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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No. 661/87

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BETWEEN J.B. & M. POSA LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Contractors

Plaintiff

AND ARNOLD LEEDER LIMITED a duly incorporated company having its registered office at Auckland, Garage Proprietor

Defendant

Hearing: 15 & 16 May 1989

Counsel: Ryan for Plaintiff
Harrison for Defendant

Judgment: 16 May 1989

(ORAL) JUDGMENT OF THORP J

This is an action for damages by a contractor owner of a 1974 Scania 12 tonne truck against the garage company which was employed to recondition the engine of that truck in October 1984. As pleaded the action relies first on breach of covenant or warranty to put the vehicle in good mechanical order and secondly on breach of the obligation of a person holding itself out as having special skills to carry out work in a good and tradesman like manner.

I am satisfied there is insufficient basis in the evidence for finding any such covenant or warranty as has been pleaded.

The only evidence given to support that claim is the evidence of Mr Posa that when he was first at Leeders with the truck he was told the engine could be overhauled for $10,000 or a new motor could be had for $19,000 and that if he had the motor overhauled "it wouldn't give any problem". As against that not only was the giving of any such assurance denied by Mr Leeder Jnr, the other party to the conversation, Mr Posa himself later stated in his evidence that he was not seeking a guarantee.

The onus is of course on the plaintiff to prove all essential allegations, and on the balance of probabilities I find it has not achieved the onus of proof on the allegation of warranty.

However, the fact that the defendant was bound to carry out whatever work it did in a competent and tradesmanlike manner was accepted by it. It is relevant in that context to note that it held the agency to repair Scania trucks for the Auckland District, and was known by the plaintiff to have that status.

The basic questions are:

1. Did it fail to carry out its work in a competent and tradesmanlike manner?
2. If so, did that failure cause damage to the plaintiff?
3. If so, what is the amount of that damage?

All those questions are essentially questions of fact, and it was for that reason that it seemed to me that no purpose would be served by reservation of judgment.

Both the first and second questions depend on the evidence of Mr Posa and Mr Hinton for the plaintiff, and the two Messrs Leeder and Mr Simpson for the defendant. Within that group Mr Posa's evidence was largely historical, i.e. setting out the facts as he remembered them. Mr Hinton gave some factual evidence, but was largely giving opinion evidence. He inspected the engine in May 1986 and considered that its failure arose from a combination of two errors on the part of the defendant, first the incorrect placement of a liner or perhaps the failure to note that it was already incorrectly placed, and secondly, excessive torqueing of the head studs, probably in September 1985. It was the first of those he emphasised and which I believe was the basis for Mr and Mrs Posa deciding to sue.

As to the defence evidence, that of the Messrs Leeder was primarily factual and that of Mr Simpson, called as an engineering expert, primarily opinion. Mr Simpson concluded that the ultimate failure of the engine arose from a combination of weakening of the engine block through wholesale use of the helicoil system to refix studs, overheating, the cause of which he could not fix with precision, and age and metal fatigue from ageing and heating. He said the factor on which Mr Hinton primarily relied, the misplaced liner, was probably the result of warping of the engine block. This he believed occurred a considerable period after the initial work was done, and after the helicoil operation, from the combined effects of that work, heating, and age.

On the issue of credibility I note that I do not think that any witness who gave evidence was trying to mislead me, but that there are sufficient internal inconsistencies, both in the evidence of Mr Posa and Mr Leeder Jnr, to show that neither now possesses a precise recollection of events in 1984 and

1985. Indeed this is a typical example of the problems which arise from delay in obtaining resolution of disputes of fact. I am sure it would have been much easier to obtain a satisfactory resolution of these disputes in 1986 than it is in 1989, for of course this Court has to decide the issues before it on the evidence which is now available to it.

It is necessary to look at each of the three occasions on which the defendant carried out work on the engine separately, at least in the first instance.

On that basis I cannot find in the evidence any basis for a conclusion that the defect discovered on 6 September 1985 was probably the result of faulty workmanship by the defendant 10 or 11 months earlier. The principal argument for that proposition was that the liner had been misplaced throughout. Mr Simpson, who appeared to me to give his evidence in a suitably careful and undramatic way, was most unimpressed with that suggestion. It would also mean that an error was first made by Leeders in October 1984 and repeated by them twice in September 1985, even though it would be an elementary matter to look for proper protrusion tolerances in an engine of this type which had been chronically overheating. There is in my mind a greater probability that the overheating during the first period was related to the first thermostat, as to which Mr Posa was quite clear that it caused some measure of overheating from the time he put it in.

Turning next to the work done on 6 September and the day or two following, I am not prepared to disregard the evidence of both the Leeders that the thermostat they then installed proved faulty on inspection, though equally I am bound to say that I am at a loss to know why, if it is clear that the work was

of no value whatever to their customer, it should be asked to pay for it.

It is the third repair on the 12th September and the day or days immediately following which seems to me hardest to assess. There is on the evidence, particularly of Mr Simpson, which I note seem to me to be informed and reliable, little doubt that the helicoil operation was a cause and a significant cause of the ultimate breakdown of the engine between three and four months later after it had done with some difficulty another three months work.

Both Mr Leeder Snr and Mr Leeder Jnr told me that they informed Mr Posa that they could not guarantee this work. It is my view at the least unfortunate that that matter was not raised with Mr Posa when he was in the witness box. He was indeed asked whether or not helicoils had been installed. I find on re-examination of the notes that his evidence was that some had been on 6 September, and the rest on the 12th. But there was no suggestion to him in cross-examination that this work was to be done wholly at his company's risk.

Mr Simpson explained that the problem of the wholesale use of this procedure on an engine such as this is that it weakens the whole structure, not merely that it is ineffective to give the necessary communication between the adjacent parts of the engine. As a matter of probability in my view this procedure did weaken the engine structure on this occasion and did play a significant part in the ultimate failure.

Where there is an acceptance by a tradesman, as there properly was in this case, of the obligation to carry out work to a good and tradesmanlike standard, and the bearer of that obligation wants to be

freed from his normal responsibility because of some special risk, in my view the exclusion of that liability must be clear and express, not ambiguous.

I can see no reason why the principle, which has for many years been applied to exclusion clauses any written contracts, should not apply in cases such as the present. The rule in the written contract cases is abundantly clear and to the effect that exclusion depends upon the extent and nature of the limitation being adequately brought to the attention of the other party: see Cheshire & Fifoot's Law of Contract 10th Edn p.138 and the following pages.

In the present case the advice to Mr Posa could well have been taken by him to mean that the use of helicoils was an unsatisfactory way of fixing the heads to the block. If so that advice falls some way short of telling him that the work would so weaken the block itself that in the case of an engine with the age and the chronic overheating problems this had there was a significant risk of total collapse within a relatively short period. The fact is that with a third thermostat, which I believe one can properly infer was likely to be efficient, and with all the appropriate rechecking of surfaces and tolerances, there was large scale cracking and warping causing the collapse of the engine within the period I have stated. I am not prepared to find that the likelihood of that consequence was sufficiently explained to Mr Posa to justify the defendant being excused from its ordinary obligations.

I believe that a sufficiently clear and unambiguous avoidance of liability has not been proven and that this resulted in a breach of the obligation to carry out the work in a competent and tradesmanlike manner, which amounted to contractual negligence.

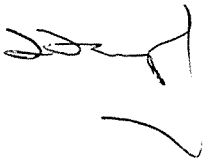
That having been found the next question which follows of course is the extent of the damage which properly flowed from that negligence.

In my view there was a near complete absence of appropriate action by the plaintiff to mitigate its losses. It appears that the trouble which arose from the final repairs was clearly evident before Christmas: see the letter from the plaintiff's lawyers dated 23 December to the defendant company. I accept the evidence of Mr Leeder Snr that he responded properly by phone both to Mr Posa and Mr Gerald Ryan and offered to have the matter referred to a suitable independent expert. Instead the plaintiff chose to accept the opinions it had received from its technical and legal advisers as to its rights against the defendant, none of which in the end have provided the basis upon which the plaintiff has succeeded. In that process it not only delayed the return of the truck to normal working, but wasted the opportunity which the holidays would have given to find some alternative. It also lost the opportunity of the defendant's contacts as a Scania agent, and its ability to find a suitable replacement block or engine.

In my view the fact that the plaintiff chose to operate the truck as it did and to reject the offer to have it further examined and if necessary repaired is a sufficient breach of the duty to mitigate losses to make it appropriate to limit damages for loss of profits to the proven cost of the work carried out by the defendant company, and thus to limit the award of damages to the cost of the replacement engine. This, it seems to me, can most conveniently be done by an award of that amount of damages, subject to the filing by the defendant of an undertaking not to prosecute against the plaintiff its claims in respect of the accounts for work

done on 6 and 12 September. It is no business of this Court of course to consider what rights if any it may have against the supplier of the parts or any other third party.

On that basis there will be a judgment for the plaintiff against the defendant for the sum of $9,018.50 being the costs of the replacement engine, plus costs at scale and that sum, together with one extra day at $250, and witnesses expenses and disbursements to be fixed by the Registrar.



Solicitors:
Ryan & Deane for Plaintiff
Peters, Lamber & Burns for Defendant