IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1318/83

1381

BETWEEN GOUGH GOUGH & HAMER LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business throughout New Zealand as a dealer and servicer of heavy machinery

Plaintiff

A N D ARTHUR ALBERT RUTHERFORD trading as "EXCLUSIVE PLANT HIRE" of Gordon Road, Te Aroha, Contractor

Defendant

Hearing: 26 October 1984

Counsel: S P Bryers for plaintiff
M J Cameron for defendant

Oral Judgment: 26 October 1984

(ORAL) JUDGMENT OF HENRY J.

This is an action relating to the sale of a Leibher Model 907 hydraulic excavator from the Plaintiff to the Defendant. The machine was originally purchased in March 1982 by the Defendant from a company called Hamilton Tractor Parts Limited. Shortly after that, in June 1982, the Defendant in the course of his dealings with the Plaintiff

negotiated some transactions as a result of which this machine was sold by him to the Plaintiff for $50,000.00. There is, in my view, no doubt that at the time of that transaction the machine was held out by the Defendant as then being unencumbered. There was, as part of that transaction, a sale back of the machine to the Defendant in respect of which a sum of $10,000.00 was accounted for by way of deposit, the balance being payable on terms over a period. A hire purchase agreement to that effect was executed.

It appears that about May 1983 the machine was involved in an accident at Te Aroha which caused it some damage, originally thought to be comparatively minor but later ascertained to be very substantial and requiring repairs of the order of $12,000 to $14,000.00. In September 1983 when those repairs were at an early stage, the Plaintiff company ascertained or was advised that the machine was in fact the subject of an earlier hire purchase agreement to Hamilton Tractor Parts Limited, under which that company was claiming arrears of payments due to it and also claiming the right to repossession of the machine. The Plaintiff then claimed a lien for the work it had already done on the machine. That was in the course of time paid by Hamilton Tractor Parts Limited, which company repossessed the machine that taking place it would appear about May of 1984. About this same time in September 1983, the New Zealand Insurance company,

which held the insurance cover over the machine, raised questions as to its liability under the policy and ultimately made a decision declining any liability except, it would seem to a limited extent so as to cover the Plaintiff company for some of its expenditure. It appears that the basis of that declination is the fact that the machine was not at the time of the proposal the unencumbered property of the Defendant.

As I understand it, it is common ground that arithmetically under the hire purchase agreement between the Plaintiff and Defendant there is now owing, after taking into account all interest payable under that contract, a grand total of $44,480.95. The Plaintiff's claim is for that amount pursuant to the terms of the agreement.

The first defence raised is that the hire purchase agreement in question cannot properly base the claim because the Plaintiff is unable to give title to the Defendant in respect of the machine. Its reason for that inability is said to be the existence of the prior encumbrance in favour of Hamilton Tractor Parts Limited. The documents produced in evidence would appear to show that title in the machine had not in fact passed to the Defendant and remained and probably still remains, so far as the Court is presently aware, with that company. I have listened with some care to Mr Cameron but I have reached a clear view that that defence is not open to the Defendant on the facts of this case.

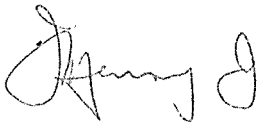
In my view he is estopped, by reason of his representation that the machine was unencumbered when he sold it to the Plaintiff, from now averring that the machine was so encumbered so as to prevent the Plaintiff from having obtained title and therefore being unable to pass title on to him. It seems to me to be a clear case within the principles set out for example in Halsbury's Laws of England, Vol.16, para.1505. It is, I think, also an example, as Mr Bryers has submitted, of a case of a Defendant endeavouring to take advantage of what was really his own default.

Mr Cameron raised another related matter and submitted that the contract in question, that is the hire purchase agreement, had been cancelled this morning when apparently the Defendant asked the representative of the Plaintiff company whether it was in a position to give title and received, understandably enough, a negative answer. In my view that does not evidence an anticipatory breach by the Plaintiff. The Defendant was then and now is in substantial breach himself, with no suggestion of that breach being remedied, and it seems to me to be in accord with principle that any obligation to give title by the Plaintiff in this case must be dependent upon the fulfilment by the Defendant of his own obligations and in particular the payment of the balance due. If that were done there would be no difficulty from a practical viewpoint in title then vesting in him.

That brings me to what is in effect the counterclaim brought by the Defendant, which is based on an alleged breach of Clause 12 (i) of the hire purchase agreement, which clause deals with the issue of insurance. I think Mr Bryers is correct in his construction of that clause when he submitted that it relates to the application of insurance monies and the actions which are concerned with such an event. Here, the situation has arisen that insurance monies, except to the very limited extent to which I have mentioned, have not been forthcoming but there has been a repudiation of liability by the insurer. In any event, in my view the clause in question creates no contractual obligation on the Plaintiff to repair. It merely gives a right, which may or may not be exercised as the vendor thinks fit, and in my view even should he elect to proceed he has the right to stop at any time and not go further. The only possible duty which I could see arising under that clause would be one which requires the vendor to take reasonable steps to complete repairs if he in fact elects to adopt that course of action. On the facts of this case I do not think that there could be said to be any breach of that sort of obligation. In my view, all reasonable steps were taken through to mid-September at which stage the problem created by the intervention of Hamilton Tractor Parts Limited became obvious and affected the whole situation, and in particular the question of insurance cover. Consequently no further work was undertaken by the Plaintiff after that date and in my view no contractual or other blame can attach to it in that regard.

I should add that it seems to me that there were, on the face of the evidence as it stands before me, grounds for the insurer to decline liability but in any event it is a fact which has occurred and the correctness or otherwise of it is not really relevant to present considerations. There appear to be no further obligations, contractual or otherwise, which could be said to be breached by the Plaintiff or to form any basis for the counterclaim against it.

There will accordingly be judgment on the claim for the Plaintiff in the sum of $44,480.95 together with disbursements and witnesses expenses to be fixed by the Registrar, and costs according to scale. On the counterclaim there will be judgment for the plaintiff.



Solicitors:

Martelli McKegg Wells & Cormack, Auckland, for plaintiff

Cameron Hinton & Co., Hamilton, for defendant