

IN THE HIGH COURT OF NEW ZEALAND  
INVERCARGILL REGISTRY

M.52/81

246.

IN THE MATTER of Section 72 of the  
District Courts Act  
1947

AND

IN THE MATTER of a decision by Judge  
Eric Bernard Anderson  
Esquire given in the  
District Court at  
Invercargill on 14th  
April 1981

BETWEEN DAVID ANTHONY BRYCE of  
Longridge North,  
Farmer

Appellant

A N D J. RAYMOND PLUNKETT of  
No. 1 R.D., Herbert,  
Farmer

First Respondent

A N D THORNBURY ENTERPRISES  
LIMITED a duly incor-  
porated company having  
its registered office  
at 160 Spey Street,  
Invercargill

Second Respondent

Hearing: 10 August 1983  
Counsel: R.G.R. Eagles for Appellant  
B.A. Boivin for First Respondent  
Judgment: 21-3-84

---

JUDGMENT OF ROPER J.

---

This is an appeal in civil proceedings which were heard in the District Court as long ago as March 1981. The appeal has had a singularly rough passage. It was filed in April 1981 but as no steps were taken by the Appellant to have it set down for hearing the First Respondent moved to have it struck out. That motion came before me on the

3rd August 1983 when I dismissed it on terms that the Appellant's points on appeal be filed by noon on the 8th August with a view to having the matter heard on the 10th August. The points on appeal were not filed until the 10th August so that Mr Boivin was in no position to argue them. The appeal was part-heard on the 10th with leave reserved to Mr Boivin to submit his argument in reply in writing. The reply was not filed until the 23rd December by which time the file had gone missing. It has now come to light and I can proceed with my judgment.

The other points of note are that the Appellant, who was the Plaintiff in the Court below, has died since the lower Court hearing and the appeal is being pursued by his estate; and there are no issues arising between the Appellant and the Second Respondent, which has not been represented on the appeal.

The case concerns the sale of a 24 year old D2 crawler tractor to Mr Bryce by Mr Plunkett for the sum of \$5,000.

By his statement of claim Mr Bryce alleged, in short, that Mr Plunkett had warranted the condition of the tractor's track gear, and in particular the rollers; or alternatively had made fraudulent or reckless representations as to the condition of the track gear with the intent of inducing Mr Bryce to purchase, and that in the result the rollers were not in good order and required extensive repairs costing \$5,177 before the tractor could be put into service. The claim was for that sum.

There was no dispute that the rollers were indeed in a very bad state of repair and the only issue was whether there was any warranty or representation that they were in serviceable condition.

The facts were that in early 1979 Mr Bryce was looking for a D2 tractor, a piece of equipment that he was familiar with and had used before over quite a period. On 6 July 1979 he attended a machinery sale where there

was a D2 for sale but the bidding went beyond his limit. At the sale he met a Mr Bulling, a Director of the Second Respondent, who told him that Mr Plunkett, who also happened to be at the sale, had a D2 for sale. It seems that at Mr Bryce's insistence he and Mr Bulling drove to Mr Plunkett's farm on the night of the 6th July and arrived when it was quite dark.

The D2 was in a shed where there was no lighting apart from the headlights of a Land Rover. Mr Bryce examined the tractor so far as he was able and concluded that those parts he could inspect were "in fairly good order". It seems that because of their position the rollers cannot be inspected. Mr Bryce had a test drive of about 15 minutes and was "very happy" with the tractor. He said that he asked Mr Plunkett about the track gear and this is his evidence:-

"I asked about the track gear and he said the pins and bushes were alright. The front idles and back sprocket were alright. I also asked about the rollers and the clutches and Mr Plunkett said more clutches had been put in. He said that he had receipts if I wanted to see them. The tracks are in section of 18" or 14" wide. The pins and bushes hold each section of the tracks together. I asked how much wear the track gear and the clutches had had, and I was told 700-800 hours. He said that whatever had had to be done was done and he had receipts if I wanted to see them. I said that I knew him well enough to take his word for it."

Mr Bryce rejected Mr Bulling's suggestion that he return in daylight to inspect the tractor and agreed to buy it for \$5,000. Mr Bryce said that after the tractor arrived at his farm he inspected the rollers and was not happy at what he saw. He complained to Mr Bulling and Mr Plunkett.

In cross-examination Mr Bryce agreed that he had had considerable experience with D2s and was aware that the machine he purchased was about 24 years old. He also agreed that he had been offered a further opportunity to inspect it and that Mr Plunkett had probably told him that

he had only used the tractor for a week or so each year. There is then this passage in his cross-examination:-

"I suggest to you that what you were told was that the pins and bushes had been reserviced 700-800 hours ago and that at that time would have had maintenance done to the rollers carried out. Is that what you were told? Yes. Were you told they were new rollers? No I was not told that the rollers were new. I was told that the rollers and the pins and bushes were in good order. I understood that the rollers, clutches, front idles, back sprockets and pins and bushes had all been reconditioned 700-800 hours ago.

To the Court

Do you agree that what you were told was that the track gear had had maintenance done to it 700-800 hours ago and that anything that needed to be done had been done? Yes, I asked about the clutches and was told that they had been checked 700-800 hours ago. I didn't think that the rollers were new.

What in fact you are saying is that repairs may have been done but more than 700-800 hours since the maintenance had been done? That is what it looked like to me."

Mr Plunkett said in evidence in chief:-

"I told Mr Bryce I had replaced pins and bushes 700 to 800 hours ago. I think I offered to show him accounts relating to that work, I had the accounts. Mr Bryce did not ask to see them. I said the front idlers had been done up, been rebuilt, as the pins and bushes, the back sprocket was built up at the same time. He was told there was a new master clutch put in and anything that needed done to the rollers had been done at that same time. By at that same time, I mean when the pins and bushes had been put in. I think I mentioned that I had done nothing to the steering clutches. I said that the master clutch had been replaced."

He produced as exhibits the accounts relating to the work he referred to. He said that he too suggested that Mr Bryce return in daylight. The accounts produced, and which would have been available to Mr Bryce on the night of the sale, showed that the work had been done in

1971, and in cross-examination Mr Plunkett confirmed that the tractor would only have done 7-800 hours work since that time. He could not account for the worn condition of the rollers as Mr Bryce found them.

He said in cross-examination:-

"Tell us again exactly what you said about the rollers? Anything that needed done at the time, the pins and bushes were put in, was done.  
 Did you say they were in good order? I thought they would be.  
 Did you say that? I think so.  
 It is important isn't it, because he could not actually examine rollers properly, could he? No.  
 So he had to take your word for that part of it? I couldn't either.  
 He had to take your word about the condition of the rollers? He took my word what was done 700 or 800 hours ago was done.  
 And they were in good order? Should have been good order.  
 Are you changing your evidence now? No.  
 Did you say the rollers were in good order? I don't recall exactly.  
 Might you have said the rollers were in good order? Without seeing them I don't think so.  
 I thought you said the track gear was mentioned and each part of it? Yes.  
 I asked you earlier if you said the rollers were in good order. What did you state about the rollers? I said anything that needed done to the rollers 700 or 800 hours previously had been done.  
 Is your evidence now that the track gear or rollers were in good order? I said the tracks were in good order.  
 The whole gear? I did not include the whole thing on one lump.  
 I put it to you, you are not being straight in your answers to me and that you did say the track gear and rollers were in good order, did you? No."

Mr Bulling said in evidence that Mr Bryce had "a good look" at the track gear although he would not have been able to see the rollers without jacking-up the tractor because of the track guard. He then said:-

"I spoke to Mr Bryce, what we were told about pins and bushes were borne out by the feel of them. We were told by Mr

Plunkett the pins and bushes had been put in. He said 700 to 800 hours previously. My actual observation and feeling of the pins bore out that statement. Mr Bryce knew that with his own experience."

In Mr Bulling's view Mr Bryce purchased on his own inspection and test drive. He said in cross-examination:-

"Did you comment that the tracks appeared to be in good order as indicated? Yes, as much as I could see.

It is true isn't it that Mr Plunkett said that the track gear was in good order? Anything wanted doing to it had been done to it, and I will repeat that, at the time the new pins and bushes were put in so anything needed to be done was done at that time.

Was the track gear mentioned at all then? The track gear covers rollers, the track covers everything.

Was the expression 'track gear' used? The word track gear was used more so than any other particular part.

What was said about track gear? The pins and bushes were renewed in it some 700 to 800 hours previously and anything else that wanted doing at the time was done.

Was nothing said about track gear generally? No, it was mentioned what was checked out on it, as far as the rollers went, anything wanted done at the time was done, borne out by the evidence today.

The rollers were mentioned only that everything needed doing was done? That's correct.

Was that repeated time after time any time pins and bushes and anything else was stated? I would say so.

When Mr Bryce claims he was told the track gear was in good order, you are saying he is completely mistaken, he was not told that? No.

He was not told the rollers were in good order either? He was told that the rollers, that anything wanted doing was done."

These are the relevant findings of the learned Trial Judge:-

1. That it was Mr Bryce's idea that he and Mr Bulling should go by night to inspect the tractor.

2. That there was a measure of uncertainty as to just what Mr Bryce, and more particularly Mr Plunkett, had said

in relation to tracks, bushes, pins, rollers and clutches.

3. That Mr Bryce was told that at the reserVICING 7-800 hours previously anything that had to be done to the rollers had been done.

4. That Mr Plunkett had told Mr Bryce that "the tracks" were in good order (by which I take him to mean that the representation did not extend to "the rollers").

5. That Mr Plunkett did not operate the tractor more than the 7-800 hours he claimed, from the time of servicing in 1971, and during that time carried out some maintenance and lubrication.

From those basic facts the trial Judge concluded that there had been no deliberate misrepresentation, fraudulent or otherwise.

As for the warranty allegation the Trial Judge appeared to accept that the only warranty given was that everything that needed to be done had been done during the servicing in 1971, that Mr Bryce had accepted that, but his reliance on that statement was negatived, and Mr Plunkett's statement lost its force as a warranty by Mr Bryce's rejection of the suggestion that he return by daylight and inspect. This is the crucial part of his judgment:-

"Now the position as I see it in this particular set of facts that I found and the evidence and looking at the totality of that situation is this: that the plaintiff elected on his own judgment to accept the word of the first defendant; that the first defendant told the plaintiff what he knew about the tractor but invited him to look at the receipts, but went further and suggested to him that because of the dark, because of the short time involved that he should come back in the morning in daylight and carry out a more thorough inspection. Now that to me on the totality of the situation does not bring to my mind that the first defendant was in any way inducing the plaintiff to enter into the contract based upon what he was telling

him. Rather to me it suggests that the first defendant was wanting the plaintiff to make sure himself and satisfy himself on the condition of the tractor before he entered into any contract. An opportunity was given to the plaintiff for further inspection to take time and consider and when I relate that back to the test that is put forward by Lord Denning, what would an intelligent bystander take out of the situation, I would say that an intelligent bystander would say that the plaintiff has entered into this contract upon his own judgment and was not induced by anybody to enter into the contract."

Indeed, Mr Eagles agreed that the offer of a further inspection was the key to the matter but submitted that the Trial Judge placed too great an emphasis upon it. Mr Eagles made the point that rollers could only be examined with difficulty even in daylight. But it was possible to do so, and I see no reason why Mr Plunkett should assume that Mr Bryce would not go to that trouble if he had returned on the following day; and indeed he did examine the rollers after taking delivery of the tractor, and before using it, which in itself seems contrary to reliance on a warranty. Mr Eagles also submitted that the offers of a further inspection were of academic interest in that the sale was already concluded before they were made. I have my reservations about Mr Eagles suggested timing but in any event it seems clear that Mr Plunkett would not have regarded Mr Bryce as bound if the latter had accepted the offer of a further inspection. Mr Eagles also suggested that Mr Plunkett may have made the offer in the knowledge that it would not be accepted, but that is mere speculation and in any event Mr Bulling also made the suggestion.

In my opinion any assurance given by Mr Plunkett did not go beyond what he knew had been done at the 1971 servicing, and which he was prepared to support by production of the relevant invoices; and his offer of a further inspection could be taken as a declaration that Mr Bryce who had the ability to assess the condition of a D2 should not accept his word for anything but see for himself.

In my opinion the Trial Judge was fully justified in reaching the conclusions he did on the evidence before



him, both as to the allegations of misrepresentation and breach of warranty, and the appeal is therefore dismissed with costs to the First Respondent of \$250.

A handwritten signature in dark ink, appearing to be 'J. H. Hanan', is written in the upper right quadrant of the page.

Solicitors:

Eagles & Eagles, Invercargill, for Appellant

Hanan, Arthur & Co., Invercargill, for First Respondent