Tu'ivai v Fifita & J.S.P. Auto Trading Ltd

Supreme Court, Nuku'alofa
Martin A.C.J.
Civil Case No.6/91

17, 18, 19, 20 & 26 September 1991

Sale of Goods - breach of warranty - damages
Damages - chattels - general damages for breach of warranty - principles
Damages - special damages for distress

The Plaintiff purchased a second-hand car from the Defendants, financed by way of a Bank loan and for use as a taxi. The Bank required assurances that the car was reconditioned. An invoice from the first Defendant stated the car was reconditioned. The Plaintiff alleged the car gave him considerable difficulties and sought damages for a number of repairs done over a 2 year period, and despite his acceptance that he was told by the first Defendant, before purchase, that there was "no guarantee"; and as well claimed that the car was not reconditioned, that there was a misrepresentation for which damages should be awarded.

HELD:

1. The Plaintiff could not go on claiming for repairs to the car, even 2 years after purchase, given his continued use of the car.
2. The Defendants had represented the car was reconditioned when it was not; and the Plaintiff acted upon that representation.
3. The representation was a part of the contract, an implied term, which in the circumstances was and must be treated as a breach of warranty.
4. The measure of damages should be the difference between the actual value of the car when sold and the value if it had fulfilled the warranty.
5. Damages should be awarded to the Plaintiff in the sums of $2500 general damages (loss of value) and $500 special damages (for "distress")
(but later, in the Court of Appeal "great doubt" was expressed whether such special damages for distress could be recovered).

Statutes considered:
Civil Law Act (Cap.25) ss3,4,5
Sale of Goods Act 1979 (U.K.)

Counsel for Plaintiff : Mr Veikoso

Counsel for Defendants : Mr 'Etika

N.B. The Plaintiff appealed claiming that the general damages awarded should have been higher. The Court of Appeal, on 24 March 1992, rejected that holding (Appeal No.29/1991) that in assessing damages the learned Chief Justice applied the correct standard, namely that the appellant's prima facie loss was the difference between the valve of the motor vehicle at the time it was delivered and the valve it would have had if it had been reconditioned", and that no "error has been shown in his assessment of damages".

The Defendant applied for leave to cross appeal, out of time, against the $500 special damages awarded. Leave was refused because the matter was well out of time and as the amount involved is very small". The Court of Appeal (Morling, Roper and Ryan, JJ.) did say however "With all respect ... we think that the basis of this part of his award is insecure. It may well be the case that some types of special damage may be recovered in a claim for breach of warranty on the sale of a motor vehicle. But in this case the special damages were awarded for ... the appellants "distress". We have great doubt whether damages of that kind can be recovered."

Judgment (in the Supreme Court):

This case revolves around the sale at a price of $7,800-00, of a Nissan Bluebird car to the Plaintiff by the Defendants. The First Defendant is the owner of the Second Defendant. The Plaintiff obtained a loan from the Tonga Development Bank (TDB) and the car was paid for with a TDB cheque.

The Plaintiff claims that the First Defendant told him that the car was reconditioned and that the invoice he was given also stated that it was reconditioned. The invoice was required by TDB before they would approve the loan - according to the Plaintiff's witness Edward Sakalia. The TDB loan agreement, dated 31 August 1991 recites that the loan is for the purchase of a "reconditioned car for taxi". This agreement names two other people, apart from the Plaintiff, as the borrower.

The First Defendant says he did not verbally, or in writing, state that the car was reconditioned and that the car was second hand and not reconditioned. He says he forgot to tell the Plaintiff it was second hand, although it was obviously not new. He produced his duplicate receipt book which referred on invoice No.7428 of 23 August 1988 to "1 UNIT NISSAN BLUEBIRD 1.8 CAR", the customer being 'Amini Tu'ivai and the price $7,800-00. He says the original, stamped at the top with the Company's name and address, contained the same words and was the only invoice he issued. He agrees that the Plaintiff said he wanted the car for use as a taxi. I attach no significance to the year being shown as 1988. It was clearly a mistake, albeit a rather strange one to make.

It seems to me to be unlikely that TDB, who required to see the invoice before agreeing to the loan, would have accepted an invoice that did not refer to the car being reconditioned. But that possibility cannot be totally ruled out. There are three possibilities. The original receipt was worded the same as the duplicate, or it had the description "reconditioned" added to the original only, or there was another invoice.

It should be borne in mind that at this stage - ie. the time of the sale - there was no dispute between the parties. On one point during the trial, the Plaintiff and the First Defendant agreed. It was about the only time they did agree. The First Defendant said he told the Plaintiff that there was no guarantee. The Plaintiff agrees that the First

Defendant told him that there was no guarantee and this was before final agreement was reached.

The Plaintiff says that from day one the car gave, and still gives, serious trouble, in particular with regard to the steering system, the engine and the electrical system. He says he complained to the First Defendant on a number of occasions. This the First Defendant denies, except that after 3 days he replaced a headlight bulb and 3 weeks later replaced the muffler, which he said had been knocked, without making any charge.

The First Defendant adds that the Plaintiff came later to buy a tyre and later, in July 1990, to purchase a pressure plate and a clutch plate in respect of which he paid a total deposit of $150-00 but did not pay the balance owing. He says on these occasions no complaints were made.

The Plaintiff produced a number of car parts, which he said had been taken from his car and replaced. It was not make clear when they were replaced. He says he spent roughly $2,500-00 on repairs from the time he bought the car up to this month. He also told me that all the damages occured two months after he bought the car. He only produced three receipts, two in January 1990 for a brake shoe and a shoe pad, total $145-00, and one in respect of the above deposit of $150-00. He says he lost money - $200-00 a week - when he could not use the car as a taxi, and suffered distress, which he evaluates at $500-00. He says the further repairs needed plus labour will amount to about a further $2,500-00. It was not made clear precisely when the car could not be used as a taxi and he says when this was so he used it for his personal use, unless it was off the road.

The Plaintiff seems to think he can go on claiming for repairs to the car, even two years after purchase. This I do not accept. There has to be a time limit even for a new car. When I asked the Plaintiff what he thought "no guarantee" meant he said he thought it would mean "no help" by the seller with repairs ie. that he would have to pay for repairs from the start.

The Plaintiff claims that he was induced to buy the car because it was represented to be reconditioned and he claims general and special damages as a result of this misrepresentation and in respect of losses due to the very poor quality of the car.

The First Defendant was emphatic that the car was not held out, verbally or in writing, to be reconditioned. He described what reconditioned meant. He said he only had his board put up (advertising the sale, inter alia, of re-conditioned vehicles) in September 1990 when he started dealing in reconditioned vehicles. I should state here that I do not attach great importance to what was stated on the board - the Plaintiff says it was there in August, 1989 - because what counts is what was agreed between the parties.

When I first questioned the First Defendant, inter alia, about duplicate invoice No.7426 - which referred to a "full recondition" car he said it was a mistake, the invoice being made by his wife - although he appears to have signed it.

When I examined the Defendants' invoice book I found that - including No.7426 - 14 vehicles are recorded as being reconditioned or fully reconditioned, between 10 May and 21 August 1989. I invited the Defendants' Counsel to ask leave to recall the First Defendant, which he did, with no objection from the Plaintiff.

I have to say that when the First Defendant gave further evidence he looked very embarrassed and uncomfortable. He said all 14 were mistakes, his wife's mistakes. All the 14 cars were second hand and not reconditioned. He admitted signing some of these invoices and said that this was his mistake. He said he owned the business and his wife

ran it. He said he should have checked the invoices. It is worth noting that the Plaintiff said that the First Defendant's wife made the invoice. This was denied by the First Defendant. His wife was not called to give evidence.

When I questioned him he admitted making some of the invoices himself. He then said he did not have a full understanding of what reconditioned meant and he thought it made no difference. He added that in Japan he saw a company who were reconditioning vehicles. He had earlier said that he had bought the Plaintiff's car and others in Japan.

I do not believe and I reject the First Defendant's evidence about his ignorance regarding the meaning of a re-conditioned vehicle. His excuse was that he was new to the business. Why then were some vehicles shown as reconditioned some not? Why, if it "made no difference", was he so sure he had not told the Plaintiff that the car was reconditioned? Why did he use the expression at all?

Common sense alone would indicate that a reconditioned car - albeit second hand - must have had something done to it to improve it. A dealer, even a new one, must be expected to know more about he cars the is selling than a layman. If the Defendants have sold 14 vehicles, wrongly described as re-conditioned, then they could well be in serious trouble, but that it not the concern of this trial. Certainly, based on the invoices, the Defendants were being held out as dealers in reconditioned vehicles.

Having rejected this part of the First Defendant's evidence I now have to decide on a balance of probabilities whether or not the Plaintiff indicated that he wanted a re-conditioned car, and whether or not the First Defendant indicated that it was reconditioned. It is unfortunate that the original receipt can not be traced.

The Plaintiff wanted a reconditioned car and the bank loan was to enable him to buy a reconditioned car. The Bank required to see the invoice before the loan was made. The Defendants had previously sold 14 cars described as reconditioned, which the First Defendant says were not reconditioned the last relevant invoice, No.7426, being dated only two days before the Plaintiff's invoice. The First Defendant said he thought whether or not a car was described as reconditioned made no difference. There was a difference between the Defendants' Counsel's address and the First Defendant's evidence on the question of a guarantee, but Counsel said from the Bar that this was his mistake.

My conclusion, which I reach without difficulty, is that the First Defendant did verbally, and probably also in writing, indicate that the car was reconditioned, and that it was on that basis that the Plaintiff agreed to buy it.

It is not disputed that the car was not reconditioned but only second hand. It was said to be a 1983 model. A reconditioned car would be likely to give less trouble than a non-reconditioned one.

The Plaintiff therefore did not get what he properly thought he was buying. This entitles him to damages. It must however be borne in mind that there was no guarantee.

There is no Sale of Goods law in Tonga - apart from the Contract Act, which is not relevant and has now been repealed. By virtue of section 3 of the Civil Law Act (Cap.25) the English Law applies subject to the qualifications in sections 4 and 5.

Under English Sale of Goods law whether a statement made regarding the goods is a stipulation and forms part of the contract, or is merely an expression of opinion which does not form part of the contract, depends on the intention of the parties to be ascertained from their conduct.

I find that it was part of the contract, and therefore an implied condition, that the car

was recondtitioned, and not just second hand. The fact that the First Defendant may have told the Plaintiff that it was a "good" car I consider to be merely an expression of opinion.

The car appears to have given the Plaintiff a good deal of trouble, and it may indeed not be a very good one. Buying a second hand (and a reconditioned car is still second hand) car is always a risky business - caveat emptor - and that is why a prudent buyer will examine it carefully and seek a guarantee or warranty for a period of time after the purchase.

On the question of the constant complaints the Plaintiff says he made to the Defendants, I prefer the evidence of the First Defendant. The Plaintiff's January 1991 letter makes no mention of such complaints and he bought items from the Defendants in the interim. If all the major faults were, as the Plainiff says, discovered in the first two months, one would have expected him not to have waited 18 months to take action and to have completed the repairs earlier. It follows that I also prefer the First Defendant's evidence that he did not offer to replace any parts free or arrange to obtain replacement parts from Japan in respect of the steering system and the engine.

I find that the Plaintiff did rely, and was entitled to rely, on the First Defendant's skill and judgment on the question of the car being reconditioned. A test drive and a look at the engine by a layman would not necessarily or reasonably have shown that it was not reconditioned.

The Plaintiff argues that the car was not fit for the purpose - of running as a taxi - and not of merchantable quality, and that there was an implied condition as to this fitness and quality. I find that there were implied conditions as to these things but I do not consider that it has been proved that the car was not fit for the purpose and or not of merchantable quality.

The Plaintiff has had the car for two years. There was evidence that it had been involved in an accident. In June 1990 it was taken for, and passed, its annual test with the Ministry of Works. It has been used as a taxi and for the Plaintiff's private use. The only evidence - apart from the Plaintiff's - as to the condition of the car was given by a mechanic who examined it for the first time in August this year. The condition of a car, and the need for renewing parts, depends very much on how the car has been used. At this stage I can not therefore find that there was anything essentially wrong with the car to make it unfit to be a taxi and not of merchantable quality, at the time, or within a reasonable time, of the sale.

If, shortly after the purchase, the Plaintiff had returned the car (and it had then been established that it had been represented as reconditioned) he would probably have been entitled to return it and be refunded. It is too late for that now. I have found that the First Defendant misrepresented to the Plaintiff that the car was reconditioned and that the Plaintiff relied on this description. This is either a breach of a condition which must now be treated as a breach of warranty, or it is a breach of warranty.

The rules as to the measure of damages for breach of warranty laid down in the English Sale of Goods Act 1979 are as follows:

(1) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(2) In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the

buyer and the value they would had if they had fulfilled the warranty.

(3) Nothing in the Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

The Defendants' Counsel has argued that any misrepresentation made by the First Defendant was innocent and that it should not therefore give rise to any damages. I am not sure that this is correct under the present law but for the reasons already given I do not consider that the misrepresentation was innocent. At best it was negligent and as a dealer - even an inexperienced one - he knew or ought to have known that the car was not reconditioned - and should have taken more care in the representations he made.

In assessing the damages it seems to me that I should apply rule (2) of the above rules. I do not have much to guide me here. The First Defendant said a reconditioned car would be worth about US$1,500-00 more as a result of being reconditioned. The Plaintiff's mechanic witness Mr. Koloe said he considered the vehicle was worth $2,000-00, but that value would increase with further repairs. He added that it would devalue by about $1,000-00 a year.

In all the circumstances I consider that $2,500 is a reasonable and proper assessment of the Plaintiff's damages under this rule and I award this sum as general damages. If rule (1) applies, not rule (2), I would award the same amount.

In view of the nature of the above award I do not consider that the Plaintiff is entitled to special damages for financial losses sustained by way of cost of repairs and non use as a taxi. If I am wrong in this, I would award $1,000 under this head. The Plaintiff's evidence was vague, and there was very little supporting documentary evidence. I have to bear in mind that there was no guarantee. I also consider that the Plaintiff exaggerated his problems. At the same time he would probably have had less problems with a reconditioned car.

I do consider, and so find, that the Plaintiff did suffer some distress as a direct result of the First Defendants misrepresentation. I award special damages of $500-00 under this head.

In the result I give judgment in favour of the Plaintiff as follows:

1.	General damages	-	$ 2,500-00
2.	Special damages	-	500-00
3.	Costs	-	250-00
			$ 3,250-00