

**BETWEEN**

**AFQ**

**APPLICANT**

**AND**

**ZUG t/a PA**

**RESPONDENT**

Date of Order:

18 July 2013

Referee:

Referee Robertshawe

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZUG t/a PA is to pay to AFQ the sum of \$14,436.00 in the following manner: he is to make fortnightly payments of at least \$20.00 until the sum owed is paid in full; the first such payment is due on or before Friday, 2 August 2013; and if ZUG fails to make any payment as required by this order, the full sum owing at that time is to become due and payable immediately.**

## **Facts**

[1] In March 2005, AFQ entered into a contract with ZUG to sell AFQ's militaria collection. The collection was informally valued at approximately \$30,000.00. ZUG was to take a 20 per cent commission on sales.

[2] By March 2006, ZUG had sold one group of items on lay-by to the value of \$1,540.00, and another to the value of \$6,720.00 (net of commission).

[3] Regrettably, on the night of 1 April 2007, all items of AFQ's that were in ZUG's possession were stolen out of ZUG's security van. ZUG was attending an antique militaria fair and had all of his collections, including AFQ's, in the van.

[4] AFQ has filed a claim against ZUG to be paid \$17,120.00 for the lost items. The parties agreed to extend jurisdiction to enable the matter to be dealt with in the Tribunal.

## **Issues**

[5] There is no dispute that AFQ's goods were stolen. However, as a "bailee" of those goods, ZUG owed AFQ a duty of care to look after them, and in law has the onus of proving that he took due care. AFQ believes ZUG did not keep his goods safe and is liable for their loss. ZUG believes that he did take reasonable care, but that the loss should be shared in some way, as they both took the risk of transporting the goods when insurance for this was not reasonably available.

[6] The issues to be resolved are as follows:

- (i) Did ZUG breach his duty of care to keep AFQ's goods safe?
- (ii) If not, how much should AFQ be compensated for the lost collection?

## **Decision**

*Did ZUG breach his duty of care to keep AFQ's goods safe?*

[7] ZUG was unable to establish that he had taken due care with AFQ's goods. This is so for the following reasons.

[8] By the date of the theft, ZUG had sold \$8,260.00 of the collection. These items were in the van and were lost, along with the unsold items. ZUG believed he had paid AFQ for some of the goods for which he had received the purchase price (\$1,540.00), but AFQ stated he had only received \$672.00 of this. ZUG has lost his records and was unable to establish that more had been paid. This left \$7,588.00 outstanding.

[9] The contract is silent as to at what time the sale took place for the purposes of the contract between ZUG and AFQ. However, ZUG had deducted his commission and was waiting for full payment from the purchaser. Regardless of whether possession had then passed to ZUG, I am satisfied that ZUG would be liable as bailee for the lay-by goods. These were sold and awaiting payment, and ought not to have been subject to the risk of loss by transporting them in an uninsured state.

[10] I have had regard to ZUG's view that he had to transport these items to hand over to buyers in case they paid him at the fairs he attended. However, transporting these goods was a risky enterprise, and they would have been better left in ZUG's locked storage at home, and forwarded once payment was received. If ZUG elected to travel with them once he had taken the commission on their sale, I am satisfied that he did this at his own risk, not AFQ's.

[11] In relation to the balance of the goods, ZUG was unable to produce any Police evidence about the theft. To establish reasonable care, ZUG needed to establish prudent parking within the motel grounds, and appropriate security in the van, with an alarm, grilles

and locks. AFQ disputed that ZUG had taken due care, but took nearly six years to file a claim against ZUG for his loss. In that time, none of the Police that had investigated the case were available to give evidence, and the file also could not be retrieved. ZUG was therefore left vulnerable by the delay in filing the claim. During the hearings, I gained the impression that ZUG may well have been able to provide adequate evidence of due care had so many years not passed. In particular, whilst at the time the Police revoked ZUG's firearms licence, the Police later considered him a fit and proper person to hold a licence despite the theft, which they might not have done had they considered he had been transporting substantial militaria, which included guns, in a careless fashion. It concerns me that the delay in bringing the proceedings prejudiced ZUG's defence. Whilst the extent to which this is so can never be known, any prejudice has been at a high price to ZUG, given the value of the goods lost. This potential for unfairness requires a sharing of the loss as set out below.

[12] For these reasons, whilst I believe ZUG was transporting the lay-by goods at his own risk, and whilst ZUG could not formally prove that he did take reasonable care at the time with the balance of the goods, I believe that the loss should be shared on the balance of the goods.

*How much should AFQ be compensated for the lost collection?*

[13] I find that ZUG is liable to pay AFQ the sum of \$14,436.00 for the lost goods.

[14] This is made up of \$7,588.00 for the lay-by goods, plus \$6,848.00 for the balance of the goods.

[15] The calculation for the balance of the goods is arrived at by the informal estimate of value that the parties agreed they might get on sale when they entered the contract (\$21,400.00), less a discount of 20 per cent for uncertainty on that value (\$4,280.00), less 20 per cent commission, which AFQ would not have received from the sale proceeds (\$3,424.00), which equals \$13,696.00. Given the factors set out in paragraph [11] above, I am satisfied that it is reasonable in the circumstances for ZUG to pay 50 per cent of this loss (\$6,848.00), leaving a total debt to AFQ of \$14,436.00.

[16] ZUG has returned one or two items to AFQ as they have been recovered by the Police, but if these were AFQ's, they did not address the claim, and their return should be taken as included in the manner in which the loss has been apportioned above.

[17] To his credit, AFQ has been patient over the years, waiting for the potential return of the stolen goods from the Police. At the same time, ZUG has kept in contact with AFQ and assured him that he felt morally obliged to compensate him for his loss. The sum ordered in this case leaves both parties with unresolved losses, but this is inevitable given the nature of the goods and the unfortunate circumstances in which they were taken.

[18] The parties agreed on the payment method set out in the order. ZUG lost his home at [town name] in the Christchurch earthquake and is unable to pay the sum due any faster. He has one sword valued at \$15,000.00 for insurance purposes, which he intends to try and sell at auction, any proceeds from which he has offered to apply to the debt.