IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M 343/82

BETWEEN CEE BEE MARINE LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business there as boat vendors

Appellant

A N D RICHARD DRUMMOND FRASER and KEVIN VINCENT JACKSON both of Cromwell, Co-Directors

Respondents

Hearing: 28 February 1984

Counsel: A P P Whiteside for the appellant
G A Howley for the respondents

Judgment: 13/3/84

RESERVED JUDGMENT OF GREIG J

The appellant, defendant in the Court below, appeals against the judgment in favour of the respondents for damages arising out of a breach of warranty in the sale of a boat by the appellant to the respondents.

By their statement of claim the respondents alleged a contract for the sale of a Hamilton jet boat fitted with a 350 cubic inch Chevrolet motor together with a trailer and other fittings, made on 13 August 1979. It was alleged that the particular purpose for which the boat was required was made known to the appellant and particular reliance was placed on the power and reliability of the motor. By paragraph 7 of the statement of claim it was alleged that the appellant warranted that the motor was suitable for the work it was likely to be called upon to

perform and that it was in good condition and repair having recently been completely reconditioned. It was then alleged that the motor was defective and was not reconditioned and had to be repaired and that because of this the respondents had had to repair the engine and boat, suffered loss of profits and experienced expense, anxiety and disappointment in not being able to offer the boat for use for the purposes so indicated. The claim was for the cost of the repairs and replacement of the motor, a sum for estimated loss of profits, general damages in the sum of $1,000 and interest at the rate of 11 percent per annum plus costs and other relief. The appellant in its statement of defence admitted the sale of the boat but alleged that it had sold the boat as agent on behalf of two named persons. It alleged as an affirmative defence that it was not liable as it had acted as agent only. It admitted that it had advised the respondents that the matter had recently been reconditioned. For a further alternative and affirmative defence the appellant alleged a written contract which expressly excluded all warranties, representations or promises and waived any warranties expressed or implied under the Sale of Goods Act.

The appellant issued third party proceedings joining in their alleged principals and seeking indemnity from them both generally as agent against its principals and on the grounds that it had merely passed on advice as to the reconditioning of the motor which the third parties allegedly had given to the appellant. By their statement of defence the third parties admitted that they instructed the appellant to sell the jet boat on their behalf but denied in terms the allegation of agency. They expressly deny any representation as to the reconditioning of the motor or any authority to the appellant to make such a representation to any purchaser or to the respondents. The third parties counterclaimed against the appellant alleging a failure to account properly on the sale.

When the matter came on for hearing the respondents abandoned their claim for loss of profits but increased their claim for the cost of repairs to the sum of $2,829.18. At the end of the hearing upon the third parties' application the learned District Court Judge took the view, as he said, "that the third parties are entitled to a nonsuit so far as the defendant's claim against them for contribution or indemnity against them is concerned, and they are dismissed or discharged from this action." In the course of that decision, made orally at the conclusion of the hearing, he appears to have made a finding that the appellant was in fact an agent of the third parties but he was satisfied that the respondents as plaintiffs were not aware of the identity of the third parties and that, as he said, "the plaintiffs could hardly have done otherwise than sue the defendant." In a reserved judgment given on 15 July 1982 the learned District Court Judge found for the respondents, awarded them $750 for general damages and the amount of $2,829.18 claimed for repair costs. Interest was awarded on that latter sum and the respondents were given costs. The third parties were given costs and disbursements against the appellant, the defendant. No decision was made on the counterclaim. What the position on that is is a matter of some doubt.

The appeal before me was on the judgment of 15 July 1982 but the appellant has appealed against the order of nonsuit given at the end of the hearing. That was not before me and remains to be dealt with on some other action.

The background facts of this matter were that the second-named respondent in or about May 1979 discussed with a Mr Farrant, the Governing Director of the appellant, the purchase of a new Hamilton jet boat for the respondents' boating operations. The respondents already had a Hamilton jet boat but wished to increase their fleet and went to the appellant because they had had dealings

with him before and he knew of their business. Discussion centered upon a second-hand boat and upon hearing the evidence and preferring the evidence of the respondent to the appellant the learned District Court Judge found that the appellant was aware of the purpose for which the boat and motor were required, recommended that it should be purchased by them and that they represented that the motor was reconditioned. In the discussions in May and after a test run on the boat the respondent expressed some dissatisfaction about its operation and there was reference to some remedial work which should be done. The first-named respondent thereafter wrote to the appellant an undated letter which must be taken, I think, to be an offer to purchase but which did not mention price. Three conditions were mentioned in that letter, in the following way:

> "Subject to the following we will take the boat -
> (1) All jobs as per your list done
> (2) A test run in boat
> (3) The motor must be running sweetly and not be noisy."

That letter was replied to by letter of 13 June 1979 from the appellant to the respondents. The letter was written by Mr Farrant and, as he expressed it, he had received "the final O.K." from the joint owners on the conditions set out in the respondents' letter. Mr Farrant recapped the situation that there would be a purchase for $7850 subject to repairs which were shortly specified, a satisfactory test run in the boat and that the motor must be running sweetly and not be noisy. Clearly these three items reflected and confirmed the matters mentioned in the respondents' previous undated letter. Reference was also made to a separate arrangement about a change in the seating in the boat which was to be at the respondents' expense. In compliance with the appellant's invitation in that letter of 13 June 1979 the respondent sent a deposit

of $500 and that appears to have been received by the appellant on 28 June 1979.

The learned District Court Judge found, and in my view correctly, that this correspondence amounted to a contract to purchase concluded in June 1979. It is to be noted that in its claim the respondents did not allege a contract made on that date.

On 13 August 1979 the second-named respondent visited the appellant having been notified, one assumes, that the boat was now ready for delivery. There was a test run which appears not to have been particularly satisfactory but the respondents indicated that they would accept the boat. There was completed a form of contract which was signed by the second-named respondent. The contract, which is prominently headed in printing with that word, is a form of contract prepared and proffered by the appellant for its transactions. It includes very wide exclusions of all warranties both expressed or implied under statute or otherwise, contained an acknowledgment that the purchaser has inspected the item being sold and relies on that inspection and his own judgment, and in a separate part of the one page document contains an acknowledgment by the purchaser that he purchases the vehicle in an "as is" condition, with all faults and no warranties whatsoever. There is provision in the contract form for special terms which are exempted, if expressed, from the warranty and liability exclusion. No special terms were contained in the document but there was a provision for a specification of repairs, etc, to be executed by the vendor and against that was handwritten "as per written instructions". The price provided for in the written contract was $8360, which is different from the price originally mentioned in the letter of 13 June. There seems to be no clear explanation of the discrepancy although a copy of an invoice indicated an additional item of sales tax but left an unexplained difference in

the base price of the boat. Whatever the position is the price in the written contract was different to that in the June contract. Clearly, too, there were different terms, particularly those excluding liability.

The learned District Court Judge having found for the June contract then treated the August written contract as superfluous. In his decision he expressed himself as finding the August contract to have no legal validity, for three reasons. I regret to say that I find these reasons unconvincing. In my view the August contract cannot be ignored, nor can it be said to be ineffective or meaningless. It has to be considered and its creation has to be placed in the context of the conditions contained in the previous contract, particularly the fact that the boat was to have a test run following its repairs and the engine was to be running sweetly and not noisily. It was clearly intended that the respondents were to be given an opportunity to examine the boat again and to see for themselves whether the conditions had been complied with before acceptance. It seems reasonable to assume that upon that examination a formal contract could then be entered into, even if this was not strictly necessary in contractual terms. The fact is that the August contract was different from the earlier contract and was signed not once but twice in the two pages provided, by the second-named respondent.

The respondents attempted to evade the exclusions of liability in the August contract by alleging the warranty as being continuing or collateral to the written August contract. The difficulty they face in that regard is the clear rule that a party may not by way of contradiction, variation or addition to the terms of a document rely upon extrinsic evidence. That rule, whatever its justification may be, is beyond doubt. If any reference is needed in support of it, I refer to Phipson on Evidence (12th ed) Ch 34, and Chitty on Contracts, General Principles (25th ed) para 802 et seq.

There are exceptions to that prohibition against the admission of extrinsic evidence but, in my view, none of them can apply in this case. Even if any of them did apply they do not authorise extrinsic evidence that is in contradiction to or variation of the terms of the written contract: they merely permit evidence as to other terms which are not inconsistent with the written contract. The warranty or warranties alleged by the respondents in this case are clearly inconsistent with the express terms.

What the respondents in essence claim in this regard is that on the execution of the August contract objection was taken to the exclusion terms, or some of them, and that they were told that the contract was a formality only. It appears that no particular reference was then made to the warranty but the respondents claim that they assumed that the written contract being a formality only, the warranty remained. The learned District Court Judge seems to have made no specific finding of fact as to whether the question of the formality or informality of the August contract was discussed but even if such a finding had been made that in itself amounts to extrinsic evidence in contradiction of the terms and tenor of the August contract. The evidence of the appellant and its officers indicated that this form of contract was invariably completed on any sale and that had been prepared, or the relevant parts had been prepared, in consultation with the appellant's solicitors. On its face then the document cannot be said to be merely an informal or collateral memorandum of a transaction and in the light of the June contract and the differences between them it is difficult to see how it can be said to be an informal document.

In my view the correct position is that whatever may have been the contractual arrangements earlier the parties entered into a formal contract as recorded in the written document of 13 August 1979. The respondents are caught by the exclusion clause and may not by extrinsic evidence contradict that.

The appellant claimed on this appeal that the learned District Court Judge was in error in finding for the warranty the respondents' reliance upon it as an inducement and the results from it. The learned District Court Judge saw and heard the witnesses and, as I have said, he preferred the evidence from the respondent to that of the appellant. All I need say in this regard is that the learned District Court Judge was entitled to make the findings of fact as he did and to find the confirmation or corroboration of that primary finding from the other material before him. One point which appears not to have been mentioned in the judgment is the admission that the appellant stated that the motor was reconditioned. Apart from that, however, the correspondence and other matters of evidence all supported the warranties both as to purpose and use and condition of the engine.

A further point that was made by the appellant was to repeat the defence expressed by it as to its lack of liability as an agent. I note that the claim made by the respondents was based on a warranty and nothing else. There was no claim in Hedley Byrne or on any other basis against the appellant. It was purely a claim in contract and the rule is plain that an agent is not liable upon a contract to the other party but the other party must sue and make its claim against the principal. The principal can be liable because of the ostensible rather than the actual authority of the agent but he may be entitled to indemnity for breach of warranty of authority or breach of the terms of the actual agency. The only way in which the agent can be personally liable, apart from questions of tort, is when because the principal is undisclosed or for some other particular reason the agent remains personally liable. As Lord Scarman has said in Kai Yung v Hong Kong Banking Corporation (1981) AC 787, at 795:

> "The true principle of law is that a person is liable for his engagements (as for his torts)

> even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability."

In this case there was not an undisclosed principal although it is clear that there was an unidentified principal who became identified at least when the appellant's statement of defence was filed. The evidence shows that in his examination-in-chief the respondent who gave evidence was aware that the boat had been abandoned by its owners and had been taken to the appellant to sell but that the owners had repossessed the boat during the Christmas holiday period of 1978 and had used it. In cross-examination that respondent appeared to resile from that position but on its face it seems clear from the evidence that he was aware of the fact that the appellant was not the owner of the boat. That position was made clear by the appellant in its letter of 13 June 1979. It may be that the respondents, as plaintiffs, should have sought to add the third party owners as defendants when the position as alleged in the statement of defence became known to them. The learned District Court Judge does not appear to have dealt expressly with this part of the case except that in his decision of nonsuit he refers to the fact of agency and the difficulties faced by the respondents in the way I have already mentioned.

I have some misgivings about dealing with this aspect of the appeal on this appeal because the question of the third parties' liability remains apparently to be considered on a further appeal and perhaps by way of the counterclaim. It seems clear, however, that in the circumstances of this case the law is in favour of the appellant and that it is entitled to succeed on that ground as well.

The appellant challenged the award or awards of

damages in this appeal. As I have said, the claim for loss of profits was abandoned but evidence was given about the loss of use of the boat while it was undergoing repair and examination and evidence was given about the general inconvenience and difficulty which the respondents suffered during what was described by them as a never-ending saga. It was not clear on what terms precisely the loss of profits claim was abandoned. It appears from the way the case proceeded that while no particularised claim for loss of profits was continued the respondents were not abandoning their claim for loss of use. It may well be that in a case such as this a claim for disappointment and personal inconvenience arising from a breach of warranty and attempts to have that rectified are not recoverable either as general or special damages. It is clear, I think, that in claims in contract it is usual if not necessary to prove with some certainty the quantum of any loss which is properly recoverable. The law is plain on the other hand that mere difficulty in quantifying damages under any proper head is not a bar to their recovery. In a case such as this, putting aside any feelings of disappointment or upset and any general inconvenience, there must be some loss of use of a revenue producing chattel which would justify more than merely nominal damages. Greig v Tasman Rental Cars Ltd (1982) 2 NZLR 171, is a case in tort in which the Court of Appeal made it clear that the loss of use of a rental car is a matter of compensation in spite of the difficulties and complexities in quantifying it. I see no reason why the principles should not be the same in claims such as this in contract. I think that in the circumstances of this case the learned District Court Judge correctly concluded that substantial damages should be awarded under the heading of general damages for the loss of the use of the boat and the inability to earn revenue by it. He fixed the sum of $750. That is not unreasonable and I would certainly not be prepared to interfere with the award under that head.

As far as the repairs were concerned the amount of damages was the sum of the accounts for repair costs of various kinds but including the cost of the purchase and installation of a replacement engine for the boat. It appears that that was a second-hand engine. The appellant correctly claimed that the amount of the damages must be limited to the cost of making good the breach of warranty and that in this case that meant the provision of a reconditioned engine, the engine sold with the boat clearly not being such an engine. Evidence was given by the person who carried out the repairs and installed the new engine that the estimated cost of reconditioning the existing engine would have not exceeded $1,700. The respondent who gave evidence stated that he had understood that the cost of reconditioning was $2,000. The appellant submitted that the amount of the damages ought to have been limited to $1,700; the respondents having chosen to buy and install another second-hand engine were not entitled to that cost.

The difficulty in this claim by the appellant is that it is not possible for me to tell whether the amount of the repair costs accepted by the learned District Court Judge is properly comparable to the alleged cost of reconditioning. On the face of it it seems that other work was done, presumably at an earlier stage, to see if the boat could be put right without major work on the engine and there seems to have been in addition some other work which appears to have been accepted by the learned District Court Judge as being consequential upon the breach of the warranties but is clearly not attributable directly to the engine itself. For all I know the cost of purchase and installation of a replacement engine may be cheaper and may have been cheaper than the cost of reconditioning at $1,700. The replacement engine itself appears to have cost $1,200 and I am quite unable to say whether the installation costs and any other consequential items

exceeded another $500. If that matter had to be decided on this appeal I would have been inclined to remit the case back to the District Court for further hearing on the question of damages. I do not need to come to any final conclusion on the question of damages.

As a result of my opinion that the written contract of August 1979 is valid and effective and that the exclusion terms must apply and cannot be contradicted by extrinsic evidence the appellant must succeed on this appeal. I am inclined to the view that the appellant must succeed on the question of agency as well but because of the way in which this matter has come before me and the fact that there is another pending appeal specifically on the question of agency I am unwilling to make any final decision on that question. The appeal will be allowed and the judgment of 15 July 1979 will be set aside as between the appellant and the respondents. There will be an order that judgment be entered for the appellant, the defendant in the Court below; they are entitled to costs and disbursements on the amount of the claim of $3,829.18 and the appellant will have its costs in this Court in the sum of $250. The order of costs in respect of the nonsuit in the third party proceedings remains unaffected by this decision.

Solicitors for the appellant: Wynn Williams & Co (Christchurch)

Solicitors for the respondents: Brodrick, Parcell & McKay (Cromwell)

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