

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

RJA
SET 2

M.1481/82

file

BETWEEN BRUCE CHARLES BUTTMORE of
Waiuku, Taxi Proprietor

Appellant

AND BRYAN WILSON BELL of Tutu-
kaka, Auto Electrician

UNIVERSITY Respondent

3 OCT 1988

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Hearing: 3rd February, 1984

Counsel: Fenton for Appellant
Hislop for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This was an action heard in the District Court at Henderson in October, 1982 and concerned the sale of a Valiant motor vehicle by the Respondent to the Appellant. The price was \$2,900. As a result of some subsequent enquiries made the Appellant stopped payment of his cheque which he had given to the vendor of the vehicle for the amount involved. Subsequently proceedings were issued in respect of the purchase price. Precisely on what basis the Appellant was being sued is somewhat difficult to pick up from the statement of claim. In fact the pleadings on both sides leave a great deal to be desired in view of the issues which have now been raised in this Court. The statement of claim merely alleges that the Respondent was the owner of the vehicle in question which the Defendant had agreed to purchase for \$2900. It goes on to state that a cheque was given in respect of the purchase price on which payment had not been made by the bank on which the cheque had been drawn and then there was a simple claim for the amount

involved, namely \$2900. Whether that was strictly a claim for breach of contract or a claim on the cheque I am not sure. It is incumbent upon parties to make sure that the opposing side is made well aware of what the allegations are. In any event, the case proceeded on the basis that \$2900 was in issue between the parties and from the whole of what took place it appears that the cause of action must have been in contract and not on the cheque. If it had been on the cheque then maybe the difficulties which this Court is now faced with would never have arisen.

The statement of defence is remarkable for what it does not say rather than for what it says. After referring to the four paragraphs in the statement of claim the statement of defence alleges a further defence which is based apparently on a representation that the Respondent had made that the vehicle in question had not been involved in a collision or collisions apart from a very minor nature. It then goes on to allege that the vehicle had been apparently badly damaged in a collision and had been ordered off the roads by the Ministry of Transport. Then, without more, paragraph 8 laconically says as follows:

"That the Defendant considers that the sum of \$1250 is a fair price for the vehicle considering its damaged state and has tendered such sum to the Plaintiff and such sum has been rejected."

There is no prayer in the statement of defence as one might expect if that paragraph is to be regarded as a claim in diminution in value, nor is there any counter-claim of any description at all. As paragraph 8 appears at the moment, the allegation is merely a reflection of an

opinion which the Defendant then held and is not an allegation in any shape or form that one would expect to find in normal pleadings if it was to be relied upon as a pleading which would entitle the Appellant to some relief.

When the matter came before the District Court there was considerable evidence given and at the conclusion of the evidence counsel for the Appellant referred to S.6 of the Contractual Remedies Act 1979. The Respondent's counsel referred to a memorandum which had been filed by him on behalf of the Plaintiff which really did not refer to the pleadings at all or to the Contractual Remedies Act, but traversed in a general sort of way the law relating to the sale of a chattel where it had been advertised, drawing the attention of the Court to the fact that it was contended that this was a sale by way of description.

The District Court Judge went on to consider the matter really on the basis of the Contractual Remedies Act which was that which had been referred to by the Appellant's counsel. It is noteworthy that at no time was there a cancellation or purported cancellation of the contract. In fact it was adopted by the Appellant in that he had repairs to the vehicle carried out and later sold it at a car auction. The question of cancellation was not in issue. The real matter, so far as the District Court was concerned, was whether the representations which were alleged to have been made by the Respondent had induced the Appellant to purchase the vehicle. In essence the Court held that that was not so and quite frankly there was no necessity in the

circumstances for the District Court Judge to go on and consider S.7 of the 1979 statute.

In this Court no attempt has been made to lift the allegations or the statements which are made in the statement of defence to the level of a claim for diminution in value of a breach of warranty. But the word warranty does not appear anywhere and there is the world of difference between a warranty and a representation.

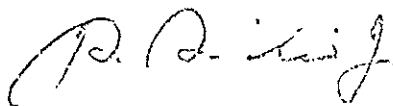
The Sale of Goods Act 1908 itself gives a particular meaning to the word "warranty" and it is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Nowhere in the Sale of Goods Act is there a definition of the word "representation" and that is the word which is used in the statement of defence. How on earth, in those circumstances, a representation can be elevated to the level of a warranty is beyond my ability to comprehend. If it is intended by a party that he is going to claim as against another for a breach of warranty or to seek a reduction in price as a consequence thereof, it is incumbent upon that party to so allege that he is relying upon a breach of warranty.

A representation and a warranty are not synonymous. That is patently obvious when one has a look at the provisions of the Sale of Goods Act and the Contractual Remedies Act.

In this particular case there is a further objection to sustaining any appeal on behalf of the Appellant. This

is a civil claim which was presented to the District Court on a particular basis, namely on the basis of the 1979 statute, not the Sale of Goods Act. There are many authorities not only in this country, but in Australia and in England which state that where a case has been presented to a Court in its civil jurisdiction on one basis it is not competent where the pleadings do not cover the position for an appellate Court to deal with it on an entirely different legal basis. That is precisely what the Appellant is seeking here and this Court, in my view, has no authority to deal with the appeal on such a basis.

Accordingly the appeal must be dismissed with costs which I fix at the sum of \$200.



SOLICITORS:

FORTUNE MANNING & PARTNERS, AUCKLAND FOR APPELLANT
THORNE DALLAS PERKINSON & MCGREGOR, WHANGAREI FOR
RESPONDENT