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A.31/83

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

853

BETWEEN THOMAS ARCHIE PERRING of Nelson Agent

Plaintiff

AND V.R. WOOD LIMITED a duly incorporated Company having its registered office at Nelson

First Defendant

AND VERNON ROSS WOOD of Nelson, Contractor

Second Defendant

Hearing: 5, 6 July 1984

Counsel: J.M. Fitchett for Plaintiff
H.W. Riddoch for First and Second Defendants

Judgment: 30 JUL 1984

INTERIM JUDGMENT OF EICHELBAUM J

The plaintiff carries on business in Stoke as a salesman and dealer in secondhand vehicles and heavy machinery. In this action he claims recovery of the price of a secondhand bulldozer in the alternative from V.R. Wood Ltd or its principal Mr Vernon Wood. I can say now that on the evidence I am satisfied the company was the purchaser. Where in this judgment I refer simply to "the defendant" that will be a reference to the company. As Mr Wood's son also comes into the matter, for clarity I will refer to the second defendant as Mr Wood and his son as Ross Wood.

The statement of defence raised two main issues. First it was said the vendor was not the plaintiff

but one Stanaway, a Rotorua contractor. Again I can deal with that aspect immediately. While Mr Perring's evidence on the point was rather confused in the end I was satisfied that as a separate transaction Mr Stanaway agreed to sell the bulldozer to Mr Perring, and that property duly passed to the latter before the first defendant acquired title.

The second line of defence was pleaded as a representation allegedly made by Mr Stanaway as agent for Mr Perring, and confirmed by the latter, to the effect the tracks had 50 to 60% of their life remaining, that that was also a term of the contract, that there was breach of the term and the representation, that it required expenditure of $11,684 to put the bulldozer into the condition it was represented to be, and that such sum should be set off against the purchase price.

Before evidence was called counsel for the defendant informed me of some changes to the defendant's proposed case. He said that in view of the decision in Finch Motors Ltd v Quin (No 2) 1980 2 NZLR 519 it was accepted that the Contractual Remedies Act 1979 did not apply and that the defence would be founded on s 16(a) of the Sale of Goods Act 1908 and upon breach of an express term. He did not elaborate on the nature of the term; since the only factual matter of this kind referred to in the pleadings was the question of the extent of the track life I assumed at the time that that was the term relied upon. In the opening stages I was also informed that the defendant no longer alleged that Mr Stanaway had made any representation. As will appear later, the defendant's stance underwent some further modifications in the written submissions which were filed by leave later. I will discuss those in their proper place but record now that the various

notifications made by Mr Riddoch, while the case was in its opening stages, which were not accompanied by any request for amendment of the pleadings, passed without objection from the plaintiff who no doubt was anxious to get the case heard. Fortunately it was of a sufficient simple nature to enable both sides to focus without difficulty on the points at issue. The Court was placed under some constraints of time to conclude hearing the evidence relating to liability alone during the sitting. I mention these matters to indicate how it came about that the pleadings do not reflect the true nature of the contest. Even in a simple case such wholesale disregard of the niceties is not to be encouraged and I would not have allowed it to pass but for the exigencies under which the hearing took place.

The business of Mr Wood's company included development of land for afforestation. The company had not previously owned any heavy machinery such work having been carried out by sub-contractors. In connection with a new project at Stony Creek however Mr Wood decided the company should itself acquire a bulldozer. Although he had to some extent worked with such equipment he did not have any detailed knowledge of its maintenance and servicing. He contacted the plaintiff and asked him to procure a suitable bulldozer for him. He described in some depth the nature of the work involved, namely logging and the cutting of supporting tracks. He indicated a price range. Thereafter Mr Perring discussed with Mr Wood a number of machines which he had ascertained were available. As a result of discussion, for differing reasons it was agreed that each of these was unsuitable. Mr Wood did not inspect any of them. Eventually Mr Perring informed Mr Wood of the availability of the machine in question. In regard to type,

size and fittings it conformed to Mr Wood's requirements. Mr Perring said it was in good order, and specifically that the tracks appeared to be in good order with 50 - 60% track life remaining. Up to that time nothing had been said to the effect that Mr Wood required any particular proportion of track life but some of the earlier machines had been discarded because of unsound track gear. Mr Wood said :

> " Mr Perring offered the statement. I didn't state it as a minimum specification. My specification at all times was the machine be in good all round condition, and able to meet job requirements as I described them to Mr Perring. "
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> (p 18)

On 30 October Mr Wood, his son and Mr Perring flew to Rotorua to inspect the machine. They were met by Mr Stanaway who was introduced as the owner and Mr Croucher who it became apparent would be responsible for transporting the bulldozer to Wellington. On the way to inspect the machine Mr Wood travelled with Mr Croucher while Mr Stanaway travelled in a separate vehicle. In Mr Perring's presence Mr Wood repeated his requirements to Mr Croucher. The group then spent some two hours inspecting the machine. Ross Wood who had had considerable experience in operating bulldozers proceeded to give the machine a trial drive. The machine was standing on a bush site with its tracks in a moderately dirty condition and it must have been obvious to all concerned that the situation did not permit of a

thorough and complete examination. In order to facilitate an examination of the tracks the bulldozer was lifted up on its plate which enabled a limited view to be had underneath and of some of the front rollers and associated track equipment. That inspection did not reveal anything amiss to Mr Wood or his son. Mr Wood said that had there been some obvious fault, something excessively wrong he might have recognised it. He said that during the Rotorua visit he was assured on numerous occasions that the machine was in sound all round condition. On my view of the totality of the evidence some of these assurances were by Mr Croucher rather than Mr Perring and others were by way of Mr Perring's response to (or lack of disagreement with) assertions made by Mr Wood himself (rhetorical statements, as he described them) that the bulldozer appeared to be in good condition. To me, this appeared an honest and credible account and I take the view that the effect of Mr Perring's conduct was the same as if he had made more explicit representations in the same terms. Mr Wood said he trusted Mr Perring's judgment because he believed that Mr Perring was conversant with that line of business and qualified to give such assurances. He did not regard himself as being similarly qualified.

On return to Nelson Mr Wood after arranging finance agreed with Mr Perring to purchase the machine and wrote him a formal letter to that effect. Mr Wood was not clear whether the vendor would be Mr Stanaway or Mr Perring; he contemplated either possibility. As he understood it he had engaged Mr Perring to procure the machine on his behalf and was not concerned about the details of how transfer of ownership would be effected. In proceeding by way of purchase from Mr Stanaway and resale to V.R.Wood Ltd Mr Perring left himself in a position to obtain a profit. It seems that Mr Wood did not think through how Mr Perring would have been remunerated had the transaction proceeded

in the form of a direct sale from Mr Stanaway to Mr Wood's company but since that situation did not arise I need not discuss it further.

It was common ground that the sale was subject to a term that the bulldozer would be in the same condition on arrival at Nelson as when seen in Rotorua, and that the purchaser was to indicate acceptance at the Port of Nelson. When inspected there by Mr Perring and Mr Wood it was noticed that the transmission housing was leaking a mixture of oil and water. This caused Mr Wood to change his original intention of sending the machine direct to the work site at Stony Creek and instead take it to the premises of agents for this class of machinery in Richmond. In the event the leak did not prove to be anything serious but a detailed inspection of the tracks and associated components indicated that extensive work and considerable expense would be required to bring the machine up to good order and condition. On the basis of the uncontradicted expert evidence of Mr Wemyss which I accept as reliable there is no doubt that so far as the tracks and associated components were concerned the machine could not be said to be in good all round condition, nor did the tracks have anything like 50% of track life remaining, on any reasonable interpretation of that expression. Thereafter Mr Woods had repairs carried out and then proceeded to use the machine as originally envisaged. At the hearing, at the plaintiff's request, questions of quantum were deferred (in any event time would not have permitted otherwise) but from the evidence I can infer that the expense required to bring the machine up to good all round condition was considerable.

Mr Wood agreed that in Rotorua it was he and his son who carried out the most extensive examination. He was unaware whether Mr Perring had seen the machine previously : in the event I accept that Mr Perring was

seeing it for the first time, having obtained such previous knowledge as he had about the machine by telephone. Mr Wood said he was not particularly concerned about the tracks until after the inspection at the workshop in Richmond. His stipulation, he repeated, was that he required a machine in good all round condition.

Mr Ross Wood provided some confirmatory evidence. He said that when he met Mr Perring for the first time (at Nelson airport on the way to Rotorua) the latter had stated that the machine was in good order and that it had approximately 50% track life. Mr Perring read this information from his diary. Mr Croucher made a similar statement about the track life during the car trip to the site in Rotorua at a time when Mr Perring was present. In general terms Ross Wood confirmed his father's account of the inspection in Rotorua. His own background was that he had driven bulldozers extensively over a period of 10 years but had had little mechanical experience with them. He said that he could tell the track life if given a good look. On this occasion the conditions were such that opportunity for inspection was poor. To the extent that he could see the track and components they were in reasonable order but he did not regard his inspection as in any way conclusive.

I turn to Mr Perring's evidence. He agreed that the question of the capacity in which Mr Wood wanted him to act had not been made explicit between them but that he understood that Mr Wood wanted Mr Perring to supply the machine; there was no dispute that he sold such machinery. Mr Perring agreed that Mr Wood had said he wanted a machine in good order and that it would be working in fairly rugged country. Significantly these comments were made when Mr Perring and Mr Wood had under consideration

one of the earlier machines which Mr Perring indicated had poor quality track gear. He had mentioned there was approximately 50% track life but said that he put it in the context of information received rather than something within his own knowledge. It is obvious from other remarks that Mr Perring appreciated that because of the nature of the work to be undertaken a machine with reasonably good tracks was required. After other machines had been discussed and discarded he got on to Mr Croucher who gave him details of the machine in question over the telephone. As was his custom Mr Perring recorded the information in his diary. In repeating the details that he had been given for the benefit of the Court he said he was under the impression that the track gear "was about 50%". He met Mr Croucher and Mr Stanaway for the first time when he accompanied the Woods to Rotorua. He said that when the machine was raised he had a quick look himself and mentioned to Mr Croucher that "it wasn't too bad". On the flight back Mr Wood told him he was very impressed and he would make a decision shortly whether to go ahead. Mr Perring said there was no salesmanship on his part. He confirmed that it was the incident of a leak from the machine that caused Mr Wood to have the bulldozer inspected by the agents.

So far as Mr Perring was concerned no doubt this particular transaction was but one of many. In giving his evidence he appeared to be heavily dependent on his diary notes for his recollection of events. In matters of significance I do not think that in the end there was a great deal of difference between Mr Perring's account of events and Mr Wood's but I regard the latter's recollection as the more reliable. When specific matters were put to Mr Perring in cross-examination he frequently had to say he could not remember. He conceded that he made a representation that the machine had 50% or better track wear remaining, that

being what he had been led to believe. When asked whether he was satisfied that the track gear looked all right he answered that he was satisfied it looked in reasonable condition for what it was. He said he was not sure if he commented to Mr Wood that it seemed in good order.

I come finally to the evidence of Mr Stanaway. He readily agreed that at the time of the Rotorua inspection the condition of the tracks was "getting down" and that less than half of their life remained; from the way he answered the question I took it that in his view it was well less than half. Indeed he maintained that he told Mr Wood that the tracks were getting down and that if he kept the machine he would "do" the tracks in time, presumably meaning to have them reconditioned or rebuilt. Mr Wood denied that Mr Stanaway made any such comment and Mr Stanaway's account is not supported by the others present. On my assessment of the evidence I am unable to accept that any such remarks were made. Mr Stanaway agreed that in Rotorua Mr Wood said the machine appeared to be in good order and condition and that there was a general consensus to this effect. In this respect his account coincided with Mr Wood's. Mr Stanaway on the one hand contended that that description was correct and on the other that the machine's defects could easily have been detected by someone sufficiently experienced. He conceded that a person lacking that degree of experience would have difficulty in exposing the defects on an inspection such as took place at Rotorua.

Summarising my principal findings to this point :

1. Mr Wood made known to the plaintiff the nature of the work for which he required the bulldozer, and that he wanted a machine in sound all round condition which could be put to work immediately, that is without the

expenditure of any substantial sum in reconditioning or repairs;

2. Prior to the Rotorua inspection Mr Perring described the machine to Mr Wood in terms that fulfilled Mr Wood's requirements. Further, the information he gave to Mr Wood included the statement that it had at least 50% track life;

3. Mr Wood and his son had some familiarity with bulldozers from an operational point of view but limited mechanical knowledge;

4. At Rotorua, when Mr Wood sought reassurance, Mr Perring by conduct if not in so many words confirmed thatthe machine was in sound all round condition, suitable to Mr Wood's requirements, and had at least 50% track life remaining. It was not a situation of passive acquiescence, such as Smith v Hughes 1871 LR 6 QB 597;

5. On an objective view the machine could not be said to be in sound all round condition. The tracks and ancillary components could not be so described and the track life fell well short of 50%. Apart from the tracks, other parts required significant work to bring the bulldozer to the standard that Mr Wood had envisaged.

I can now deal specifically with the remaining heads of defence.

Express term

In his final written submissions counsel for the defendants sought to rely on three separate express terms : that the machine (a) had 50% or more track life remaining (b) was in good all round condition and (c) was immediately capable of tracking and logging work. Counsel

for the plaintiff in reply objected that only (a) had been pleaded. That is correct, and I do not feel able to allow an amendment at this stage. The other two certainly emerged in the course of the defence evidence but had the question of an amendment arisen then I would have had to give opportunity for the plaintiff to be recalled. I reach this conclusion with regret because I think that (b) was probably a term of the contract. I do not believe that (a) was. It was not a matter brought up by Mr Wood when describing his requirements but raised gratuitously by Mr Perring at a later stage. In my opinion it was no more than a representation. This head of defence therefore fails.

Misrepresentation

In final submissions counsel for the defendants invoked s 6(1) of the Contractual Remedies Act, which of course is applicable by virtue of the express provisions of s 6(2). Counsel for the plaintiff did not object, stating he had earlier expected that that was how the defence would be run.

The specific representations relied upon were framed in the same terms as set out lettered (a) (b) and (c) under the previous heading. The same objection arises in relation to (b) and (c) and I must take the same course and decline to permit the defendants to rely upon them.

As to (a), in final submissions the plaintiff accepted that such a representation was made, and that it was false. On the evidence those concessions were realistic. The plaintiff's argument however was that such representation did not induce the defendants to enter into the contract.

As to the facts, Mr Perring initially made the representation regarding track life in a telephone conversation with Mr Wood when he first drew the Rotorua machine to the latter's attention. It was repeated to Ross Wood on the day of the visit in circumstances where it is reasonable to infer that Mr Wood either heard the statement or became aware of it. Accordingly, in point of time the representation was closely proximate to the making of the contract; Mr Wood made up his mind to buy the machine on the day of the visit, subject to being able to obtain finance.

Mr Fitchett submitted that the representation only induced Mr Wood to inspect the machine, and that there was no causal connection between the representation and the formation of the contract. The representee is not required to establish that the representation was the sole inducement or that it was indispensable to the extent that in its absence the representee would not have entered into the contract. Edgington v Fitzmaurice, 1885 29 Ch D 459 was an action for deceit in relation to a prospectus. The defence sought to place reliance on an admission by the plaintiff that in making an advance to the company he was influenced by the mistaken belief that the debentures would give him security over the company's assets. In part, the headnote reads :

> " Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit. "

Cotton L J said :

" But it was urged by the counsel for the Appellants that the Plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion which really induced the Plaintiff to advance his money. In my opinion this argument does not assist the Defendants if the Plaintiff really acted on the statement in the prospectus. It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will be still liable. "

(pp 480-1)

Similarly, in the judgment of Bowen L J :

" Then the question remains - Did this misstatement contribute to induce the Plaintiff to advance his money. . . . . The real question is, what

> was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference."
>
> (p 483)

See also per Fry L J at p 485.

In re London and Leeds Bank Ltd, ex parte Carling 1887, 56 LJ Ch 321 was an application for rectification of a company register on grounds that the applicants had been induced to purchase shares by misrepresentations in a prospectus. Stirling J applied the test laid down in Edgington v Fitzmaurice.

The expression that a person has been induced to enter into a contract by m misrepresentation has long been in common useage in contexts similar to the present and it is clear that in employing it in s 6 of the Contractual Remedies Act the legislature intended to preserve the interpretation placed upon it in cases such as those cited. Applying that to the facts, I have no doubt that the test is amply met. Mr Wood's primary concern was whether the bulldozer was in good all round order, his intention being to put it to use without having to undertake any extensive repairs. It seems obvious that the tracks and ancillary mechanisms are an important part of the machine, and susceptible to wear. Mr Wood was anxious to satisfy himself about their condition so far as he reasonably could, subject to the constraints imposed by the conditions and the limited knowledge he and his son had about the subject. That Mr Perring, whom he regarded as better qualified,

should give assurances the effect of which was that the tracks had plenty of life left in them, and not wish to modify it after inspection of the machine, is something that one would reasonably expect to influence Mr Wood in a material way, and I find as a fact that it did so. In this context I do not think it matters whether Mr Wood appreciated that Mr Perring had not seen the machine previously. There were only two reasonable possibilities, either that Mr Perring was speaking of personal knowledge, or that the information had been passed on to him by someone who had that knowledge.

This leads me to refer briefly to another topic to which I have given some consideration although it was not specifically raised. It might be queried whether the reference to 50% track life was simply an opinion, or the transmission of someone else's opinion. From Mr Wemyss's evidence I am satisfied that such a statement, although obviously containing an element of judgment, is fairly to be regarded as a statement of fact, akin to a representation about the mileage of a car. As he explained, the operator is always conscious of the extent of track wear, the lapse of time since the last overhaul and the amount of use since then. A deliberate assertion by a knowledgeable person that there was a particular proportion of wear remaining is a meaningful statement based on facts which in the context amounts to a representation of fact not a statement of opinion.

Accordingly I find that the defendant succeeds under this cause of action, and is entitled to damages as provided by the Contractual Remedies Act.

Sale of Goods Act, s 16(a)

The initial issues are whether (a) the machine was of a description which it was in the course of the plaintiff's business to supply (b) the purchaser made known the particular purpose for which the machine was required, so as to show (c) he relied on the plaintiff's skill and judgment; and (d) whether the bulldozer was reasonably fit for the purpose. The existence of (a) and (b) was conceded.

As to (c), it is well settled that the reliance on the seller's skill and judgment need not be total or exclusive, see Ashington Piggeries Ltd v Christopher Hill Ltd 1971 1 All E R 847, 854. Reliance must however be brought home to the mind of the seller, expressly or by implication : Grant v Australian Knitting Mills 1936 AC 85, 99.

The various discussions must have brought it home to Mr Perring that Mr Wood, having described his requirements, was relying on him to assist him to find a suitable machine. I have no doubt that Mr Wood relied on Mr Perring's expertise to a substantial degree, in particular in regard to his assurances relating to the track life, as already discussed. In fact I consider that Mr Wood's reliance on Mr Perring was on a wider basis; there was Mr Perring's agreement, indicated at Rotorua either expressly or at least by conduct, that the machine was in good all round order. The state of the tracks formed an important component in that description. Further Mr Perring agreed, again either expressly or by implication, that the bulldozer was in such condition that it could be put to work immediately. I consider that reliance on these

assurances constituted substantial and effective inducement leading to the purchase, see Benjamin's Sale of Goods (2nd Edn) paras 830, 831.

Mr Fitchett pointed to the inspection by the Woods as demonstrating absence of reliance. An inspection is not conclusive, see Benjamin (op cit) para 835. Here, the defendant's reliance on the plaintiff played a part in deterring the defendant from arranging a more detailed and expert examination, which would have entailed removal of the machine to suitable premises and at least dismantling the stone guards so that an expert could examine the track gear more closely. There is a degree of analogy with Smart v Preston 1937 NZLR 467.

It was also argued that the plaintiff and the defendant were equally knowledgeable, as in Feast Contractors Ltd v Ray Vincent Ltd 1974 1 NZLR 212, 215. The history of the track gear and the amount of life remaining however are matters peculiarly within the knowledge of the previous owner and Mr Wood could reasonably have expected Mr Perring to have checked into them. Even apart from that, as a regular dealer in such equipment Mr Perring should reasonably be regarded as possessing a greater degree of knowledge and experience in assessing the condition and suitability of second hand machinery.

The final argument on behalf of the plaintiff was that in terms of the proviso to s 16(a) this was the sale of a specified article under its trade name. However, on the evidence I reject that contention. It is true that Mr Wood referred to a "D7 bulldozer, Model 17A" but he added "or similar machine" and in the context I think he was doing no more than describing, in general rather than specific terms, the type of bulldozer he wanted, subject

to the further requirements specified. Accordingly I find that (c) is made out.

Turning to (d), the argument for the plaintiff, as I understood it, was that the bulldozer in question was in fact suitable for the forestry work for which it was intended. This is true in the sense that the machine met the criteria of type, size, and attachments, but the undertaking here arising by virtue of s 16(a) also related to the condition and quality of the equipment. As Hardie Boys J said in Finch Motors Ltd v Quin (above) at p 524 almost every defect is temporary in the sense that it can be remedied with time and money; the question must be one of degree. Here, a machine intended for immediate work required major repairs involving several thousand dollars worth of work before it could be put to the proposed use. Of course there are risks in the purchase of second hand machinery against which, in the absence of an express warranty, the purchaser has no protection but taking the most generous view of the seller's position this factual situation is outside the ambit of what constitutes reasonable fitness for purpose.

Accordingly, I hold that the defendant succeeds under this head also.

The action therefore stands adjourned for determination of the defendant's damages. If the parties are unable to agree that issue, the proceedings may be brought on for further hearing at 14 days notice.

Solicitors :
Rout Milner & Fitchett (Nelson) for Plaintiff
Fell & Harley (Nelson) for Defendants