

907

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC 148/96



BETWEEN

HAMMER AUCTIONS NZ
LIMITED

Appellant

A N D

SCOTNEY CRAEG
WILLIAMS

Respondent

Hearing: 5 & 6 March 1997

Counsel: R.J. Warburton for Appellant
M.R. Dean for Respondent

Judgment: 10 APR 1997

JUDGMENT OF MORRIS J.

Solicitors: Warburton, DX CP20506, Auckland

Corboy Wilson & Co., Wellsford

This appeal concerns the provisions of the Fair Trading Act 1986. The essential grounds of the appeal are set out below. Before turning to these it is first necessary to outline the facts.

FACTS

The respondent, Mr Williams, went to the premises of the appellant, Hammer Auctions NZ Ltd, on 15 August 1995 with the intention of purchasing at auction a four seat, two door, four wheel drive vehicle. He arrived about an hour before the auction was due to start and inspected a Nissan Safari vehicle which fitted this description. It was being sold on behalf of Autoways, a Licensed Motor Vehicle Dealer which imported used vehicles from Japan to New Zealand. The Nissan had the following notice on its windscreen:

"Unregistered vehicle. A fee of \$550 plus GST will apply to this vehicle to bring it to MR2 registration standard."

Mr Williams enquired of Mr Tobin, a sales representative for Hammer Auctions, what the notice meant. He was told there was a once-only fee, payable to Hammer Auctions which covered the cost of bringing the vehicle up to the standard necessary to go on New Zealand roads. Mr Tobin said the inspections were conducted by Vehicle Inspections New Zealand and all imported vehicles were required to go through such a process. When Mr Williams asked what things might be covered by the fee, Mr Tobin replied:

"Take the back seats for example, they will need to have seat belts fitted."

Mr Williams was satisfied from Mr Tobin's explanation if he purchased the Nissan at auction and paid the fee of \$550 plus GST, he would get the Nissan complete with seat belts for all its four seats. On the basis of what he saw of the Nissan and what Mr Tobin had told him, Mr Williams bid for the Nissan and was successful in buying it with a bid of \$24,800. Hammer Auctions retained possession of the Nissan for it to be brought to MR2 registration standard and registered.

On 25 August Mr Williams went to collect the Nissan. He saw, to his surprise and frustration, its two rear seats were lying on their sides unattached to the vehicle and seat belts had not been fitted. He was told by the appellant's Sales Manager, Mr McSkimming, Hammer Auctions was not liable. Mr McSkimming claimed the appellant had a defence under the Consumer Guarantee's Act and was not obliged to warrant any vehicle fit for any purpose. Mr Williams took possession of the vehicle and immediately took it to Rod Milner Motors to enquire as to the cost of having seatbelts fitted. He then found out the matter was more complicated than he had thought and to bring the Nissan to registration standard as a four seater would cost considerably more than \$550 plus GST. Later the same day he rang the General Manager of Hammer Auctions, Mr Fletcher. He was told that Hammer Auctions was under no obligation to register the vehicle as

a four seater. Mr Williams' reaction was to seek to rescind and get his money back.

By letter dated 22 September 1995 Mr Williams gave notice to the appellant he would apply to the District Court to rescind the contract, and request the purchase price be refunded to him in full. Hammer Auctions denies ever receiving this particular letter. Mr Williams wrote again to the appellant by letter dated 17 October 1995. He advised the vehicle was to be advertised for sale in an attempt to mitigate the loss of both parties. If it didn't sell at Mr Williams' cost then he was going to obtain quotations for the cost of the certification of the vehicle, installation of seats and fitting of seatbelts. He indicated if necessary he would issue proceedings to claim the costs of converting the Nissan into a four seat vehicle. There was no response from Hammer Auctions. On 23 November 1995 Mr Williams wrote advising Hammer Auctions the vehicle did not sell at cost and he was proceeding to obtain three independent quotations. Again Hammer Auctions did not respond. On 11 December 1995 Mr Williams wrote and advised the appellant he had spent four hours driving around town obtaining quotes for seats and seatbelts. At about the same time a possible sale of the Nissan came to nothing when a prospective purchaser found a mechanical fault in the vehicle. Mr Williams decided he no longer wished to waste any further time on the vehicle. On 13 December Mr Williams filed proceedings in the District Court based on a breach of the Fair Trading Act 1986 ('the Act').

DISTRICT COURT

In the District Court Judge Nicholson QC found:

"The irresistible inference in this case is that in order to bring the Nissan up to standard and obtain registration as a four seater vehicle, it would have been necessary for Autoways to spend considerably more than \$550 plus GST, and therefore rather than lose it decided to win by unfastening the rear seats and avoiding the cost of installing rear seatbelts. It then, through Hammer Auctions, foisted the Nissan on Mr Williams as a two seater and despite his justified protests washed its hands of responsibility." (p.12)

The learned Judge observed that the Fair Trading Act is primarily consumer protection legislation, and s.9 is directed to protecting the consumer from the kind of "shabby trick" which the appellant played in this case. Mr Williams was entitled to expect Hammer Auctions would deliver the Nissan with all its seats fixed as they were when he purchased it. Furthermore, on the basis of the statement made by Mr Tobin, Mr Williams was entitled to expect seatbelts would be fitted to the rear seats. The Judge found the evidence established Hammer Auctions had engaged in misleading and deceptive conduct in breach of s.9. He exercised his discretion under s.43 to declare the contract between Mr Williams and Hammer Auctions void, and awarded damages accordingly.

GROUND OF APPEAL

Four main issues are raised on appeal. Each will be considered in turn.

1. Section 9: Misleading and deceptive conduct

The first issue is whether the statement "Take the back seats for example, they will need to have seat belts fitted" amounted to misleading or deceptive conduct. The appellant submits the statement was literally true and therefore the District Court Judge erred in finding it was misleading and deceptive conduct in breach of s.9. This point can be dealt with briefly.

Section 9 of the Fair Trading Act 1986 reads:

"9. Misleading and deceptive conduct generally - No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

This section was considered by the Court of Appeal in *Taylor Bros. Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, also reported as *Taylor Bros. Ltd v Taylors Textile Services Auckland Ltd* (1987) 2 TCLR 447. Cooke P. at p.39 line 52 said:

"As to when conduct is to be characterised as misleading or deceptive, judicial exegesis probably can do little at a general level to expand upon the ordinary words of the section, and obviously it cannot be allowed to supersede them. In the end one must always return to them and apply them to the particular facts."

A statement may be misleading and deceptive despite the fact it is literally true; *Commerce Commission v James Pascoe Ltd* (1989) 3 TCLR 647.

In the present case Mr Tobin's statement was made in the context of discussing what the \$550 fee covered. The inescapable inference was the

seatbelts *would* be fitted to the vehicle as Mr Williams saw it, not merely that they *needed* to be fitted. To try and argue this was not misleading and deceptive conduct by reason of the literal truth of the statement is unnecessarily pedantic. Mr Williams relied on the statement and bid for the vehicle accordingly. Having done so, he found he had been led into error since he was given a two-seater vehicle with no seatbelts fitted on the rear (unattached) seats.

I therefore uphold the finding of the District Court Judge that the statement amounted to misleading and deceptive conduct in breach of s.9.

2. Agency

The second point on appeal relates to agency. This is a new point and was not raised in the District Court. Hammer Auctions claims it was merely an agent acting on behalf of a disclosed principal, Autoways. It submits it is Autoways which is therefore responsible for the representation whether by way of statement or the display of the vehicle as a four seater vehicle. I am bound to say I find this difficult to accept.

The position with regard to agents was set out by Cooke P (as he then was) in *Goldsbro v Walker* [1993] 1 NZLR 394, 398:

"There is no difficulty in accepting that an innocent agent who acts merely as a conduit and *purports* to do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so

passed on ... On the other hand, an agent who does not merely purport to pass on what he has been told, or who passes it on inaccurately or in some way adopts it as his own or adds to it, may himself thereby engage in misleading conduct." (Emphasis added).

The essential question then, is whether Hammer Auctions was a *mere conduit* of information. I think not. At all times Mr Williams's dealings were with Hammer Auctions. The auction was advertised by Hammer Auctions. It was Hammer Auctions which showed a four-seater vehicle to Mr Williams and told him the \$550 would bring the vehicle up to MR2 registration standard 9 which would include back seatbelts fitted). The vehicle was auctioned by Hammer Auctions. The contract itself was made with Hammer Auctions. The documents relied upon by the respondent were not signed until after completion of the auction. On any view Hammer Auctions played an active role in both the presentation and sale of the vehicle. It was no mere conduit of information, but an active, indeed one might say the sole, participant in the sale process. Mr Williams was entitled to rely on Hammer Auctions to provide correct information. It is Hammer Auctions who is responsible for its own misleading conduct. That it was required to account for the proceeds from sale to Autoways is, for present purposes, irrelevant.

3. Affirmation

The third point on appeal is the evidence does not support the finding of the District Court Judge that "at all stages he (Mr Williams) has wanted and sought rescission." The appellant argues the actions of Mr Williams subsequent to taking possession demonstrate a conscious decision on his

part to accept and repair the vehicle. The doctrine of affirmation is therefore said to apply, with the result that Mr Williams cannot now purport to rescind the contract.

The law is clear affirmation of a contract requires an *unequivocal act* evidencing an intention to affirm a contract. Moreover, a party may seek to minimise loss without being taken thereby to have affirmed the contract; *Yorke & Anor v Treasureway Stores Pty Ltd & Ors* (1982) ATPR 40-313 at 43-865.

In the District Court Judge Nicholson QC found there was no such unequivocal affirmation. Instead the evidence established that "at all stages he has wanted and sought rescission". (p.15) The Judge went on to say (at pp.15-16):

"However, even if there was affirmation the doctrine would not apply in this case to defeat Mr William's claim for the return of his money and damages. Affirmation is an equitable doctrine which presupposes that nothing had been done by the injuring party of an unconscionable character to bring about the affirmation - *Crump v Wala* [1994] 2 NZLR 331, 337. The equitable principle that he who seeks equity must come to equity with clean hands applies. The conduct of Hammer Auctions and its principal Autoways on the sale and delivery of the Nissan was misleading and deceitful. Their conduct after that was mean and unconscionable. From the outset Hammer Auctions on behalf of Autoways callously used its commercial position to avoid refunding Mr Williams' money."

The appellant argues the action of Mr Williams in taking the vehicle to Rod Milner Motors when he first uplifted it demonstrated a conscious decision to accept and repair the vehicle. This decision is said to be evidenced in the subsequent correspondence. Perhaps more insidiously, it is suggested that Mr Williams only decided he wanted to rescind the contract when he,

through the actions of a possible purchaser, discovered there was a problem with the engine.

On the contrary, I find Mr Williams was very unhappy when the Nissan was delivered as a two seater and he made his dissatisfaction known. The letter dated 22 September demonstrates his clear desire to rescind the contract. Subsequently he made numerous efforts to contact Hammer Auctions to resolve the situation. In the face of continued silence by Hammer Auctions Mr Williams endeavoured to keep them informed of his actions, and explored different options with a view to finding a satisfactory remedy for both parties. In my opinion Mr Williams has acted at all times in good faith. I cannot accept the proposition that a party cannot seek to negotiate a solution for fear he will be held to have affirmed the contract.

Against the evidential background the District Court Judge was right to reject the contention Mr Williams had affirmed the contract. I find there has been no unequivocal affirmation of the contract. It is not necessary to consider whether there has been unconscionable conduct on the part of the appellant, although I am inclined to agree with the conclusions of the District Court Judge on that point.

4. Remedy

Finally, it is submitted on behalf of the appellant the remedy of avoidance of the contract was excessive and unwarranted when compared to the costs of remedying the failure to provide seatbelts. The sum of \$910 is suggested as an appropriate remedy, being the lowest quote Mr Williams obtained for installing the seatbelts.

In the District Court, Judge Nicholson QC ordered Hammer Auctions to refund the sum of \$25,672.96, plus interest of 11% to be calculated from 25 August. This covered the price of the vehicle (\$24,800), title insurance (\$25) and the original \$550 fee plus registration and GST (\$847.96). In addition Hammer Auctions was ordered to pay Mr Williams damages of \$159.21 for advertising costs and general damages of \$1,000 for stress and inconvenience.

Section 43 of the Fair Trading Act confers a wide discretion on the Court as to the appropriate remedy to be granted in any given case. With regard to damages the appropriate measure is to be determined by using the tort measure of damages; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1. Under this approach the Court seeks to determine a sum which will restore the plaintiff to the position she or he would have been in had there been no misconduct by the other party. The remedy granted by the learned District Court Judge does exactly that: it puts Mr Williams back in the position he would have been without the misleading conduct. The evidence is that but for the misleading and deceptive conduct of Hammer

Auctions, Mr Williams would not even have bid for the vehicle. He would still have had his \$24,800 to use to purchase another vehicle.

It was within the jurisdiction of the Judge, who had the benefit of hearing the evidence and seeing the witnesses, to decide in his discretion that rescission was the appropriate remedy. Furthermore, if Hammer Auctions were now required merely to pay \$910, there would be little incentive to it not to engage in similar conduct in the future. Such a remedy would do little to promote "fair trading". I therefore uphold the remedy granted by the learned District Court Judge.

Variation of Judgment

The respondent has requested a variation of judgment pursuant to r.718A.

The order made by Judge Nicholson QC provides:

"The \$25,672.96 is to be paid within 48 hours of when Mr Williams delivers the Nissan along with its certificate of registration and a correctly signed notice of change of ownership form to Hammer Auctions at its present place of business."
(p.18)

The concern is that, having relinquished the vehicle, Mr Williams will carry the risk as to whether he receives a refund of his purchase price. I agree. In light of the previous conduct of the appellant I find such a variation justified. Point three of the judgment is hereby varied as follows:

"Mr Williams shall give Hammer Auctions not less than 48 hours notice in writing, a copy to be served on its solicitors, of the time and day that he shall return the

vehicle to Hammer Auction's premises. Such notice shall be accompanied by the certificate of registration and a correctly signed notice of change of ownership form to Hammer Auctions at its present place of business. Hammer Auctions shall, on the due date for delivery, tender a bank cheque to Mr Williams in full payment of the judgment sum in exchange for the vehicle. If Hammer Auctions does not tender a bank cheque on that date, Mr Williams will execute forthwith the judgment against Hammer Auctions and retain possession of the vehicle until payment is received in full."

Conclusion

I concur with the finding of the learned District Court Judge that this was indeed a "shabby trick". The appellant has acted in blatant disregard for the policy behind the Fair Trading Act. I find the appeal to be wholly without merit and it is hereby dismissed. The appellant must pay costs which I fix at \$1,500 together with disbursements (including photocopying). This amount is to be paid to the respondent at the same time as the bank cheque is paid to him as directed in this judgment.

A handwritten signature in black ink, appearing to read "A. Williams", is written in a cursive style on the right side of the page.