taxes.

[56] There will be court order interest from the date of August 5th, 2008, the date the notice of claim was filed. Reasonable applicable costs of this action -- of prosecuting this action will be assessed by the registrar and paid by the defendants to the claimant.

[57] The claim against the two bailiff companies was discontinued before this trial began so I need not deal with that.

[58] Now, Mr. Martin, are you seeking judgment against both defendants?

(DISCUSSION)

[59] THE COURT: So just to clarify, the amount I mentioned earlier, $14,474.39, is payable in total to the claimant. The amount of $13,474.39 is assessed against the corporate

defendant and $1,000 against the personal defendant and, on the counterclaim, the debt of $500 plus taxes is to be paid to the corporate defendant.

[60] And, as I mentioned, Mr. Byblow left the courtroom so I am unable to ask him what his proposal is with respect to payment of the judgment. Accordingly, the payment order is effective immediately.

[REASONS FOR JUDGMENT CONCLUDED]